

# Family Law News and Review

## Using Special Masters to Resolve Post-Divorce Conflicts

by Angus Strachan, Ph.D.

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*Maria and Tom Warrenpiece were stuck. They had two children: Carlos, age 7, and Elsa, age 9. Subsequent to their separation two years ago, they had extreme difficulty making decisions together about the care of their children. A year ago, they had a custody evaluation and the Commissioner ordered a joint custody arrangement with the outline of a schedule for school weeks and during vacations and holidays. However Maria continued to see Tom as very controlling and unresponsive to the children. Tom thought that Maria was trying to exclude him from the children's lives whenever she could. As a result of the uncertainty and conflict, Carlos was having behavioral problems at school and Elsa was frequently weepy. Maria would only allow communication through their attorneys. After they had been in court three times in six months, the Commissioner proposed that the parties consider using a Special Master. Both Maria and Tom were disillusioned with using the court repeatedly to resolve their problems. They were informed that by mutual agreement they could try a new process. Through their attorneys, they agreed on procedures and chose a Special Master. One year later Tom and Maria communicate by fax, sparingly using the phone and occasionally meet with the Special Master to make particular decisions.*

This is the kind of situation in which a family can benefit from the appointment of a Child Custody Special Master, or Parenting Plan Coordinator. This new role, recently introduced in Southern California, provides a useful alternative to other dispute resolution mechanisms for chronically conflicted divorced parents, particularly those who repeatedly look to the courts to resolve relatively minor issues in the family. It is also useful when one or both parents have significant psychopathology, when there are children with special needs, or children who are infants and toddlers in which significant negotiation needs to occur to coordinate parenting of their development.

A big impetus to the establishment of this role was provided by a training session given by Dr. Joan Kelly in the fall of 1997, co-sponsored by the Divorce and Family Therapy Specialists, L.A. County Bar Family Law Section, and Cedars-Sinai Hospital. The participants in this seminar were surveyed after the seminar about their opinions and the results of this survey will be described later in this article.

### What is a Child Custody Special Master?

It is a hybrid role involving aspects of a mediator, an arbitrator, a parent educator (particularly about developmental psychology), and a child custody evaluator.

A Special Master's job is to resolve problems quickly by mediation where appropriate or by making decisions for the family where the parents cannot come to a decision, using quasi-judicial authority stipulated to by the parents in advance. Sometimes, the Special Master will focus the parents on their children's needs and educate them about developmental and psychological issues. The Special Master may issue written or oral decisions: a summer schedule might be written whereas the resolution of a weekend crisis by telephone may be done orally.

### What Qualifications Does a Special Master Need?

Special Masters can be either mental health professionals or attorneys but, most importantly, they must be knowledgeable and have relevant experience. They need to have good conflict resolution skills, a working knowledge of family law, an understanding of developmental psychology and family systems, therapeutic sensitivity, an ability to make decisions, and legal drafting skills.

### What's In the Name?

Whether the role is called Special Master or Parenting Plan Coordinator, the stipulation defines the role. As indicated above, the core feature is that the person has quasi-judicial immunity conferred through stipulation agreed upon by the parents and then made an order of the court. Although Special Masters usually focus on resolving issues to do with the children, they can also set up procedures for the parents' communication that help with general conflict between parents.

### What are the Advantages?

The advantage of using a Special Master or Parenting Plan Coordinator include: enabling decisions to be made outside of the court using decision making mechanisms which improve collaboration rather than polarizing the parents; reducing the negative effects of conflict on children; having a knowledgeable objective person make timely decisions; having someone available who knows the family well; and reducing costs to the family.

### Are There Disadvantages?

One early concern was that the Special Master may subvert the authority of the court. In practice, this is not an issue because the parents can always go back to the court if they wish. Another disadvantage might be that a Special Master who jumps into the arbitration role too often may undermine the parties' abilities to come to agreements without using an outside third party. The arbitration aspect needs to be used judiciously.

### How Does It Work?

Frequently, Special Masters will initially spend time getting to know the family and reviewing documents so that they can be helpful on an ongoing basis. Some Special Masters see the parents together monthly, some see them as needed. Arrangements for costs will be covered in the

stipulation. In our office, we ask for an advance deposit, and a quarterly administrative charge for handling all the ancillary matters of phone calls, faxes and written documents.

### **What Is the Statutory Authority of Special Masters?**

This is a somewhat murky area. There is no specific legislation in California for this hybrid role. It can go under various codes, such as Evidence Code §730 (Custody Evaluator), Code of Civil Procedure §1280 et.seq. (Arbitrator), Code of Civil Procedure §638 (Referee), or Family Code §3160, et.seq. (Family Mediation). Different counties have adopted different codes in the stipulation. For example, Marin County only cites the Family Mediator code. Santa Clara County uses the special Referee code. In Los Angeles County, the proposed stipulation (see below) quotes the section codes for Custody Evaluations, Arbitrations, and Special Referees. Despite these differences, probably the most important definition of the authority of the Special Master is defined in the particular stipulation.

### **Is There a Common Stipulation for a Special Master in Southern California?**

Currently, there is no definitive approved suggested stipulation for use in such cases in Southern California. However, the family court services liaison committee of the L.A. County Bar Association Family Law Section, chaired by Leslie Ellen Shear, J.D., has devoted a lot of effort to reviewing stipulations and developing a model order for use in L.A. County. This stipulation defines the role of the Parenting Plan Coordinator (Child Custody Special Master) quoting the code section for custody evaluators, arbitrators and referees but not the code section for mediation.

Further, the stipulation clearly outlines different levels of decisions that can be made by the Special Master. Level One decisions are orders which are immediately effective and final. Level Two decisions are orders which are effective immediately subject to review by the court if one or both parties makes formal objections. Level Three decisions are recommendations to the family and the court which may become orders by stipulation or by court proceedings. The stipulation allows the flexibility for parents together to decide what areas should be Level One, Two or Three decisions (e.g. handling transition decisions or scheduling vacations with moving the child's geographical residence). The stipulation also outlines the procedures and financial arrangements for using the Special Master.

### **Survey Results.**

Returns were received from 50% of the 42 participants in the training seminar. Participants represented a cross-section of attorneys, mental health professionals, judges and commissioners, court conciliators and mediators. The results of the survey were very clear. There was overwhelming support for a stipulation standard in all L.A. County courts. Attendees from other counties (Orange, Riverside, Santa Barbara, Ventura) also stressed that a standard stipulation would be useful to the other counties as well. Sixty-six percent (66%) thought that it would be useful to invent a hybrid stipulation based on the Marin and Santa Clara County stipulations that would be specific to

L.A. County. The comments on these questions revealed a strong opinion that a) there should be active input from a wide range of judges and commissioners, b) that this stipulation should be reviewed with representatives from Marin County and Santa Clara County, and c) that getting buy-in from the participants to what is agreed in the stipulation is very important.

The second part of the survey concerned planning and training which would be required for Special Masters. Eighty-three percent (83%) felt that planning and training should be provided by an inter-disciplinary group such as the A.F.C.C. (Association of Family and Conciliation Courts) or other organization rather than by the court or by the County Bar. Incidentally there was also strong support for the establishment of a Los Angeles Section of A.F.C.C.

### **Can a Judge or Commissioner Order the Appointment of a Special Master?**

No. An appellate court decision in 1997 found that the use of a Special Master in custody cases could not be ordered by the court over the objections of a parent. However, a judge can recommend and parties can stipulate to the use of a Special Master as a decision maker.

### **Negotiating the Stipulation is of Paramount Importance**

It is our experience that the stipulation be finalized, in particular the level of decisions and content areas, prior to the Special Master commencing his/her involvement. In some cases, this step was thought not to be a problem for the parties but in fact took six to nine months to negotiate. There are various possible ways to solve this problem, all of which involve the parties' attorneys. The involvement of the attorneys is absolutely essential in this area. Of course, the parties could negotiate on their own. However, given the fact that they have been unable to agree on a wide variety of issues, it is unlikely that they will be able to negotiate this situation. An alternative is having the attorneys negotiate the language of the stipulation. Mary Lund, Ph.D. and I have been moving towards a model in which the initial meeting with the parties should include their attorneys with the goal of negotiating the stipulation while also clarifying issues of procedure and confidentiality, etc.

### **Response to Date**

Overwhelmingly, the parties who have used a Special Master have been very positive about their experience. The parties feel that they can bring up issues that are important to them and have decisions made in a timely manner. Some report never having been able to address important issues such as the frequency and content of phone calls between parents and children because these issues have been overshadowed by court time about money and fees. Paraphrasing one of our clients: "Having a Special Master has really helped us. Instead of conflicts dragging on, we get decisions made promptly. Even though I haven't agreed with some of these decisions it's much better than the alternatives."