

Special Masters: One Way to Deal With Difficult, Chronic Post-Divorce Conflict

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Every family law attorney, family law evaluator and child custody evaluator knows who they are. They're that one couple in ten who just can't seem to get past chronic conflict, even when the divorce is history. Bickering continues ad infinitum; it seems that no matter what the issue, contentious disagreement reigns. "If she says it's Wednesday, you can be sure he'll argue that it's Thursday," said one frustrated family law attorney regarding a couple with whom he was working.

These are the couples who are constantly re-litigating, spending untold amounts of money to challenge each other on every possible issue, all the while most likely wreaking havoc on their children's adjustment to the parental split. (It is a well-accepted finding that the best predictor of post-divorce adjustment for children is the amount of conflict that continues between their parents. Estimates are that children who must live with parental post-divorce battles are 4 to 5 times more likely to have significant emotional and/or behavioral problems.) They consume the lion's portion of the Family Law Court's time as well.

Special Masters: An Alternative Solution That Goes By Many Names

But in more and more jurisdictions, there is an alternative, i.e. the appointment of an expert to help families successfully navigate the shoals of post-divorce life and to provide the Court with the kind of in-depth information it needs to make the best decisions for those issues that can be handled no other way besides litigation. Known by various names (examples are Special Master in California, Wise Persons in New Mexico, Custody Commissioner in Hawaii, Co-

parenting Coordinator in Colorado and Parenting Coordinator in other areas), these folks are court-appointed experts. Both parents agree that these experts will investigate any or all of a wide variety of post-divorce conflict areas and report to the Court their findings and recommendations on how the situation would best be handled.

For the most part, they are mental health professionals, at least when the major sources of the conflict are child custody issues. Attorneys are more often appointed when the main arguments center around property division or other primarily legal matters. Their methods and scope of operation vary by local rule although all are dependent on statute enacted by the legislature. In most jurisdictions, parents may specify which issues fall under the Special Master's authority, and retain the right to continue to argue and even litigate over those remaining (and/or eliminate areas where they have no disagreement).

Dr. Janet Johnston, well-known expert in divorce issues, believes that "interdisciplinary partnerships" are vital in these cases: she feels it is not reasonable to expect the Court to "have some special capacity to resolve the most difficult, the most complex of family problems....the role of the family court should be one of leadership in bringing the issues, the parties, and their helpers to the table."

According to former Family Law Commissioner George Taylor, who had many years experience dealing with post-divorce cases, "Jurisprudence is rooted in the adversarial model of 'the truth will eventually come out.' In other areas of law, litigation is 'event-driven', that is, something happens (such as someone hitting your car), and you ask 'what are the damages?' But in family law, you have the overlay of emotions concurrent with the event. And the adversarial approach only intensifies the conflict, it does not reduce it. This is why family law is better served by a multidisciplinary approach."

An Example of How a Special Master Works

Let's say the parents are arguing about how to transport Junior to and from visits to the non-custodial parents. Discussions between them have resulted only in further arguments and increased tension, all of which cannot help but harm the children emotionally. If this were a case that had a Special Master assigned to it (and this issue was one of those that had been agreed to be covered), the parents would call the Special Master. Each would express his or her position or they all may meet together to discuss the problem at the Special Master's office. The Master will be very familiar with the case and be in a good position to ferret out any underlying issues (for example, maybe Mom is resisting dropping Junior off because she knows Dad's new girlfriend is there, and she resents her). Methods of conflict resolution will vary from Master to Master and case to case. Most likely, the Special Master will attempt to help the parents come to a mutually satisfactory resolution; but if that fails, the Master has the parents' previously stipulated agreement that he/she will make a recommendation to the Court regarding the unresolved matter at hand. For instance, the Master may find that the parents meet to exchange Junior at a specified neutral location such as a nearby park, thus defusing this emotional hot button. The Master's finding is issued as a written recommendation to the Court but it has the full force of a temporary Court order; the parents have two weeks to object; if they do not object, the Court is highly likely to issue the order containing the recommendations.

In California, the Special Master concept began as a variant of alternative dispute resolution. Although no exact count is known, some variation of the Special Master exists in numerous jurisdictions, albeit (as has been noted) with variations.

Special Master Benefits

The advantages of having a Special Master involved are many:

Speedier access: Instead of waiting for an opening on the Court is often over-crowded calendar, the parties can call their Master as easily as they can reach any other professional. The Master can respond as expeditiously.

Avoidance of Litigation: In addition to its costs, litigation is not only very costly, but also tremendously draining emotionally for all concerned. With a Special Master in place, parents can quickly meet in a low-key setting and feel as though their positions are thoroughly understood.

Relevant Expertise: The Special Master's mental health training and understanding of family dynamics is of great value for families in this sort of upheaval. Further, the Master usually has an appointment for a significant length of time (anywhere from a few months to indefinitely; the average in California is one to two years) and thus, has the opportunity to really get to know the individuals involved and the history behind the important issues. Contrast this position with that of a judge who may have only 15 minutes to review a thick file, or with attorneys, each of whom is sworn to advocate for his or her client's interests. (It should be noted that the limited term gives both the Master and the parents an opportunity to terminate the relationship gracefully; if it is working well, it may be renewed.)

Lower Cost: Special Master costs are generally far less than that of an attorney and/or litigation, and the Special Master cost is generally divided between the parties. As an example, let's say parents each have an attorney who charges \$250 an hour. If they find themselves at odds, they will each pay \$250 an hour plus filing fees (a total that can easily reach thousands of dollars) or they can meet with their Special Master and split the Master's fee (which will vary, depending on location).

Opportunity for Personal Growth: Parents may ultimately gain a more pragmatic perspective regarding the realities of

being a post-divorce parent. For instance, Mom may think Junior should be in bed on school nights by 8 p.m. without exception, whereas Dad is more willing to be flexible and allow an occasional late night. After a few instances of bringing this issue to the Master's attention, and having the Master, (who is perceived as a trained expert in these things) point out that Junior's grades and health have remained fine, Mom may more easily come to see value in Dad's more relaxed approach, and that in any case, Dad is entitled to parent as he chooses during his time with Junior as long as Junior's health and well-being are not endangered. Mom may be more willing to lighten up a bit. The Master will probably point out that post-divorce parenting is not just another way to mutually parent; it is two people acting as separate entities when each is in charge. (It must be admitted, however, that this sort of parental epiphany rarely occurs. Using a Special Master certainly does not itself make the conflict disappear; it simply is a way of coming to a resolution that avoids major expense, hostile parental interaction an over-use of the Court.)

Nuts and Bolts of Using A Special Master

The usual procedure is for both parents to sign a stipulation agreeing to the appointment of a specific Special Master. The stipulation outlines the limits of the Master's powers and the duration of the appointment. Then the judge approves the order and the Special Master is in place. The Master will have his/her own separate contract with the parents, spelling out what is expected and what procedures will be followed for things such as after-hours problems, etc. It is really a very simple process. In California the Special Master is also given limited quasi-judicial immunity, since they are acting under the umbrella of the court.

Alternatively, the Court may decide that it requires more in-depth information about a specific topic and on its own, appoint a Master to investigate a particular issue and report back to the Court. In both cases, the Master acts in an

advisory capacity but his or her recommendations are taken very seriously by the Court.

Most Masters ask for at least a \$1,000 retainer, half paid by each parent. As fees are incurred, charges of \$125 per hour (billed at \$62.50 against each parent's individual retainer) are deducted. When the retainer dips below a specified level, each parent replenishes it. It is important to note that both parents are charged for any services, not only the parent who brought the issue to the Master's attention. This practice reinforces the idea that this is a joint endeavor that the issue at hand is to be dealt with by both parents.

Dr. Phil Stahl, an experienced Master and custody evaluator (and author of two books on custody evaluations) contends that the first order of business is for the Master to develop a bond of trust between Master and parents. This is a task which is inhibited by the feeling of many parents that the Court system has not been responsive to their needs. Stahl recommends an individual, face-to-face meeting with each parent where the parent has the opportunity to express his/her feelings and where the Master can reiterate that all decisions made will be in the best interests of the children, not in the interests of the parents. The Master should stress that decisions will be made expeditiously. Stahl points out that the conflict between the parents is roughly analogous to siblings fighting over their parents' attention. Just as they have difficulty sharing their parents, so do the parents have trouble sharing the children. Stahl suggests a process for the Special Master to make decisions:

- 1) Look to the Court order for a precedent; if there is no clear guideline, then
- 2) examine how the issue affects the children; if there is no clear effect, then decide on basis of fairness to parents, alternating between them and in all cases, keeping well-documented records.

Dr. Matthew Sullivan, another Master and custody evaluator, urges "a neutral, child-focused stance" and believes that "the Special Master must foster a 'holding environment' in which parents feel understood and decisions are framed in a child-centered, supportive atmosphere." In his view, "the process is designed to eliminate negotiation and problem solving by the parents and encourage parallel parenting. Co-parenting can be conducted in a more rational and businesslike manner when sessions with the Special Master are the only face to face contact parents have. As issues are resolved, the frequency of appointments gradually diminishes. Parents disengage and are encouraged to deal with issues in a more proactive, planned manner which decreases the emotional nature of their interactions."

The question may emerge regarding how to handle a situation where one parent is using the Master's services far more than the other. Masters differ in their approach. Some say that any parenting issue, regardless of who brings it to the Master's attention, is something for which both parents are responsible. Others believe that if one parent is using the Master as a virtual soapbox to harangue his or her position, that constitutes abuse of process and that parent should be billed separately. Issues such as these must be spelled out at the outset of the contract.

As might be imagined, being a Special Master is not a job without its perils. Dealing with such contentious group of people who are wrestling with such emotionally-laden subjects is not unlike trying to defuse a ticking bomb. But in San Mateo County (California), at least, Special Masters have immunity from prosecution. And they may not be ordered to testify, although they may choose to do so if they wish. Similarly, Special Masters are not obligated by ex parte rules: they may contact the judge on their own volition without notifying attorneys, or contact one attorney without notifying the other. In practice, however, Special Masters are scrupulous in avoiding the appearance of favoritism. But the Special Master is able to contact the judge if s/he feels that an issue needs

the Court is attention.

Even with such safeguards in place, being a Special Master can be grueling work. Said one Master, "sometimes all the incessant bickering gets to me. These are very demanding, self-centered people for the most part, with little ability to empathize with each other. It's hard not to just yell "Oh, grow up!"

So why do they do the work? Most Masters find satisfaction in their belief that they are helping the children in the family by infusing some rationality into a very volatile environment. "I often feel like I am being parachuted into a war zone," said one. "And I take great pleasure in rescuing the kids a little from that. Sometimes, I'm the only one who's primarily concerned with their welfare rather than with winning or losing the battle."

Dr. Sullivan believes that the Special Master concept has shifted from a phase of "euphoric expansion" to one of "cautious refinement: Special Masters are not the panacea for everything." Dr. Stahl worries that more and more professionals are declining Special Master work due to the stress of the job, and that there are few replacements.

Beginning a Special Master Program

Starting a Special Master program may not be easy. "The Courts in our area simply don't want to relinquish control" said one exasperated mental health professional. Attorneys may fear the potential loss of income, as arguments that previously lead to re-litigation are now resolved by consulting the Special Master. Most family law attorneys, however, are delighted to have an ally in dealing with these most difficult, time-consuming and emotionally taxing clients. (One busy family law attorney said "A Special Master on the case can often deflect much of the destructive emotional charge of a divorce. They're better equipped to handle the hyper-emotionality of divorce than I am.")

In some areas, Special Masters meet regularly to consult on these very complex cases. Mutual support and sharing of resources is critical to avoid burn-out. And many also belong to the Association of Family and Conciliation Courts (AFCC) an interdisciplinary organization for professionals in the family law field. (AFCC may be contacted at 329 W. Wilson, Madison WI 53703. The website is <http://www.afccnet.org/>). A six-hour training video and manual (one for beginning Masters and another for more experienced ones) produced for either beginning or advanced Masters is available to professionals (for a fee) from Dr. Terry Johnston, 1746 Hamilton, San Jose CA 951125-5424 (408) 294-6866).

The pain of divorce and its devastating impact on its child victims is greatly exacerbated by continuing conflict. Highly conflicted parents may lack the emotional detachment necessary to put aside their differences and work cooperatively in the best interests of their children. Disagreement becomes a habit carried over into every aspect of interaction. The introduction of a Special Master into this explosive brew may serve as a calming force with positive ripples throughout the family constellation.

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Events Calendar:

Establishing a Forensic Practice by David L. Shapiro, Ph.D. November 19th, Maryland Psychological Association. 301-596-3999.

May 31-June 3rd 2000, Annual Conference of the Association of Family and Conciliation Courts, New Orleans, Louisiana

Resource Note:

Parents without partners is a good place for Divorcing parents to meet other single, separated and divorced parents with similar issues and concerns.

Whether to network with childcare or begin dating, its a resource worth knowing. There are well over 1000 local chapters nationwide, and they can be reached at 800-637-7974. The web site for the national organization is www.parentswithoutpartners.org .

Legal Note:

Virginia Judge Denies Biological Mother's Bid

For Custody -Child Was Switched At Birth

In a recent case in Virginia, a biological mother's bid for custody of her child was denied, and she was given visitation rights. Four year old Rebecca Chittum was switched at birth by a hospital mistake in 1995. She had never seen her mother, Paula Johnson, prior to her "parent's" automobile death. She has since lived with her grandparents, who after a contentious attempt to get along, had been unwilling to let Ms. Johnson visit her daughter.

The Juvenile and Domestic Relations Judge John Curry declined to give the mother custody, but did grant visitation. In the ruling, the judge appeared to follow closely the recommendations of the expert witness, who indicated that the child should not be stressed with further losses at this time. The judge also ordered the child psychologist to schedule the visits. The judge ordered both families into therapy.

The two family's feud had become quite dysfunctional, with many allegations and insults. This eventually led to the current custody trial. The biological grandparent was also given visitation rights. Both sides seemed pleased with the judge's ruling.