

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** *Vardy v. Vardy*, 2019 NSSC 285

**Date:** 20190920  
**Docket:** 1206-5970  
**Registry:** Sydney

**Between:**

Paul Berkley Vardy

Applicant

v.

Sylvia Ann Mortimer

Respondent

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Lee Anne MacLeod-Archer  
**Heard:** August 22, 2019 in Sydney, Nova Scotia  
**Written Decision:** September 20, 2019  
**Subject:** Provisional Hearing  
**Summary:** Applicant sought variation based on undue hardship arising from access expenses, which was rejected, but change in circumstances and undue hardship based on job loss post-filing proven.  
**Issues:** (1) Variation Application (Child Support) - Provisional  
(2) Undue Hardship  
**Result:** Provisional Variation Granted

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Respondent

**Judge:** The Honourable Justice Lee Anne MacLeod-Archer

**Heard:** August 22, 2019, in Sydney, Nova Scotia

**Written Release:** September 20, 2019

**Counsel:** Paul Berkley Vardy, Self-Represented  
Sylvia Ann Mortimer, Not Participating

## **By the Court:**

### **Facts**

[1] Mr. Vardy is the father of two children, who live with Ms. Mortimer in Ontario. The parties' divorce order was issued on November 23, 2010. A Corollary Relief Order (CRO) was issued the same day.

[2] Mr. Vardy filed a Notice of Variation Application (Provisional) on March 4, 2019. With that application, he also filed a statement of undue hardship circumstances. He cites excessive travel expenses and summer child care costs as the basis of his hardship circumstances.

[3] Ms. Mortimer was notified of the provisional variation, but chose not to accept the Nova Scotia court's jurisdiction by participating, which is her right. She is entitled to address the provisional application when it is reviewed for confirmation or variation in Ontario. I'm satisfied that the requirements of section 18 of the *Divorce Act* [RSC 1985, c 3 (2nd Supp)], have been met.

[4] Mr. Vardy was employed with Marine Atlantic at the time he filed his variation application, but was terminated on May 3, 2019. At the time of the hearing, he was in receipt of employment insurance (EI) benefits. He currently

receives \$522.00 net every week from EI. His income from Marine Atlantic in 2017 was \$88,534.00. He didn't file his 2018 tax return with the court.

[5] Mr. Vardy cashed some RRSPs after he lost his job, and used that income to meet expenses while he awaited receipt of EI benefits. He received no severance pay, although he grieved his termination and may receive compensation in future. He expects to receive approximately \$500.00 from another grievance against Marine Atlantic, relating to a shift differential that he's owed. In addition, he's entitled to receive a pension payout in the range of \$60,000.00.

[6] Mr. Vardy remarried in October, 2017. His spouse is a permanent, full-time employee with the Federal Government. She earned \$76,376.00 in 2017. She is the mother of two children who reside with her and Mr. Vardy, and whose father pays support for them of \$570.00 per month, plus he shares some section 7 expenses.

[7] The CRO which Mr. Vardy seeks to vary provides for payment of the table amount of child support of \$889.00 per month. It also requires him and Ms. Mortimer to share transportation expenses for the children to have access with Mr. Vardy in Nova Scotia. Since the CRO was issued, Mr. Vardy has adjusted his

child support annually to reflect his increases in income. When he filed his Application, he was paying \$1,240.00 per month.

### **Reasons and Decision**

[8] Child support in this case is payable under s.3(1)(a) of the *Child Support Guidelines* [SOR/97-175], which contains a presumptive rule that, for children under the age of majority, the table amount of support will be paid based on the payor's income. Section 3(3) provides that payment is to be made according to the table for the province of residence. Mr. Vardy resides in Nova Scotia.

[9] Section 17(4) of the *Divorce Act* requires that, before I make an order varying the child support payable, I must be satisfied that there's been a material change in circumstances since the CRO was issued. A material change involves circumstances which differ from what was contemplated at the time the order was granted. It must be material to the children's needs, or his ability to pay or otherwise meet the needs of the children. The onus is on Mr. Vardy to prove such a change.

[10] In advancing a hardship claim, Mr. Vardy relies on s.10 of the *Child Support Guidelines* which states:

10 (1) *On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.*

*Circumstances that may cause undue hardship*

(2) *Circumstances that may cause a spouse or child to suffer undue hardship include the following:*

- a. The spouse has responsibility for an unusually high level of debts reasonable incurred to support the spouses and their children prior to the separation or to earn a living;*
- b. **The spouse has unusually high expenses in relation to exercising access to a child;***
- c. The spouse has a legal duty under a judgment, order or written separation agreement to support any person;*
- d. The spouse has a legal duty to support a child, other than a child of the marriage who is...*
  - i. Under the age of majority, or*
  - ii. The age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and...*
- e. The spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.*

*Standards of living must be considered*

(3) *Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion of that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.*

*Standards of living test*

(4) *In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.*

*Reasonable time*

(5) *Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.*

[emphasis added]

[11] The Nova Scotia Court of Appeal recently revisited the test for determining an undue hardship claim in **Reid v Faubert**, 2019 NSCA 42. In that decision, the court confirmed that claims of undue hardship involve a two-step process: step one involves assessing the claim of undue hardship according to the Guidelines; step two involves a comparison of household standards of living **only if** undue hardship is proven.

[12] In **Pretty v. Pretty**, 2011 NSSC 296, Justice Forgeron reviewed some legal principles applicable to claims of undue hardship at para. 78, which provides, in part, as follows:

- A narrow definition of “undue hardship” must be adopted to ensure that the objectives of the *Guidelines* will not be defeated. Only exceptional circumstances will justify a reduction in child support; **Hanmore v. Hanmore, supra**, at Para 10;
- The burden of proof is on the person claiming the relief: **Hanmore v. Hanmore, supra**, at para 11;
- “Hardship” is defined as “difficult, painful suffering”, and “undue” is defined as “excessive, disproportionate.” To succeed, one must prove that the hardship is exceptional, excessive, or disproportionate in the circumstances. This produces a “very steep barrier” to a successful claim: **Hanmore v. Hanmore, supra**, at paras 11 and 17, and quoting from **Barrie V. Barrie** (1998, 230 A.R. 379 (Alta. Q.B.);

- Parents are expected to exhaust all efforts to increase their incomes and decrease discretionary expenses before consideration can be given to reduce a child support obligation: **McPhee v. Thomas**, 2010 NSSC 367.

[13] I have approached Mr. Vardy's application from two perspectives: first, as originally presented; and second, as his circumstances have changed since he lost his job.

[14] Mr. Vardy claims that paying travel and summer childcare costs on top of the table amount of child support creates undue hardship for his family. The onus is on him to satisfy me that he meets the test: that he suffers not only hardship, but also that it's undue. I must interpret the *Guidelines* narrowly, so as not to defeat their primary objective, which is "to establish a fair standard of support for children that will ensure that they continue to benefit from the financial means of both spouses after separation".

[15] Mr. Vardy filed a Statement of Income on March 4, 2019 which shows his monthly income at that time (net of union dues) at \$6,843.68. This equates to a gross annual income of \$82,124.16 for purposes of the tables. His Statement of Expenses filed on the same date shows a net monthly shortfall of \$668.67, plus income tax payable on his gross income.



[16] There are some problems with his budget. First, it allows for the full cost of the expense, not a pro-rated share as between him and Ms. Laderoute. For example, he claims the full cost of the mortgage payment of \$1,671.32 per month. In addition, he's included Ms. Laderoute's Visa payment and her children's activity expenses of \$115.00 per month, but he hasn't included her income in calculating a surplus or shortfall.

[17] To May 1, 2019, Ms. Laderoute earned \$ 28,591.30. Assuming that she continues to work at the same level for the rest of the year, she can expect to earn over \$85,000.00. Net of taxes, that equates to over \$5,000.00 per month. This may be a conservative figure, as she testified that she now accepts overtime shifts, because Mr. Vardy is available to stay with her children.

[18] When her disposable income is added to the budget, along with the child support Ms. Laderoute receives for her children, the expenses presented by Mr. Vardy are well within their means. Mr. Vardy failed to prove a material change in circumstances and undue hardship in that scenario.

[19] However, based on his termination, I am satisfied that there has been a material change in circumstances. Mr. Vardy lost his employment in May, 2019. It seems unlikely that even if his grievance is successful, he will return to work

with Marine Atlantic. His income has been significantly reduced, and although he's applied for jobs, he hasn't yet secured alternative employment.

[20] His Record of Employment shows that his final pay period with Marine Atlantic was May 16, 2019, and that his earnings to that point were \$46,189.67. With 30 weeks of EI until the end of the year, his income will total approximately \$63,289.67 (exclusive of the RRSPs he cashed after his termination).

[21] Mr. Vardy's budgeted expenses total \$7,634.60 per month, which includes \$500.00 per month for access costs. He also includes \$50.00 per month for childcare, though he lists an annual cost of \$1,000.00 in his Statement of Undue Hardship Circumstances. For reasons I'll explain below, I do not consider that expense as reasonable as it relates to Mr. Vardy's children. Otherwise, I accept that Mr. Vardy has decreased his discretionary expenses to a reasonable level.

[22] Mr. Vardy's net monthly income from EI is approximately \$2,260.00. That income, along with his wife's net income of at least \$5,000 per month, plus the child support she receives of \$570.00 per month, will leave them with a surplus of about \$145.00 per month on the budget presented. That surplus doesn't include any savings in pension contributions and union dues while Mr. Vardy is unemployed, nor savings in gas expenses for travel to work.

[23] Mr. Vardy has taken appropriate steps to address his termination through a grievance. He's also undertaken a job search in the local area. The uncertainty at this time is whether he will secure an alternative position, and whether it will pay equivalent income. Until that situation sorts itself out, EI benefits are his sole source of income.

[24] I recognize that Mr. Vardy cashed some RRSPs, which he says were used to support the family while he waited for his EI benefits to commence. That is a non-recurring source of income which I haven't considered in assessing his income.

[25] I also recognize that he may be entitled to a pension payout in the range of \$60,000.00. However, in my view, that pension payout should not be considered income. It is an asset which accumulated for the purpose of supporting Mr. Vardy in his retirement. Those monies should be reinvested. Likewise, I haven't considered any income from his remaining RRSPs. They are a retirement fund for future, not a source of income at present.

[26] Mr. Vardy's projected income in 2019 of \$63,289.67 constitutes a change in circumstances which affects his ability to meet the needs of the children. The Nova Scotia table amount for two children, based on an income of \$ 63,289.67 per annum, is \$932.86 per month.

[27] Mr. Vardy's monthly average for access costs is \$500.00, which on top of his varied table amount payable, brings his monthly child support obligation to \$1,432.86.

[28] I have reviewed Mr. Vardy's statement of undue hardship with this figure in mind. Based on the budget presented in evidence, as well as the adjustments I've identified, his household will have a monthly shortfall of about \$700.00 per month while he's on EI. Even recognizing clause 12 of the CRO, this is excessive and disproportionate to his income and ability to pay at present. This brings Mr. Vardy within s.10(2)(b) of the *Guidelines*.

[29] Having made that determination, I must next assess the household standards of living, in order to determine whether I should exercise my discretion under 10(1) in reducing his child support payment.

[30] Mr. Vardy provided a comparison of household incomes. However, he was unable to do so based on actual figures, because he doesn't have Ms. Mortimer's financial information. He has estimated her household income, based on the province of residence and occupations of Ms. Mortimer and her spouse.

[31] In the circumstances, I accept this as a reasonable approach. None of the *Divorce Act*, the *Child Support Guidelines* or Nova Scotia civil procedure Rule 59

provide guidance in this respect. Further evidence will likely be required under s.19 of the *Divorce Act* in Ontario. In the meantime, I must make a decision on the evidence before me.

[32] Mr. Vardy has included in his calculations the annual average access costs he pays of \$6,000.00. I accept that figure as valid, based on the evidence.

[33] However, he's also included annual childcare costs of \$1,000.00 which is not reasonable or supported by the evidence. His children are now of an age (12 and 14) where childcare may not be necessary. In addition, in the emails he attached to his affidavit, it's clear that Ms. Mortimer offered to solve that problem by making her parents available for childcare when the children visit Cape Breton. Further, no childcare receipts or other evidence of expenses incurred were tendered in evidence.

[34] He also underestimated his wife's income for 2019. And he used a child support figure of \$1,225.00 per month, which is higher than what he'd be required to pay based on his EI income.

[35] On my review of the numbers, even after adjustment for the issues identified above, and assuming that Ms. Mortimer and her husband earn at least as much as

the salaries Mr. Vardy used, his household income and standard of living still falls below that of Ms. Mortimer. The ratio I calculate is 46% to 54%.

[36] I must next decide whether I will exercise my discretion under s.10(1) or 10(5) of the *Guidelines*. Mr. Vardy asks that he be required to pay only 50% of the table amount, and no child support for the months of July and August when his daughters are with him for access. Alternatively, he requests that he pay no support during the summer, and that Ms. Mortimer be required to pay all travel costs.

[37] I find this to be an appropriate case for an adjusted monthly payment under s.10(5) for a specified period of time. I don't accept Mr. Vardy's requests for relief. Instead, I direct that Mr. Vardy pay child support of \$300.00 per month, effective May 30, 2019 and continuing each month for so long as he is unemployed and reliant solely on EI income. I find this to be an appropriate case for an adjusted monthly payment under s.10(5) for a specified period of time. I don't accept Mr. Vardy's requests for relief. Instead, I direct that Mr. Vardy pay child support of \$300.00 per month, effective May 30, 2019 and continuing each month for so long as he is unemployed.

[38] Mr. Vardy must notify Ms. Mortimer immediately upon securing employment income. He must provide her with the name of his employer, a copy of his offer or contract, and copies of his first three paystubs. Until then, he must provide her with quarterly updates on his job search, including the names of employers to whom applications are submitted, and copies of any rejection letters or offers of employment which he chooses not to accept.

[39] In addition, in the event that he receives compensation for his termination (or for any other reason) from Marine Atlantic, Mr. Vardy must immediately notify Ms. Mortimer and disclose documents confirming the amounts paid to him. Upon receipt of such payment, either party may request a review of Mr. Vardy's child support obligations, if they cannot agree on whether he owes a retroactive adjustment for child support, and if so, the amount of same.

## **Conclusion**

[40] I conclude that there has been a change in circumstances material to Mr. Vardy's ability to pay the table amount of child support. His income has declined because of his termination. I find that he faces undue hardship if required to pay the full table amount of child support, plus access costs while unemployed. He

will pay a reduced table amount of \$300.00 per month for so long as he remains unemployed. He will also remain responsible for his share of the children's travel costs as per the Corollary Relief Order.

MacLeod-Archer, J.



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**FAMILY DIVISION**

**Citation:** *Vardy v. Vardy*, 2019 NSSC 285

**Date:** 20190920

**Docket:** 1206-5970

**Registry:** Sydney

**Between:**

Paul Berkley Vardy

Applicant

v.

Sylvia Ann Mortimer

Respondent

**ERRATUM: September 23, 2019**

**Judge:** The Honourable Justice Lee Anne MacLeod-Archer

**Heard:** August 22, 2019, in Sydney, Nova Scotia

**Written Release:** September 20, 2019

**Counsel:** Paul Berkley Vardy, Self-Represented  
Sylvia Ann Mortimer, Not Participating

**Erratum:**

Paragraph 36: “If he opts to cash more RRSPs while he’s unemployed” was removed.

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**Date:** 20190920

**Docket:** 1206-5970

**Registry:** Sydney

**Between:**

Paul Berkley Vardy

Applicant

v.

Sylvia Ann Mortimer

Respondent

**ERRATUM: September 26, 2019**

**Judge:** The Honourable Justice Lee Anne MacLeod-Archer

**Heard:** August 22, 2019, in Sydney, Nova Scotia

**Written Release:** September 20, 2019

**Counsel:** Paul Berkley Vardy, Self-Represented  
Sylvia Ann Mortimer, Not Participating

**Erratum:**

Paragraph 37: “I find this to be an appropriate case for an adjusted monthly payment under s.10(5) for a specified period of time. I don't accept Mr. Vardy's requests for relief. Instead, I direct that Mr. Vardy pay child support of \$300.00 per month, effective May 30, 2019 and continuing each month for so long as he is unemployed” was added.