

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Gillis v. Gillis*, 2013 NSSC 251

Date: 2013-08-08

Docket: 1201-059630

Registry: Halifax

Between:

Barbara Marion Marie Gillis

Petitioner

v.

Michael Richard Gillis

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: July 24, 2013, in Halifax, Nova Scotia

Counsel: Barbara Darby, counsel for Michael Gillis
Barbara Gillis on her own

By the Court:

Introduction

[1] This is Michael Gillis' variation application. He asks that I determine child support for his son, Jamie. Jamie's mother is Barbara Gillis. Jamie is twenty and entering his third year of studies at Acadia University. Mr. Gillis asks that this variation be retroactive to September 2011 when Jamie started university.

Corollary Relief Judgment

[2] Michael and Barbara Gillis were divorced in 2010. According to their Corollary Relief Judgment, Barbara Gillis had an annual income of \$5,000.00 and Michael Gillis had an annual income of \$80,000.00. Jamie, then seventeen, had his primary residence with his mother. Mr. Gillis was ordered to pay monthly child support of \$687.00 on the first of each month. The Corollary Relief Judgment provided that this amount would be reviewable in July 2011 when Jamie's post-secondary education plans would be determined. There was no review in July 2011. Mr. Gillis filed this variation application in January 2013.

The threshold for varying a child support order

[3] Before I may vary a child support order I must be satisfied that there's been a change of circumstances "as provided for in the applicable guidelines" since the most recent child support order was granted. This requirement is in subsection 17(4) of the *Divorce Act*, R.S.C. 1985, (2nd Supp.), c. 3. The applicable guidelines are the *Federal Child Support Guidelines*, SOR 97/175. Section 14 of the *Guidelines* lists various changes in circumstances that allow for a variation of child support. Where child support is determined based on the tables, the situations include a change in a payor's income, a change in the number of children to be supported or a change in the payor's province of residence. Where child support is not based on the tables, the situations include any change in the condition, means, needs or other circumstances of either former spouse or the child who's entitled to support.

[4] Jamie is now over the age of majority. According to subsection 3(2) of the *Guidelines*, his child support may be based on the tables or it may be calculated in another way. Clause 3(2)(a) relies on the tables. I have evidence that Mr. Gillis' income has increased from \$80,000.00 to \$93,252.00 since the Corollary Relief

Judgment was granted. This is a change relating to the calculation of child support based on the tables.

[5] The alternate method for determining child support is in clause 3(2)(b) and requires me to consider the condition, means, needs or other circumstances of either former spouse or the child who's entitled to support. Now that Jamie has started university, his condition, means, needs or other circumstances may be relevant to determining child support. This is another change.

[6] I'm satisfied that there are changes in circumstances that allow me to vary Mr. Gillis' child support payments. Changes which warrant variation have existed since Jamie began university in 2011.

[7] I'll begin by considering child support payments for 2013 and hereafter, and then determine the child support from September to December 2011 and for 2012.

Prospective child support: clause 3(2)(a)

[8] As I've said, subsection 3(2) of the *Guidelines* offers two alternatives for calculating child support for a child the age of majority or older. The first method is described in clause 3(2)(a). That method is to apply the *Guidelines* as I normally would, as if Jamie was under the age of majority. If I find this approach is inappropriate, I'm to use the alternate method. So, I'll begin with the calculation required by clause 3(2)(a), calculating support as the *Guidelines* would normally be applied.

[9] There are two components to the *Guidelines*: the tables and any apportionment of special or extraordinary expenses. Applying the *Guidelines* means calculating both components.

The table amount

[10] Based on Mr. Gillis' annual income of \$93,252.00, he would pay monthly child support of \$784.00. This is the table amount.

Apportioning special or extraordinary expenses

[11] The second component, apportioning special or extraordinary expenses, requires me to refer to section 7 of the *Guidelines* and to conduct the analysis required of that section.

Estimating the expense

[12] Subsection 7(1) of the *Guidelines* says that I may order an amount to cover all or any portion of certain expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and the child and the family's spending pattern prior to the separation.

[13] The expense that concerns me is Jamie's expense for post-secondary education. This is mentioned in clause 7(1)(e). It is a "special" expense, so it isn't necessary to prove that it is "extraordinary", as is required for some expenses.

[14] There's been no dispute that the expense for post-secondary education is necessary in relation to Jamie's best interests. No issue has been taken with the reasonableness of the expense in relation to the parents' means, Jamie's means and the family's pre-separation spending pattern. As a result I find that the expense for Jamie's post-secondary education is necessary and reasonable.

[15] Jamie is enrolled in the Bachelor of Science program at Acadia University. He's majoring in chemistry. He's in the co-operative program, which requires him to complete three work terms in addition to his academic studies. He's completing one work term this summer. If Jamie continues in the co-op program, Mr. Gillis expects Jamie will graduate in December 2015. Jamie may decide to leave the co-op program: if he leaves, he'll graduate in May 2015.

[16] Mr. Gillis estimates the cost for Jamie's post-secondary education is \$19,000.00 for each of the remaining years. Ms. Gillis doesn't disagree with the figure of \$19,000.00. She hasn't researched the costs and says that she hasn't been informed of them. The figure of \$19,000.00 is approximately \$1,500.00 more than the annual cost for each of the past two years, but it does reflect that education costs are likely to increase.

Available subsidies, benefits and tax deductions

[17] Subsection 7(3) of the *Guidelines* requires that in determining the amount of an expense, I consider the availability of and eligibility to claim subsidies, benefits, income tax deductions and credits relating to the expense. Civil Procedure Rule 59.22(1) requires litigants to provide evidence about these subsidies, benefits, income tax deductions and credits by filing a Statement of Special or Extraordinary Expenses (Form FD4).

[18] Mr. Gillis filed a Statement of Special or Extraordinary Expenses but didn't complete it. Instead, he noted "see affidavit", suggesting the information was to be found there. In his affidavit, Mr. Gillis gave evidence about the tuition tax credit for 2011, which I'll address when I deal with the retroactive variation claim. In the context of a current child support order, my concern is the current tuition tax credit.

[19] The tuition tax credit is provided for in section 118.5 of the *Income Tax Act*, R.S.C. 1985, (Supp. 5), c. 1, and described in an Interpretation Bulletin, IT-516R2, December 9, 1996. Expenses that are considered eligible tuition fees are: admission fees, library or laboratory fees, examination fees, application fees where the student subsequently enrolls in the particular institution, confirmation fees, fees for a certificate, diploma or degree, membership or seminar fees, mandatory computer service fees and academic fees. If HST is added, the HST is also an eligible tuition fee. Fees for athletic and health services that are paid to the institution and are required to be paid by all students are also tuition fees. If not all students are required to pay athletic and health services fees, their eligibility is limited to \$250.00.

[20] Fees which are not eligible are: student activity fees, student union dues, medical or health care fees, transportation and parking, room and board, materials with enduring value that the student will keep (books, laboratory items, clothing) and initiation fees.

[21] The tuition tax credit is equal to 23.79% of eligible tuition fees. According to the email attached to Jamie's expense summary, the tuition for his courses is \$7,873.00 each year. There is additional tuition of \$732.00 for each work term semester. Those expenses which are not part of his tuition are his residence, his student fees, books, and his meal plan, for example. I calculate his eligible tuition fees to be \$8,605.00. At 23.79%, the tuition tax credit is \$2,047.13.

[22] Mr. Gillis made no reference to the education tax credit, textbook tax credit or the amounts of these tax credits in his Statement of Special or Extraordinary Expenses, his affidavit or his testimony. These are provided for in subsections 118.5(2) and (2.1) of the *Income Tax Act*, respectively. The combined education and textbook tax credits are worth \$88.00 per month for every month a student is in full-time attendance at university. The education and textbook tax credits reduce Jamie's post-secondary education expense by \$704.00 annually. He is in full-time attendance at the university for eight months each year.

[23] As a result of these calculations, I find that Jamie's post-secondary education expense is \$16,248.87. I've calculated this by reducing the estimated total cost of \$19,000.00 by \$2,047.13 for the tuition tax credit and \$704.00 for the education and textbook tax credits.

Jamie's contribution

[24] The next step in apportioning Jamie's post-secondary education expense is in subsection 7(2) of the *Guidelines* which states that the guiding principle in determining the amount of an expense is that the parents share the expense in proportion to their respective incomes after deducting any contribution to the expense made by the child. In *Selig v. Smith*, 2008 NSCA 54 at paragraph 17, Justice Roscoe, who wrote the Court's unanimous reasons, said that, "The proper order of the calculations would be to deduct the child's share from the total costs and apportion the remainder between the parents."

[25] When I consider Jamie's contribution, I look to the money he earns, the money he borrows, and the money he receives as a scholarship from the university.

[26] In *Lu v. Sun*, 2004 NSSF 108, Justice Lynch considered the daughter's scholarships to be part of her contribution to her education expenses. The Court of Appeal took no issue with this characterization in *Sun v. Lu*, 2005 NSCA 112, and similarly described the daughter's scholarships as her "contribution" at paragraph 37 of its reasons. (Leave was sought to appeal this decision to the Supreme Court of Canada and dismissed SCC 31163, December 22, 2005 at 2005 CanLII 47808 (SCC).)

[27] Jamie is working for a professor at the university this summer as part of his co-op program. Mr. Gillis testified that Jamie will earn between \$5,000.00 and \$6,000.00 for this work. Earnings of \$6,000.00 are consistent with Nova Scotia's minimum wage. This is less than Jamie earned last summer when he worked for his father's employer. Mr. Gillis acknowledges that Jamie wants to work in his field of study. This employment helps Jamie complete his degree requirements. I find that Jamie's earnings are \$6,000.00.

[28] Jamie does not have a large scholarship this year. He did receive \$7,100.00 in student loan funds, a Nova Scotia University Student Bursary and a small scholarship which he used to pay all of his university expenses during the months from January to May 2013.

[29] Generally, Jamie's eligible for total student loan funds of \$27,000.00 through the course of his education, and I'm told that he's already received \$9,000.00 of these funds, leaving \$18,000.00 available for the remainder of his degree. Over the next two and one-half years until he graduates from the co-op program, this allows for funds of \$7,200.00 annually.

[30] Neither parent questions whether Jamie must borrow money to finance his education. I am mindful of Justice Roscoe's comment, at paragraph 20 in *Selig v. Smith*, 2008 NSCA 54, that, "The higher the parents' income, the less the student should be required to contribute." Her Ladyship's remark was in the context of holding that there is no error for a judge to assume that a grown child will be expected to borrow to finance post-secondary education even where the parents' combined annual incomes exceeded \$96,000.00. Justice Davison reached a similar conclusion in *MacDonald*, 2001 NSSC 158, where the parents' combined incomes approached \$160,000.00.

[31] If Jamie earns \$6,000.00 each year and has \$7,200.00 available in annual student loans, his means total \$13,200.00. Jamie paid the entirety of his education expenses for January to May, 2013 using his student loan proceeds, a Nova Scotia University Student Bursary and a small scholarship. His expenses (other than books) were \$8,094.87, according to an email from the manager of student accounts at Acadia.

[32] Jamie prepared an abbreviated expense statement. It was not sworn. In his expense statement, he budgets approximately \$270.00 each month for his personal costs (phone, clothing, toiletries, entertainment and the like). Annually, Jamie's personal costs are \$3,240.00. The amounts are modest and don't include any expense for food or transportation to and from the university.

[33] This summer, Jamie had to rent an apartment in Wolfville. His monthly rent, according to his father, is \$325.00. I estimate his food expense at \$300.00 each month. So, it costs him \$2,500.00 for the four summer months when he's not in residence and has no meal plan. Jamie has two more co-op terms. I assume that he will not be able to live with his mother during the week during these terms, but that he will continue to spend every weekend at her home during the summer months and many weekends there during the school year, as he has in the past.

[34] Deducting rent, food and personal expenses of \$5,740.00 from his earnings and loan proceeds of \$13,200.00 leaves \$7,460.00. Jamie's earnings and student loan proceeds are sufficient for him to support his personal expenses throughout the year, to pay for his rent and food during the summer months and to make a

\$5,000.00 contribution to his university costs. I assign him responsibility to contribute \$5,000.00 to his annual post-secondary education expenses. This is thirty percent of his education expense.

The parents' proportionate shares

[35] Following Justice Roscoe's direction at paragraph 17 in *Selig v. Smith* 2008 NSCA 54 that I'm to deduct Jamie's contribution from the total cost and apportion the remainder between the parents, I turn to calculate each parent's share of Jamie's post-secondary costs.

[36] Jamie's annual university expense is \$16,248.87. I calculated this amount by reducing the estimated total cost of \$19,000.00 by the tuition tax credit and the education and textbook tax credits. The sum is further reduced by Jamie's contribution of \$5,000.00. This leaves \$11,248.87 to be apportioned between Michael Gillis and Barbara Gillis.

[37] In calculating each parent's share of Jamie's post-secondary costs, I need to determine each parent's income. The steps for doing this are explained in sections 16 to 20 of the *Guidelines*. In particular, section 3.1 of Schedule III to the *Federal Child Support Guidelines* says that for the purposes of calculating a parent's income so I can apportion a contribution to a special expense, I must deduct the spousal support paid to the former spouse. For Mr. Gillis, this means that his annual earnings of \$93,252.00 are reduced by the \$18,000.00 in spousal support he pays to Ms. Gillis: when I do my proportionate sharing calculation, his income is \$75,252.00.

[38] There's no similar adjustment to be made to Ms. Gillis' income. Her income is calculated by totalling all her sources of income on her tax return. Her income is comprised of her earnings and her spousal support. Ms. Gillis works part-time on a seasonal basis at a garden centre where she earns minimum wage of \$10.15 per hour. She says she works an average of fifteen hours each week, working from the start of May until the end of October. Additionally, she'd receive four percent vacation pay. I find Ms. Gillis' annual earnings to be \$4,117.00. Her income for the purpose of the proportionate sharing is \$22,117.00.

[39] As I discuss Ms. Gillis' income, I should be explicit in stating that Mr. Gillis did not challenge the amount of her earnings. He did not argue that she should be earning more or that I should impute income to her. For the purpose of this application, he conceded that her income was as she testified. He was clear that this was not a concession that would necessarily extend to any other

application at any other time. As a result of his concession, Mr. Gillis did not question Ms. Gillis' testimony about why her income was at its current level. For Ms. Gillis, I want to be clear that Mr. Gillis' failure to challenge her testimony does not mean that he accepted it, merely that it was not necessary for him to question it at this point, in light of his concession.

	Income amounts	Proportionate shares
Mr. Gillis' income	75,252.00	77.3
Ms. Gillis' income	22,117.00	22.7
Total	97,369.00	100

[40] Based on the proportions above, Mr. Gillis would contribute \$8,695.38 and Ms. Gillis would contribute \$2,553.49 to the \$11,248.87 in university costs.

[41] Determining child support pursuant to clause 3(2)(a) of the *Guidelines*, Mr. Gillis would pay child support of \$784.00 based on the tables and he would make a monthly contribution of \$724.62 pursuant to section 7 of the *Guidelines* for a total monthly child support payment of \$1,508.62.

Prospective child support: clause 3(2)(b)

[42] The alternate method of determining child support is used if I consider the approach taken by the first method (which is outlined in paragraphs 10 to 41 above) "to be inappropriate". If it's inappropriate, I'm to determine an amount I consider appropriate, having regard to Jamie's condition, means, needs and other circumstances and each parent's financial ability to contribute to Jamie's support.

[43] In deciding whether the approach in clause 3(2)(a) is "inappropriate" I look to the language in clause 4(b) of the *Guidelines* where the word "inappropriate" is also used.

[44] Section 4 of the *Guidelines* deals with the child support to be calculated and paid on that portion of a spouse's annual income which exceeds \$150,000.00. It first provides, in clause 4(a), that the parent paying support has the table amount of support calculated on the entirety of his or her income. There is an alternate method of calculating support which is used "if the court considers that amount [calculated pursuant to clause 4(a)] to be inappropriate".

[45] The Supreme Court of Canada considered section 4 of the *Guidelines* in *Francis v. Baker*, 1999 CanLII 659 (SCC). Justice Bastarache wrote the Supreme Court's unanimous decision. At paragraph 37 of the decision, he referred to "the

established principle that where the same word is used on multiple occasions in a statute, one is to give the same meaning to that word throughout the statute”. From paragraph 36 of *Francis v. Baker*, 1999 CanLII 659 (SCC), I know that “inappropriate” means “unsuitable”. So, where “inappropriate” means unsuitable in section 4 of the *Guidelines*, it also means unsuitable in section 3.

[46] Justice Bastarache discussed how inappropriateness is established. At paragraph 43, he said, “the evidence in its entirety must be sufficient to raise a concern that the applicable Table amount is inappropriate”. He agreed with Justice Lysyk, who said at paragraph 27 in *Shiels*, 1997 CanLII 767 (BC SC) that there must be “clear and compelling evidence” for departing from the *Guidelines* figures. At paragraph 48 of *Francis v. Baker*, 1999 CanLII 659 (SCC), Justice Bastarache was explicit that “custodial parents are entitled to the Table amount unless that amount is shown to be inappropriate”.

[47] Justice Bastarache said at paragraph 44 that the factors listed in clause 4(b)(ii) were relevant to the initial determination of inappropriateness: “Only after examining all of the circumstances of the case, including factors expressly listed in s. 4(b)(ii), should courts find Table amounts to be inappropriate and craft more suitable child support awards”.

[48] I have Jamie’s budget for his own expenses and a Statement of Expenses from Mr. Gillis. I have no Statement of Expenses from Ms. Gillis, though I have her unchallenged evidence that her “household bills total more than \$1,800.00 per month, not including property tax and income tax.”

[49] Applying the reasoning in *Francis v. Baker*, 1999 CanLII 659 (SCC) to the parallel provisions of subsection 3(2) of the *Guidelines*, the approach of applying the *Guidelines* as if Jamie was under the age of majority is to be followed unless there’s clear and compelling evidence that this approach is unsuitable. I want to be clear about the parallel structure of section 4 and subsection 3(2). Clause 3(2)(a) and subsection 4(a) dictate a starting point for calculating child support. Clause 3(2)(b) and subsection 4(b) come into play only once this starting point is considered to be inappropriate. I’m deliberately referring to a “starting point” because the starting points are different. In subsection 4(b) the starting point is the *amount* calculated pursuant to subsection 4(a). In clause 3(2)(b) the starting point is the *approach* required by clause 3(2)(a). My analysis pursuant to clause 3(2)(b) is not whether the amount of child support calculated by applying the *Guidelines* as if Jamie is under the age of majority is appropriate, but whether that approach to calculating his support is inappropriate.

[50] According to Justice Bastarache, I should consider Jamie's condition, means, need and other circumstances and each parent's financial ability to contribute, when I determine whether the calculation of child support pursuant to clause 3(2)(a) is inappropriate.

[51] I'll begin with Jamie. His means are \$13,200.00 from his earnings and student loan proceeds. From this, he pays expenses of \$5,740.00 (rent and food during the summer and personal costs all year round). I am requiring Jamie to contribute \$5,000.00 to his university costs. Jamie's means are significantly depleted by his needs which are modest. Jamie attends university full-time and is employed when he is not attending university. His earnings are reasonable, considering the fact that they are earned in the context of an academic requirement. Jamie's ability to contribute and his contribution are as great as I would expect.

[52] Now, I'll consider Michael Gillis' financial ability to contribute. Mr. Gillis said that he couldn't afford to pay child support to Ms. Gillis and to pay directly for Jamie's university expenses.

[53] Mr. Gillis' total annual income is \$93,252.00. Reviewing his Statement of Expenses, after he pays \$800.00 toward Jamie's university costs and all his own costs, he has a monthly surplus of \$778.22. (This amount is nine dollars less than the amount shown on his Statement which contains a mathematical error.)

[54] Recognizing that he already budgets \$800.00 toward Jamie's university expenses each month, if Mr. Gillis also directs his budgeted surplus of \$778.22 toward Jamie's expenses, he can afford the \$1,508.62 I've calculated and still have a surplus of almost \$70.00.

[55] However, on closer examination, Mr. Gillis' monthly budgeted surplus is even greater than \$778.22.

[56] On his Statement of Expenses, Mr. Gillis' monthly income tax expense is shown as \$2,108.00. He says this is an "average per paystubs". Mr. Gillis provided tax returns for 2010, 2011 and 2012 and notices of assessment for two of these years. According to these materials, he's overpaid his taxes through source deductions in each of these years. For 2010, he paid taxes at source of \$22,209.99 and received a tax refund of \$7,015.96. For 2011, he paid taxes at source of \$24,762.92 and received a tax refund of \$8,274.08. For 2012, he paid taxes at source of \$24,902.96 and received a tax refund was \$8,210.77. So, the monthly surplus shown on Mr. Gillis' Statement of Expenses is artificially low, since it results from deducting too much income tax (an average of approximately \$650.00

too much) each month. Over the last three years, on average, Mr. Gillis overpaid his taxes by approximately \$650.00 each month. According to his Statement of Expenses, Mr. Gillis is paying \$25,296.00 in income tax through source deductions this year.

[57] If Mr. Gillis reduced the source deduction of income tax from his salary by \$650.00 each month, he would have surplus funds of \$1,428.22 each month. This surplus is \$80.00 less than his entire child support payment of \$1,508.62, and that is without considering the surplus is *after* he's budgeted paying \$800.00 in university costs. Once Mr. Gillis paid the child support I've calculated, his monthly surplus (if he adjusted his source deduction of income tax), would be \$719.60.

[58] Mr. Gillis has significant ability to contribute to Jamie's support. He can afford the child support payment I've calculated pursuant to clause 3(2)(a) while still having an annual surplus of \$8,635.20.

[59] Lastly, I'll consider Ms. Gillis' financial ability to contribute. Ms. Gillis says that Jamie comes home for the school break at Christmas (which she says is one month long) and that he is home for three or four weekends each month throughout the school year and every weekend during this summer. During these times Ms. Gillis provides for him.

[60] Ms. Gillis' spousal support and earnings provide her with \$1,843.08 each month, before she pays income tax. She says her "household bills total more than \$1,800.00 per month, not including property tax and income tax." Property taxes are approximately \$3,500.00 each year. So, she has a monthly deficit is a minimum of \$300.00 after paying household costs and property taxes, but without considering her income taxes.

[61] The Corollary Relief Judgment gave Ms. Gillis exclusive possession of the former matrimonial home. It also required that Ms. Gillis pay the mortgage, property taxes, property insurance, interest on the parents' credit line and the home's utilities until the home is sold. It's currently listed for sale. After paying costs associated with its sale, the outstanding mortgage and credit line balances, the remaining funds are to be split equally. From his share, Mr. Gillis owes Ms. Gillis a contribution toward her costs on the divorce.

[62] Ms. Gillis' financial means are insufficient to sustain a proportionate contribution by her to Jamie's expenses. As she explains it, her means are

exhausted by meeting her obligation to maintain the home and pay the bills related to it.

[63] In *Wambolt*, 2008 NSSC 52, Justice Dellapinna determined it was inappropriate to calculate child support for children over the age of majority pursuant to clause 3(2)(a) of the *Guidelines*. The application before Justice Dellapinna was one to vary child support retroactively. The children were aged 23 and 20 and attending university. They lived with their father who contributed to their financial needs. Both children received CPP disability benefits as a result of their mother's disability. The son worked and used his earnings for his university costs and the daughter used her earnings and RESP funds to finance her university costs.

[64] As I have, Justice Dellapinna looked to *Francis v. Baker*, 1999 CanLII 659 (SCC), in considering clause 3(2)(b) of the *Guidelines*. He held, at paragraph 29, that there was clear and compelling evidence to “depart from the strict application of subsection 3(1)” as is prescribed by clause 3(2)(a). He described the children as hardworking, willing and able to make significant contribution to their own expenses. Ms. Wambolt had income of \$23,077.56 (comprised of pension payments, disability benefits of \$5,277.00 and spousal support of \$7,800.00). Dawson Wambolt's income was \$12,100.00, and Jacqueline Wambolt's income was \$11,898.04.

[65] At paragraph 31, Justice Dellapinna found that Ms. Wambolt was living in poverty and unable to pay child support. He concluded that the approach which required Ms. Wambolt to pay child support “would simply increase her need for spousal support”. Instead, he applied clause 3(2)(b) and, having considered the factors described there, ordered that Ms. Wambolt make no payment of child support whatsoever.

Conclusion on prospective child support

[66] Applying the *Guidelines* as if Jamie was under the age of majority results in Michael Gillis being required to pay child support of \$784.00 each month (the table amount of support) and to pay a proportionate share of university costs of (\$8,695.38). This provides \$18,103.38 to meet Jamie's annual needs. Mr. Gillis' total monthly child support payment would be \$1,508.62.

[67] This approach results in providing funds for Jamie's support while at Ms. Gillis' home though Jamie does not live there full-time. To the extent that this provides money to Ms. Gillis which exceeds what she requires to care for Jamie

when he is home, it enables her to contribute to Jamie's post-secondary education expenses without requiring additional spousal support from Mr. Gillis. Ms. Gillis' current earnings are \$4,117.00, well below the level that would compel her to pay child support. Her income only reaches the level where the *Guidelines* apply because she receives spousal support.

[68] In *Wesemann*, 1999 CanLII 5873 (BC SC) at paragraph 31, Justice Martinson suggested that the closer a child's circumstances match those where the *Guidelines* apply (for example, the child lives at home, the parent who provides the home makes a significant contribution to the child's support by providing the home, the child does not earn an income and is dependent on the parents), the less likely the approach in clause 3(2)(a) will be inappropriate.

[69] Here, I have evidence that Jamie is at home for one month at Christmas, every weekend from May to September and three or four weekends for each of the months of September, October, November, February, March and April. He is home, I estimate, slightly more than one hundred days each year. His mother makes some provision to his support by providing a home. Jamie earns an income and has other means and is not wholly dependent on his parents.

[70] The approach in clause 3(2)(b) recognizes Jamie's financial and other circumstances and considers the financial ability of each of his parents to contribute to his support.

[71] Jamie's situation is sufficiently different from the typical situation where the *Guidelines* apply, that I find the approach contained in clause 3(2)(a) is inappropriate.

[72] Having regard to Jamie's means and his contribution to his own needs, and the means of both of his parents, I order Mr. Gillis to pay monthly child support of \$1,200.00. This amount is sufficient to fund the shortfall in Jamie's university costs and to make a contribution to the cost of Jamie's occasional residence with his mother. It allows Mr. Gillis to maintain a comfortable monthly surplus in his budget. It assists Ms. Gillis in servicing her monthly deficit.

[73] During the period from January until July 31, 2013, Mr. Gillis made payments of \$687.00 each month to Ms. Gillis in January, February, March and April, paying \$2,748.00 in total. He did not make these payments in May, June and July. For the period from January to July 31, 2013, Mr. Gillis owes child support of \$5,652.00.

[74] Commencing on August 1, 2013, Michael Gillis shall pay monthly child support of \$1,200.00.

Retroactive child support

2011

While under the age of majority

[75] While a child is under the age of majority, child support is determined pursuant to subsection 3(1) of the *Guidelines*. In *Lu v. Sun*, 2005 NSCA 112 at paragraph 24, Justice Hamilton wrote, on behalf of the unanimous Court of Appeal, “The presumptive rule under s. 3(1) applied while the daughter was a minor; the table amount plus section 7 expenses.”

[76] Jamie started at Acadia University in September 2011. He turned nineteen on October 21, 2011. Until Jamie reached age nineteen he was under the age of majority and his child support is determined by subsection 3(1) of the *Guidelines*: the table and the apportionment of special or extraordinary expenses. Once a child reaches the age of majority, subsection 3(2) of the *Guidelines* outlines the two methods by which I can determine Jamie’s child support.

[77] In 2011, Mr. Gillis’ income was \$91,178.00. Based on this income and the then-applicable tables, Mr. Gillis would pay monthly child support of \$772.00.

[78] The second aspect of child support is the apportionment of special expenses. To follow the prescribed analysis correctly, I should calculate Jamie’s university expenses after subtracting available tax credits, subsidies and tax credits and then subtracting Jamie’s contribution. Lastly, I should apportion the remaining sum between Jamie’s parents.

[79] Happily, Jamie received a scholarship and all of his educational costs were paid for 2011. (In fact, all his expenses were paid for the entire 2011-2012 academic year.) Because all of Jamie’s university costs were covered by his scholarship, the formal analysis would result in my apportioning no costs between his parents so I’ll forgo the analysis.

[80] So, for September and October 2011, Mr. Gillis owes child support of \$772.00 each month.

While the age of majority or older

[81] For the last two months of 2011 after Jamie reached the age of majority, his child support is determined by subsection 3(2) of the *Guidelines*. Clause 3(2)(a) of the *Guidelines* sees his support calculated as in paragraphs 10 to 41 above: calculating the table amount and apportioning special expenses.

[82] The table amount of child support is \$772.00 per month. Jamie's scholarship obviates the need for his parents to contribute to his university expense. So, the amount payable pursuant to clause 3(2)(a) of the *Guidelines* is \$772.00.

[83] Mr. Gillis said that he and Ms. Gillis "shared the tuition tax credit", but he didn't disclose the amount of the tuition tax credit. In his testimony, he estimated the tuition tax credit was worth \$1,000.00. He provided a copy of a cheque paying one-half of the tuition tax credit he received for 2011 to Ms. Gillis. This cheque was for \$571.28, meaning the entire credit received for Jamie's four months at Acadia in 2011 was \$1,142.56.

[84] I am to deviate from this calculation if I believe this approach is inappropriate.

[85] During the last two months of 2011, Jamie was living at his mother's home three to four weekends each month and for one month at the time of the university Christmas break. In addition to providing this home for him, Ms. Gillis was paying the additional cost of having him home, such as purchasing food for him. Ms. Gillis' income was derived entirely from spousal support payments of \$18,000.00. She was not employed. She was obliged to pay all the bills associated with the home from these funds, including the mortgage and property taxes.

[86] I find this approach is not inappropriate. Jamie was continuing to spend significant time at his mother's home. According to her evidence, he was home for one month at Christmas and for three to four weekends every month. I estimate this as more than twenty-eight days during the sixty-one day period from November 1 to December 31, if I allocate twenty-one days of the Christmas break to December (university classes typically resume during the first week of January), the Remembrance Day long weekend and two to three additional two day weekends during this time. There was no evidence that, aside from his scholarship which provided for him at Acadia, Jamie had any other means of independence.

[87] Finding that the approach in clause 3(2)(a) is not inappropriate, I calculate that Mr. Gillis owes child support of \$772.00 for November and December 2011.

[88] During the final four months of 2011, Mr. Gillis paid child support of \$687.00. He has underpaid his 2011 obligation by \$340.00.

2012

[89] From January until May 2012, Jamie was in full-time attendance at Acadia and all his university costs were paid by his scholarship. From May until September 2012, Jamie lived with his mother and was working full-time. From September to the end of 2012, Jamie was back at university, studying full-time, however he had no scholarship.

[90] Mr. Gillis earned \$92,318.00 in 2012. According to the tables which came into force at the end of 2011, Mr. Gillis would pay monthly child support of \$776.00 on this income.

[91] I've been told that Jamie's university expenses for his entire first year of study were paid by a scholarship and that he had no scholarship during his second year. So, he had scholarship money during January to May and none from September to December. His T4A slip from Acadia shows he received \$7,108.00 in scholarship funds in 2012. These funds would have equalled his expenses for the first part of 2012. Jamie's university costs for the September to December 2012 term were \$8,522.04. Accordingly, his total university expenses for 2012 were \$15,630.04 (\$7,108.00 + \$8,522.04).

[92] These expenses would be reduced by the various tax credits (tuition, education and textbook) that I've described earlier. Totalling \$2,751.13, these tax credits reduce the university cost from \$15,630.04 to \$12,878.91.

[93] Jamie earned \$10,769.78 in 2012 and, according to his T4A slip from Acadia, he received \$7,108.00 in scholarship funds. His total income was \$17,877.78. His scholarship was dedicated to his university expenses, reducing them from \$12,878.91 to \$5,770.91.

[94] Mr. Gillis suggests that Jamie's earnings should have been dedicated in some or whole to his university costs. As it happened, Jamie had no savings to pay toward his expenses. Mr. Gillis paid the costs for the first term of Jamie's second year, paying the university \$8,522.04.

[95] What happened to Jamie's earnings remains a mystery that neither parent has solved. Ms. Gillis said that she didn't require Jamie to pay her room and board, though he purchased any special food items he wanted that weren't part of her typical grocery purchases. Jamie has no identified medical needs, but follows a regime of protein shakes and vitamins. He paid for these items.

[96] Jamie's university costs in 2012 were \$12,878.91. He contributed \$7,108.00 (fifty-five percent) of these expenses. I am satisfied that this is a sufficient contribution for him to make. It's more than half of his university cost for 2012.

[97] Apportioning the remaining university costs of \$5,770.91 between the parents, I look to their 2012 incomes outlined in the table below.

	Income amounts	Proportionate shares
Mr. Gillis' income	74,318.00	80.5
Ms. Gillis' income	18,000.00	19.5
Total	92,318.00	100

[98] Sharing the university costs proportionately requires Mr. Gillis to pay \$4,645.58 and Ms. Gillis to pay \$1,125.33.

[99] Calculating Jamie's child support pursuant to clause 3(2)(a) results in a child support payment of \$1,163.13 (\$776.00 according to section 3 and \$387.13 according to section 7).

[100] Again, I need to ask whether this calculation is inappropriate. Jamie was at home for May, June, July and August, one month at the Christmas break and three to four weekends each month during January, February, March, April, September, October and November. All told, Jamie would have been living with his mother more than half of the year. My calculation exceeds 190 days. While Jamie was home a great deal, his earnings would have enabled him to have some degree of independence. Mr. Gillis' income was over \$92,000.00 (over \$74,000.00 for the purpose of calculating his contribution to section 7 expenses) and he had a tax refund of \$8,210.77. Ms. Gillis' income was derived entirely from spousal support.

[101] In these circumstances, there isn't a clear and compelling case that calculating child support pursuant to clause 3(2)(a) of the *Guidelines* is inappropriate because Jamie was home and reliant on his mother for so much of the year.

[102] Accordingly I order that Mr. Gillis pay monthly child support of \$1,163.13 for 2012.

[103] Mr. Gillis paid \$687.00 each month in 2012 (for a total of \$8,244.00) and he paid \$8,522.04 to Acadia University. He paid \$16,766.04 for Jamie's support in 2012. As a result, he has overpaid his obligation by \$2,808.48 that year.

Conclusion

[104] I grant Mr. Gillis' application to vary the child support terms of the Corollary Relief Judgment both prospectively and retroactively.

[105] For 2011, I order Mr. Gillis to pay child support of \$771.00 for each of the last four months. He owes child support of \$340.00 for this year.

[106] For 2012, I order Mr. Gillis to pay monthly child support of \$1,163.13. He has exceeded this contribution by \$2,808.48.

[107] For 2013, I order Mr. Gillis to pay monthly child support of \$1,200.00. To the end of July, he owes \$5,652.00.

[108] Overall, Mr. Gillis owes child support of \$3,183.52 to Ms. Gillis. I order that this amount be paid to her on the earliest of his receipt of his 2013 tax refund, his receipt of his share of the proceeds from the sale of the matrimonial home or no later than June 1, 2014.

[109] There shall be no provision of costs. Mr. Gillis' counsel shall prepare the order.

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

Halifax, Nova Scotia