

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Francis v. Isadore-Francis*, 2010 NSSC 208

Date: 20100528

Docket: SFSND1206-003735

Registry: Sydney, NS

Between:

Virick Francis

Applicant

v.

Lindia Isadore-Francis

Respondent

Judge: The Honourable Justice Darryl W. Wilson

Heard: January 19, 2010 and April 14, 2010

Written Decision: May 28, 2010

Counsel: Virick Francis, Self-Represented Applicant
Gus Postlewaite, Counsel for the Respondent

By the Court:

[1] The Applicant, Virick Francis, and the Respondent, Lindia Isadore-Francis, are the parents of five children. Only three of the children are dependent at this time. The parties were divorced in November, 2000. A Separation Agreement concluded in 1996 and amended in November, 1998, was incorporated into the Corollary Relief Judgment. The agreement provided for joint custody of the children - day-to-day care with the mother and reasonable access with the father. The father was not required to pay child support since his annual income of \$7,000.00 was below the *Table* amount required to pay child support.

[2] The Corollary Relief Judgment was varied by consent in July, 2003. The father had been elected as a Band Councillor for the Eskasoni First Nation Community and was employed as a social and economic development officer with the Eskasoni Band Council. Income from both sources was exempt from federal and provincial income taxes. The parties consented to an imputed income of \$90,534.00 for purposes of determining child support. The father was ordered to pay child support of \$1,482.00 per month for three dependent children.

[3] The father was dismissed from his employment as a development officer in 2006. He challenged his dismissal. At the same time, in July, 2006, he applied to reduce his child support obligation. In determining his child support obligation, his annual income was fixed at the tax-exempt amount of \$42,000.00. The father's child support obligation was varied to \$959.00 per month, effective March 1, 2007, based on an imputed annual income of \$51,219.47. The varied order also indicated that the father had over-paid his child support obligation in the amount of \$3,485.00 for the period June 1, 2006 to February 28, 2007. The mother was ordered to repay this amount at the rate of \$100.00 per month, which was to be deducted from the father's ongoing child support payment.

[4] Soon after the order was issued, the father was re-instated to his position as a development officer for the Eskasoni Band Council and was reimbursed for the income lost due to his dismissal.

[5] The father had received a severance payment on his dismissal and was receiving employment insurance benefits during part of the time he was not

employed. The severance payment and EI benefits were repaid out of the lump-sum he received for wages lost when he was re-instated to his former position.

[6] The father said he expected to be returned to his position as a Development Officer with the Band Council. The mother said she did not apply for an increase in child support when the father was re-instated to his former position because the father told her he would arrange to change the order. On April 26, 2007, he applied to vary the order that was issued in February, 2007. He continued the child support payments at the rate of \$1,482.00 per month, despite the fact that the varied order required him to pay only \$959.00 less \$100.00 for his over-payment. The father's application of April 26, 2007, did not proceed to a resolution but has never been withdrawn or dismissed.

[7] The father paid monthly child support of \$1,482.00 until December, 2008, when he stopped paying child support all together. The father had built up a large credit through the Maintenance Enforcement Program because he was paying more support than the amount of the varied order. The father was not re-elected as a Band Councillor in the November, 2008 election. By December, 2008, his only source of income was his employment as a development officer. By application dated December 22, 2008, the father requested a reduction in the amount of his child support obligation because he lost the honorarium as a Band Councillor.

[8] The mother filed a response to the father's variation application in April, 2009. The mother requested an increase in the *Table* amount of child support, plus a Section 7 contribution towards the cost of orthodontic treatment for the dependent child, Hailey. The mother filed an amended response in March, 2010, requesting a retroactive increase in the *Table* amount of child support to January 1, 2007.

[9] The father left his employment as a Development Officer early in 2010 to stay at home and care for his young children from a new relationship. He received a severance package and was receiving EI benefits at the time of the court hearing.

[10] The issues for the court's determination include:

- (1) Should there be a retroactive variation of the amount of the father's child support obligation to January 1, 2007?

- (2) What is the father's income for purposes of determining his child support obligation?
- (3) What is the effective date of payment of the father's child support obligation?
- (4) Should income be imputed to the father for purposes of determining his child support obligation?

CONCLUSION

[11] Roscoe, J.A. in **Rafuse v. Conrad**, 205 N.S.R. (2d) 46 at paragraphs 24 and 25 stated:

24 However, one of the policy considerations as noted in *L.S. v. E.P.* is that an order for support is presumed to be correct at the time it was made. At para 48 , Justice Rowles pointed out:

A previous court judgment is assumed to be correct and should be respected unless it is reversed on appeal or varied. In *Willick v. Willick*, [1994] 3 S.C.R. 670 at 687-88 Sopinka J. said the following with respect to variation of a maintenance order made under the Divorce Act:

Therefore, in a variation proceeding, it must be assumed that, at the time it was made, the original child support order or the previous variation order accurately assessed the needs of the children having regard to the means of the parents. As such, the correctness of the previous order must not be reviewed during the variation proceeding. The previous order will not be departed from lightly and will only be varied if the requirements under s. 17(4) of the Divorce Act are properly satisfied.

25 A rational corollary of that policy would be that in the absence of any fraud or deception or other reason to set it aside, the order continues to be appropriate for at least some period of time beyond the date it became effective.

[12] Section 17(1)(a) and Section 17(4) of the *Divorce Act* provides:

Order for variation, rescission or suspension

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively, (a) a support order or any provision thereof on application by either or both former spouses;

...

Factors for child support order

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[13] The court has jurisdiction to retroactively vary the amount of child support but absent fraud or deception, not to the effective date of the last order. I am not able to conclude there was fraud or deception involved in the determination of the variation order in February, 2007. At the time of the last variation hearing, in addition to his honorarium, the father had received a severance package and EI benefits, which do not appear to have been considered in fixing the amount of his child support obligation. The mother was represented by counsel, who was involved in drafting the variation order, which was not appealed. That order is presumed to be correct at the time it was made.

[14] There was a material change in the father's financial means in April, 2007. He was re-instated to the position of a development officer with the Eskasoni Band Council at an annual salary of \$35,320.00. He received a lump sum payment of \$20,770.00 which related to income he earned in the period covered by the variation order of February, 2007. Most of this lump sum was used to re-pay the severance package and EI benefits he received after his dismissal.

[15] His annual income for purposes of determining child support is fixed at \$77,320.00 consisting of \$42,000.00 honorarium as a Band Councillor and \$35,320.00 employment income as a development officer. Both of these incomes were exempt from federal and provincial income taxes.

[16] The court's jurisdiction to vary the February, 2007 order effective May 1, 2007 is the application of the father in April, 2007, to prospectively vary that order and the application of the mother in March, 2010, to retroactively vary that order. I

grant the mother's request for a retroactive variation. There was no unreasonable delay by the mother in bringing her application. She relied upon the father's assurance he would change the last order. The father did not disclose his income as he was required to do by previous orders until his application in December, 2008. The father had the ability to pay the order and, in fact, continued his payments during this time. The mother subsidized the children's needs. The children would benefit from the retroactive support order. The father would not suffer undue hardship.

[17] Section 19 of the *Federal Child Support Guidelines* provides:

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

(b) the spouse is exempt from paying federal or provincial income tax;

[18] In determining the amount of income to be imputed to the father because he is exempt from paying federal and provincial income tax, I have used an effective tax rate of 33.59%. This percentage was provided to the court by counsel for the mother as the effective tax rate on an annual income of \$74,904.00, which is close to the court's determination of \$77,320.00. The father's annual income for purposes of determining his child support obligation is \$116,428.00 ($\$77,320.00 \div .6641$). The *Table* amount of support for three children based on annual income of \$116,428.00 is \$1,997.00.

[19] The father is ordered to pay child support of \$1,997.00 beginning May 1, 2007.

[20] There was a further change in the father's financial means in December, 2008, when he was not re-elected as a Band Councillor. His income for purposes of determining his child support obligation at this time consisted of his tax-exempt salary of \$37,076.00 as a development officer. Applying an effective tax rate of

23.11% as provided by counsel for the mother, the father's annual income was grossed up to \$48,218.00 ($\$37,076.00 \div .7689$). The *Table* amount of support for three children based on an annual income of \$48,218.00 is \$907.00.

[21] The father is ordered to pay child support beginning December 1, 2008, in the amount of \$907.00 per month.

[22] The father voluntarily left his employment with the Eskasoni Band Council in January, 2010 because he wanted to remain at home caring for two young children from another relationship. He did not present any evidence indicating the necessity of caring for these children in the face of his support obligations to his children with Ms. Isadore. The father received a severance payment of \$7,000.00 when he left his employment and was receiving EI benefits at the time of the hearing.

[23] The mother requests that income be imputed to him for purposes of his child support obligation based on his intentional unemployment.

[24] The father has not established on a balance of probabilities his unemployment is required by the needs of a child under the age of majority and his request for a reduction in the amount of his child support obligation based on his current EI benefits is denied.

[25] The issue of the mother's application for a contribution to the cost of Hailey's orthodontic treatment was considered and dealt with at a separate hearing.