SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: **Conrad v. Skerry, 2012 NSSC 77**

Date: 20120227
Docket: SFH MCA-071399
Registry: Halifax

Between:

Seretha Lynn Conrad

Applicant

v.

Anthony Leo Skerry

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	January 6, 2012
Counsel:	Lynn Conrad representing herself Anthony Skerry representing himself

By the Court:

Introduction

[1] Lynn Conrad and Anthony Skerry are the parents of two: Breana is fifteen and Anthony is twenty-two. Ms. Conrad and Mr. Skerry have never lived together, though their relationship lasted twenty years, according to Ms. Skerry.

[2] In July 2010, Lynn Conrad applied for sole custody and sole decision-making authority relating to Breana and for child maintenance for her. She later amended her application to request child maintenance for Anthony: since filing her application, Anthony had returned to live with her. In response, Mr. Skerry asked for a shared parenting arrangement with Breana. These are applications of first instance under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160.

[3] Ms. Conrad and Mr. Skerry took part in shuttle conciliation in November 2010 where they resolved the issue of Breana's interim child maintenance pursuant to section 3 of the *Nova Scotia Child Maintenance Guidelines*, NS Reg 53/98. An interim child maintenance order was issued.

[4] Ms. Conrad requested a conference. Justice Legere-Sers presided at the conference on September 26, 2011 and a memorandum containing her directions for the hearing was sent to both parties. Ms. Conrad was directed to file particulars of her financial claims and Mr. Skerry was to file an affidavit and "updated financial statements, including his 2010 Income Tax Return and Notice of Assessment and verification from his employer of year to date income."

The hearing

[5] The application was scheduled for November 8, 2011. Mr. Skerry did not appear. He was ordered to pay costs and the application was adjourned to January 6, 2012 when both parties were present. Ms. Conrad filed the materials listed below.

Date of filing	Documents filed by Ms. Conrad
September 9, 2010	Affidavit Statement of Income Statement of Special or Extraordinary Expenses Parenting Statement
November 22, 2010	Collection of receipts
May 11, 2011	Statement of Special or Extraordinary Expenses
October 11, 2011	Affidavit
November 18, 2011	Affidavit

January 3, 2012	Affidavit Statement of Special or Extraordinary Expenses

For his part, Mr. Skerry filed a Parenting Statement and a Statement of Income on October 18, 2010.

[6] As the hearing began, in confirming that each party had received all the documents filed by the other, I learned that Mr. Skerry had not received the affidavit and Statement of Special or Extraordinary Expenses which Ms. Conrad filed on January 3, 2012. We recessed to allow Mr. Skerry to review these two documents.

[7] At the end of the recess, Mr. Skerry said he wanted to speak with his lawyer about the information he'd just read. Mr. Skerry explained that while he isn't represented, he has been consulting with a lawyer. I asked Mr. Skerry to identify the information he wanted to discuss with his lawyer so I could determine whether to grant his request for an adjournment. Mr. Skerry said that he wanted to address the "new" claims that: he owed arrears of child maintenance arising from the interim order, Anthony was entitled to child maintenance, and Ms. Conrad's retroactive child maintenance claim should commence in 2007.

[8] I dismissed Mr. Skerry's request for an adjournment. Concern about his payment of interim child maintenance was known prior to Ms. Conrad's January 3, 2012 filings. Similarly, the issue of maintenance for Anthony was raised at the conference before Justice Legere-Sers and in the amended application filed in October 2011. Mr. Skerry knew about these claims in 2011 and he could have consulted his lawyer about them earlier.

[9] Ms. Conrad's claim for retroactive child maintenance for Breana initially dated from May 2008. In the documents she filed on January 3, 2012, she asked that retroactive child maintenance commence in 2007. This was new. Understanding that this change to her claim would result in an adjournment so Mr. Skerry could discuss this new claim with his lawyer, Ms. Conrad withdrew it.

[10] Ms. Conrad filed a brief on October 28, 2011. Because Mr. Skerry did not file a brief or affidavit, his position on the issues was unclear. For example, the parenting arrangement he proposed in his Parenting Statement wasn't the same as the one he sought in conciliation. To focus the hearing, I asked each party about its position on each of the issues.

[11] This application raises a number of issues. First, with regard to Breana, I am to determine both her custodial arrangement and how her time shall be spent. Then, I must determine claims relating to her maintenance, pursuant to sections 3 and 7 of the *Nova Scotia Child Maintenance Guidelines*. There is a retroactive claim for child maintenance for Breana. This claim relates to section 3(1)(a) of the *Nova Scotia Child Maintenance Guidelines* and dates from May 2008. With regard to Anthony, since he's over the age of majority, I must determine whether he is a dependent child under section 2(c) of the *Maintenance and Custody Act* before I can consider Ms. Conrad's application for child maintenance for him. If Anthony is a dependent child and entitled to the benefit of child maintenance, I must determine maintenance for him pursuant to section 3(2) of the *Nova Scotia Child Maintenance*

Guidelines. It's in this order that I will address the issues, with one exception: I intend to deal with retroactive child maintenance last for reasons I will explain as I deal with that claim.

Breana's custody

[12] Ms. Conrad wants to be solely responsible for decisions relating to Breana. Mr. Skerry wants "to be part of" custody. He wants Ms. Conrad to consult with him. He is unsure about who should make the final decision if he and Ms. Conrad don't reach an agreement about matters: he thinks they should try to agree.

[13] Since her birth, Breana has lived with Ms. Conrad. In her affidavits, Ms. Conrad describes her involvement in Breana's life. She's been primarily responsible for major decisions relating to Breana: she's arranged tutoring for Breana and involved Breana in recreational activities. Ms. Conrad summarized the evidence of her involvement in her closing comments: she has been the primary decision-maker for Breana throughout her life, she's attended all parent/teacher sessions, contacted Breana's school each week, assisted with homework and co-ordinated Breana's tutoring. Ms. Conrad volunteers at Breana's school and is a Girl Guide leader. She works nights so that she can take part in Breana's activities. Ms. Conrad's been the dominant parent.

[14] Mr. Skerry agreed that it was three years ago when he last attended a parent/teacher meeting for Breana. He did not admit to being less familiar than Ms. Conrad with caring for Breana if she has an asthma attack, but acknowledged that Breana might call her mother, without his knowledge, when she has an attack.

[15] Mr. Skerry objects to the extent of Ms. Conrad's contact with him and has told her that she is to contact him only if there's an emergency.

[16] Section 18(4) of the *Maintenance and Custody Act* provides that "the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child" unless otherwise provided by the *Guardianship Act*, S.N.S. 2002, c. 8 or ordered by a court.

[17] There is no prior order or agreement in place regarding Breana's parenting, so her parents are equally entitled to her care and custody. The evidence indicates that Ms. Conrad and Mr. Skerry haven't exercised joint custody in any active way.

[18] According to section 18(5) of the *Maintenance and Custody Act*, in any proceeding concerning a child's care and custody or access and visiting privileges, I shall apply the principle that the child's welfare is the paramount consideration.

[19] In *Rivers*, 1994 CanLII 4318 (NS SC), Justice Stewart analysed a claim for joint custody under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3. While Ms. Conrad's application is pursuant to the *Maintenance and Custody Act*, I believe that the jurisprudence under the *Divorce Act* is relevant. In her analysis of a joint custody claim at paragraphs 50 to 53, Justice Stewart considered four issues. Framed as questions, the issues were:

> (1) has each parent maintained a meaningful relationship with the child and does each possess parenting capabilities that are adequate to meet the child's needs?
>
> (2) will the parents be able to make decisions together? Are they able to co-parent? Can they isolate negative feelings about each other in order to focus upon the child's need for a relationship with both parents?
>
> (3) will the child be involved in detrimental parental conflict?
>
> (4) will joint custody cause disruption and discontinuity to the child's developmental needs?

[20] Breana has a meaningful relationship with each of her parents. While Ms. Conrad questioned Mr. Skerry's ability to respond to Breana's asthma, she raised no other concerns about Mr. Skerry's ability to meet Breana's needs adequately. Mr. Skerry doesn't agree that he's unable to care for Breana's asthma but admits Breana may seek assistance from her mother rather than from him when she has an attack.

[21] Decisions have been made about Breana throughout her life, particularly with regard to her health and educational needs. I wasn't told how these were made. Mr. Skerry suggests he hasn't been consulted in the past. In her affidavit of September 9, 2010 Ms. Conrad said "Until now, we have always been able to communicate in regards to the welfare of our children and my desire is to continue an open bond of communication with him."

[22] Despite his desire to be consulted, Mr. Skerry has instructed Ms. Conrad not to text him unless it's an emergency. He asks that Ms. Conrad contact him by text or email. He cannot complain that he is not consulted where he demands that Ms. Conrad's communication with him be restricted to emergency matters.

[23] I cannot predict whether Breana will be involved in detrimental parental conflict. It appears this hasn't happened to date in circumstances where Mr. Skerry hasn't been actively engaged in decision-making. Similarly, there isn't information which allows me to predict whether joint custody would cause disruption or discontinuity to Breana's developmental needs.

[24] Ms. Conrad is protective of her position as the parent who has been primarily responsible for both children. Based on Mr. Skerry's claim and Ms. Conrad's description of the parents' past communication, I believe that Mr. Skerry can be involved in decision-making with regard to Breana in a way which will not involve Breana in detrimental parental conflict or cause disruption or discontinuity to her developmental needs. This can be done where decision-making is structured.

[25] When a decision about Breana arises which requires a parent's consent in matters relating to her discretionary health care, education or religion, the parent who becomes aware of the decision must notify the other parent of the decision to be made and what she or he thinks is in Breana's best

interests. This notice must be given as soon as the parent becomes aware that a decision must be made. If one parent has information which is relevant to the decision, she or he must provide that information to the other parent as soon as the parent becomes aware that a decision is required. If there is any deadline by which a decision must be made, this must be communicated as soon as it is known. The parent who is advised must respond prior to the deadline, identifying the decision he or she believes is in Breana's best interest. If there is no response, then the parent who initiated the discussion may make the decision. If the parties disagree, Ms. Conrad shall make the decision.

[26] Neither parent may make any major developmental decision regarding Breana without the consent or acquiescence of the other parent except on an emergency basis. Despite Mr. Skerry's preference, in the event of an emergency, Ms. Conrad may contact Mr. Skerry by whatever means enable the fastest contact.

[27] I order that each parent share with the other any information he or she receives concerning Breana's health, education, recreational activities and the like. In particular, Lynn Conrad shall:

> a) complete Breana's school registration identifying Mr. Skerry as a contact person;
>
> b) provide school and recreational activity notices to Mr. Skerry within a one week of receipt; and
>
> c) provide Mr. Skerry with a copy of each of Breana's report cards within one week of receipt.

[28] A discrete order will be issued, ordering that each parent is entitled to request information of third parties (health care providers, educators and others involved with Breana) and these third parties shall be entitled to respond to the requests without requiring consent from the other parent to release information.

Breana's parenting time

[29] Breana's welfare is paramount in a decision about where her time is spent.

[30] Breana is fifteen and in grade nine at Elizabeth Sutherland School in Spryfield. She has asthma.

[31] Breana's involved in many activities. Her extra-curricular resumé is impressive: she's completed St. John Ambulance's emergency first aid, standard first aid, CPR and wilderness first aid training. She's completed a babysitter training course. She's completed level 9 swimming lessons. She's been involved in Girl Guides since 2002 and is a junior leader at both the Captain William Spry Centre and summer church camp. She's played ringette for ten years and plays badminton, basketball, soccer and hockey. She won the Lady Baden Powell award (the highest achievement in Girl Guides) in 2009 and earned the Canada Cord (the highest achievement in Pathfinders) in 2011.

[32] While Breana is distinguished in her extra-curricular activities, her academic career is not so accomplished. Last year when she was in grade eight, she needed programming adaptations at school and, according to a March 11, 2011 email Ms. Conrad sent to the director of the Pathways Education Program, "[Breana] is in desperate need of a tutor. She has failed most of her exams this year (Math is a huge problem for her)."

[33] Mr. Skerry wants Breana to divide her time between her parents' homes, alternating between homes weekly.

[34] Shared parenting is not defined in the *Maintenance and Custody Act*. It appears only in the *Nova Scotia Child Maintenance Guidelines* where, in section 9, the arrangement is defined by the amount of time a child spends with each parent. In *Gibney v. Conohan*, 2011 NSSC 268 at paragraph 92, Associate Chief Justice O'Neil identified a number of factors which focus consideration of the child's welfare in a way consistent with the requirements of 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.

[35] Decisions on shared parenting applications are 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.

[36] Throughout Breana's life, Ms. Conrad has been primarily responsible for meeting Breana's needs. She's been responsible for Breana's education, health care and extra-curricular activities. Mr. Skerry has asked for a shared parenting arrangement, but he has not demonstrated a motivation or willingness to share the responsibility of parenting to date.

[37] Mr. Skerry gave no evidence of his involvement in Breana's life beyond driving her to activities that occurred proximate to his access time and, three years ago, attending a parent teacher meeting.

[38] Ms. Conrad has been more active in seeking professional advice about Breana's needs, particularly her educational needs.

[39] 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.

[40] I have no evidence which suggests that either parent would use shared parenting to control the other. Ms. Conrad has been the dominant parent: she has not used this to control Mr. Skerry.

[41] Shared parenting arrangements require a high level of cooperation and communication between parents. Such a level of communication isn't present between Ms. Conrad and Mr. Skerry. To provide stability for a child, the rules and expectations in each household must be consistent. Ms. Conrad and Mr. Skerry don't demonstrate this level of communication.

[42] Based on these considerations, I conclude that Breana's welfare is not served by a shared parenting arrangement. Her welfare is best served in the primary care of Ms. Conrad.

Breana's access with Mr. Skerry

[43] Having decided that it doesn't serve Breana's welfare to be in a shared parenting arrangement, I must determine what arrangement does serve her welfare.

[44] In her Parenting Statement, Ms. Conrad asks that Breana spend every second weekend with her father, from Friday at 7 p.m. until Sunday at 7 p.m. In his Parenting Statement, Mr. Skerry makes the same proposal. I will include this provision in my order. The alternate weekends will begin on March 9, 2012.

[45] The exact dates of Breana's activities aren't known, particularly the dates of tournaments. If Mr. Skerry will not or cannot ensure that Breana attends her activities on his weekend, then his access with her will be forfeit. Given the extent of Breana's activities, trying to replace lost access time would be too difficult.

Additional time

[46] Mr. Skerry asks for additional time with Breana. In his Parenting Statement, he suggested that he would be with Breana from 6 p.m. until 9 p.m. every Monday evening. This is appropriate. During this time, he is responsible for Breana attending her scheduled activities.

[47] Ms. Conrad asks that Mr. Skerry give her one to two weeks advance notice of any additional time he wants with Breana. Mr. Skerry suggests that two to three days' notice of any additional access is more appropriate. Mr. Skerry's notice requirement is the more reasonable proposal of the two. I direct that if Mr. Skerry wants additional time with Breana he shall have the additional time on three days' notice to Ms. Conrad. If Breana has activities during this time, Mr. Skerry is responsible for her transportation to and from them.

Christmas

[48] Ms. Conrad and Mr. Skerry disagree about how Breana should spend her Christmas. Mr. Skerry seeks time with Breana from 6 p.m. on December 24 until 7 p.m. on December 25 and from 7 p.m. on December 25 until 7 p.m. on December 26 in even-numbered years. He proposes Ms. Conrad would follow this schedule in even-numbered years. He says he wants this schedule so that Breana "can enjoy both her mom and me". In contrast, Ms. Conrad wants a schedule where Breana would spend time with her father on December 25 from 11 a.m. to 2 p.m. and then from 8 p.m. on December 25 until 7 p.m. on December 26. She says this is the schedule that they've followed in the past.

[49] According to Mr. Skerry, December 24 (from approximately 5 p.m. until 8 p.m.) is spent with his wife's family. Christmas dinner is held on Boxing Day. Ms. Conrad says that her family gets together on December 25.

[50] Considering the information I have about the family celebrations which occur over the Christmas holidays, the best way I can ensure that Breana is able to participate in all her family activities is to maintain a schedule that's similar to the one she's had in the past. Each year, Breana will be with her father from 4 p.m. until 9 p.m. on December 24, from 11 a.m. until 2 p.m. on December 25, and from 8 p.m. on December 25 until 8 p.m. on December 26.

Travel abroad

[51] Ms. Conrad asks for permission to travel abroad with Breana so that she will not need Mr. Skerry's authorization. There was no evidence of any plans to travel outside Canada with Breana and no evidence that Mr. Skerry would fail to provide authorization. Because Breana is involved in competitive sports and wishes to take part in class trips, the occasion may arise when Breana will travel

outside Canada.

[52] If either parent wants to travel with Breana within North America (but outside Canada) for a period of less than four days, she or he shall give the other parent seven days' written notice and provide an itinerary five days before the trip. Where a parent wants to travel with Breana outside North America for any period of time or within North America (but outside Canada) for a period of more than four days, he or she shall give the other twenty-one days' notice. Consent shall not be withheld where these notice requirements are met: in other words, a parent cannot withhold consent where the travelling parent has met these requirements. For further clarity, four days means that the date of departure and the date of return shall be within four days of each other – for example, if Breana leaves on Tuesday, she must return on Friday.

Prospective maintenance for Breana

[53] The *Nova Scotia Child Maintenance Guidelines* provide for two types of child maintenance. The basic amount of child maintenance is governed by section 3(1)(a) of the *Nova Scotia Child Maintenance Guidelines* and is based on the paying parent's income, the number of children to be supported and the payor parent's province of residence. The amount prescribed is to finance the child's shelter, food, clothing and ordinary activities. This is not a complete list of the expenses to be funded by this maintenance, these are merely examples.

[54] Section 7 of the *Nova Scotia Child Maintenance Guidelines* involves expenses a child might or might not have. Within this type of maintenance there are two types of expenses: special expenses and extraordinary expenses. Special expenses include child care, the portion of health or dental insurance premiums which relate to the child, health-related expenses that exceed a specified amount and expenses for post-secondary education. Extraordinary expenses are comprised of extracurricular activities and educational expenses that meet a child's particular needs.

[55] Maintenance is analysed differently, depending on whether the person being supported is under or over the age of majority.

[56] There is an interim order for Breana's maintenance dated November 22, 2010. This order was based on Mr. Skerry's Income Statement of October 2010. According to that Statement, his annual income was $33,850.00 and this resulted in monthly child maintenance of $300.00 which Mr. Skerry paid in bi-monthly intervals. This order provided for Breana's maintenance according to section 3(1)(a) of the *Guidelines*. There was no provision for a contribution to Breana's special or extraordinary expenses pursuant to section 7. The Maintenance Enforcement Program record of payments showed that Mr. Skerry was in arrears of his payments by one month and enforcement action was noted. Where the Director is acting to collect arrears, I decline to act.

Child maintenance pursuant to section 3 of the *Guidelines*

[57] Mr. Skerry testified that his 2011 income was approximately $33,000.00. He did not provide any documentation, such as a paystub, to confirm this. The amount is consistent with his 2010

earnings. Ms. Conrad's only question about Mr. Skerry's income related to his earnings for running the rink's ice clock. For this work, Mr. Skerry is paid between $3.00 and $5.00 per game. There are between ten and twelve games each season. So, this work earns him between $30.00 and $60.00 annually.

[58] Mr. Skerry's stated income is consistent with that shown on his past income tax returns: in 2007, his income as shown on line 150 of his personal tax return was $34,398.00; in 2008, it was $30,062.00; in 2009, it was $33,397.00. The paystub filed with his Statement of Income in October 2010, when extrapolated to an annual income, suggests Mr. Skerry had an annual income of $35,152.00 in 2010.

[59] Mr. Skerry's testimony was not challenged by Ms. Conrad and it is consistent with his historical earnings. I find that his annual income for the purposes of determining child maintenance is $33,060.00.

[60] Section 1 of Schedule I of the *Nova Scotia Child Maintenance Guidelines* provides that "Schedule I of the *Federal Child Support Guidelines* established pursuant to Section 26.1 of the *Divorce Act* (Canada), as amended from time to time, is adopted for the purposes of these Guidelines." The *Federal Child Support Guidelines* were most recently amended on December 31, 2011 by SOR/2011-267. So I refer to the new *Federal Child Support Guidelines* to determine the amount of child maintenance that Mr. Skerry must pay for Breana. A Nova Scotian parent with an annual income of $33,060.00 who is supporting a single child is to pay monthly child maintenance of $278.00.

[61] This amount of maintenance may be changed, depending on the conclusion I reach following my analysis of the claim for maintenance for Anthony.

Child maintenance pursuant to section 7 of the *Guidelines*

Expenses on which the parents agree

[62] Ms. Conrad asks that I order Mr. Skerry to share equally the costs of Breana's ringette, her school supplies, her bowling, her Pathfinders, her Girl Guide registration and camps, her softball registration, her grade nine class trip, her medical and dental insurance premiums and her school ski trips. Mr. Skerry agrees to contribute equally to Breana's ringette, school supplies, softball registration, her grade nine trip, her medical and dental insurance premiums and her school ski trips.

[63] By virtue of their agreement, I am not analysing whether the expenses for Breana's ringette, school supplies, softball registration, grade nine trip, medical and dental insurance premiums and school ski trips are special or extraordinary ones or whether there should be any proportion of sharing other than equal.

[64] Ms. Conrad's Statement of Special or Extraordinary Expenses disclosed the expenses upon which the parties have agreed as follows:

Item	Total monthly expense
ringette	31.25
school supplies	6.25
softball registration	3.75
grade nine trip	10.47
medical and dental insurance premiums	37.29
school ski trips	2.08
Annual expense	1,093.08

[65] According to Ms. Conrad, she didn't consider the Children's Fitness Credit in calculating the cost of Breana's activities. Section 7(3) of the *Guidelines* says that in determining the amount of an expense I must take into account any subsidies, benefits or income tax deductions or credits relating to the expense. The Child Fitness Tax Credit allows the parent of a child under age sixteen to claim up to $500.00 of a child's fitness expenses as a non-refundable credit. A tax credit is a direct reduction in tax: a $500.00 tax credit means that taxes are reduced by $500.00. The credit is called a non-refundable credit because if the taxpayer doesn't owe enough taxes to exhaust the credit, the unused portion isn't refunded to the taxpayer. Ms. Conrad has an annual expense of $420.00 for Breana's ringette and softball registration. This saves her $420.00 in taxes.

[66] The total amount of these expenses is $1,093.08 annually. As a result of the non-refundable Children's Fitness Tax Credit of $420.00, the actual (after-tax) cost of these activities is $673.08. Based on this amount and the parents' agreement that these expenses should be shared equally, I order that Mr. Skerry pay $28.04 each month toward these special and extraordinary expenses.

Expenses on which the parents don't agree

[67] The parents' agreement still leaves me to decide whether Mr. Skerry should contribute to Breana's bowling, her Pathfinders and her Girl Guide registration and camps. If I order that he make a contribution, I must decide what that contribution should be.

[68] According to section 7(1) of the *Nova Scotia Child Maintenance Guidelines*, one parent can ask that I order the other parent pay all or any portion of certain enumerated expenses. The amount of the expense claimed may be estimated. In making an order under section 7, I am to consider:

1. the necessity of the expense as it relates to the child's best interests; and
2. the reasonableness of the expense in relation to:
    a. the parents' and child's means; and

b. the family's pre-separation spending pattern.

[69] In *L.K.S. v. D.M.C.T.*, 2008 NSCA 61 at paragraph 27, Justice Roscoe said that it's "preferable to deal first with s. 7(1) to determine whether the expenses are necessary in relation to the child's best interests and reasonable in relation to the means of the parents before dealing with the definition of extraordinary expenses in s. 7(1A)." If the expense isn't necessary or it isn't reasonable, then I need not proceed any further with the analysis under section 7(1A).

[70] The particular expenses I am considering are Breana's bowling, her Pathfinders, her Girl Guide registration and camps. I heard no evidence of the necessity of these expenses as they relate to Breana's best interests. Breana has no special needs or disabilities as identified by either parent on his or her Parenting Statement, though there was evidence of her educational needs. Breana participates in many activities: she's taken first aid courses and a babysitter training course, she's taken swimming lessons, played ringette, basketball, soccer and hockey. She's a junior leader at both the Captain William Spry Centre and summer church camp. In terms of physical activity, social interaction and leadership training, I think bowling, Pathfinders and Girl Guides add little to the other activities in which Breana participates. Her activity schedule crowds the time available for her access with her father. Also of concern is the difficulty that Breana had in eighth grade when she failed most of her exams. I conclude that bowling, Pathfinders and Girl Guides are not activities which are necessary as they relate to Breana's best interests.

[71] As a consequence of reaching this conclusion, I do not need to pursue the remainder of the analysis required by section 7 of the *Guidelines*.

Maintenance for Anthony

[72] Anthony is twenty-two. Ms. Conrad says that Anthony returned to live with her in July 2011.

[73] Anthony graduated from high school in June 2008. According to Ms. Conrad, he started work at the World Trade and Convention Centre in July 2008, doing housekeeping work. She says he earned minimum wage and worked there "off and on" until May 2009 when he went to work at Empire Theatres. Ms. Conrad says Anthony worked the night shift at Empire Theatres and earned minimum wage there, as well. Anthony remained at Empire Theatres until July 2010 when he went to work at New Era Technologies. His work at New Era ended August 19, 2011. At that employment he earned $11.19 per hour and could earn overtime and a bonus, according to his paystubs.

[74] Anthony was laid off from New Era and decided to return to school. He moved back into his mother's home in June 2011. He was accepted into the accounting technician course at Eastern College where he currently studies. This course is thirty-two weeks long: it began on September 17, 2011 and it ends on June 15, 2012. The course reports from Eastern College indicate Anthony attends regularly and has scored extremely well in his exams. Ms. Conrad says that Anthony didn't quit his job, but his application for Employment Insurance benefits was rejected on the basis that he had quit. It seems, from what Ms. Conrad says, that Anthony's Record of Employment indicated he had quit, rather than being laid off.

[75] Materials from Eastern College say that the cost of tuition, books and taxes is $9,433.00.

[76] While he was living away from home, Anthony lived with his girlfriend and shared expenses with her. Ms. Conrad says that when Anthony decided to return to school, he couldn't afford to continue this arrangement, so he returned to Ms. Conrad's home. While he was on his own, Anthony purchased a car and incurred other financial obligations, such as a car loan, a credit card and a cell phone.

Is Anthony a "dependent child"?

[77] Section 2(c) of the *Maintenance and Custody Act* defines a "dependent child" as a child who, if over the age of majority, "is unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or provide himself with reasonable needs". Since Anthony is over the age of majority, in order to be a dependent child, he must be unable "by reason of illness, disability or other cause, to withdraw from the charge of the parents or provide himself with reasonable needs".

[78] It is a factual determination whether a child is dependent, according to Chief Justice MacDonald in *Harris*, 2006 NSCA 79, at paragraph 10.

[79] In *Martell v. Height*, 1994 CanLII 4145 (NS CA), the Court of Appeal heard an appeal relating to a twenty-one year old who, after completing a B.A., was studying cartography. At issue was whether the twenty-one year old remained "a child of the marriage" pursuant to section 2(1) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 (that section is the *Divorce Act*'s parallel to the "dependent child" provision of section 2(c) of the *Maintenance and Custody Act*). Writing for the entire Court of Appeal, Justice Freeman said at paragraph 8:

> As a general rule parents of a *bona fide* student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency.

[80] This decision was considered in *MacLennan*, 2003 NSCA 9 where Justice Cromwell wrote the Court of Appeal's unanimous reasons. In *MacLennan*, 2003 NSCA 9, the issue was whether the trial judge erred in concluding that a twenty-one year old would be a "child of the marriage" within the meaning given that phrase by the *Divorce Act*, if he returned to full time university attendance in the coming weeks. The trial judge had evidence that the twenty-one year old was living at his mother's, "had substantial student loan obligations, had enjoyed a measure of success in his previous two years of university study, but had been unable to return to university for financial reasons" according to Justice Cromwell's summary of the case, at paragraph 42. The Court of Appeal held that the trial judge didn't err in concluding that the young person would be a child of the marriage if he returned to university in the near future.

[81] Looking at Anthony's particular circumstances, I conclude that he is a dependent child. Anthony has completed high school and been able to support himself through employment. He has been able to find work at which he earns more than minimum wage. History shows that Anthony's high school education has prepared him for employment with low wages and little security. He has come to realize this and has undertaken further study. He's successfully applying himself to his studies. While at Eastern College, Anthony isn't able to support himself. His mother provides him with spending money and pays for his groceries. Anthony's car has been parked: he cannot afford to insure it and he is "quite far in arrears" of his car loan payments.

How much maintenance should Mr. Skerry pay for Anthony?

[82] Because Anthony's over the age of majority, maintenance is considered pursuant to section 3(2) of the *Nova Scotia Child Maintenance Guidelines*. According to this section, the amount of maintenance payable for Anthony is the amount determined by applying the *Guidelines* as if he was under the age of majority; or, if that approach is inappropriate, I'm to order an amount that I consider to be appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to Anthony's maintenance.

[83] Ms. Conrad says she incurs an additional cost of $20.00 to $25.00 each week for gas (Anthony uses her car to get to Eastern College) and an additional cost of $100.00 each month for groceries. She says she provides him with $50.00 each month in spending money. The education expense of $9,433.00 is not payable until he completes his course, according to Ms. Conrad. Anthony is already looking for work, including applying for a three year term position in Nunavut.

[84] Ms. Conrad asked me to award her $200.00 each month as maintenance for Anthony. This is approximately eighty percent of the direct cost she says she incurs for Anthony.

[85] At his income of $33,060.00, if Mr. Skerry was ordered to pay maintenance for two children (Breana and Anthony), he'd be required to pay $480.00 each month. The difference between the amount paid for one child and two is roughly the $200.00 that Ms. Conrad seeks for Anthony.

[86] Neither parent suggested that the amount of maintenance dictated by section 3(2)(a) of the *Guidelines* was inappropriate. Neither parent provided me with the information necessary to consider whether some other amount of maintenance might be appropriate: I know each parent's income, but I don't have information about their expenses or other circumstances that would enable me to perform the analysis required of section 3(2)(b) of the *Guidelines*.

[87] I order that Mr. Skerry pay child maintenance of $480.00 for his children, Breana and Anthony. This payment shall begin on January 15, 2012.

Retroactive child maintenance for Breana

[88] Ms. Conrad asks that I order maintenance for Breana retroactive to May 2008. She filed her application in July 2010. In her affidavit of September 9, 2010, Ms. Conrad said that "Mr. Skerry has

been contributing to the support of his daughter "Breana" for approximately ten years until he formed another relationship with a woman from our community two and one-half years ago. Since he met this woman he has ceased paying child support completely." Ms. Conrad learned of Mr. Skerry's other relationship in April 2010. Shortly thereafter, she filed her application. An order was put in place in December 2010 providing for Breana's interim maintenance.

[89] In deciding whether to make a retroactive award, the competing principles of certainty and flexibility are to be balanced, and the core principles of child maintenance respected. The core principles of child maintenance were identified by the Supreme Court of Canada in *Richardson*, 1987 CanLII 58 (S.C.C.) and *Willick*, 1994 CanLII 28 (S.C.C.) and were endorsed in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 38: child maintenance is the child's right; the child's right to maintenance survives the breakdown of the parents' relationship; child maintenance should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship ended; and the amount of child maintenance varies, based upon the parent's income.

[90] *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, instructs me to consider: the reason for Ms. Conrad's delay in claiming maintenance; Mr. Skerry's conduct; Breana's past and present circumstances; and whether a retroactive award would result in hardship in deciding if a retroactive award is appropriate. All of these factors must be considered and no one factor on its own determines whether a retroactive award is appropriate, according to Justice Bastarache, who wrote for the majority of the Supreme Court of Canada in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 99.

[91] I deal with Ms. Conrad's claim for retroactive maintenance last because in order to consider whether a retroactive award would constitute hardship, I need to know Mr. Skerry's current child maintenance.

Ms. Conrad's delay

[92] There was no evidence of why Ms. Conrad delayed bringing her application for Breana's maintenance. According to her September 2010 affidavit, she knew that Mr. Skerry wasn't providing for Breana as he'd provided for her in the past.

Mr. Skerry's conduct

[93] I have no evidence of Mr. Skerry's conduct beyond his failure to support Breana during the retroactive period.

Breana's past and present circumstances

[94] Breana's past circumstances were not addressed directly. I have evidence of her mother's earnings, which would have maintained Breana in the absence of maintenance from Mr. Skerry. In

2008, Ms. Conrad earned $43,775.00 and in 2009, she earned $48,373.00. Her earnings in 2010 were $38,133.00. I wasn't provided with information about Ms. Conrad's income in 2011.

[95] I was given evidence of Breana's participation in activities and I have reviewed this elsewhere. She's been heavily involved in activities and there was no indication that her involvement was curtailed for financial reasons.

Hardship

[96] Neither parent offered evidence of hardship. I am aware that the order I am making for prospective maintenance for Breana and Anthony consumes more than eighteen percent of his gross income. More than seventeen percent is paid in income tax. Without considering his Canada Pension Plan or Employment Insurance premiums, Mr. Skerry's disposable income is less than $1,800.00 monthly.

[97] While retroactive awards may be made, they are not always appropriate. This is not an appropriate case to award child maintenance retroactively: Ms. Conrad's delay is not reasonable, Mr. Skerry's failure to support Breana does concern me, Breana did not go without during the retroactive period and, based on Mr. Skerry's income, I am concerned that a retroactive award will compromise his ability to meet his prospective obligation.

[98] Mr. Skerry's current maintenance obligation is for both Breana and Anthony. I do not want to undermine meeting both children's current needs by ordering maintenance to meet a past (and passed) obligation. I dismiss Ms. Conrad's application for retroactive maintenance for Breana.

Conclusion

[99] With regard to child maintenance, I dismiss Ms. Conrad's claim for retroactive maintenance. In terms of prospective maintenance, Mr. Skerry shall pay monthly child maintenance for Anthony and Breana of $480.00 pursuant to section 3 of the *Guidelines*. He shall pay an additional $28.04 pursuant to section 7 of the *Guidelines* for Breana. Following the pattern of the interim order, I order that this amount, totalling $508.04, be paid in two equal instalments of $254.02 on the first and fifteenth of each month, starting on January 15, 2012.

[100] With regard to Breana's care and custody, when a decision about Breana's discretionary health care, education or religion arises and the parents' consent is required, the parent who becomes aware of this decision must notify the other parent as soon as possible of the issue and what she or he thinks is in Breana's best interests. If one parent has information which is relevant to the decision, she or he must provide that information to the other as soon as possible. If there is any deadline by which a decision must be made, this must be communicated as soon as it is known. The parent who is advised must respond prior to the deadline, identifying the decision he or she believes is in Breana's best interest. If there is no response, then the parent who initiated the discussion may make the decision. If the parties disagree, Ms. Conrad shall make the decision.

[101] Neither parent may make any major developmental decision regarding Breana without the consent or acquiescence of the other, except on an emergency basis. In the event of an emergency, Ms. Conrad may contact Mr. Skerry by whatever means enable the speediest contact.

[102] Each parent shall share with the other any information he or she receives concerning Breana's health, education, recreational activities and the like. Lynn Conrad shall complete Breana's school registration identifying Mr. Skerry as a contact person and provide Mr. Skerry with school and recreational activity notices and Breana's report card within a one week of receipt.

[103] Each parent is entitled to request information of third parties (health care providers, educators and others involved with Breana) who shall be entitled to respond to the request without requiring consent from the other parent to release information.

[104] Starting March 9, 2012, Breana shall have access with her father every second weekend from Friday at 7 p.m. until Sunday at 7 p.m. If Mr. Skerry will not or cannot ensure that Breana attends her activities on his weekend, then his access with her will be forfeit. Breana shall have access with him every Monday evening from 6 p.m. until 9 p.m. and, during this time, he is to be responsible for taking Breana to any scheduled activities. Breana shall have additional time with Mr. Skerry on three days' notice to Ms. Conrad. If Breana has activities during this time, Mr. Skerry is responsible for her transportation to and from them.

[105] Each year, Breana will be with Mr. Skerry on December 24 from 4 p.m. until 9 p.m., and on December 25 from 11 a.m. until 2 p.m. and from 8 p.m. on December 25 until 8 p.m. on December 26. She shall be with Ms. Conrad otherwise.

[106] If either parent wants to travel with Breana within North America (but outside Canada) for a period of less than four days, she or he shall give the other parent seven days' written notice and provide an itinerary five days before the trip. Where a parent wants to travel with Breana outside North America for any period of time or within North America (but outside Canada) for a period of more than four days, he or she shall give the other twenty-one days' notice. Consent shall not be withheld where these notice requirements are met.

[107] The order arising from this hearing will be prepared and sent to Ms. Conrad, Mr. Skerry and to the Maintenance Enforcement Program. The order will require each parent to provide the other with a copy of the complete tax return he or she files and the Notice of Assessment and any Notice of Reassessment received from the Canada Revenue Agency on an annual basis.

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

Halifax, Nova Scotia