

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Hendrix v. Rivard*, 2017 NSSC 277

Date: 2017-10-30

Docket: *SFSNMCA* No. 042882

Registry: Sydney

Between:

Terry John Hendrix

Applicant

v.

Janine Kathryn Rivard

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: August 29, 2017, in Sydney, Nova Scotia

Written Release: October 30, 2017

Counsel: Jennifer MacDonald for the Applicant
Janine Kathryn Rivard, Self-represented Respondent

By the Court:

FACTS:

[1] Mr. Hendrix applied on May 17, 2017 to vary his support obligations under an Ontario Superior Court order issued March 11, 2003. It required him to pay support for the two children of the marriage in the amount of \$340.00 per month. This table amount was based on an annual income of \$23,982.40.

[2] The Supreme Court of Nova Scotia provisionally varied the Ontario order in 2007. The Nova Scotia order was confirmed by the Ontario Superior court. Under this latest order, Mr. Hendrix was required to pay the monthly table amount of \$313.00 for two children, based on an income of \$21,500.00. The new payments commenced January 1, 2007.

HISTORY OF PAYMENTS:

[3] The Nova Scotia Maintenance Enforcement program (MEP) printout shows a balance owing of \$5,908.90 as of February 1, 2007. It also shows that Mr. Hendrix paid extra child support between April, 2008 and January, 2013 to catch up on these arrears.

[4] In addition, I accept the evidence that Mr. Hendrix started paying an extra \$40.00 per month directly to Ms. Rivard by way of email transfers in April 1, 2013. This brought his monthly payment up to \$353.00/month. He says this was based on an agreement he reached with Ms. Rivard to reflect his increased income the year prior. The extra payments did not go through MEP.

[5] In November, 2015, Mr. Hendrix adjusted the extra amount payable to \$187.00 per month (to bring his total payment to \$500.00/month). He paid that higher figure until March 1, 2016 when he stopped paying support altogether.

[6] Even with these extra payments, Mr. Hendrix would still have underpaid child support according to his level of income in 2014 and 2015. In 2016 the same wouldn't be true. His income that year would have been in the range of \$9,000.00 (exclusive of retraining monies) so he fell under the threshold to pay child support. However, his underpayment in 2014 and 2015 exceeds what he overpaid in 2016 by \$4,050.00 (by my calculation).

MR. HENDRIX'S INCOME:

[7] Mr. Hendrix was employed as a labourer when he was injured. He has been unemployed since March 3, 2015. He requires a hip replacement, but is currently on a lengthy waitlist. He is in receipt of CPP disability benefits, which pay \$751.00 per month.

[8] It is clear that Mr. Hendrix's income increased after the 2007 order. In the 2014 tax year, his line 150 income was \$41,976.00. In 2015 his line 150 income of \$42,244.00. His 2016 T1 Summary shows that his line 150 income was \$20,084.29.

[9] He explained why his income in 2016 was higher than CPP income of \$751.00/month would produce. I accept this explanation that he received a grant to complete retraining after his injury, through which he was able to obtain his health and safety certification. Unfortunately, he was unable to work as a safety officer, because it required a lot of walking. He says he did not receive any extra money for retraining, though the grant was reported on his 2016 tax return.

THE GARNISHEE:

[10] Because he has been unable to work since March, 2015 and stopped paying support in February, 2016, MEP has been garnishing his CPP income to satisfy the current support order.

MR. HENDRIX'S POSITION:

[11] In his original Application, Mr. Hendrix sought termination of child support effective March 1, 2017 and repayment of all overpayments since 2007. However, in counsel's post hearing submissions, she clarified that he seeks variation retroactive to June 1, 2017 only.

REPAYMENT OF GARNISHEED SUMS AFTER JUNE 1, 2017:

[12] Counsel for Mr. Hendrix notes that his sons receive CPP benefits as a result of their father's disability. She acknowledges that CPP benefits are not a replacement for child support, but says that these benefits are relevant to the issue of repayment of sums paid to Ms. Rivard under the garnishee since June 1, 2017 (which she calculates as of September 29 at \$1,217.00). She says that because the

children receive CPP benefits, repayment of the \$1,217.00 would not constitute a hardship to Ms. Rivard.

[13] I have no evidence about Ms. Rivard's financial circumstances, nor the financial arrangements for Taylor, who is attending university and works part-time. I cannot determine whether or not repayment of sums paid since June, 2017 would constitute hardship for Ms. Rivard without that evidence.

[14] Because of the garnishee, Mr. Hendrix says he is unable to support himself. He receives less than half of his monthly CPP payment, with the other monies being directed to MEP under the garnishee.

[15] Mr. Hendrix says he would agree to monthly payments of \$100.00 until the amounts paid to Ms. Rivard since June 1, 2017 under the garnishee are repaid. He argues that payment over time would not create undue hardship to Ms. Rivard.

CHANGE IN CIRCUMSTANCES:

[16] I find there has been a significant change in Mr. Hendrix's ability to work since 2015 and that his income has declined significantly. I accept that he has been unable to work due to a serious hip injury since March, 2015. I accept that although he retrained, he is unable to work as a safety officer, at least pending surgery and recovery. I accept that he has been waiting for surgery since at least October, 2016.

[17] These changes constitute a change of circumstances sufficient to justify variation of the child support payable.

ORDERS:

[18] I am satisfied that Mr. Hendrix's current income falls below the threshold for payment of child support under the Nova Scotia table. Effective June 1, 2017 child support is terminated. Any arrears attributed to him (including fees and interest on such sums) for the time frame since June 1, 2017 are forgiven.

[19] Ms. Rivard was served with Mr. Hendrix's notice of variation application along with supporting documents on June 15, 2017. She has been on notice since then of Mr. Hendrix's request to terminate support, forgive arrears, and receive reimbursement of overpayments. However, I know nothing about her financial circumstances.

[20] I am not prepared to order repayment of sums paid to Ms. Rivard under the garnishee since June 1, 2017. In addition to not knowing her financial circumstances, I find that Mr. Hendrix underpaid from 2013 – 2015, even accounting for the email transfers. If Ms. Rivard received \$1,217.00 between June 1 – September 29, 2017 under the garnishee, this is less than what she would have received if Mr. Hendrix had paid the correct table amount between 2014 – 2015. Equity dictates that Ms. Rivard should not be required to repay any monies in these circumstances.

[21] Counsel for Mr. Hendrix will prepare the order. The file will be sent to Ontario for confirmation.

MacLeod-Archer, J.