SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Lunn v. Giffin, 2010 NSSC 413

Date: 20101116
Docket: 1201-057127
Registry: Halifax

Between:

Kelly Ivan Lunn

Petitioner

v.

Lorri Jane Giffin

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	October 14, 2010
Counsel:	Deborah I. Conrad, for Lorri Giffin R. Ritchie Wheeler, for Kelly Lunn

By the Court:

Introduction

[1] Both Lorri Giffin and Kelly Lunn have applied to vary the terms of an order dealing with the parenting and financial arrangements for their daughters.

[2] Ms. Giffin and Mr. Lunn divorced in 2004. In January 2006, they consented to the variation of their Corollary Relief Judgment as it related to the parenting and financial arrangements for their daughters, Madison and Eden. The variation order gave the girls extensive access with their father, while they had their primary home with their mother. More specifically, the girls were to see their father on alternate weekends from Friday after school until Monday morning. On long weekends, their visit was extended by an extra day. Every Wednesday, they would visit overnight. The girls were to share the March Break with their parents and alternate between their mother's home and their father's, on a weekly basis during the summer.

[3] Ms. Giffin filed a variation application in December 2009 asking to vary child support, both prospectively and retroactively. Her retroactive claim was confined to the child support payable under section 3 of the *Federal Child Support Guidelines*, SOR/97-175. Mr. Lunn filed a response in March 2010, asking to vary the parenting terms of the 2006 order. While Ms. Giffin's application was filed first, the girls' parenting arrangement has an impact on the support application, so I must address it first.

Applying to vary a parenting order

[4] I'm governed by *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) in making a decision to vary parenting arrangements. At paragraph 10 of the majority reasons, then-Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.

[5] At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:

1. there must be a change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the needs of the child;

2. the change must materially affect the child; and

3. the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[6] Material change is more than a threshold to be crossed before varying a parenting order. All parenting applications, including variation applications, are determined on the basis of children's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the children's best interests. Then, section 17(5) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 instructs me that in making the variation order, I shall consider only the best interests of the child as determined by reference to that change. I note this particularly because of its importance in terms of the case a parent must make when applying to vary a parenting order.

Mr. Lunn's parenting application

[7] Mr. Lunn says there are a number of reasons for changing the parenting terms of the 2006 order. Any of these "reasons" can only support a variation if it is a material change that has occurred since the 2006 order was granted that was unforeseen or not reasonably contemplated.

[8] First, Mr. Lunn says there was an event which warrants the change. Mr. Lunn doesn't describe this event: he says there was "a documented event last April [2009] between my daughter and her step-father". He says this "ended up involving a verbally abusive and threatening situation I found myself the victim of." The quotations I offer are the full extent of his description of what happened.

[9] It's for Mr. Lunn to prove there's been a change that has altered the children's needs or the ability of the parents to meet those needs in a fundamental way which was unforeseen or not reasonably contemplated. It is not sufficient merely to say "something happened" and to demand a variation. It's necessary to describe the change that's alleged to have occurred so I can determine whether the change meets the requirements identified in *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) and identify what variation, if any, should be made, since any variation is to reflect the children's best interests in the new circumstances. Mr. Lunn's meagre comments don't provide me with the evidence necessary to determine that the event in 2009 merits varying the 2006 order.

[10] Ms. Giffin provided a little more information about the April event. She says that then-thirteen year old Madison was being disciplined "for doing something she knew she shouldn't have done". From comments later in Ms. Giffin's affidavit, it appears that Madison had decided she was not coming home one evening and left this information in a voicemail message rather than speaking to someone about it. While Madison was being disciplined, Mr. Lunn came into the Giffin home. He was not invited. He was repeatedly asked to leave, but he would not. Ms. Giffin says that Mr. Lunn interfered with appropriate discipline and he put Madison in the middle of a situation that shouldn't have happened. While Mr. Lunn has rejected this description, he has provided no further information.

[11] Even Ms. Giffin's description is too vague to persuade me there has been a change in circumstances that merits varying the girls' parenting arrangements. This description of a single incident doesn't persuade me that either daughter's needs have changed or that the parents' ability

to meet their needs has changed. It does indicate that there has been a single instance when Mr. Lunn and Ms. Giffin's new husband have been in conflict in the presence of one of the girls.

[12] Second, Mr. Lunn asks to vary the 2006 order saying, "I believe at this stage in their life [the girls] should not have time with their father limited." Mr. Lunn has offered no basis for this opinion. The opinion does raise the spectre that there is something about the girls' current "stage of life" that might warrant a change in their parenting time with him. However, the statement stands in isolation from any information that would give it meaning: was there some prior stage when, for some reason, the girls' time with their father should be limited? What was that stage? Why was it appropriate that the girls' time with their father be limited at that earlier stage? What is it about the girl's current stage of life that means it is now best to allow them unlimited (or less limited) time with their father? The difficulty with this opinion is that it offers me no factual information that might be relevant to my decision-making, either in determining whether a material change has occurred or in fashioning an appropriate order if a change had occurred. This reason does not persuade me that there has been a change which merits varying the 2006 order.

[13] Third, Mr. Lunn says that he continually asks for more time with the girls during the school year and Ms. Giffin denies his requests. However, he was able to offer only one example of when this occurred. In response, Ms. Giffin was able to offer a handful of examples when she re-scheduled the girls' time with their father or when they had time with him that was not provided for in the order. There is no indication that Ms. Giffin has denied the girls the time they are ordered to have with their father. The order allowed that the parents might change this schedule by mutual agreement, but it did not require that either parent accommodate the other's requests for changes to the schedule. The order specifically said that failing mutual agreement, the ordered schedule shall prevail. There is no evidence that Ms. Giffin continually refused to accommodate requests for changes to the schedule and, in fact, the evidence I have is that Ms. Giffin does not stand in the way of requests for additional access. This reason is not change of any sort, let alone one which is a basis for varying the parenting arrangement.

[14] Fourth, in his supplementary affidavit, Mr. Lunn says the girls ask to spend more time with him. Ms. Giffin says the children do not. To the extent that this might be an exception to the hearsay rule and admissible as proof of each girl's state of mind, it does little to assist me. The parents offer conflicting reports about their daughters' state of mind and there is no basis to prefer one over the other. There is no indication that the comments, if made, might be a change in circumstances. I do not know whether the girls wanted more or less time with their father in the past.

[15] Fifth, Mr. Lunn argues for more parenting time, saying that it "isn't a stretch" to move the girls to more time, given the amount of time they currently have. Whether something is a "stretch" or not, isn't a material change that would support a variation.

[16] Sixth, in submissions, Mr. Lunn argued the "passage of time" since the 2006 order was a material change. This argument has the same failings as the argument about the girls' "stage of

life". The statement is made without any contextual information that would give it meaning. Time passes. That it passes is foreseen and reasonably contemplated. What about the passage of four years means that the girls' needs have changed? What about the passage of time means that the parents' ability to respond to the girls' needs has changed? This argument offers me no factual information that is relevant to my decision-making, either in determining whether a material change has occurred or in fashioning an appropriate order if a change had occurred.

[17] I dismiss Mr. Lunn's application to vary the parenting arrangement for Madison and Eden. They shall continue in their current parenting arrangement.

[18] This decision leaves me to address Ms. Giffin's applications to vary child support payments pursuant to section 3 of the *Federal Child Support Guidelines* retroactively and to vary child support payments pursuant to sections 3 and 7 prospectively.

Applying to vary child support retroactively

[19] Retroactive support is governed by the Supreme Court of Canada's decision in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37. A "retroactive" award is one which addresses a historic period when there was no prior agreement or order or which varies the terms of a prior agreement or order after the fact, rather than prospectively.

[20] The Supreme Court's decision tells me that awards made retroactively are neither automatic nor exceptional. I am to take a holistic approach to varying support retroactively, balancing the competing principles of certainty and flexibility, while respecting the core principles of child support. Those core principles are that child support is the right of the child; the child's right to support survives the breakdown of the relationship between the child's parents; child support should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship broke down; and the amount of child support varies, based upon the parent's income.

[21] According to *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 99, when determining whether it's appropriate to make an award retroactively, I am to consider: the reason for the recipient's delay in making the claim, the payor's conduct; the children's past and present circumstances; and whether an award made retroactively would result in hardship. All of these factors must be considered and none is dispositive on its own.

Ms. Giffin's application to vary child support retroactively

[22] The 2006 order was the result of two settlement conferences held in late 2005. Neither parent was represented by counsel. The order addressed the parents' incomes in a particular fashion, saying, "For the purpose of calculating the child support to be paid for 2006, Kelly Ivan Lunn has an annual income of $45,000.00 and Lorri Jane Giffin has an annual income of $30,000.00."

[23] The 2006 order required Mr. Lunn to pay a total child support payment of $725.00 each month. The amount was comprised of two components. First, there was a payment pursuant to section 3 of *Federal Child Support Guidelines* based on an annual income of $45,000.00. Second, there was a contribution to the cost of the girls' child care, their dental and health insurance premiums and their school lunch program. The net monthly cost of these expenses was $395.00. Mr. Lunn wasn't paying a proportionate share of these costs. A proportionate share of these expenses would have required Mr. Lunn to pay sixty percent and would have cost him $237.00 monthly. Instead, Mr. Lunn paid $108.00, approximately twenty-seven percent of the expenses. The order explained that the parties didn't calculate an exact proportionate sharing of the girls' special or extraordinary expenses "in recognition of the time the children are in the care of Kelly Ivan Lunn and also the likelihood that he may have child care costs during the summer when the children are in his care". In other words, the only child care cost that was being shared was Ms. Giffin's.

[24] The 2006 order contained a lengthy and detailed provision about ongoing disclosure. I reproduce it in full, adding emphasis to notable aspects of the disclosure obligation:

> In order to establish the appropriate amount of child support to be paid in the year 2007 and in subsequent years, and in order to avoid potentially significant retroactive recalculations or payments for child support, the parties shall exchange, on or before January 15 in every year, commencing with the year 2007, all financial information about the previous year necessary to permit a calculation of annual income expected to be received in the upcoming year including such information as, a statement from an employer outlining total money paid to the employee for the previous year or a payment stub that shows the total money paid to the employee for the previous year, financial statements to previous year end for a business owned wholly or partially by a party including statements of income and expenditures, accounts receivable, accounts payable, balance sheet, cash flow statements, payments for the previous year to persons related to or living with the party, and payments taken by a party from the business during the previous year. Should a party experience an unexpected change in annual income, whether an increase of a decrease, he or she shall, within a reasonable time thereafter, notify the other party and provide all necessary financial information upon which to recalculate child support.

[25] Paragraph 13 of the order stated that if either parent's 2006 income was more or less than the amount upon which the order was premised "[n]either party shall seek any retroactive readjustment for child support in the future for the year 2006". In effect, the parents acknowledged that they were estimating their 2006 incomes and they were satisfied with this arrangement.

[26] Ms. Giffin says that after the 2006 order was finalized, she learned Mr. Lunn's income was "significantly higher than $45,000.00". She doesn't say when she learned this. She says she had been requesting financial disclosure from him for "some time".

[27] Ms. Giffin says that during their marriage Mr. Lunn was an employee and now he is self-employed. She says "I do know that [Mr. Lunn] maintains a lifestyle which is consistent with or better than he enjoyed as an employee." She says that Mr. Lunn has cohabited for five years and that he and his new partner live in a "large waterfront home" which Mr. Lunn uses as his business address. She speculates that Mr. Lunn's offices expenses "would be limited and would likely be a tax deduction off his income". Despite her observations and her conjecture, it was not until December 2009 that Ms. Giffin applied to vary child support and neither in her affidavit nor in her testimony did she explain her delay in bringing her claim for retroactive child support.

[28] Ms. Giffin says she received Mr. Lunn's 2008 Notice of Assessment in late November 2009. She filed her variation application on December 9, 2009.

[29] Ms. Giffin offered no evidence that the girls, in their past or present circumstances, have suffered from their father's failure to pay a greater amount of child support or that they experienced any sort of impact from it. She says that she is primarily responsible for Madison and Eden's financial needs: their medical and dental insurance coverage, their school supplies, their activities (soccer, karate and band), their clothing, their haircuts, their toiletries and their school transportation costs. Ms. Giffin's evidence with regard to Mr. Lunn's conduct relates entirely to his failure to provide annual disclosure.

[30] Mr. Lunn said that he provided his prior year's financial materials each year after his "total income was done" by his accountant. He said that is would have been an impossibility for his accountant to have this work done by the January 15 deadline stated in the order.

[31] Mr. Lunn notes that though the girls' child care expenses ended, he didn't reduce his child support payment, but continued to pay the ordered amount and he also paid the entire cost of the girls' registration for paddling. Ms. Giffin did not dispute this evidence. As well, Mr. Lunn had the costs associated with providing for his daughters for significant periods of time. This would not relieve Ms. Giffin of maintaining a home for her daughters, but it would relieve her of some day-to-day costs.

[32] With regard to whether an award made retroactively would result in hardship, Mr. Lunn says "I am not in any position to pay arrears in child support if they are sought by the Respondent nor do I think they are appropriate". His comments are a conclusion, they are not evidence. Whether he is in the position to pay a retroactive award and whether it is appropriate that he do so are conclusions for me to reach based on evidence, not on his conclusion offered in lieu of evidence.

[33] It is for Ms. Giffin to persuade me that the core principles of child support are served by making a retroactive support award, rather than by respecting the terms of 2006 order. Here, Ms. Giffin's delay is unexplained and there is no indication the girls' circumstances were compromised by Mr. Lunn's failure to pay child support on a basis that reflected his actual income. Even by his own evidence, Mr. Lunn was not diligent about meeting deadlines for his financial disclosure, however, he exceeded his ordered obligation to pay support.

[34] I am not persuaded that this is an appropriate case to vary Mr. Lunn's child support obligation retroactively. Those core principles are that child support is the right of the child; the child's right to support survives the breakdown of the relationship between the child's parents; child support should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship broke down; and the amount of child support varies, based upon the parent's income. Here, the children have been the beneficiaries of support that has regularly been paid and, by virtue of spending considerable time at their father's home and his contribution to expenses, they have experienced the income level of their father. The children's standard of living has not suffered since their parents' separation and they have benefit from their father's income.

[35] I dismiss Ms. Giffin's claim for a retroactive variation of child support.

Applying to vary child support prospectively

[36] According to section 17(4) of the *Divorce Act*, before I vary a child support order, I am to be satisfied that, since the last child support order was made, there has been a change of circumstances as provided for in the applicable *Federal Child Support Guidelines*. Once I have determined there has been such a change, section 17(6) tells me I am to make a variation order in accordance with the *Guidelines*.

Ms. Giffin's application to vary child support prospectively

[37] Child support in that order was premised on an annual income of $45,000.00 for Mr. Lunn and an annual income of $35,000.00 for Ms. Giffin. As well, the order provided for a sharing of expenses for child care, health insurance premiums and school lunch. The monthly expense for childcare was $280.00 after tax, while health insurance premiums were $70.00 monthly and school lunches cost $45.00 each month. Each of these amounts was a "net" amount.

[38] Many of the circumstances provided for in the applicable *Guidelines* have changed: Mr. Lunn's income has changed, the expense for child care has disappeared and new expenses have appeared for extra-curricular activities and school transportation. Given all these changes, this is an appropriate case to vary child support. I am to vary child support, pursuant to section 17(6.1) of the *Divorce Act*, "in accordance with the applicable guidelines". Mr. Lunn says the applicable *Guidelines* in this case include section 9. He argues that this is a situation of shared parenting, where child support should be determined pursuant to section 9 of the *Child Support Guidelines*.

Section 9 applies "[w]here a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year".

Shared parenting

[39] Mr. Lunn calculates the girls are with him for 40.7 percent of the time. He provided a detailed calculation and a copy of the Halifax Regional School Board's 2010 - 2011 school calendar. In reviewing his calculation, I accept his equal division of the March Break and his note that this usually provides him with 3.5 days with the girls. I also accept his calculation of the summer vacation and his calculation of the weekends and Wednesdays he spends with his daughters during the school year. I do not accept his counting of a "day" which attributes the girls' daytime hours to the parent with whom they spend the overnight. This, I think, is over-generous in Mr. Lunn's favour as it relates to his mid-week access during the school year. On Wednesdays, Madison and Eden visit with their father from after school until they go to school on Thursday morning. Since the girls are in their mother's primary care (according to the order) and with her for two-thirds of the school year, this mid-week would not disturb Ms. Giffin’s primary care for the girls.

[40] Mr. Lunn calculates that he has the girls with him for seven days over the Christmas holidays, however the calendar shows this break is twelve days long, so he has the girls with him for six days during this period.

[41] Mr. Lunn's calculation includes an equal division of days when he says the girls are not in school. On the Halifax Regional School Board's 2010 - 2011 school calendar he circled days when he says the girls aren't in school. He says there are thirteen such days and he's credited himself with 6.5 of these. I disagree with this calculation for three reasons. First, the order provided that if the girls weren't required to attend school on a Friday or Monday when they're with their father, they would be with him from Thursday evening after school or until Tuesday morning. In his analysis, Mr. Lunn has included three days when the girls aren't required to attend school which are neither a Friday nor a Monday. According to the order, the girls are with their mother these days. This reduces the number of Friday/Monday holidays from thirteen to ten.

[42] Second, the calendar notes that three different "bus clusters" have professional development days on different dates. Mr. Lunn has attributed all of these professional development days to his daughters, as if they are students in each of three different bus clusters. However, there is no evidence the girls are in a “bus cluster” at all and that any of these days apply to them. This reduces the number of Friday/Monday holidays from ten to seven.

[43] Third, one of the Friday/Monday holidays is for students at Citadel High School and Sackville High School. The Lunn girls attend school in Bedford and this holiday doesn't apply to them. This reduces the number of Friday/Monday holidays from seven to six.

[44] Madison and Eden's time with their father over the course of a year is shown below.

		Number of days
Summer holidays	½ of 9 weeks	31.5 days
Christmas holidays	½ of 12 days	6 days
Professional Development days	½ of 6 days	3 days
March break	½ of 1 week	3.5 days
School year: 4 days of every fortnight	20 fortnights x 4	80 days
Total number of days per year		124 days

[45] Based on the current order and the evidence I have, I conclude that this is not a shared parenting arrangement. Before turning to the analysis required of sections 3 and 7 of the *Federal Child Support Guidelines*, I must determine Mr. Lunn's income.

Mr. Lunn's income

[46] Mr. Lunn says he takes an annual income of $60,000.00 per year from the business which he controls. Ms. Giffin argues that I should attribute a much greater income to Mr. Lunn, having regard to section 19(1) of the *Child Support Guidelines*. In particular, her argument seems to focus on sections 19(1)(f) and 19(1)(h): Mr. Lunn has failed to provide income information when under a legal obligation to provide the information and he derives a significant portion of his income from dividends which are taxed at a lower rate than employment income.

[47] The complaint with Mr. Lunn's income disclosure is his failure to provide the information required by the 2006 order, all schedules and attachments to his tax returns (including T4s, T5s and similar documents), three recent paystubs, an affidavit regarding the detailed state of the company (including the number of employees, their salaries and the number of shareholders).

[48] The failure to disclose income information doesn't assist me in determining an amount of income to impute to Mr. Lunn. Ms. Giffin argues that I should impute an income of $186,000.00 to Mr. Lunn. This amount originates on Mr. Lunn's 2008 tax return. In that year, he incorporated his business, which had previously been a sole proprietorship. In 2008, he built an energy efficient home which was to be sold. The house didn't sell and remains unsold. Mr. Lunn was advised by his accountant that his financial investment in this house could not be deducted from his gross business income for that year. Without that deduction, the business's net income (which was declared on Mr. Lunn's tax return as a sole proprietor) was artificially high, according to Mr. Lunn. This explanation was not challenged by Ms. Giffin. While Mr. Lunn says $186,000.00 is "artificially high", he did not provide any calculation of what his income would have been if he had been able to claim the deduction.

[49] The other basis on which Ms. Giffin has argued I should impute income to Mr. Lunn is his receipt of income as dividends. Mr. Lunn says he receives dividends of $5,000.00 each month. I accept this argument, based on section 19(1)(h) of the *Guidelines*: Mr. Lunn's receipt of income by way of dividends provides him with income which is subject to the dividend tax credit (thereby reducing the tax he pays on this income). He also agreed that he deducts a "very limited" portion of his housing costs as business expenses. There was no evidence of what amount this might be. Mr. Lunn pays a fixed amount toward his housing expenses. Absent his full financial disclosure, it isn't possible to quantify what expenses he is able to deduct.

[50] While there are reasons which would support an order to impute income under section 19 of the *Child Support Guidelines*, there must be a reason to support the amount of income imputed.

[51] Mr. Lunn provided a Statement of Expenses. This shows him to have monthly expenses of approximately $6,400.00. His Statement of Property does not disclose that he has any debt which results from these expenses, though his monthly expenses should create an annual debt of almost $17,000.00. The only debt he discloses relates to the personal line of credit and this, he says, is in relation to the house that was built for sale.

[52] Based on Mr. Lunn's failure to provide income information that he was under a legal obligation to provide, his ability to deduct some portion of his personal expenses as business expenses and his receipt of income by way of dividends, I am prepared to impute income to Mr. Lunn which is equal to the amount of his monthly spending. This equates to an annual income of $76,800.00.

Child support pursuant to section 3 of the *Guidelines*

[53] Based on an annual income of $76,800.00, section 3 of the *Guidelines* provides that Mr. Lunn will pay monthly child support of $1,067.00. He currently makes his payments on the first of each month and I order that this continue. His payments shall continue to be made through the Maintenance Enforcement Program.

Child support pursuant to section 7 of the *Guidelines*

[54] Ms. Giffin claimed a contribution to the girls' special or extraordinary expenses pursuant to section 7 of the *Child Support Guidelines*.

[55] There are a number of considerations relating to Ms. Giffin's claim under section 7. In making an order under section 7, I am to consider the necessity of the expense as it relates to the girl's best interests and the reasonableness of the expense in relation to the parents' and girls' means and the family's pre separation spending pattern. As well, in determining the amount of an expense, pursuant to section 7(3), I must take into account any subsidies, benefits or income tax deductions or credits relating to the expense or any eligibility to claim these. Expenses for secondary school education and for extracurricular activities must be extraordinary to be subject to a claim under section 7(1). The amount of each expense is important, so I'll start there. In that regard, I note that, according to section 7(1) of the *Guidelines*, the amount of the expense claimed may be estimated.

[56] In her Statement of Special or Extraordinary Expenses, Ms. Giffin listed and quantified certain expenses specifically:

Madison's orthodontic costs;

Madison and Eden's health insurance premiums;

Madison and Eden's bus fares;

Madison and Eden's expenses for soccer registration and equipment; and

Eden's band registration and instrument expense.

[57] The parents have agreed that they have dealt with Madison's orthodontic expenses on their own. So, I don't need to address those costs.

[58] In her Statement of Expenses, Ms. Giffin's evidence about the girls' expenses pursuant to section 7 of the *Guidelines* differs from the evidence in her Statement of Special or Extraordinary Expenses. In her Statement of Expenses, she lists day-care or baby-sitting (summer camps and sports camps) and includes karate as an extracurricular activity. As well, the amount she states for insurance premiums and for extra-curricular activities differs from the amounts shown on her Statement of Special or Extraordinary Expenses. Determining the actual amounts of expenses is my first step.

[59] Ms. Giffin has expenses for child care during the summer. She did not claim these on her Statement of Special or Extraordinary Expenses, but I would be remiss not to recognize them since she did list them on her Statement of Expenses. She estimates this expense at $804.00. The calculation of her taxes shows that she did not consider any deduction for child care

expenses. Ms. Giffin has just reached her current income level as a result of completing her education. I presume her income is lower than her husband's and I presume she claims the child care expenses. At the marginal rate shown on her tax calculations (38.67%), deducting child care expenses of $804.00 would save her $310.90 in income taxes, so the after tax cost of the child care is $493.10.

[60] Ms. Giffin claims a contribution to the medical and dental insurance premiums she pays for the children. She clarified the cost of medical and dental health in her testimony, noting the bi-weekly medical insurance premium is $43.73 and the bi-weekly dental insurance premium is $15.26. This equates to an annual premium expense of $1,533.74. Ms. Giffin did not provide any information from her insurer of the portion of the premiums attributable to the children, though she estimated this would be twenty to thirty percent of her total premium. Both she and her husband have insurance and expenses, such as Madison's orthodontia, are claimed against each policy before she seeks a contribution from Mr. Lunn. Accepting Ms. Giffin's evidence that thirty percent of her total premium is attributable to family coverage, the premiums attributable to the children cost $460.12 annually.

[61] Since both parents have identified the cost of school transportation, band participation and soccer on their Statements of Expenses, I assume there is no contest that these expenses are extraordinary. Mr. Lunn did not take exception to them in his submissions.

[62] Ms. Giffin says the bus fees are $120.00 each month, the band cost is $50.00 each month and soccer costs $95.00 each month. On her Statement of Expenses she notes an expense for karate which doesn't appear on her Statement of Special or Extraordinary Expenses. The expense for extracurricular activities on her Statement of Expenses is $30.00 more than the expense for extracurricular activities on her Statement of Special or Extraordinary Expenses and I attributable the extra $30.00 to karate.

[63] According to Ms. Giffin, the educational expenses are $120.00 each month: this is the cost of the girls' bus transportation to school. She calculates this amount based on buying individual bus tickets for the girls to use on each bus trip they take to or from school. Ms. Giffin has neither considered the availability of less costly bus passes for the girls nor the non-refundable tax credit available for public transit passes of at least monthly duration.

[64] The appropriate cost to be considered is the cost of children's transit passes ($52.00 per month per child for the ten months of the school year), less the non-refundable tax credit. The total cost of the passes is $1,040.00. The non-refundable tax credit is calculated by multiplying the amount spent on the transit passes by fifteen percent. Here, the non-refundable tax credit is $156.00 which means that the girls' school transportation cost is $884.00 per year.

[65] Eden's band participation costs $50.00 each month. There are no subsidies, benefits, income tax deductions or credits relating to this cost, so the annual expense is $600.00.

[66] Soccer costs $95.00 each month. Both girls play and the annual cost is $1,140.00. Ms. Giffin notes that the children's fitness credit of $500.00 is available for each girl, so I assume this expense is equally divided between Eden and Madison. Claiming the full $500.00 credit for each girl results in a tax saving of $300.00, making the actual soccer cost $700.00.

[67] The karate cost is $30.00 each month. It was not mentioned in Ms. Giffin's Statement of Special or Extraordinary Expenses, though it was listed on her Statement of Expenses. Mr. Lunn did not mention this expense, so I do not assume that it is one he accepts is extraordinary. What constitutes an extraordinary expense may be determined either under section 7(1.1)(a) or section 7(1.1)(b) of the *Guidelines*. Pursuant to section 7(1.1)(a), extraordinary expenses are those which are too great for Ms. Giffin to reasonably cover, considering her income and the child support she receives. Where the expenses can reasonably be covered, I am to determine if the expenses are extraordinary by considering the five factors listed in section 7(1.1)(b).

[68] Ms. Giffin will receive $12,804.00 in child support pursuant to section 3 of the *Guidelines*. Once Ms. Giffin receives her child support, she will have an annual pre-tax income of $90,804.00. Her monthly expenses (inclusive of all the section 7 expenses, adjusted to reflect their net cost) are $7,959.88. She can reasonably cover the karate cost at this income level. Concluding that the karate expense Ms. Giffin has claimed does not exceed what she can reasonably cover given her income and the child support she will receive, I need to consider section 7(1.1)(b) of the *Guidelines*.

[69] Section 7(1.1)(b) of the *Guidelines* requires me to consider the relationship of the expense to Ms. Giffin's income and her child support; the nature and number of the educational programs and extracurricular activities in which the girls participate; any special needs and talents the girls have; the overall cost of the programs and activities; and any other similar factor I consider relevant.

[70] I've noted the relationship of the expense to Ms. Giffin's income and her child support and the overall cost of the programs and activities. As well, I've described the nature and number of the educational programs and extracurricular activities. The nature of the programs is not remarkable. The programs are typical of those in which any child attending school would participate. The extracurricular activities are moderate (three activities overall) and none of these activities costs more than $600.00 per year. No special needs or talents have been described to me. I conclude that karate does not constitute an extraordinary expense. Mr. Lunn is not ordered to share in this expense.

[71] This means I can return to the main issue of section 7: in making an order under section 7, I am to consider the necessity of the expense as it relates to the girl's best interests and the reasonableness of the expense in relation to the parents' and girls' means and the family's pre separation spending pattern. Ms. Giffin did not offer evidence with regard to the necessity or reasonableness of the expenses or the family's pre-separation spending pattern. Mr. Lunn has not contested the necessity or reasonableness of the child care, health and dental insurance premiums, bus fares, soccer or band costs. The requirement in the 2006 order that Ms. Giffin

maintain health insurance suggests it has existed for some time (at least prior to that order). The parents have enjoyed a significant saving on the cost of Madison's orthodontia because of this insurance and I conclude it is necessary and reasonable, particularly since Mr. Lunn does not maintain insurance for the girls. I determine that bus fares to travel to school are, as well, a necessary and reasonable cost.

[72] In the 2006 order, there was no mention of expenses for the girls' activities. The parties have been separated since 2001 or 2002 according to Ms. Giffin. That means Madison would have been six or seven and Eden would have been three or four at the time of the separation. At those ages, I would not expect the parents' pre-separation spending pattern would be relevant. It is unlikely the girls would be involved in extra-curricular activities. Mr. Lunn, in his affidavit, voiced a willingness to contribute to the girls' expenses.

[73] Lastly, I accept the expense for child care during the summer months is appropriate. Both parents and their partners are employed. It is prudent to have the girls involved in activities which provide them with supervision.

[74] In conclusion, I determine that it is appropriate to order a sharing of the children's expenses for child care, the portion of health and dental insurance premiums attributable to their coverage, the expense for bus fees, the expense for soccer and the expense for band. To be clear for the variation order, I have noted the expenses in the table below.

Guidelines section	**Gross amount**	**Actual amount**
7(1)(a) Child care	804.00	493.10
7(1)(b) Premiums attributable to children	460.12	460.12
7(1)(d) Extraordinary secondary school expenses	1,040.00	884.00
7(1)(e) Extraordinary extra-curricular activity expenses (soccer)	1,000.00	840.00
7(1)(e) Extraordinary extra-curricular activity expenses (band)	600.00	600.00

[75] I order that the actual amount of these expenses be shared by the parents in proportion to their incomes. With an imputed income of $76,800.00, Mr. Lunn will pay have forty-nine percent of the actual amounts, or $133.00 each month pursuant to section 7 of the *Guidelines*.

Conclusion

[76] To summarize, I dismiss Mr. Lunn's application to vary the time his daughters spend with him and I dismiss Ms. Giffin's application to vary child support retroactively. I find that Madison and Eden are not in a shared parenting arrangement. I impute income of $76,800.00 to Mr. Lunn and I order that beginning on December 1, 2010, Mr. Lunn pay Ms. Giffin child support pursuant to section 3 of the *Guidelines* of $1,067.00 and child support pursuant to section 7 of the *Guidelines* of $133.00, for a total monthly payment of $1,200.00.

[77] Success has been divided and neither party claimed costs, so none are awarded. Each party shall bear its own costs.

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Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia