IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Smith v. Wilkins, 2011 NSSC 432

Date: 20111123
Docket: SFH MCA 057870
Registry: Halifax

Between:

Mélanie Suzanne Smith

Applicant

v.

John Thomas Wilkins, Junior

Respondent

DECISION

Judge: The Honourable Justice Elizabeth Jollimore

Decision: November 23, 2011

Counsel: William M. Leahey for Mélanie Smith
John Wilkins on his own behalf

By the Court:

[1] Mélanie Smith and John Wilkins had a turbulent relationship which was marked by multiple separations. Their final separation occurred at the end of January 2010. Since that time, there have been four interim orders defining their ongoing relationship with their daughter, Jaida, who will turn five this coming February. Ms. Smith seeks permission to move Jaida to Montreal. Mr. Wilkins does not want Jaida to move and wants her to be in shared parenting arrangement. There are additional requests relating to retroactive and prospective child maintenance for Jaida. The application is pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160.

Family background

[2] Mélanie Smith moved to Nova Scotia in the spring of 2006. She met John Wilkins soon after arriving and, within a month or so of their meeting, Ms. Smith was pregnant. They moved in together in August 2006. The relationship was unstable and they lived together for only a few months before separating. Just before Jaida was born on February 13, 2007, they made a second attempt at cohabiting and Ms. Smith moved into Mr. Wilkins' trailer. This was short-lived. Ms. Smith decided to end the relationship in May, but she was only able to find her own place in August 2007 so she and Jaida divided their time between the trailer and the home of Ms. Smith's mother and step-father until they could move.

[3] From August 2007 when Jaida was six months old until April 2009 when she was slightly more than two years old, Jaida and Ms. Smith lived in Cole Harbour. In March 2008, Mr. Wilkins was ordered to pay maintenance for Jaida. At eighteen months of age, Jaida began to attend daycare.

[4] According to Mélanie Smith, the couple last attempted to live together in May 2009. John Wilkins disagrees with this date, but his mother, Beatrice Wilkins, confirms it. Ms. Smith says that by August the relationship had started to break down and she met with a case worker to apply for Social Assistance benefits. She was "splitting [her] time" between Mr. Wilkins' home and the home of her mother and step-father. Ms. Smith and Jaida finally moved from Mr. Wilkins' home at the end of January 2010, returning to Cole Harbour. During periods when they weren't cohabiting, Mélanie Smith and John Wilkins would, on occasion, spend nights or weekends together.

[5] While Ms. Smith's mother and step-father live in Cole Harbour, the remainder of her family lives in Quebec. Jaida and her mother have visited with Ms. Smith's family in Quebec approximately a dozen times since Jaida was born. Four or five of these visits have occurred since Jaida was two years old. The visits were between seven and ten days long.

[6] Mr. Wilkins' parents live in Dartmouth. He has a brother who also lives in the immediate area and other members of his extended family live in the Halifax Regional Municipality.

Jaida's paternal grandparents have been involved in her access with Mr. Wilkins, both transporting her and providing her with a place to stay during scheduled access times.

Hearing

[7] The application was heard over four days. Ms. Smith, her sister (Shai'na Smith) and their mother (Sandra Ashton) all filed affidavits and were cross-examined. Mr. Wilkins and both his parents, Beatrice Wilkins and John Wilkins Senior, did the same. Additionally, I heard from Heather Power, a registered psychologist who conducted a parental capacity assessment and administered psychological tests to both Ms. Smith and Mr. Wilkins. Ms. Power prepared an extensive report after interviewing and testing the parents, observing them with Jaida, reviewing court materials and interviewing collateral contacts (family members and professionals who were involved with the family). Ms. Power was qualified as an expert witness. As is typically the case in applications where a parental capacity assessment has been ordered, each party cross-examined the assessor.

Parenting

[8] Mr. Wilkins wants Jaida to be in a shared parenting arrangement. Ms. Smith wants Jaida to be in her primary care. She also wants to move Jaida to Montreal. Logically, my first step is to determine whether Jaida should be in a shared parenting or a primary care arrangement. If I determine that it is in her best interest to be in a shared parenting arrangement, then my analysis need go no further.

Shared parenting or primary parenting?

[9] Shared parenting is not defined in the *Maintenance and Custody Act* and appears only in the *Nova Scotia Child Maintenance Guidelines*, NS Reg 53/98 where, in section 9, the arrangement is defined by the amount of time a child spends with each parent. This does little to inform my decision about Jaida. More useful is Associate Chief Justice O'Neil's recent decision in *Gibney v. Conohan*, 2011 NSSC 268 where, at paragraph 92, he identified a number of factors which focus consideration of the child's best interest in a way consistent with the demands peculiar to a shared parenting arrangement. The factors he mentioned are:

a. the proximity of the parents' homes;

b. the daily availability of parents and others in the child's extended family;

c. each parent's motivation and capability;

d. the number of transitions between homes required of the parenting schedule;

e. the ease of mid-week contact;

f. each parent's interest in shared decision-making;

g. the ease of developing a routine in each home;

h. each parent's willingness to share the parenting burden;

i. the benefits to each parent of sharing the parenting burden;

j. any improvements to the parents' standards of living as a result of sharing the parenting burden;

k. the parents' willingness to access professional advice on parenting issues;

l. "the elephant in the room", and

m. each parent's style of parenting.

[10] Decisions on shared parenting applications are very fact-specific and not all of the factors identified by Associate Chief Justice O'Neil in *Gibney v. Conohan*, 2011 NSSC 268 will be relevant in all cases.

[11] Mr. Wilkins proposes that Jaida would alternate weeks between his home and Ms. Smith's.

[12] Throughout Jaida's life, even during times that Ms. Smith and Mr. Wilkins cohabited, Ms. Smith was primarily responsible for meeting Jaida's needs. She located daycares, arranged for the daycare subsidy, made medical appointments and arranged outside activities. Aside from saying he wants a shared parenting arrangement, Mr. Wilkins hasn't demonstrated a motivation or willingness to share the responsibility of parenting Jaida by undertaking these tasks.

[13] Mr. Wilkins' evidence is that he was involved in Jaida's care by getting her dressed, washed and fed in the mornings three days each week while the couple cohabited. Ms. Smith would be responsible for the other three days and they'd alternate Sundays. He says that whether they lived together or apart he would transport Jaida to and from her daycare.

[14] Ms. Smith admits the couple tried to divide the early morning routine as Mr. Wilkins described, but says that it worked out "five percent" of the time. She acknowledges that Mr. Wilkins or his parents provided most of Jaida's transportation to and from daycare. Mr. Wilkins knows how to drive and has access to two vehicles while Ms. Smith doesn't know how to drive.

[15] Mr. Wilkins says that he tends to Jaida's needs two days each week during her access with him. The current order allows Mr. Wilkins access with Jaida every Wednesday afternoon from 5 p.m. until Jaida returns to daycare on Thursday morning and every Friday evening from 5 p.m. until Saturday at 6 p.m. Mr. Wilkins relies heavily on his parents to care for Jaida during the time she is scheduled to be with him. For example, from May 2011 until the time of the hearing, Jaida was spending her access time at Mr. Wilkins' parents' home while Mr. Wilkins lived elsewhere. He said he would see Jaida Thursday morning to drive her to daycare and on Saturday morning. Throughout this time Mr. Wilkins was neither employed nor attending school.

[16] Between the parents, Ms. Smith has a greater willingness to access professional advice on parenting matters. She's attended the Family Division's mandatory Parent Information Program and taken advantage of community-based parenting resources. As well, she participated openly in the parental capacity assessment and psychological testing ordered by Justice Lynch. Mr. Wilkins failed to attend the Parent Information Program. Claiming embarrassment, he was not truthful with Heather Power, the psychologist conducting the parental capacity assessment and he didn't allow sufficient time to participate in the assessment

[17] In *Gibney v. Conohan*, 2011 NSSC 268 at paragraph 92, Associate Chief Justice O'Neil referred to the "elephant in the room": the financial consequences of a particular parenting decision or the negative consequences that may arise from a decision which creates the impression that there is a winner and a loser. This factor reminds me to be cognizant of why a parent might be motivated to seek a particular result and how parents will react to different results. In not all cases is the parent's motivation or reaction in the child's best interest.

[18] Ms. Smith says that Mr. Wilkins had problems controlling his anger and was verbally abusive throughout their relationship. This began during her pregnancy and has occurred in Jaida's presence. Mr. Wilkins admitted his verbal abuse to Heather Power. This abuse comes regardless of Mr. Wilkins' prior participation in an anger management program. A shared parenting arrangement could provide Mr. Wilkins with the opportunity to abuse the parenting arrangement in anger as Associate Justice O'Neil described. I have no evidence which suggests that Ms. Smith would use a primary parenting position to control Mr. Wilkins.

[19] I have the advantage of a parental capacity assessment to assist me in considering each parent's style of child-rearing. In addition to Jaida, Mr. Wilkins is the father of teen-aged Danielle and he has had custody of Danielle and her half-brother, Dametry, since February 2010 when they were placed in his care after having been taken from their mother by child welfare authorities in Ontario. His actions in parenting these children offer me some insight into his parenting. Heather Power described his actions with regard to these children as lacking in commitment. In the assessment, Mr. Wilkins claimed that the children's mother was abusing them, "trying to get the demons out of them [. . .] threw their stuff out. Baptised them in the lake, washed their hands in scalding water". Despite this history, a letter referring Danielle to a particular treatment program says that Mr. Wilkins has only been engaging services for Danielle since the spring and summer of 2011 – more than one year after the children arrived from Ontario.

[20] With regard to Jaida, Ms. Power observed both that Mr. Wilkins disciplined Jaida too harshly and failed to discipline Jaida when it would have been appropriate to do so.

[21] Heather Power recommended that Mr. Wilkins participate in programs to enhance his parenting: education regarding child sexual abuse and appropriate and effective disciplinary techniques, and substance abuse treatment to address his past drug use and its impact on parenting. She said it may also be beneficial for him to discuss his gambling with a therapist specializing in addictive behaviours. There were no equivalent recommendations for Ms. Smith, who has already participated in more than one parenting education program.

[22] Neither parent challenged Ms. Power's observations of his or her parenting session with Jaida. From Ms. Power's report, I conclude that Ms. Smith and Mr. Wilkins are not equally capable parents. Ms. Smith is more willing to seek assistance from others and to take a measured approach, while Mr. Wilkins is less open to external direction and more inclined to react in the instant, depending on the circumstances. If Jaida's time was divided between her parents' homes, she would be moving between households with quite different parenting arrangements. Heather Power testified that shared parenting arrangements require a high level of cooperation and communication between parents. Such a level of communication isn't present between Ms. Smith and Mr. Wilkins. They were unsuccessful in using a communications journal. Ms. Power explained that to provide stability for a child, the rules and expectations in

each household must be similar. Ms. Power said that Ms. Smith and Mr. Wilkins don't have the ability to provide this stability for Jaida.

[23] Heather Power did not recommend shared parenting for Jaida. I agree with her recommendation. The observations she recorded in her assessment report are consistent with the observations I made of the parents. I appreciate Ms. Power's comment that there are no significant problems in either household in communication between each parent and Jaida. A crucial aspect of a shared parenting arrangement is communication between the parents and the resulting ability to ensure that Jaida's living environments are consistent. This crucial element is missing.

[24] Based on these considerations, I conclude that it is not in Jaida's best interest to be in a shared parenting arrangement. It is in her best interest to be in the primary care of her mother. This means I must decide whether Jaida will remain in Nova Scotia or move to Quebec.

Should Jaida be allowed to move?

Mobility application principles

[25] *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.), established the principles which guide the determination of mobility applications. It was decided under the *Divorce Act*, R.S.C. 1985 (2nd Supp), c. 3. Ms. Smith's application is pursuant to the *Maintenance and Custody Act*. While the legislative context is different, the decision in *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) is equally applicable to this application according to the Court of Appeal's decision in *Mahoney v. Doiron*, 2000 NSCA 4 at paragraph 56.

[26] *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) was a variation application. In *Burgoyne v. Kenny*, 2009 NSCA 34 at paragraph 20, Justice Bateman said that where an original parenting order is sought, it isn't necessary to demonstrate a material change in circumstances because there's no prior order. The current order governing Ms. Smith and Mr. Wilkins is an interim order and each parent now seeks an original parenting order so I don't concern myself with whether there's been a material change in circumstances since the most recent interim order of December 2010.

[27] The considerations which relate to original mobility applications, rather than variation applications, were identified by Justice Bateman in *Burgoyne v. Kenny*, 2009 NSCA 34 at paragraph 23, where I'm told that my inquiry is limited to what's in Jaida's best interest, considering all the relevant circumstances relating to her needs and her parents' ability to meet her needs. The only issue which concerns me is her best interest in the current circumstances. My focus is not on the interests and rights of Ms. Smith or Mr. Wilkins, but on Jaida's best interest.

[28] According to Justice Bateman, I'm to consider:

> (a) the desirability of maximizing contact between Jaida and both her parents;

(b) Jaida's views, if appropriate;

(c) Ms. Smith's reasons for moving, only in the exceptional case where it is relevant to her ability to meet Jaida's needs; and

(d) the disruption to Jaida resulting from her removal from family, schools and the community she's come to know.

[29] I want to address two of these considerations before I begin my analysis.

[30] First, in my decision I don't consider Jaida's views. I was provided with no information about them. This doesn't mean that I would have considered her views if they had been made known to me. Jaida's four and it may not be appropriate to consider her views.

[31] Second, I don't consider the reason for Ms. Smith's proposed move. The reason for a move is only to be considered in exceptional cases where the reason is relevant to the parent's ability to meet the child's needs. This limited relevance was explained by Justice McLachlin at paragraph 23 of the majority's reasons in *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.). Justice McLachlin began by saying that a parent's conduct can be considered under the *Divorce Act* only if it's relevant to parenting ability. She said that usually a parent's reason for moving won't be relevant to parenting ability, but occasionally "the motive may reflect adversely on the parent's perception of the needs of the child or the parent's judgment about how they may best be fulfilled." She offered an example: "the decision of a custodial parent to move solely to thwart salutary contact between the child and access parent might be argued to show a lack of appreciation for the child's best interests [citations omitted]."

[32] Ms. Smith offered a number of justifications for her desire to move to Montreal. They can generally be classed into two categories: the benefits of moving and Ms. Smith's financial circumstances. She identified benefits of moving as:

a. Jaida could spend quality time with her extended family in Montreal;

b. Jaida's cousin, Jack, would be a good influence on her; and

c. the move would expose Jaida to the French language and multi-culturalism.

[33] *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) at paragraph 49 tells me that absent a connection to parenting ability, the custodial parent's reason for moving shouldn't enter into my inquiry.

[34] Here, the benefits that Ms. Smith identifies aren't related to her parenting ability. The influence of Jaida's four year old cousin, Jack, has no relevance to Ms. Smith's ability to parent. Similarly, Jaida's ability to spend quality time with extended family in Montreal is irrelevant to Ms. Smith's ability to parent. The francophone community and multi-culturalism of Montreal aren't aspects of Ms. Smith's parenting ability.

[35] The second general justification Ms. Smith offered for wanting to move was that if she moved, she wouldn't have to struggle financially. A parent's financial circumstances have been held to be relevant to parenting ability. In *Burns*, 2000 NSCA 1 at paragraph 35, Justice Roscoe, who wrote the Court's unanimous decision, said that "The impact of the move on the mother's ability to meet the basic needs of the children is undeniable." Ms. Burns was the primary care-giver for the two children and their primary financial support. The children were young and Ms. Burns faced many years of financial responsibility for them with no realistic prospect that Mr. Burns would ever share this burden. Ms. Burns faced the stress "of trying to achieve financial security in Cape Breton" and an uncertain financial future without further education. Her plan to re-locate to Ottawa was an "economic necessity".

[36] Second, while financial circumstances are relevant to parenting ability, Ms. Smith hasn't proven that her financial circumstances will be better in Montreal. In Nova Scotia, Ms. Smith and Jaida have their own apartment. Ms. Smith is employed at the Boys and Girls Club. She earns $10.50 per hour and works between thirty and thirty-five hours each week. Jaida is registered at a daycare and her position is subsidized. In Montreal, Ms. Smith has been offered a job at a jewellery store where she'd worked previously. The offer is open for a limited time. She and her prospective employer have had no detailed discussion of what she would be paid. Ms. Smith didn't know what she'd be paid. She said there was "hinting" and from this hinting she concludes her earnings would be favourable. She intends to stay with her sister until she gets established. She's planned different options for Jaida's daycare. There was no information about how child care would be financed in Montreal. There isn't enough information about Ms. Smith's economic circumstances in Montreal to let me conclude that Ms. Smith won't have to struggle financially in Montreal.

[37] Based on this analysis of Ms. Smith's reasons for moving, I conclude that this is not an exceptional case where her reasons are related to her parenting ability. The one reason she offers which might be relevant hasn't been proven.

[38] Justice McLachlin's reasons in *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) at paragraph 23 identified that if a parent wanted to move for the purpose of limiting beneficial contact between a child and an access parent, this might reflect on the parent's "lack of appreciation for the child's best interests". She reiterated this consideration at paragraph 48: "The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability."

[39] The relationship between Jaida's parents has not been stable at any point. Mr. Wilkins has filed an affidavit asserting that Ms. Smith is in need of "mental help". Ms. Smith says that Mr. Wilkins has been verbally abusive and has an anger management problem. Despite this history, I have not heard evidence that Ms. Smith has denied contact between Jaida and her father in any systematic way or has attempted to constrain Jaida's relationship with her father. I am not concerned that Mélanie Smith wants to move to thwart Jaida's relationship with John Wilkins.

[40] These leaves me to analyse Ms. Smith's request to move on the basis of the desirability of maximizing contact between Jaida and both her parents and the disruption to Jaida resulting

from her removal from family, schools and the community she's come to know. In deciding whether I should allow Jaida to move, I need to know whether this would allow Jaida the maximum amount of contact with her father that's in her best interest and to consider the impact of disrupting Jaida.

Maximum contact

[41] *Gordon v. Goertz* 1996 CanLII 191 (S.C.C.) refers to the desirability of maximizing contact between a child and its parents. This, too, stems from the *Divorce Act*. At paragraph 24 of her reasons, Justice McLachlin explained "The [*Divorce*] *Act* only obliges the judge to respect [the "maximum contact" principle] to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact [citation omitted]". The goal is not maximum contact, but the maximum contact that is in the child's best interest.

[42] In *Gordon v. Goertz* 1996 CanLII 191 (S.C.C.) at paragraph 25, the majority said if a child's needs are likely best served by staying with one parent "and this consideration offsets the loss or reduction in contact with the access parent", then I should permit the move. I should, of course, acknowledge the principle that maximum contact with both parents is generally in the child's best interest.

[43] Heather Power described Ms. Smith as Jaida's "primary attachment". She said Mr. Wilkins is a "secondary attachment". Jaida has spent time with her father since her birth and has a relationship with him. Jaida has been separated from her father when travelling to Quebec and there's been no difficulty described with these separations. I was told by Shai'na Smith that Jaida is able to remember people from whom she's been separated for lengthy periods, such as her maternal relatives in Montreal, and that Jaida is able to take part in phone conversations, which she does with her cousin, Jack.

[44] Ms. Power said that Danielle and Dametry were "possibly tertiary attachments". She explained this by saying that they'd been in Jaida's life for a short period when the assessment was completed. The assessment was completed during the period from March 28, 2011 to May 26, 2011 at which point Danielle and Dametry had been living with Mr. Wilkins for more than fourteen months. These are not profound attachments.

[45] Jaida relies on her mother to meet her needs and Ms. Smith has demonstrated an ability to do this. Mr. Wilkins relies on others to meet Jaida's needs when she's in his care: others provide financially for her, contribute to transportation for her visits and provide care for her during her access. The three earliest consent orders dealing with access dated from March 2010 until December 2010 and all provided that Jaida would have access with her father every Wednesday evening from 5 p.m. until 8 p.m. and every Friday from 5 p.m. until Saturday at 8 p.m. The December 2010 order reduced the length of the Saturday visit by two hours and made the Wednesday visit an overnight visit. Though he wasn't working or attending school, Mr. Wilkins hasn't utilized all the access available to him pursuant to this order. In the months leading up to the hearing he would see Jaida on Thursday morning to take her to daycare and on Saturday

morning. There was no explanation why he would have less contact with Jaida than the initial orders allowed him.

[46] If Ms. Smith is allowed to relocate Jaida, she proposes that Mr. Wilkins could travel to Montreal and stay as a guest of Shai'na Smith and her family during his access time with Jaida. She offered that his parents could do the same if they visited. Shai'na Smith confirmed that Mr. Wilkins, his parents, Danielle and Dametry would all be welcome. Alternately, Ms. Smith suggests Jaida could travel to Nova Scotia to be with her father for one week each month until January 2013 – as long as this doesn't disrupt Jaida's school. As well, she proposes that Mr. Wilkins would have one-half of the summer with Jaida. She says that her family members are willing to do whatever they can to support her move, so they would assist in driving Jaida part of the way to Nova Scotia for access with Mr. Wilkins.

[47] Ms. Smith offered that she would make "whatever arrangements are required to ensure" that Jaida has Skype contact with her father. She said she'd ensure that Jaida's medical and school records are available to Mr. Wilkins and that he has phone numbers for her teachers. She offers to consult with Mr. Wilkins on all major changes that must be made in Jaida's life.

[48] Ms. Smith says that she is offering Mr. Wilkins more time with Jaida than he has had under the interim orders. In this manner she seeks to provide Jaida with the maximum amount of contact with her father.

[49] I have already determined that for Jaida to be in a shared parenting arrangement is more contact with her father than is in her best interest. Regular contact which allows Jaida to spend time with members of her extended paternal family is in her best interest.

Disrupting Jaida

[50] At paragraph 50 of *Gordon v. Goertz* 1996 CanLII 191 (S.C.C.), Justice McLachlin said "the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community". I've considered the importance of Jaida remaining with her mother and must now weigh this against the continuance of contact with her father, her extended family and her community.

[51] Jaida's contact with her community is limited. Locally, Jaida attends daycare. Ms. Smith has taken Jaida to the local pool and, once, registered her in skating. Finances have limited Jaida's participation in other organized activities. Jaida has play dates with other children, arranged by her mother, and she and her mother go to the park and the library. As a pre-schooler, Jaida is not integrated into her community. It isn't surprising, given Jaida's age and Ms. Smith's finances, that Jaida has limited connection with her community.

[52] In terms of her extended family in the local area, Jaida spends time with Ms. Smith's mother and step-father, Sandra Ashton and David Byrne, and with her paternal grandparents, Beatrice and John Wilkins Senior, and with her half-sister, Danielle, and Danielle's half-brother, Dametry. These attachments are, according to Heather Power, more remote than her attachment

to her father. Jaida's paternal grandparents have been involved in transporting her for access and have provided a place for her to stay during her access periods since May of this year. Jaida's maternal grandmother plans to assist in the move to Montreal, if it is permitted. Ms. Ashton maintains good relations with her family who live in Montreal.

[53] Mr. Wilkins is an African-Canadian. His mother grew up in Africville and Ms. Smith says that Jaida has attended the annual picnic and reunion in Africville which occurs during the last week of July. I was provided with no information about other activities or exposure to this aspect of Jaida's heritage. In her testimony, Ms. Smith noted that Mr. Wilkins is also of Mi'kmaq ancestry and he has a card which, she said, entitles him to a "break on taxes" for certain purchases. Beatrice Wilkins explained that she is Métis, not Mi'kmaq. There was no indication from any witness that this heritage plays any part in the life of Wilkins' family. I mention these aspects of Mr. Wilkins' (and Jaida's) heritage because if they were recognized in some way by him or his family, I would want to consider whether relocation would disrupt them. In the Wilkins family, there's little integration of their heritage in their lives according to the evidence I heard. The only example offered was offered by Ms. Smith who mentioned that Jaida has twice attended the annual Africville picnic and reunion. To the extent that this cultural identity has been recognized in the past, it can continue to be recognized in the future.

[54] Ms. Smith is a French Canadian. Until moving to Nova Scotia, she lived her entire life in Quebec. All her family except her mother and step-father, live in Montreal. She is fluently bilingual and has taught Jaida some French. She proposes and has made arrangements for Jaida to attend a bilingual daycare which she does not do in Nova Scotia. If that arrangement falls through, her back up plan is for Jaida to attend a smaller, in-home daycare which is French.

[55] Jaida's environment is her family and, most importantly, her mother. Throughout all her parents' multiple separations and reconciliations, Jaida and her mother have been together. This is the most stable arrangement for Jaida and the one which is in her best interest. At her age and given the limits that finances have placed on Jaida's involvement in the larger community, the disruption Jaida would experience from leaving Nova Scotia is more than offset by the value of remaining with her mother. The reduction of her time with her father and members of her extended family can, I believe, be remedied by an appropriate access schedule.

[56] Heather Power discussed the issue of disruption in her report. She referred to one study of children who had been relocated. This study was the basis for Ms. Power's recommendation that Jaida not be allowed to move. I was, in general, impressed by Ms. Power's report. Her comments about Jaida's level of development were helpful since neither parent provided me with much information about Jaida.

[57] Ms. Power explained that her recommendation against a move was based on the study. My task is to make a decision about Jaida in her particular circumstances. To make that decision based on a study, rather than based on Jaida's circumstances, is the wrong approach for me. That said, I do want to address one aspect of the research Ms. Power reviewed: she said the risk from a move, as identified in the research, was that the children who moved have poorer relationships with their fathers over time and less financial support from their fathers. In this case, Mr. Wilkins has been a distant parent before. His daughter, Danielle, lived in Ontario for many years

and he maintained a relationship with her and traveled to see her. When child welfare concerns were raised, he was sufficiently engaged to become her custodial parent. Based on this history, Mr. Wilkins may be less likely to be a father whose relationship with a distant child deteriorates.

[58] Weighing the importance of remaining with Ms. Smith against the continuance of contact with her father, family and community in Nova Scotia, I find that it is in Jaida's best interest that she is able to move. A suitable access arrangement can moderate the impact of relocating.

Contact with Mr. Wilkins

[59] Ms. Smith proposes that Mr. Wilkins could spend one week each month with Jaida. She suggests that this would continue until January 2013, as long as it didn't disrupt Jaida's school. Visits could occur in Nova Scotia or in Montreal where he could stay as a guest of Shai'na Smith and her family. She offers that his parents could do the same. As well, she proposes that Mr. Wilkins would have one-half of the summer with Jaida. She said that her family members were willing to do whatever they could to support her move, so they would assist in driving Jaida part of the way to Nova Scotia for Jaida's time with Mr. Wilkins.

[60] In her testimony, Heather Power said that since Jaida sees her mother every day, it would be too fast a transition for Jaida to start immediately with week-long visits with her father. Ms. Power agreed that, after September 2012, an access schedule comprised of one-half the summer vacation, one-half the Christmas vacation, alternate spring school breaks and long weekends sounded like a "reasonable plan" if Ms. Smith relocated.

[61] To ensure that Mr. Wilkins is able to obtain information about Jaida directly from her educators, care-givers and others involved with her, there shall be a discrete order stating that each parent is entitled to communicate directly with educators, care-givers and others involved with Jaida and to obtain information directly from them. In arranging for Jaida'a health care, day care and for others to be involved with Jaida, Ms. Smith shall ensure that the individual involved can communicate in English, so that Mr. Wilkins will be able to speak with them. Ms. Smith will provide the names, addresses, phone numbers and email addresses of Jaida's educators and health care providers to Mr. Wilkins. Ms. Smith offers to consult with Mr. Wilkins on all major changes that must be made in Jaida's life and I order her to do so. Major changes include such matters as involving Jaida in any religious faith, relocating Jaida from Montreal, determining whether Jaida will attend a bilingual or unilingual school and authorizing discretionary health care. This list isn't exhaustive.

[62] While I am permitting Ms. Smith to re-locate Jaida, this may not occur prior to December 13, 2011. Until she and Jaida move, I am modifying Jaida's access so that she may begin adjusting to longer absences from her mother and her father. Jaida's Wednesday overnight visits will terminate following the visit on November 23, 2011. The first Friday following the release of my decision, Jaida will have her usual access with her father, seeing him from Friday at 5 p.m. until Saturday at 6 p.m. The following weekend, she will be with her father from Friday at 5 p.m. until returning to day care on Monday morning. Every following weekend until Jaida leaves Nova Scotia, her access with her father will run from Friday at 5 p.m. until Monday morning.

[63] The schedule I order until December 31, 2012 is in the table below.

Start date	End date
December 26, 2011	January 1, 2012
January 28, 2012	February 4, 2012
March 3, 2012	March 10, 2012
April 14, 2012	April 21, 2012
May 19, 2012	May 26, 2012
June 16, 2012	June 23, 2012
July 21, 2012	August 18, 2012
October 6, 2012	October 13, 2012
November 10, 2012	November 17, 2012
December 29, 2012	January 5, 2013

[64] After January 6, 2013 Jaida will spend the winter school break with her father. I refer to this as the "winter school break" because I don't know whether it occurs in February or March in Montreal: I'm not referring to the Christmas break in December. Jaida will do this every year. This visit will start on the day following the commencement of the break and it will end with Jaida being returned two days before school resumes. As well, Jaida will spend each Easter break with her father. This visit will start on the day following the commencement of the break and it will end with Jaida being returned the day before school resumes. Jaida will be with her father for every Victoria Day long weekend: this visit will start on the Friday before the long weekend and she will be returned on the Tuesday after the holiday. Jaida will spend four weeks in July and August with her father every year. This will start on the second Saturday in July and continue for four weeks. Jaida will spend the Thanksgiving weekend with her father every year. This visit will start on the Friday before the long weekend and she will be returned on the Tuesday after the holiday. At Christmas, Jaida will be with her father from December 26 until January 3. This routine of access will be repeated annually. It may be modified by the parents' agreement: if they don't agree, then this routine prevails.

[65] At his choice and expense, Mr. Wilkins may fly to Montreal to collect and return Jaida. When this happens, he must give Ms. Smith his itinerary for picking up and returning Jaida one week prior to the date when his visit begins. If he chooses to drive, he must let Ms. Smith know this one week prior to the date when his visit begins. If he chooses to drive, Ms. Smith shall arrange for Jaida's transportation to and from an agreed location in Saint John, New Brunswick at the beginning and end of each visit. Many members of Mr. Wilkins' extended family live in Saint John. Jaida will be driven there by Ms. Smith (once she's earned her license) or one of her family members. In Saint John, Jaida will be picked up by Mr. Wilkins or a member of his family. A similar arrangement will be made on Jaida's return trip to Montreal. Mr. Wilkins will

identify the exchange location and let Ms. Smith know when he will be in Saint John to pick up and return Jaida. If Mr. Wilkins chooses to exercise his access in Montreal at Shai'na Smith's home, he must give Mélanie Smith one week's notice of this intention.

[66] Either parent may contact Jaida by telephone while she is in the care of the other parent. Ms. Smith shall arrange for Jaida to "visit" with her father by Skype once each week. I am not dictating a time when this will occur. The parties should select a regular time so it can become part of Jaida's routine. Additionally, the visit should be long enough to permit time for Jaida to speak with others, such as her paternal grandparents, Danielle or Dametry. It should not need to be longer than thirty minutes.

[67] At all times when he is with Jaida, Mr. Wilkins must refrain from the use of non-prescribed drugs (including marijuana), alcohol and cigarettes. He has not attended the Parent Information Program and I direct him to attend.

[68] Both parents may attend Jaida's daycare, school and recreational activities, regardless of whether they occur during Ms. Smith's time with Jaida or Mr. Wilkins'.

[69] Jaida and her mother have frequently travelled outside Nova Scotia to Quebec. If either parent intends to remove Jaida from the province where he or she resides, that parent must provide the other parent with notice. If Mr. Wilkins takes Jaida outside Nova Scotia or if Ms. Smith takes Jaida outside Quebec for a period of less than 48 hours, he or she must provide the other parent with 48 hours' notice, identifying where Jaida is being taken, where she will be staying and providing a telephone number. If the intended absence is for more than 48 hours, one week's notice must be given and the parent who travels outside the province with Jaida is also required to advise the other parent where Jaida is going, where they will be staying and to provide a "local" telephone number at the destination where Jaida can be reached. This notice isn't required when Jaida leaves Quebec for access with her father in Nova Scotia.

[70] In the case of any international travel, a consent letter in the form suggested by Foreign Affairs and International Trade Canada shall be provided by the parent who is not traveling. This letter requires the traveling parent to provide certain information to the parent who is not traveling. Such letters can be found at the website for the federal Department of Foreign Affairs and International Trade. A current version is found at http://www.voyage.gc.ca/preparation_information/consent-letter_lettre-consentement-eng

Prospective child maintenance

Determining Mr. Wilkins' income

[71] Determining Mr. Wilkins' income is governed by sections 16 to 20 of the *Nova Scotia Child Maintenance Guidelines*. I start by using the sources of income under the heading "Total Income" on his tax return. These are to be adjusted as required by Schedule III of the *Guidelines*.

[72] In *Dillon*, 2005 NSCA 166 at paragraph 23, Justice Bateman made clear that the *Guidelines* direct me to use the sources of income under the "Total Income" heading on the personal income tax return, and she reminded me that annual income for the purposes of child

maintenance is not necessarily the same as the total income reported on a personal income tax return.

[73] If the methodology of section 16 doesn't result in the fairest determination of Mr. Wilkins' income, then I'm to determine a fair and reasonable amount, looking - over the span of the last three years - at the pattern of his income, any fluctuations in his income or his receipt of income which doesn't recur. This is provided for in section 17.

[74] Justice Dellapinna ordered that Mr. Wilkins disclose certain financial materials to Ms. Smith. In addition to a Statement of Income listing all his revenue from January 1, 2008 to December 31, 2010 (including annual tax returns and notices of assessment), Mr. Wilkins was ordered to supply an affidavit verifying all income received from all sources for the period from January 1, 2008 to March 31, 2011. This affidavit was specifically to disclose income that he received "whether declared on his income tax returns or not, including any income received from any websites that he may have had or run" during that period. He was to provide copies of all his bank records, eBay records, PayPal records and a record of all advances his mother made to him for this period. Mr. Wilkins also provided copies of some of his parents' bank records.

[75] Mr. Wilkins' 2008 tax return was attached to his Statement of Income. His 2009 and 2010 tax returns were filed at the court, but weren't introduced as exhibits at the trial. He provided an outline of his income sources, records for a bank account and information from his mother outlining, in very general terms, the financial assistance she'd provided for him.

[76] According to Mr. Wilkins' affidavit, in 2008 he worked for his brother's company, received Employment Insurance benefits and sold items, both his own and those belonging to friends and family, on eBay. According to his 2008 tax return, he had income of $21,311.00 comprised of earnings of $9,601.80, Employment Insurance benefits of $10,710.00 and other income, from unspecified sources, of $1,000.00. Mr. Wilkins said that he hasn't worked since April 2008. He took part in an apprenticeship program from September 2008 to February 2009.

[77] Mr. Wilkins said his EI benefits ended in January 2009 and he received social assistance payments in March and April 2009. These two sources provided him with $3,053.00 in 2009. The only other source of income he identified was the sale of collectibles on eBay. He doesn't know how much he earned from this. In the fall of 2009 he gave his eBay enterprises to his father, he said.

[78] Mr. Wilkins said he received social assistance payments of $7,700.00 and Canada Child Tax Benefit payments of approximately $10,400.00 in 2010. In 2011, Mr. Wilkins says he's received these same payments (social assistance and CCTB) which provide him with between $1,142.00 and $1,544.00 each month, depending on whether he's living with the children.

[79] The table below summarizes the income information I have from Mr. Wilkins. I have not included his receipt of HST or Canada Child Tax Benefit payments in this table because these amounts are excluded from the determination of the income on which child maintenance is payable pursuant to section 16 of the *Guidelines*. I have not been given the information necessary to make the adjustment required by section 4 of Schedule III which tells me to deduct any amount of social assistance that isn't attributable to Mr. Wilkins. For 2009 and 2010, where

I have no tax return, I've done the addition necessary to determine his line 150 income.

	2008	2009	2010
Earnings	9,601.80		
Employment Insurance	10,710.00	2,205.00	
Other	1,000.00		
Social Assistance		848.36	7,703.00
Line 150	21, 311.80	3,053.36	7,703.00

[80] Against the background of this information, in his September 15, 2011 affidavit, Mr. Wilkins says that he is starting employment and will earn $15.00 per hour until he earns his "red seal" and is qualified as an electrician. He'll work for a friend who is starting a new business and says that his hours will be sporadic. Mr. Wilkins offered monthly child maintenance of $250.00, which is the rate appropriate for a payor parent with an annual income of $28,100.00.

Imputing income

[81] Ms. Smith argues that I should impute an annual income of between $40,000.00 and $50,000.00 to Mr. Wilkins for the purpose of determining his child maintenance obligation. She claims that he has earned income by selling sports memorabilia through internet websites in the past and, if he isn't doing that now, he should be. She says that he "burned" and sold movies on the internet in the past. Mr. Wilkins advertises his services as an electrician on websites like Kijiji and she believes he is working at this. He has worked in construction for his brother in the past. She thinks he should pursue this work. She says that he "scams" the welfare system.

[82] Imputing income is governed by section 19 of the *Nova Scotia Child Maintenance Guidelines*. I can only impute income where I consider it appropriate. Section 19(1) of the *Guidelines* says that I may impute income in certain circumstances that relate to the paying parent. Some circumstances where imputing income might be appropriate are listed, but the list isn't complete. Ms. Smith hasn't identified a specific provision in section 19 which relates to Mr. Wilkins.

[83] The list includes, in section 19(1)(a), circumstances where "the parent is intentionally under-employed or unemployed". This section excludes situations where the under-employment or unemployment is required by the needs of the child for whom support is sought or, in fact, any child under the age of majority. Also excluded are situations where the under-employment or unemployment is required by the parent's reasonable educational or health needs. No other enumerated circumstance or analogous circumstance is suggested by the evidence or by Ms. Smith.

[84] The "intention" in section 19(1)(a) refers to the parent's intention to be in his or her current circumstances, not an intention to defeat his or her child maintenance obligation. At paragraph 35 of the Court of Appeal's decision in *Montgomery*, 2000 NSCA 2, Justice Pugsley wrote: "Section 19 **does not** establish any restriction on the court to imputing income only in those situations where the applicant has intended to evade child support obligations, or alternatively, recklessly disregarded the needs of his children in furtherance of his own career

aspirations. [my emphasis]" Based on *Montgomery*, 2000 NSCA 2, at paragraph 37, the issue of reasonableness isn't limited to Mr. Wilkins' circumstances, but includes all the circumstances, including Jaida's financial circumstances, so that, in deciding whether to impute income, I ensure that Jaida receives a fair standard of maintenance as set out in the *Guidelines*' objectives.

Is Mr. Wilkins under-employed?

[85] Mr. Wilkins is thirty-seven years old. According to the information Heather Power gathered, Mr. Wilkins left school after completing junior high, when he left home and went to central Canada. He didn't attend senior high, but completed a construction / electrician apprenticeship program at the Nova Scotia Community College's Institute of Technology in 2009. Mr. Wilkins has failed three times in his efforts to pass the electrician's licensing exam.

[86] Mr. Wilkins' evidence is that in mid-September he would start working for a friend, Glen Cox, who's an electrician. Mr. Cox is starting a new business. Mr. Wilkins says that he told Mr. Cox that he wouldn't be able to start work until this proceeding has concluded. He says he's signed up for online training to prepare for the certification exam.

[87] Mr. Wilkins said that his work for Mr. Cox would earn him $15.00 per hour. This was challenged in the context of his testimony at discovery that he "couldn't afford to work for $15.00 or $15.50" per hour.

[88] Mr. Wilkins has been employed by his brother at different times. His brother owns C.A. Wilkins Electric. Bank statements show that Mr. Wilkins was most recently on the company's payroll in April 2008 – before he took part in the apprenticeship program. Mr. Wilkins says he's been fired by his brother four times. When asked by Heather Power about seeking work from his brother he said that he hadn't because, and I quote from Ms. Power's report, it's "very hard to work for your family". Ms. Power reported that Mr. Wilkins explained his firings by saying he was "[n]ot showing up to work, not responsible enough when I was a kid". At the time he last worked for his brother, Mr. Wilkins was thirty-three years old and the father of a one year old daughter. He wasn't a "kid".

[89] Mr. Wilkins has placed various ads on websites offering his services as an electrician. He says these have brought him no work. Ms. Smith questions this, based on Mr. Wilkins' bank account records from January 2008 to March 2011. The records show frequent, often daily, deposits of sums in the range of $20.00 to $200.00, but don't identify the source of the deposits.

[90] Mr. Wilkins denies that these deposits are cash payments he earned for doing small electrical jobs. He claims that when he's in need, he asks his mother for money and she provides it to him. He explains that since the bank has a daily limit on how much money he can withdraw, the cheques from his mother don't exceed this amount and, as a result, he might be compelled to ask her for money every day. Beatrice Wilkins claims that she's provided her son with "moneys to tune of approximately $40,000.00". John Wilkins says his mother can't afford to retire because of his financial demands. Financial support from John Wilkins Senior and Beatrice Wilkins has come in the form of cash, cheques and use of their credit cards. Beatrice Wilkins owns a car which is in Mr. Wilkins' possession constantly. She and her husband make the payments on it and pay other related expenses, as needed. Mr. Wilkins said that his mother also obtained a line of credit for him. For her part, Beatrice Wilkins explained the situation in a

letter she wrote to Ms. Smith's counsel: "When our son becomes gainfully employed, at some point, I'm sure that he will start repayment to us, however if that doesn't happen we will die knowing that it was his intention to pay us back some day." Mr. Wilkins has not been pressured for repayment of any sort and his parents' support seems not to have faltered.

[91] The bank records show that Mr. Wilkins' account normally had a positive balance. A review of the transactions suggests that Mr. Wilkins was not concerned about his spending: there were very frequent fast food purchases, along with purchases of discretionary items like liquor and lottery.

[92] In the past, Mr. Wilkins supported himself by selling sports items on the internet. Mr. Wilkins transferred this sales business to his father as a way to repay the debt he owes to his parents. Beatrice Wilkins isn't involved in the business and claims to know little about it. John Wilkins Senior has done little with the business. He says that he's retired and found operating the internet business "like real work". He's earned, he says, about one thousand dollars from it. If Mr. Wilkins wanted to repay his parents, it seems this would be most effectively done by selling memorabilia himself, rather than burdening his father with this task.

[93] Aside from his internet ads offering his services as an electrician, which were provided to me by Ms. Smith, Mr. Wilkins has given me no information about any efforts to find work since he completed his apprenticeship program. He deprived himself of one opportunity to earn by transferring his internet business to his father. He's not sought work from his brother who had hired him in the past when he had fewer qualifications than he has now. When working for C.A. Wilkins, Mr. Wilkins earned a salary which equated to an annual income of $28,800.00. He gave no evidence of other efforts to find employment.

[94] I find that Mr. Wilkins is under-employed.

Is Mr. Wilkins' under-employment required?

[95] Section 19(1)(a) of the *Guidelines* allows me to impute income where a parent's employment circumstances are not required by the needs of the child to be supported, some other child, the parent's reasonable health needs or the parent's reasonable educational needs. So, if any of these things requires Mr. Wilkins to be in his current employment circumstances, it isn't appropriate for me to impute income to him.

[96] I have no evidence that Mr. Wilkins' current employment circumstances are required by his reasonable health or educational needs. He has no identified health needs and he completed his program at the Community College two years ago. He hasn't passed his interprovincial certification exam, but this didn't prevent him from doing construction work in the past or from working for his brother. Qualifications as an electrician aren't necessary for him to sell sports memorabilia.

[97] I have no evidence that Mr. Wilkins' current employment circumstances are required by Jaida's needs or those of any other child under the age of majority. Jaida's main home is with her mother and her access with her father wouldn't disrupt a Monday to Friday work schedule. When Jaida visits, I expect her father will be required to make child care arrangements for her, as all working parents must. Jaida has no particular needs that compromise either parent's ability or availability to work. Mr. Wilkins has custody of his daughter, Danielle, and her half-brother,

Dametry. Mr. Wilkins testified that Danielle and Dametry don't always live with him. Danielle has a history of running away from her father's home and the children have both spent extensive time at their paternal grandparents'. Mr. Wilkins has worked with the Dartmouth District Office of Community Services for "several months" prior to September 2011 to access services for Danielle but I have no information that the children's needs have any impact on his ability to work and he hasn't suggested that his employment situation is dictated by the needs of any child.

[98] I am satisfied that Mr. Wilkins' employment circumstances are not required by his needs or those of Jaida, Danielle or Dametry. This is an appropriate case to impute income to him.

What amount of income should I impute?

[99] Ms. Smith has suggested that annual income of $40,000.00 to $50,000.00 be imputed to Mr. Wilkins. I reject this suggestion because there is no reason why I should impute this level of income to Mr. Wilkins.

[100] Mr. Wilkins says he'll earn $15.00 per hour at his new job. He says his hours at this job will be sporadic. In the past, he's done construction work and he's sold sports memorabilia. He continues to collect sports items. If Mr. Wilkins exploits all of the areas of endeavour he pursued in the past, I believe it's reasonable to assume that Mr. Wilkins could earn an annual income of $30,000.00. This is the equivalent of full-time employment at an hourly rate of $15.00. I impute to him an annual income of $30,000.00 for the purpose of determining his child maintenance obligation. Pursuant to section 3 of the *Child Maintenance Guidelines*, Mr. Wilkins will pay monthly maintenance of $268.00 for Jaida.

[101] There's no claim for child maintenance pursuant to section 7 of the *Guidelines*.

Impact of access cost

[102] Within the strictures of the *Child Maintenance Guidelines*, I may modify the amount of child maintenance if I find that the parent making the request or the child in respect of whom the order is made would suffer undue hardship would otherwise suffer undue hardship. Mr. Wilkins has not asked that his child maintenance be modified on this basis. However, Ms. Smith says she's willing to offset child maintenance against the cost of Jaida's access transportation.

[103] Mr. Wilkins testified that the cost of a return flight to Montreal is $600.00 per person. Based on the contact schedule I've ordered, there are ten visits during Jaida's first year in Montreal and six visits in the following years. The cost of travel by air far exceeds the amount of child maintenance Mr. Wilkins would pay annually. If he chooses to drive, there will be costs associated with this. Mr. Wilkins will also need to finance Jaida's expenses while she is with him, which may include child care.

[104] While I have not followed the prescribed analysis of section 10 of the *Guidelines*, it's with Ms. Smith's consent that I consider offsetting child maintenance payments against access costs. I find that the expense of access, whether travel is by car or by plane, would be unusually high and I reduce Mr. Wilkins' monthly child maintenance obligation to zero.

Retroactive child maintenance

[105] Ms. Smith seeks child maintenance for Jaida dating from January 30, 2010. This is the last date when Ms. Smith and Mr. Wilkins cohabited.

[106] The parties participated in a settlement conference in November 2010 which resulted in the consent order of December 3, 2010. In part, this order provided that Mr. Wilkins' previously ordered obligation to pay child maintenance "is retroactively varied, such that commencing February 1, 2009, and continuing on the first day of every month thereafter, there shall be no child maintenance payable". As well, all arrears were forgiven.

[107] Ms. Smith seeks to vary the child maintenance terms of the order by having Mr. Wilkins ordered to pay child maintenance starting on January 30, 2010.

[108] The principles applicable to retroactive child maintenance claims are found in 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; Heimstra v. Heimstra*, 2006 SCC 37. Writing the majority decision for the Supreme Court of Canada, Justice Bastarache directs me to take a holistic approach to retroactive awards, balancing the competing principles of certainty and flexibility while respecting the core principles of child maintenance which the Supreme Court of Canada articulated in *Richardson*, 1987 CanLII 58 (SCC) and *Willick*, 1994 CanLII 28 (SCC). These core principles are that:

a. child maintenance is the child's right;

b. the child's right to maintenance survives the breakdown of the parents' relationship;

c. child maintenance should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship ended; and

d. the amount of child maintenance varies, based upon the payor parent's income.

[109] In determining whether a retroactive award is appropriate, I'm to consider:

a. the reason for the delay in bringing the application;

b. the conduct of the payor parent;

c. the child's past and present circumstances; and

d. whether a retroactive award would result in hardship.

[110] The settlement conference occurred in November 2010. Ms. Smith made known her intention to seek a retroactive award on August 16, 2011 at a conference before Justice Williams.

[111] Ms. Smith says that after the settlement conference her counsel found a website and, from this, it appeared that Mr. Wilkins was continuing to operate his internet business of selling sports

collectibles. She offers no information about when this website was found, saying only that it was "since" the settlement conference. Ms. Smith argues that when she entered into the settlement it was without the benefit of financial disclosure from Mr. Wilkins. The website materials do not prove that Mr. Wilkins was continuing to operate his internet business. They materials are consistent with the evidence by Mr. Wilkins and his father that Mr. Wilkins Senior was operating the website.

[112] If Mr. Wilkins was continuing to operate the business, this is consistent with what Ms. Smith knew. From her affidavit evidence, it's clear that Ms. Smith knew Mr. Wilkins was involved in an internet business and that he worked in the construction trade. She knew that he hadn't qualified as an electrician. She knew these things in 2006 when she was pregnant and she and Mr. Wilkins were discussing how they would support their baby. She described the time Mr. Wilkins spent working on his internet business while they cohabited during her pregnancy. She said that he worked for his brother doing electrical or construction work and plowing snow and that he "burned" movies and sold them. Ms. Smith knew all of this information about Mr. Wilkins' possible employment at the time of the settlement conference.

[113] There was little delay in Ms. Smith's claim for retroactive child maintenance, given the proximity of the settlement conference and hearing dates. She suggests that there was blameworthy conduct on Mr. Wilkins' part and that it was the absence of information from him which resulted in the consent order. However, the disclosure did little to substantiate this claim and, while it provided a flood of numbers, it didn't identify any unknown source of income.

[114] With regard to Jaida's circumstances, I heard that Mr. Wilkins attempted to meet Jaida's financial needs with money from his parents so there was some effort to compensate for his own failure to pay child maintenance. Lastly, in light of the expense that Mr. Wilkins will have in exercising access to Jaida, I find that there would be hardship imposed on him and, more particularly, upon Jaida, if he was ordered to make a retroactive payment. A retroactive award may jeopardize access between Jaida and her father.

[115] I am not prepared to award retroactive maintenance. The information which Ms. Smith says was withheld from her was, generally, known to her at the time of the settlement conference. It is true that she lacked some materials which were later provided to her. The court file contains various orders compelling disclosure by Mr. Wilkins. Little of this disclosure was entered into evidence. That which was introduced (Mr. Wilkins' bank records) added little to what Ms. Smith already knew about Mr. Wilkins' financial circumstances. As a result of all these considerations, I dismiss Ms. Smith's claim for retroactive child maintenance.

Costs

[116] Ms. Smith has not claimed costs. Whether Jaida could move to Montreal has been the central issue in this application. Costs are in my discretion and are to be withheld from a successful party only where there is a principled reason to do so. One principled reason for withholding costs is frequently that the prospect of such an award would deter a parent from litigating a *bona fide* parenting claim. This application is a *bona fide* parenting claim and, if asked to award costs to Ms. Smith, I would decline to do so.

Conclusion

[117] Jaida and her mother may move to Montreal. I have specified a schedule for Jaida's contact with her father. In light of the unusually high expense of exercising access to Jaida, I do not require Mr. Wilkins to pay child maintenance on a prospective or retroactive basis. There shall be no costs.

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

Halifax, Nova Scotia