No. D53412/11

DATE: 2013-05-09

Citation: *McCall v. Res*, 2013 ONCJ 254

2013 ONCJ 254 (CanLII)

Ontario Court of Justice

47 Sheppard Avenue East

Toronto, Ontario M2N 5N1

BETWEEN:

HUGH WALLACE MCCALL

Applicant, moving party on the motion (father)

- and –

LAILA RES

Respondent, responding party on the motion (mother)

Before Justice Robert J. Spence

Motion Heard on 5 December 2012 and 20 February and 2 April 2013, and subsequent written submissions received in chambers

Reasons for Judgment released on 09 May 2013

Applicant father, in person

Ms. Rodica David and Ms. Elizabeth Virtue, for the respondent mother

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Nature of the Case

[1] The parties have a two year-old son. They separated shortly after his birth. On August 4, 2011 they entered into a consent order ("consent order") dealing with the issues of custody, access, child support, change of name, passports and travel pertaining to the child. On October 22, 2012, the mother commenced a change motion, seeking:

- Changes to the access schedule,
- Dispensing with travel consent by father,
- Removal of the child from the Passport Canada's Passport System Lookout,
- The appointment of a parenting coordinator to assist the parties in resolving ongoing disputes,
- An increase in child support based on father's increased income, and
- An order restraining the father from molesting, annoying or harassing the mother and her family and friends.[1]

[2] The father responded by agreeing to the change in child support and by disagreeing with most of mother's other claims.[2] He has requested his own changes to the access order.

Background

[3] The parties cohabited for a very brief period of time between 2009 and 2010. Their two year-old son has lived with the mother since his birth.

[4] The originating application was issued by the father on February 28, 2011. The mother subsequently responded and, to the credit of both parties, they managed to enter into a final consent on August 4, 2011. That consent was a comprehensive

[1] Neither the issues of a parenting coordinator or a restraining order were dealt with in the consent order

[2] The parties subsequently agreed to resolve the travel issues

settlement of the issues of custody, access, child support and travel outside Canada with the child.[3]

Child Support

[5] The parties agreed to a change in the child support amount based on father's increased income. They signed a consent on October 24, 2012, and it appears that this consent has since been incorporated into an issued and entered order.

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Passport System Lookout

[6] Shortly after the child's birth the father unilaterally, and without notifying the mother, placed the child on Passport Canada's Passport System Lookout. This resulted in travel complications for the mother when she subsequently attempted to travel with the child outside Canada. The father said he did this so that the mother would be prevented from permanently removing the child from Canada. However, I was not presented with any evidence to suggest that this was a danger that would give rise to a realistic concern for the father. Although the father did subsequently agree[4], by consent dated October 24, 2012, to take whatever steps were necessary to remove the child from that System, I will have more to say about the father's actions in this regard later in my reasons.

Access and travel issues

[7] The consent order permits mother to travel to Croatia with the child for "up to four weeks" in the summer or fall.[5] Croatia is specifically referenced because that is where mother's family is located and mother feels it is in the child's best interests to have this opportunity each year so that he can learn about his maternal family's heritage and culture.

[8] In her change motion, mother states that she now wishes to be able to travel with her son for up to 10 weeks per year. This would allow her to spend four weeks in Croatia and additional weeks to travel to other locations as well.

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[3] The mother did raise the request for a restraining order in her original Answer/Claim, but the parties failed to address that issue one way or the other in the consent order.

[4] This agreement followed strong words from the court, disapproving of father's unilateral and, in the court's opinion, unjustified actions

[5] Actually the order permitted that travel to occur "this summer or fall", but the father does not appear to object to a four-week travel vacation occurring on annual basis.

[9] In his response, the father agrees to four weeks' vacation out of Canada on an annual basis, provided that mother gives him 30 days' notice; and he also agrees to waive the necessity for his consent to such travel. However, the father is opposed to any extension of the vacation time out of Canada and, in particular, to the 10 weeks requested by mother.

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[10] In addition to the submissions presented in court respecting the issue of vacation time, the parties requested the opportunity to make written submissions with respect to paragraph 8 of the consent order. That paragraph provides:

> Hugh shall have additional access with [the child] during holidays, birthdays and special events (such as family reunions), to be arranged between the parties, and in accordance with [the child's] age and development.

[11] Clearly, this provision is very broad and it sets out little in the way of objectively discernable guidelines or parameters for how that "additional access" is to be arranged. Mother has submitted an extensive written submission which, if the court accepted it, would effectively re-write the access agreement between the parties. Understandably, mother wishes to eliminate the subjective elements which are at the core of paragraph 8.

[12] Father's response to those submissions is to assert, what he says is the mandatory intent of paragraph 8 of the consent order[6], and he then proposes more specific parameters for how that additional access shall be determined. While his suggested re-write of paragraph 8 is not as extensive as mother's, it is a re-write nonetheless.

[13] Both parents have raised understandable concerns respecting the wording of this paragraph. However, the essence of those concerns really comes down to this: the parties are unable to agree on what additional access is appropriate. As a result, what each is suggesting is, in effect, a re-do of the access provisions in the consent order.

[14] Section 29 of the *Children's Law Reform Act* ("CLRA"), states [my emphasis]:

Order varying an order

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[6] "Hugh shall have additional access. . . "

29. A court shall not make an order under this Part that varies an order in respect of custody or access made by a court in Ontario unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child. R.S.O. 1990, c. C.12, s. 29.

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[15] In the case of *Preston v. Markle* [2011] O.J. No. 5509 (Ont. C.J.), Justice Stanley B. Sherr stated at paragraphs 9, 10 and 11 [my emphasis]:

> The Ontario Court of Appeal in Persaud v. Garcia-Persaud., 2009 ONCA 782, sets out the need to first find a material change in circumstances before varying a custody or access order, at paragraph 3 as follows:
>
> - As this court has made clear, jurisdiction to vary a custody and access Order is dependent on an explicit finding of a material change in circumstances since the previous Order was made. If an Applicant fails to meet this threshold requirement, the inquiry can go no further: see Litman. v. Sherman (2008), 52 R.F.L. (6th) 239 (Ont. C.A.). The matter is jurisdictional and a court must make a finding of a material change of circumstances even when, as here, both parties request a variation.

The Supreme Court of Canada in Gordon v. Goertz, [1996] 2 S.C.R. 27, found that the change in circumstances must not have been foreseen or reasonably contemplated by the judge who made the original order. The change must be to the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child.

The party seeking the variation bears the onus of demonstrating a material change that will materially affect the child. The change must have altered the child's needs or the ability of the parent to meet those needs. The last order is presumed to be correct. Wiegers v.Gray, [2008] S.J. No. 12, 2008 CarswellSask 10 (C.A.).

[16] In her argument against the changes to the access schedule requested by father, Ms. David correctly points out that the parties spent considerable time negotiating a detailed access order which was incorporated into the consent order. Additionally, she points out, there must be a “material change” since the making of that order. I agree with Ms. David. However, the same applies equally to the changes being requested by the mother.

[17] Mother's evidence, contained in her affidavit dated November 13, 2012, in support of her change motion, under the heading "Future Holiday Trips" states her wish

> "to plan many more trips with [the child] to Croatia as well as to other destinations. As a custodial parent, I should have that right and [the child] should have that benefit."

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[18] Without deciding whether mother should have that right or whether the child should have that benefit, the bigger difficulty for mother is that none of her evidence discloses that there has been a material change in circumstances, as required by section 29 of the CLRA. All of the evidence in mother's affidavit in support of her requested changes to vacation time is evidence that was available to her prior to the parties' entering into the consent order.

[19] Nor is there is evidence of a material change in circumstances in the father's responding material that would support his requested changes to the access schedule.

[20] Similarly, with respect to the parties' submissions respecting paragraph 8 of the consent order, there is no evidence of a material change in circumstances since the date of that order. Rather, what has in fact occurred here is that the parties drafted a provision that was intended to provide flexibility based on the need for cooperation and a mutual understanding of the child's needs. However, instead of cooperating, the parties have turned that paragraph into a battleground, with the child caught in the crossfire.

[21] By no stretch of the judicial yardstick is it open to conclude that the parties' inability to cooperate in respect of paragraph 8 is:

- A change that "must not have been foreseen", and
- A change that goes to the "condition, means, needs or circumstances of the child, or the "ability of the parents to meet the needs of the child"

[22] And because the necessity to find these changes goes to the very jurisdiction of the court under section 29 of the CLRA, the court is unable to make any such change order "even when, as here, both parties request a variation".[7]

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[23] I do appreciate that parties, in their understandable desire to finalize litigation, will sometimes enter into a consent that they afterwards wish to tweak, or that they later feel does not adequately address all of their concerns. However, in the absence of a subsequent consent, it is not open to the court to change those orders simply because one parent or the other later experiences buyer's remorse. And, as I have discussed, in the absence of a material change in circumstances, which is the case here, the parties must live with the existing order.

Procedural Issue regarding the Parenting Coordinator and Restraining Order

[24] As I noted at the outset, the mother's requests for a parenting coordinator and a restraining order are heads of relief that were not addressed in the consent order. The mother did not file an application under Rule 8(2.1) as she ought to have done. However, the requirement to file an application under this Rule where fresh claims are being made, concurrently with changes to a final order, are permissive, rather than mandatory.[8] Neither party raised any objections to the matter proceeding solely under the change motion brought by mother. Accordingly, and in particular having regard to the provisions of Rule 2 (2)[9], I will address each of these issues on the merits, without regard to the formality of the pleadings themselves.

Request for Restraining Order

1. **Background**

[25] In order to better understand mother's expressed vulnerabilities it is important to be aware of the context. Mother suffered an Acquired Brain Injury ("ABI") as a result of a motor vehicle accident in 1996. Her Neuropsychiatrist filed an affidavit shedding some light on the ABI and the consequential impact on mother.

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[7] See *Gordon v. Geortz,* supra

[8] "the party may file an application" (per Rule 8(2.1)

[9] Which states: "the primary objective of [the Family Law Rules] is to deal with cases justly"

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[26] Mother was originally in a comatose state following the accident. But by the time this Neuropsychiatrist first met mother in 2004, she was living independently on her own. She was taking courses at Ryerson University and "leading an almost typically normal life." For example, she has a driver's licence and has driven regularly, with a clean driving record. The doctor continues [my emphasis]:

> [Notwithstanding her near normal functioning] she functions less well when she is anxious or distressed . . . . [mother] occasionally does have problems with cognition . . . . [However] if she is given adequate time she is able to grasp the essence of the issue and respond appropriately. If she is fatigued or placed under anxiety this ability is disrupted and her decisions may not be those that she would make if she were given time. She becomes therefore somewhat vulnerable to the influences of those she is close to.

2. The statutory scheme

[27] The statutory authority for the making of a restraining order emanates from section 35 of the *Children's Law Reform Act* ("CLRA") and section 46 of the *Family Law Act* ("FLA"). Section 35 of the CLRA provides [my emphasis]:

Restraining order

35. (1) On application, the court may make an interim or final restraining order against any person if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody. 2009, c. 11, s. 15.

Provisions of order

(2) A restraining order made under subsection (1) shall be in the form prescribed by the rules of court and may contain one or more of the following provisions, as the court considers appropriate:

1. Restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating with the applicant or any child in the applicant's lawful custody.

2. Restraining the respondent from coming within a specified distance of one or more locations.

3. Specifying one or more exceptions to the provisions described in paragraphs 1 and 2.

4. Any other provision that the court considers appropriate. 2009, c. 11, s. 15.

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Section 46 of the FLA provides [my emphasis]:

Restraining order

46. (1) On application, the court may make an interim or final restraining order against a person described in subsection (2) if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody. 2009, c. 11, s. 35.

Same

(2) A restraining order under subsection (1) may be made against,

(a) a spouse or former spouse of the applicant; or

(b) a person other than a spouse or former spouse of the applicant, if the person is cohabiting with the applicant or has cohabited with the applicant for any period of time. 2009, c. 11, s. 35.

Provisions of order

(3) A restraining order made under subsection (1) shall be in the form prescribed by the rules of court and may contain one or more of the following provisions, as the court considers appropriate:

1. Restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating with the applicant or any child in the applicant's lawful custody.

2. Restraining the respondent from coming within a specified distance of one or more locations.

3. Specifying one or more exceptions to the provisions described in paragraphs 1 and 2.

4. Any other provision that the court considers appropriate. 2009, c. 11, s. 35.

[28] Although the legislation permits the court to make a restraining order prohibiting or restricting the father's contact with the mother or the child, it does not permit the court to make a restraining order which extends to "family", "friends" and "acquaintances" of the mother, which the mother has requested in this case. Accordingly, that particular request for relief by mother cannot be granted.

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3. Case law

[29] Before the court can grant a restraining order, it must be satisfied that there are "reasonable grounds [for the mother] to fear for her own safety or for the safety of [her child]". In *Fuda v. Fuda* 2011 CarswellOnt 146 (Ont. S.C.), Justice McDermot had this to say, at paragraph 31 [my emphasis]:

> It is not necessary for a respondent to have actually committed an act, gesture or words of harassment, to justify a restraining order. It is enough if an applicant has a legitimate fear of such acts being committed. An applicant does not have to have an overwhelming fear that could be understood by almost everyone; the standard for granting an order is not that elevated. A restraining order cannot be issued to forestall every perceived fear of insult or possible harm, without compelling facts. There can be fears of a personal or subjective nature, but they must be related to a respondent's actions or words. A court must be able to connect or associate a respondent's actions or words with an applicant's fears.

[30] In *Azimi v. Mirzaei* 2010 CarswellOnt 4464 (Ont. S.C.), Justice Ruth Mesbur made the following comments, at paragraphs 7 and 9 [my emphasis]:

> More importantly, Horkins J made specific findings of fact that the applicant had physically and verbally abused the respondent, with psychological abuse being more frequent. It is telling that today, when the respondent raises the issues of her ongoing psychological fear of the applicant, the applicant simply suggests she should get counselling. [In this case] I accept that the respondent has reasonable grounds to fear for her own safety and the safety of the child who is in her custody. This fear extends to both their physical safety and psychological safety.

[31] What I take from these cases is:

- The fear must be reasonable
- The fear may be entirely subjective so long as it is legitimate
- The fear may be equally for psychological safety, as well as for physical safety

4. Analysis

[32] Upon a review of all the evidence and hearing submissions from both parties, I have concluded that a restraining order ought to be granted, and I do so for the following reasons.

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[33] Mother has deposed to a number of incidents in the past, which father did not deny, including:

- In November 2009 he “shoved me to the floor while swearing angrily at me”.
- In mid-December 2009, “knowing I was pregnant”, he slapped her in the face “extremely hard, threw a banana at the wall and stomped around the house in an infuriated state”.
- “The last incident of physical violence occurred on March 17, 2010, when he grabbed the chair I was sitting in, when he felt I was taking too long at the computer, and forcefully wheeled it to the front door of the home, and threatened to eject me out the front door and into the street, while he was cursing at me and telling me to get out of his home, which was also my home at the time”.
- “on one occasion he left the house, commenting that I would end up giving birth to a ‘cripple’, due specifically to my eating habits”.
- In an email dated August 19, 2010, father requested certain information from her, including “if I am breastfeeding and any medications I am receiving” (ie, asking for information about her medical history).

[34] These are but a few of the many examples of harassing behaviour which the father has inflicted on the mother in the past. While the evidence discloses more pre-litigation examples of such behaviour, I do not find it necessary to provide any further examples in order to reach my conclusions.

[35] Instead of the harassment coming to an end with the onset of the present litigation, another very troubling incident occurred after the current change motion was issued. As a result of her long therapeutic relationship with mother, the Neuropsychiatrist expressed her opinion[10] that mother is an “excellent caregiver” to the child. The parties’ consent order implicitly reflects that opinion, by the parties’ own agreement that mother is to be the child’s sole custodial caregiver.

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[10] The doctor was not qualified as an expert which would normally be a pre-condition to expressing such an opinion. However, the father, by his actions in agreeing to the custody order, implicitly agreed with that opinion

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[36] And yet, in his affidavit dated November 22, 2012, responding to the mother's change motion, the father questions mother's parenting ability without, at the same time, seeking a change in custody. Father states: [my emphasis]:

> It is my opinion that it would be beneficial to all involved, particularly my son, that an independent assessment of [mother's] parenting ability, in light of the circumstances surrounding her brain injury be performed.

[37] I am forced to ask myself what the legitimate purpose of this could be when the father was neither seeking a change in custody, nor did he raise in his oral argument the issue around an "assessment of mother's parenting ability". It is difficult to conclude, therefore, that he pled this in good faith and in support of an argument for any of the relief he in fact sought in this proceeding, or in opposition to any of the relief sought by mother. Instead, I conclude that these statements were intended solely to harass or intimidate the mother. Father is a very intelligent man and there can be little doubt that he must have given considerable thought to the crafting of his pleading before finalizing it and serving it on mother. And he knew or ought to have known the effect these words would have on her.

[38] Additionally, since the commencement of this litigation, father has also made a complaint against mother's counsel to the Law Society of Upper Canada. He previously complained to the College of Physicians and Surgeons about mother's psychiatrist.[11] And, as I noted earlier, he placed the child on Passport Canada's System Lockout, something which I found to be entirely unjustified. In my opinion, all of these actions can be cumulatively designed for one purpose only, namely, to psychologically harass the mother.

[39] Father defends the request for a restraining order by pointing out that the parties have been in each other's presence during access pick-ups and drop-offs and they have also exchanged emails with one another. He says that all of this has happened without incident and that the mother has not demonstrated fear in his presence.

[40] In his argument the father asked, rhetorically, whether mother's feelings of "torment" are really as a result of his actions, or more realistically due to her brain

[11] Father understandably provides his own justifications for both these complaints

injury.[12] However, in my view, even asking this question misses the point. The incidents which I have referred to[13] are more than sufficient to create a legitimate subjective fear of being harassed and manipulated by father. Whether or not mother still has a fear of being physically abused at the present time, the history of father's actions toward her, combined with his more recent behaviour amply justify the imposition of a restraining order, at least on the basis of a legitimate subjective fear of psychological harassment.

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Parenting Coordinator

[41] Mother's counsel argues for the appointment of a parenting coordinator. Father is opposed. The argument in support of the coordinator is that it would enable the parties to address out of court any issues that might arise between them and which could be resolved more expeditiously and more cost-effectively than returning to court each time there is a dispute.

[42] Father's opposition is based on the argument that it is better for the parties to communicate directly with one another in an open manner, without adding another layer to the process. He also argues that the appointment of a parenting coordinator would lead to additional delay in resolving issues that the parties could resolve more quickly through direct communication. In anything even remotely close to a perfect world, I would agree completely with father. All things being equal, it is always better for parents to communicate directly than to insert parenting coordinators, mediators, judges and other third parties into the mix.

[43] However, the fallout from paragraph 8 of the consent order, and the clearly demonstrated inability of the parties to communicate effectively on the issue of additional access to the child, is strong evidence that father's stated wish to communicate directly with the mother in an effective way, is not at all realistic at this time.[14]

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[12] Implying that mother was over-reacting because of her particular vulnerability, rather than because of any inappropriate behaviour by father

[13] And the numerous other incidents mother has experienced at father's hands, which I have not found necessary to include in my discussion

[14] Which is not to suggest that open communication may not be possible at some point in the future, perhaps then obviating the need for the continuing involvement of a parenting coordinator

[44] This strong evidence is reinforced even further by the father's behaviour toward the mother, and his inclination to exert his power and authority through intimidation. And because of this, I am of the view that contact between the parties ought to be limited, rather than expanded. For direct communication to work effectively, the parties would have to be on a more-or-less level playing field with each other. They clearly are not. As I noted earlier, mother's Neuropsychiatrist talks about mother's anxiety, her stress and her vulnerability when placed in the kinds of situations that could easily arise if the parents were required to resolve issues by direct communication. Accordingly, the appointment of a parenting coordinator would appear to be a reasonable way to prevent such problems from occurring.[15]

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Conclusion

[45] In the result I make the following orders:

1. Subject to the consent which the parties agreed to on October 24, 2012, whereby they made minor changes to the consent order for access,
   a. the mother's claim for a change to the access order is dismissed, and
   b. The father's claim for a change to the access order is dismissed.
2. The parties' communication regarding the logistics of ongoing access will be in accordance with the current practice of the parties, as set out in paragraphs 55 and 56 of the mother's affidavit, sworn November 13, 2012.
3. The child support was previously settled, but if the terms were not incorporated into a prior order, they will become part of this order.
4. Father's consent to the child's travel outside Canada, and for mother to obtain the child's passport is dispensed with. Mother shall provide the father with 30 days' written notice of her intent to travel out of Canada, and she shall provide father with a written travel itinerary, as well as emergency contact coordinates.
5. The restraining order is granted, to apply to mother and the child, with a 200 metre geographic restriction, other than as agreed by the parties in writing, and then solely in respect of access-related issues alone. Mother's counsel to submit the court's restraining order endorsement sheet properly completed, for my signature.
6. The request for a parenting coordinator is granted in accordance with paragraph 57 of the mother's affidavit sworn November 13, 2012. In the absence of ultimate agreement by the parties on any issue that might arise which necessitates the involvement of the parenting coordinator, the parenting coordinator will not have final decision-making authority. However, if as a result of recommendations made by the parenting coordinator, the parties are

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[15] Or at least, to minimize the likelihood of their occurrence

> nevertheless unable to agree, the reasonableness or lack of reasonableness by either party will be a factor to be taken into account in any costs award that might arise from a subsequent court proceeding. If the parties are unable to agree on the name of a parenting coordinator, the mother will provide the father with three names acceptable to her, together with curriculum vita and hourly rates, and the father will choose one of the three suggested persons.

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[46] There are a couple of messages here for the parties. They are the parents of a young child, and they will be very involved in his life for many years to come. Father in particular needs to decide how he will conduct himself toward the mother. If he chooses to carry on in the manner he has demonstrated up until now, he will find himself in ongoing litigation, with potentially very serious consequences. Apart from the more obvious consequences, he will eventually discover that by modelling such poor behaviour for his son, this could well lead to negative outcomes for his child. Very simply, he must change his attitude toward the mother, as well as his behaviour toward her.

[47] For her part, the mother must understand that notwithstanding her victimization at the hands of the father, he is very much involved in his son's life and, on the evidence to date, it is in the child's best interests that this continue. The mother's attitude expressed in her pleadings, that she is the custodial parent and, as such, she has the right[16] to make vacation decisions, including the sole decision regarding how much time she is entitled to be out of Canada with the child, is dismissive toward the father, as well as to the child's rights to have an active and nurturing relationship with him.

[48] The parents are now at a crossroads, and they have two choices. They can continue along their present path, the results of which will not be pleasant for either of them nor, incidentally, for their child. Or, they can sit down with the parenting coordinator and make sincere efforts to reach compromise solutions to their respective problems. Each will have to make concessions to the other. That is what parenting is about; that is what life is about. If they demonstrate their willingness and ability to take this second path, they can then concentrate on moving on with their lives, rather than becoming one of those high-conflict sets of parents who spent their child's entire life returning to court over and over again. I wish to stress that I do not believe these parents are at this stage <u>yet</u>, but unless they engage in an <u>attitudinal</u> sea-change, it is only a matter of time before they get there.

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[16] "As a custodial parent, I should have that right…" (see this excerpt from mother's pleadings earlier in my reasons)

[49] Should either party wish to speak to costs, they may arrange a time with the trial coordinator's office when they are both available to attend court, on any day that I am sitting. The appointment may be scheduled for 9:30 a.m. if that better conveniences the parties. I will allow no more than 15 minutes for submissions by each party.

Justice Robert J. Spence

09 May 2013

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