

Marmer Penner Newsletter

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EXCEPTIONS TO FRANCIS AND BAKER ALSO KNOWN AS “IS PLESTER BESTER?”

In 1988, former Finance Minister Michael Wilson tried to simplify the *Income Tax Act* (“*the Act*”). Not surprisingly, *the Act* got thicker and more complex, not thinner and simpler. In 1997, the Child Support Guidelines were intended to simplify the calculation of child support and, not surprisingly, many new complexities have arisen.

In October 1997, an appeal was heard from a Readers will recall that where income of the payor exceeds \$150,000 per annum, the Child

master’s decision on interim child support (*Plester v. Plester*). The parties had two children and the husband had an annual income of about \$700,000. The wife’s annual income was \$250,000. The wife submitted monthly child expenses totalling \$4,000.

The master had relied upon the Child Support Guidelines to calculate monthly support at \$7,100.

Support Guidelines (paragraph 4(b)(ii)) permit the court to consider the means and

The husband did not contest the \$4,000 monthly child expense budget put forward by his wife, and relied on it to support his argument that the Child Support Guideline award of \$7,100 per month was “inappropriate”, that is, excessive.

needs of the children and the financial ability of both parents to determine

the child support payable.

Humphreys, J. indicated that one of the purposes of the Child Support Guidelines was to establish a fair standard of support for children, and to ensure that they continue to benefit from the financial means of both spouses after separation. If the income of the non-custodial parent increases after separation, it is intended that the children benefit from the increase, and should not be limited to the standard enjoyed during marriage.

The wife's counsel in Plester referred to *Francis*. However, notwithstanding *Francis v. Baker*, Humphreys, J. found in Plester that the master erred in failing to consider the means of the recipient spouse and the needs of the children in concluding the Guideline amount of \$7,100 was

v. Baker, a decision of Benotto, J. There, the defendant (Baker) had become wealthy after date of separation, having a yearly income of almost \$1,000,000, and a net worth of \$78,000,000, whereas the plaintiff (Francis) was struggling financially. According to the Guidelines, Baker was required to pay \$10,000 per month for two children. He argued that the sheer size of the payment made it inappropriate. The court disagreed, stating "a determination that the table amount is inappropriate can only be made by looking at all the circumstances of the case," and considered the appropriate. Humphreys, J. explained that under the old child support system, the wife would have been required to contribute to the children's expenses with her income. Under the new system, her ability to contribute is still relevant when the

financial ability of each spouse to contribute to child support, and the condition, means, needs, and other circumstances of the children, as well as the objectives of the Guidelines. Madame Justice Benotto ordered the defendant to pay the Guideline amount of \$10,000 per month. Humphreys, J. accepted Benotto, J.'s reasons that "the higher the level of wealth enjoyed by the parents, the more inappropriate the consideration of basic need becomes. The reasonableness of discretionary expenses replaces the concept of need."

income level of the recipient spouse is as high as in this case.

Humphreys, J. added, "I do not see this as discriminating against the children of the wealthy, as counsel for the petitioner characterizes it.

for discretion in the case of certain income levels, and requires the judge to determine if the Guideline amount is appropriate. The needs of the children will always be paramount, but the fairness of the process is protected by the exercise of this discretion.”

In another case also heard in 1997 (*Simon v. Simon*) prior to the release in the decision in *Francis v. Baker*, the payor of child support was a hockey player earning \$1,000,000 US per annum. The court considered that Mr. Simon was unlikely to continue earning this type of income for most of the period that child support was expected to be paid.

Under the terms of a separation agreement, Mr. Simon was paying child support of \$2,200 monthly including \$750 which was paid into a trust for the benefit of the child. The spouse was seeking an increase to \$9,217 pursuant to the Guidelines. McNeely, J. found that the needs of the child did not require the full amount under the Guidelines. Furthermore, as Mr. Simon’s high income was likely of relatively short duration, McNeely, J. added, “it would be unfair and clearly not in the best interest of any child to experience luxuries and a lifestyle that will be of relatively short duration and suddenly reduced.” As a result, the court ordered support of \$5,000 per month of which

\$1,000 was to be paid into a trust account for the child. The Simon case is currently under appeal (argued October 1997 and under reserve) and is expected to be decided based on the decision in the appeal of *Francis v. Baker*.

As can be seen, the assumption that the decision in *Francis v. Baker* will always prevail may not be the case. The appeal of *Francis v. Baker* is expected to be heard in 1999.

This newsletter is intended to highlight areas where professional assistance may be required. It is not intended to substitute for proper professional planning. The professionals at Marmer Penner will be pleased to assist you with any matters that arise.