CITATION : De Melo v. Gooding, 2010 ONSC 2271
COURT FILE NO.: FS-03-048772-00
Brampton
DATE: 20100416

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ADRIANO BORGES DE MELO	)	Audrey A. Schecter for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
PATRICIA GOODING	)	Ms. Gooding self-represented
	)	
	)	
	)	
Respondent	)	

ENDORSEMENT

D.L. CORBETT J.

[1] Ms. Gooding seeks a broad range of relief. I quote from the opening paragraphs of Mr. De Melo's factum:

> The respondent mother… has brought a motion in which she claims 22 heads of relief, 15 of which are referable to parenting the parties' 9 year old son. In regard to these claims, the respondent is seeking to vary the terms of the final order of Madam Justice Van Melle dated February 21, 2005. The remaining claims [are]… largely outside this court's jurisdiction.
>
> There is no cross-motion. The Applicant father's… position is that [the Respondent mother's] motion should be dismissed in entirety, with costs. Many of the claims are *de minimis* in and of themselves and in the relief sought. All of the issues could have been dealt with by a parenting coordinator, as provided by the order and there was no need for these issues to be brought to court.

[2] I agree with most of these points.

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[3] This said, I agree with one fundamental point raised by Ms. Gooding, which lies at the heart of this motion. Mr. De Melo has resisted the use of a parenting coordinator to resolve minor parenting differences on the basis that the issues were too minor, or no proper foundation had been established for taking them to a parenting coordinator.[1] I accept that his position on these issues is sincere. However, the parties are co-parenting their son Michael. They need a mechanism for resolving differences between them on parenting issues, large and small, and they specified the use of a parenting coordinator for that process. Most of the issues before me could and should have been resolved in that way, but it is Mr. De Melo's fault that this did not happen. As will be seen, I am dismissing most of the requests from Ms. Gooding, without prejudice to those issues being brought before the parenting coordinator, and without prejudice to a further motion if the process before the parenting coordinator does not lead to resolution.

[4] I agree with the general principle that the minutiae of parenting is not the proper subject of a motion in this court. But that is not to say that smaller issues are unimportant, especially when aggregated. If these parties cannot find a way to resolve differences that arise between them concerning their co-parenting of Michael, that may form a basis to change the decision-making and dispute-resolution processes currently in place, or, if it is thought that those changes would not rectify the situation, to change the primary residence and access terms to reduce the scope of conflict and provide clearer authority for one of the parties to make day-to-day decisions affecting Michael.

[5] Parenting is a dynamic process. Issues arise and need to be addressed. The parties cannot expect a family law judge to sit in their respective living rooms to decide daily issues that arise between them. Nor can the parties establish an agreement that sets out, once and for all, the course to be followed for every parenting issue that may arise. Rather, the court can establish, or the parties can agree, on a general scheme for parenting, lines of authority for decision-making, and dispute resolution processes for those instances where the parties cannot agree.

[6] I agree with Mr. De Melo that some of Ms. Gooding's concerns are truly *de minimis* or fall into the general categories of "house rules" – which need not be the same in the parties' respective households. However, I do not agree with

[1] See for example Mr. De Melo's email dated September 2, 2005: from the very beginning, Mr. De Melo has purported to preclude access to the parenting coordinator for dispute resolution unless he, in his own discretion, was satisfied that it was worthwhile to attend.

him when he says, as he does in his affidavit: "I hoped and believed that if we set out specific and detailed parenting terms from the outset, there would be no future issues…."[2] This was not realistic. But, as I say, it was sincere, and it explains Mr. De Melo's studied resistance to participation in dispute resolution through the parenting coordinator. It also explains his position that Ms. Gooding had to demonstrate, to him, the materiality of a particular concern before he would participate in dispute resolution with her.

[7] One spouse in a successful and loving relationship may sometimes consider the concerns of the other to be misplaced or overblown. It is hardly a recipe for success to dismiss them and refuse to discuss them. So too for co-parents who are separated. The co-parenting relationship simply cannot succeed if one side can dismiss the concerns of the other side and refuse to talk about them.

[8] With these general thoughts in mind I turn to the specific concerns raised by Ms. Gooding.

Threshold Issues

[9] Mr. De Melo argues that this court has no jurisdiction to vary custody and access terms unless the court finds that there has been a material change in circumstances.

> Before the court can consider the merits of the application, it must be satisfied there has been a material change in circumstances of the child since the last custody order was made. Section 17(5) [of the *Divorce Act*] provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no further.
>
> … What suffices to establish a material change in the circumstances of a child? Change alone is not enough; the change must have altered the child's needs in a fundamental way…. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier…. Moreover, the change should represent a distinct departure from what the court could have reasonably anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J.G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.[3]

[2] Mr. De Melo's Affidavit sworn July 30, 2009, para. 7.
[3] *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27 at para. 10. The court cites *Wilson* v. *Grassick* (1994), 2 R.F.L. (4th) 291 (Sask. C.A.) in support of this proposition.

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[10] In *Gordon* v. *Goertz* and the other cases cited to me by Mr. De Melo, the issue was whether there had been a material change justifying variation of custody, access, or the principle residence of a child.[4] It does not follow from these authorities that change must be of that magnitude to warrant a variation in minor terms of a custody and access order. For example, in *Litman* v. *Sherman*, the Court of Appeal concluded that there was no material change justifying a change from joint custody to sole custody. However, the court also concluded that "[g]iven the difficulties the parties have had in working with [the current parenting coordinator], the issue of who will be the parenting coordinator may need to be revisited. If the parties are unable to agree, the selection of the new parenting coordinator shall be dealt with by way of a motion to the Superior Court".[5]

[11] Based on this authority, I conclude that the test – whether there has been a material change of circumstances – is to be applied in the context of the change that is sought, and neither in the abstract nor necessarily to the overall scheme of custody and access. Thus there is jurisdiction to order relatively minor changes to custody and access orders on the basis of relatively minor material changes in circumstances.

[12] This is not to encourage interminable court attendances, or unending participation in formal dispute resolution outside the court process. There comes a point at which the frequency and intensity of conflict may warrant a change in the overall custody and access regime, in an effort to reduce that conflict. In other words, the failure of the processes established by the parties may, itself, be a material change of circumstances, just as the apparent inability of the parties to work with a specific parenting coordinator could justify changing the coordinator in *Litman* v. *Sherman*.

Background

[13] The parties were married in July 1997. They separated in July 2003. They have one child, Michael David Gooding De Melo (D.O.B. August 24, 2000). Michael is currently in grade four at Hawthorn Public School in Mississauga.

[14] In February 2005 the parties entered into a partial separation agreement in which they agreed to shared parenting of Michael (the

[4] See also *Litman* v. *Sherman* (2008), 238 O.A.C. 194 (Ont. C.A.), *Griffin* v. *Bootsma*, 2004 CarswellOnt 2715, [2004] O.T.C. 564 (Ont. S.C.J.), per Lalonde J.
[5] At para. 47.

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"Agreement"). They also created a "Schedule of Time with Michael" (the "Schedule"). Both the Agreement and the Schedule were incorporated into a consent order of Van Melle J. dated February 21, 2005 (the "Order").

[15] The Order sets out a comprehensive plan for parenting Michael, and, for the most part, the parties have proceeded on the basis of the Order since 2005. The Order is premised on Michael spending equal time with each parent, on an alternating-week basis. In the agreement, the parties specifically acknowledge their respective parenting autonomy when Michael is with them:

> [The parties] acknowledge that each of them has the right, during their time with [Michael] to follow his or her own standards, beliefs or style of child-raising, without unreasonable interference from the other parent, so long as the parenting is not contrary to medical advice or harmful to Michael."[6]

[16] This is an important and necessary provision, and is an acknowledgment of a basic principle often invoked in cases such as this. Each party is a parent. Each has responsibility and authority to parent in the absence of the other. Neither is entitled to reach into the other's household to parent there. The parties will not parent identically, and there is no harm in a child being exposed to different ways of living. Differences can be as minor as bedtimes, food variety, and the like. The discretion of a parent is broad, because there is no one way in which to raise a child. But, of course, there are boundaries to parental discretion. If a child is deprived of sleep or nutrition then decisions generally within parental authority can become concerns for the court. None of the concerns raised by Ms. De Melo rise to this level. Michael is well provided for by both of his parents. If either was the "primary" parent, the court would not intervene. But where the parties are co-parenting, a higher degree of cooperation is required. Taking, for example, the issue of bedtimes: if Michael goes to bed "late" in one household and "early" in the other, this may be a concern, whereas there might be no concern if he went to bed consistently "late" or "early".

[17] I now turn to the specific issues raised by Ms. Gooding. I address them in the order in which they are presented in her written materials.

Issue #1 – Off-Week Overnights

[18] Ms. Gooding asks that the Order be "followed and clarified" regarding mid-week overnights.

[6] Para. 3.1.

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[19] The Order provides for “alternating weeks” with transfer between households on Fridays. There is one overnight during the week that Michael is with the other parent. Currently Ms. Gooding has Mondays for overnights; Mr. De Melo has Tuesdays. Mr. De Melo says that on long weekends, Ms. Gooding’s mid-week night is Wednesdays rather than Mondays.

[20] Paragraph 2 of the *Schedule of Time with Michael* provides:

> Each parent shall have one overnight per week with Michael when he with the other parent. The parent having the overnight shall choose the date, with as much notice as possible to the other parent.

[21] This provision is clear. It does not establish a fixed day each week for overnights. It accords discretion to the parent to select which night it will be, each week. Indeed, the use of the word “date” (which denotes one specific calendar date, rather than a regular day of the week) implies that the parent need not select a fixed day for the overnight, week-in, week-out.

[22] On the basis of this provision, then, Ms. Gooding may select which day Michael will have an overnight with her, and it may be a different day of the week.

[23] Also on the basis of this provision, neither party is restricted to selecting a regular weekday night for the weekly overnight. The provision accords each parent the discretion to select the night. Certainly this provision does not entitle Mr. De Melo to decide which night Ms. Gooding will have her overnights with Michael. Neither does it permit Ms. Gooding to insist that Mr. De Melo’s overnights be consistently on the same night of the week.

[24] This provision is an excellent example of how a detailed separation agreement may be drafted and then applied by the parties in their day-to-day lives. As a matter of common sense, this arrangement could not work if both Mr. De Melo and Ms. Gooding randomly changed their weekly overnights on short notice to each other and to Michael. And generally they have not done so. They have established a set of conventions about these overnights. They have, in fact, been mid-week, with an understanding that they are not to trench on each other’s weekend time with Michael. Very sensible. They have also generally had the overnights on the same day each week. This enables them to schedule regular activities for themselves and for Michael without the disruption of an unpredictable and ever-changing routine. Also very sensible. And they have accorded themselves authority to act unilaterally to establish their own mid-week overnight with Michael.

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[25] This is an area that could be discussed fruitfully with the parenting coordinator. If the parties "stand on their rights" under the terms of this provision, this will wreak havoc to the orderly running of their households. If they cannot reach a satisfactory resolution through the parenting coordinator, the court would be moved to vary the provision to establish fixed nights of the week for each parent, or some other mechanism to restore order (perhaps by abolishing the mid-week overnights altogether now that Michael is older).

[26] I note, in closing, that Mr. De Melo had established Tuesdays as the regular night of the week he would have overnights with Michael. However, he did not "commit" to this protocol. The result was that Ms. De Melo made regular plans for Tuesday evenings (to work), and then found that she had a responsibility for Michael for which she had to incur daycare expenses or make other arrangements. This is an object example of the point I make above. The parties' agreement accords them each the authority to pick their day, at will, from week to week. If they cannot agree on how to implement this arrangement constructively, it will have to be changed to establish a regular routine. Both sides can benefit from flexibility in these arrangements, if there is cooperation. If they cannot cooperate to benefit from that flexibility, then fixed nights, or no overnights, will be more practical than the current arrangement. I do hope they can come to a constructive resolution of this issue with the parenting coordinator.

Issue #2 – Bedtimes

[27] Ms. Gooding proposes that Michael's bedtime be 9:00 p.m. when he is age 7 and 8; 9:30 p.m. when he is age 9-12, 10:00 p.m. when he is age 13-16, and once Michael is 16 "it is probably up to [Michael] at this point".

[28] Courts do not supervise bedtime.

[29] Bedtime may be discussed before a parenting coordinator. Some coordination may be desirable so that Michael has reasonably consistent routines between the two households. However, unless the "bedtime issue" is creating serious difficulties for Michael, such as (for example) fatigue at school or concerns that raise medical issues, then this is an issue within the autonomy of the parties when Michael is with them. If an inability to cooperate on this issue is leading to a situation where Michael's well-being is compromised, then the court's solution may be to change from alternating weeks to some other arrangement. The court cannot, and will not, micro-manage day-to-day routines within each household.

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Issue #3 – Tutoring

[30] Ms. Gooding asks that she "be allowed to obtain tutoring or other education-related help for Michael where needed without interference".

[31] This sort of issue can be difficult where there is co-parenting. In some cases, tutoring might be "necessary" for a child, in the sense that a child has learning difficulties that can best be addressed in this way. Ms. Gooding sought to establish this kind of need on the basis of a recommendation from one of Michael's teachers.

[32] The recommendation was not a clinical one. Michael was not identified as having a particular need that had to be addressed. Michael has always been a competent student, and continues to be so. He might benefit from extra tutoring, but the same could be said of many students.

[33] The decision to provide non-essential tutoring, or any other program or activity outside the core curriculum provided in school, has to be taken in the context of a child's overall needs and wants, the family's means, and the child's other activities. It is the sort of decision on which reasonable parents may disagree. The same may be said of summer camp, scouting, athletic programs, and any other extra-curricular programs. As a general principle, the court agrees that it is beneficial for children to have particular activities they pursue. Selecting the activities is a matter of parental judgment.

[34] Where a child is primarily resident with one parent, ordinarily that parent will select the activities in which the child participates (subject to case-specific arrangements for consultation with the other parent, and perhaps cost-sharing of activities between the parents). Where a child is equally resident with both parents, then cooperation is necessary to establish which activities will be pursued.

[35] Many extra-curricular activities, such as tutoring, require consistent participation, often on a weekly, or more frequent, basis. Joining a baseball team, for example, would not likely succeed if the child was only able to be present every other week because one parent supported the activity and the other did not.

[36] This is not an issue that can be swept away on the basis of the autonomy of the parties to parent in their own fashion. If the parties cannot agree, then Michael may lose his opportunity to participate in activities.

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Alternatively, the default may well be that Michael participates only in activities of his own choosing. When he is older that may be appropriate, but at the age of ten it is appropriate that his parents have substantial authority determining what activities he will pursue.

[37] Deciding on a regime of extra-curricular activities (which could include tutoring) is exactly the sort of issue that should be canvassed with the parenting coordinator if the parties cannot agree. Ms. Gooding does not need to establish that there is some dire need for tutoring in order to pursue it as one of Michael's activities. Perhaps it would be of benefit to him; perhaps he would benefit and enjoy doing something else for his extra-curricular time. But this needs to be talked out and agreed. If it cannot be agreed through the parenting coordinator, then this may be an issue that has to return to court.

[38] I cannot leave this topic without brief comment on the manner in which Ms. Gooding placed the evidence concerning the recommendation from Michael's former teacher. I will not name her so as to minimize any embarrassment she might feel about being drawn into this case.

[39] The teacher appears to have suggested that Michael might benefit from some tutoring in a final report card at the end of grade two. Based on the manner in which this recommendation was presented, this was not a situation where there was a critical need for extra-curricular teaching – this was a thoughtful teacher suggesting that Michael might benefit from a little extra academic attention. No doubt this suggestion was made in good faith and represented the teacher's best judgment on the point, but it was not being offered as a professional judgment that Michael "needs" extra tutoring. It was not communicated as a professional identification of an "exceptional" child in need of extra help. It was not memorialized in educational records as a need that should be addressed by the school system.

[40] When Ms. Gooding asked the teacher to attest to her recommendation, the teacher demurred, on the basis that her suggestion had never been intended as an opinion that Michael "needed" more than was being provided in the classroom. Further, the teacher remembered very little about the recommendation, it not having been a formal assessment. The teacher told Ms. Gooding that she really did not recall the recommendation or the circumstances that led her to make it. Ms. Gooding was undeterred. She obtained a summons for the teacher to come to court to testify about her recommendation. Ms. Gooding served the summons herself, and was aggressive in her attempts to do

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so, threatening the teacher with possible sanctions (including jail) if the teacher did not attend as directed.

[41] This was wholly unwarranted. The teacher, now retired after a long and distinguished career, was reduced to tears. She was made to feel that she was in trouble with the courts, and was at risk of penal sanction if she did not cooperate with Ms. Gooding. And she was in fear of Ms. Gooding, who was evidently cross with her for being less supportive than Ms. Gooding had expected.

[42] This would have been avoided if Ms. Gooding had distinguished between a helpful suggestion (one which a reasonable parent could decide not to follow), and a professional judgment of "need", which a reasonable parent could not ignore. This was exacerbated by Ms. Gooding's training: she too is a teacher. I do not doubt that Ms. Gooding is a good teacher. And I do not doubt that Michael's former teacher was being helpful and exercising good judgment when suggesting Michael might benefit from some tutoring. But neither is a basis for the court deciding that Michael should have tutoring. That is a joint decision to be made between Ms. Gooding and Mr. De Melo, with the help of their parenting coordinator, based on Michael's needs and wishes and the other activities he is pursuing. A program of tutoring is the sort of activity that is not likely to be of great benefit unless it is followed consistently with the support of both parents.

[43] The court will not determine Michael's extra-curricular activities on a year-to-year basis. This is a parenting decision. If the parties cannot agree on appropriate extra-curricular activities for Michael, even with the help of a parenting coordinator, then this may be a basis to change the overall custody and access regime. Michael should not be deprived of activities because of the inertia borne of conflict. But neither is it practical to order an activity that one parent wants if the other will not support it.

Issues # 4, 5 and 6 – Christmas, Hallowe'en and Winter Break Scheduling

[44] Ms. Gooding has provided me with emails between the parties setting out their discussions concerning Christmas scheduling. I decline to review this issue in detail, since it does not, at the moment, present as an issue of principle. The parties have established the general principles for division of holiday times in the Agreement and Schedule. The specific schedule will have to be settled annually, and there will have to be communication about it annually. Disagreements can be brought before the parenting coordinator.

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[45] It appears that the parties have agreed that henceforth they shall alternate the winter break holiday (that is, one year Michael shall spend it with one parent, and the next year with the other parent). If there are disagreements about this, they should be raised with the parenting coordinator. Only if the conflict cannot be resolved in that forum should it be brought to court.

[46] In respect to Hallowe'en, the issue seems to be the precise mechanism that is used to divide time on the evening of Hallowe'en. This should be addressed with the parenting coordinator.

Issue #7 and 8 – Daycare Costs

[47] I accept Ms. Gooding's evidence respecting daycare costs. Mr. De Melo has been difficult respecting the information he has required before paying for daycare expenses, and has gone so far as to say that he will not pay his share of these expenses when they are incurred because the parties are both in court (rather than daycare required because Ms. Gooding is working or at school).

[48] The amounts in dispute have been minor. The principle is clear: necessary daycare costs will be split. When daycare providers issued receipts, Mr. De Melo would not pay his share because the hours were not specified. When Ms. Gooding provided the hours, he still would not pay, because the hours had not been written out by the daycare providers (even though they had attested to them).

[49] I understand that Mr. De Melo did decide to pay these disputed amounts shortly before the motion.

[50] The documentation provided by Ms. Gooding was more than adequate, and Mr. De Melo's objections were tendentious. If there are difficulties in future in respect to this issue, Ms. Gooding may bring them back to court. The parenting coordinator does not have the jurisdiction to deal with this issue.

Issue #9 – Michael's Club Attendance

[51] Ms. Gooding asks "that the order regarding Michael attending a club he belongs to regardless of which parenting he is with be enforced". There is no evidence before me on this point. The issue sounds akin to the issue of tutoring and extra-curricular activities, with the caveat that if there is an order in place, the parties are bound to obey it until it is changed by consent or further order.

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This also sounds like the sort of issue that ought to be canvassed with the parenting coordinator before it is brought to court.

Issue #10 – Telephone Access

[52] Ms. Gooding complains that she does not have effective telephone access with Michael when he is with his father. She says the reverse is not true. She says this is inconsistent with para. 3.17 of the Agreement.

[53] This should be addressed with the parenting coordinator to establish a regime that ensures Michael has effective telephone access with his mother. If the parties cannot agree on something sensible, I would order them to provide Michael with a cellphone, and jointly pay the cost in the same proportion as daycare expenses. Michael is old enough now that this could be a practical solution. If the parties would prefer that Michael not have a cellphone at his age, then perhaps this will encourage them to come to some other resolution of this issue.

Issue #11 – Michael's Belongings

[54] Ms. Gooding complains that she purchases items for Michael and that they go with Michael to his father's house and do not return. She itemizes some clothing and lunch accessories said to have cost $168. Pursuant to para. 3.18 of the Agreement, these items are dealt with as property of the parent who purchased them.

[55] This sort of thing can be very annoying, I know. But it is an issue that should be dealt with in front of the parenting coordinator. I add that as Michael is getting older, presumably he will have more to say about what he brings back and forth between his homes. If the parties cannot resolve the issue through the parenting coordinator, it will remain open to Ms. Gooding to return Michael with what he brought from his father's, and ensure that items she purchases remain in her household. This is not very practical for either parent, since it would mean that Michael would end up with two sets of "everything".

[56] I would also note that clothes and personal items such as lunch pails belong to Michael, not to the parent who purchased them. At the time of the Agreement it was appropriate to deal with these items as parental property, but now that Michael is ten they should generally be viewed as belonging to him. And now that he is ten he should be getting to the stage where he can have more to say about these things, and it is hoped that this conflict will fade away.

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Issue #12 – Michael's Doctor

[57] Ms. Gooding raised issues about Michael's physician. Michael's doctor, Dr. Sloan, moved her medical practice in 2005. Dr. Sloan referred Michael to another doctor. There was then an acrimonious exchange of correspondence between the parties about the process of providing information and making decisions about a new doctor.

[58] Now Michael is seeing Dr. Strachan, who was selected by Mr. De Melo. Ms. Gooding wants this changed to a doctor suggested by Dr. Strachan.

[59] I have some sympathy for Ms. Gooding's concerns about how this was handled back in 2005. However, more than four years has passed since this time, and process concerns from 2005 cannot overcome the benefits of maintaining consistent care with Dr. Strachan. But Ms. Gooding says that it is too difficult to get in to see Dr. Strachan.

[60] These are issues that should have been canvassed with the parenting coordinator back when they arose. Ms. Gooding explains her approach to the issues back in 2005 on the basis that she wished to avoid conflict. That is a reasonable basis not to stand upon one's "rights" in respect to a particular issue. However, having taken that approach, Ms. Gooding cannot have things considered now as if the situation was as it was in 2005.

[61] If Ms. Gooding feels that Dr. Strachan's availability is so limited that a change is in order, this should be raised with the parenting coordinator. Mr. De Melo does not believe this is a problem, and he can put forward his view to the parenting coordinator as well. The process of considering this issue, however, starts from the premise that Dr. Strachan is and has been Michael's doctor for more than four years. There is no suggestion that his medical care has been less than satisfactory. Process concerns relating to the manner in which Dr. Strachan was selected back in 2005 are now irrelevant: by inaction on this point for so long, Ms. Gooding is not now entitled to raise those process concerns as a basis for changing from Dr. Strachan now.

Issue #13 – Michael's Health Card

[62] This is an issue that ought to have been dealt with before the parenting coordinator. The answer is so obvious, however, that this court will provide direction rather than remit the matter to the proper forum.

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[63] Michael's health card shall travel with him. The parties are free to obtain notarized copies of Michael's health card for their own records, so they will always have that, in case Michael forgets or misplaces the original.

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Issue #14 – Michael's School Work

[64] Ms. Gooding seeks copies of various pieces of school work done by Michael over the years. This list includes such items as a "memories book" of Michael's from when he was in senior kindergarten. Ms. Gooding says this is required by para. 3.31 of the Agreement.

[65] Preservation of important childhood memories is not *de minimis*. As to whether there has, or has not, been compliance with the Agreement in respect to these items, that can be addressed with the parenting coordinator. Obviously it is a little late in the day to be asking for school work from more than four years ago. But if it still exists, and has not been shared, then the parenting coordinator can deal with the issue.

Issue #15 – Birthday Parties

[66] Ms. Gooding complains that she is unable to have a birthday party for Michael with his friends because Mr. De Melo always gets his invitations out first. Mr. De Melo does not deny that he does this, but rather dismisses Ms. Gooding's concerns on the basis that it is open to both parents to hold their own birthday party for Michael.

[67] This is a good example of why these parties need to be seeing a parenting coordinator. The parties may hold their own birthday parties for Michael, of course. But it is not reasonable to suppose that Michael's "little friends" will all be able to attend and bring presents to two parties for each of Michael's birthday parties. A sensitive and well-planned co-parenting regime could well alternate responsibility for the "main" party from year-to-year. Certainly there should not be a race to get out invitations each year so that one party is a success and the other not.

[68] I agree that this sort of grievance is not the sort of thing that should be brought to the Superior Court, but that is not because it is *de minimis*. It is because co-parents should be able to find a reasonable solution to this problem, or have recourse to an effective dispute resolution system that leads to a resolution, without spending their time and money on a motion before the court.

Issue #16 – Old Motion Materials

[69] Ms. Gooding asks that Mr. De Melo or his counsel provide her with a copy of the motion materials that they placed before Tulloch J. and which led His Honour to make an order. Mr. De Melo responds that these materials are available in the court file, and Ms. Gooding can go and get herself a copy.

[70] Again, this is not the sort of issue that ought to be brought before the court. Mr. De Melo should have instructed his counsel to provide the requested materials; had the request come from counsel for Ms. Gooding, surely it would have been provided as a matter of professional courtesy. Conversely, Ms. Gooding should pay the reasonable and actually incurred photocopying and binding costs for putting these papers together for her.

Issue #17 – Wedding Photos

[71] Ms. Gooding wants a proper division of wedding photos, which are of considerable sentimental value. Mr. De Melo says that he does not have any wedding photos now. He says that he has told Ms. Gooding this many times.

[72] In her affidavit, Ms. Gooding says that "[w]e agreed that these [photos] were to be divided". She does not say when or how this was agreed. It appears that the only reference to an "agreement" respecting these photos is in a memo authored by her counsel in 2004, which suggests that there had been prior agreement to division of these items.

[73] The Order does not deal with equalization of property.

[74] If there are outstanding equalization issues, they are not matters of varying the Order of Van Melle J. The evidence before me does not form a basis for granting summary judgment on this issue. Nor does it support a conclusion that there was an agreement in 2004, or earlier, that has not been performed. Any outstanding equalization issues may be pursued to trial or other final disposition of the case. They should not, however, be done piecemeal.

Issue #18 – Change of Name

[75] Ms. Gooding has changed her name back to her unmarried name, Gooding. She wishes to be referred to as such by Mr. De Melo. Mr. De Melo responds that he has complied strictly with court orders to make payments to "Patricia De Melo".

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[76] This is another example of Mr. De Melo being tendentious for the purpose of annoying Ms. Gooding. There is no air of reality to his stated concern that he could have been assailed for non-compliance with court orders by making his payments to “Patricia Gooding” at her request.

[77] An order shall issue amending the name of proceedings in this case to refer to the respondent as “Patricia Gooding”. This order shall apply to amend orders for the payment of money such that any cheques payable to the respondent should henceforth be payable to “Patricia Gooding”.

Issue #19 – Police Enforcement

[78] Ms. Gooding asks for police assistance enforcing the Schedule. This request is denied. Non-compliance can be raised with the parenting coordinator or on motion to this court. Given the nature of the conflict between the parties, which is largely psychological (on both sides), police involvement is more likely to lead to an escalation in conflict than a diminution of it. Further, incidents of alleged non-compliance, while arguably frequent, are of a relatively minor nature, and do not require immediate response from police.

Issue #20 - Costs

[79] The parties shall make written submissions as to costs within 21 days. There shall be no responding submissions unless I direct otherwise.

Issue #21 – Consequences for Non-Compliance

[80] Ms. Gooding asks that “there… be such consequences as the Judge sees fit” for future non-compliance. No doubt there may be.

Issue #22 – Sole Custody

[81] Ms. Gooding asks for sole custody of Michael in the alternative to her requests respecting issues 1 to 15. She notes that she is not really seeking this remedy at this time, but has asked for it in case Mr. De Melo asks for it, on her understanding that if she does not ask for sole custody and he does, the court could award Mr. De Melo sole custody, but could not award it to her.

[82] Ms. Gooding is not seriously seeking this relief at this time. The request is dismissed without prejudice to a future request by either parent for sole custody, or other variation in the custody and access regime.

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The Underlying Problem

[83] This motion really was not brought to establish a bedtime or set out a precise schedule for Hallowe'en each year. The real thrust of this motion is summarized in the following excerpt from Ms. Gooding's evidence:

> Before I detail the specific issues, I will describe the impact that these issues are having on me.
>
> In general I am a reasonably easy-going person who is willing to take into account other peoples' wishes sometimes at the expense of my own. However, when Michael was born there were some issues (physical safety issues, a healthy diet, and emotional safety issues, being allowed to nap, etc.) which I was not willing to compromise on for my son's sake. In addition there were many things that I was "not allowed" to do: I was not allowed to decorate the house, help plan the gardens, buy Michael a rubber ball, have a baby gate at the top of the stairs (at first), to go out with a friend and many other things which I view as normal and healthy. When I stood up for these things rather than giving in, Adriano became violent (starting with yelling and insults and escalating to threats to kick me out of the car, smashing a baby gate, cutting a sieve with a knife in front of me, preventing me from talking to my mother, monitoring my phone calls, and telling me that if we divorced, Michael would not be part of my family). All of this history is documented in the continuing record.
>
> Since the divorce, this behavior has continued: He [Mr. De Melo] has taken or refused to give back items belonging to me (a lunchbox, clothing, icepacks, sandals, wedding pictures, baby pictures, Michael's memory book and other work from school), he is refusing to allow me to be involved in making decisions regarding Michael's doctor, immunizations, his eyeglasses, tutoring, my overnight. He has taken Michael out of school to prevent me from picking him up. He attempted to exclude me from Michael's first communion classes and showed up on my weeks even though there was a restraining order in effect. He has made it so that I have no way of contacting Michael or even of knowing where he is when Michael is with his dad. This pattern of behavior hurts terribly, cuts of[f] many avenues of effective parenting for me, and makes it difficult to manage my own career and social life.[7]

[84] This passage provokes a dual response, given the content of the entire record. First, there is some merit in Ms. Gooding's concerns. There is a dismissive and controlling tone to Mr. De Melo's responses to Ms. Gooding's concerns over the years. Second, the dynamic between the parties is experienced by Ms. Gooding through the filter of her experiences during the marriage and during the breakdown of the relationship.

[7] Ms. Gooding's Affidavit dated July 22, 2009.

[85] Standing back from the entire situation, it appears to me that the "alternating weeks" arrangement is working reasonably well, but imperfectly. But the imperfections, not having been addressed and resolved, continue to fester.

[86] The parties need recourse to dispute resolution with the parenting coordinator. If that fails, they may need to come back to court. And if conflicts cannot generally be resolved, then the "alternating weeks" regime may need to be revisited. Should this happen, both parties should understand that Michael's primary place of residence will not be determined by the court assessing who is more "at fault" for conflict, but rather what arrangement is in Michael's best interests. The ability of each parent to encourage Michael's relations with the other parent could be a significant aspect of that analysis, since it is clear that both parents are capable of parenting Michael effectively.

[87] The parties do not have a history of accessing the parenting coordinator effectively. They will be reinitiating that process now, in the wake of this decision. If there are conflicts in initiating that process, either side may seek directions from me. The parties are to attend their first session with their parenting coordinator no later than May 31, 2010.

[88] Any motion arising from a failure to resolve conflict through the parenting coordinator in respect to any of the issues which were the subject-matter of the motion before me will be brought back before me or as I may hereafter direct.

[89] There were numerous issues raised before me, with inconsistent numbering in the voluminous materials. If I have neglected to decide any issue that either party believes is before me, this should be raised with me, in writing, by April 30, 2010. If the parties cannot settle the terms of the order then they shall submit their respective draft orders to me no later than May 31, 2010.

_____

D.L. CORBETT J.

Released: April 16, 2010

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DE MELO.

Applicant

- and –

GOODING

Respondent

ENDORSEMENT

D.L. CORBETT J.

Released: April 16, 2010