

Citation: *Kelly v. Lyle*, 2002 YKSC 66

Date: 20021113
Docket: 96-D2814
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

COLLEEN ANNE KELLY

PETITIONER

AND:

KERRY ELWOOD LYLE

RESPONDENT

**REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON**

[1] This is the third application for a variation of the Corollary Relief Order granted in 1997. The basic facts are that there are two children of the marriage, Krysta, born June 12, 1983, and Shane, born September 27, 1986.

[2] In 1997, by Consent Order on the basis of an agreed \$45,000.00 income on the part of the respondent (applicant), the sum of \$787.00 per month was ordered to be paid. This was made up of \$633.00 for child support and \$154.00 for the respondent's share of extraordinary expenses.

[3] In 1999, an application to vary this Corollary Relief Order was denied as being unfair and unreasonable because of apparent financial advantages not shared with the petitioner.

[4] A further application was successfully made in 2001. A variance was allowed and an imputed income of \$35,000.00 was made by the Chambers judge. The amount payable was reduced by allowing \$506.00 per month for support and \$112.00 for extraordinary expenses resulting in a monthly obligation of \$618.00.

[5] These orders all had as their basis income from a business run by the respondent as a sole proprietor. The financial statements of this sole proprietorship are being provided in each case.

[6] In March 2002, because of the fact that the older child had moved out of her mother's home and had commenced to reside common-law with a young man and apparently had actually declared herself to be removed from the care of her parents, the respondent unilaterally reduced his child support payments. He did this on the basis of \$35,000.00 income; and on the basis of the Child Support Guidelines started paying \$304.00 per month for child support and \$42.00 per month for extraordinary expenses. Reduction in extraordinary expenses was proportionally larger because the expenses for the daughter had been larger.

[7] The respondent has paid \$346.00 per month since that time. The records of the Maintenance Enforcement office would show arrears of \$2,176.00, this being the difference between \$787.00 and \$346.00. These figures are provided by the respondent.

[8] The petitioner, however, acknowledges the allegations and agrees that the child Krysta is no longer a child of the marriage and agrees that the arrears, as they may be

shown on the records of the Maintenance Enforcement office, should be cancelled and it is so ordered by the court.

[9] The respondent also seeks a current reduction in both the support payment for Shane and the proportion of extraordinary expenses to be paid by him to reflect his evidence that his average income for the last three years has been \$24,500.00 rather than the previously imputed income of \$35,000.00.

[10] Section 17(4) of the *Divorce Act*, R.S.C., 1985, c.3, provides that before a variation order can be made, there should be proof of a material change in circumstances with respect to the payor's abilities to pay. The evidence actually shows that the circumstances of the respondent have in fact improved. The respondent challenges the finding of a \$35,000.00 income by the Chambers judge in 2001, in that he had concluded at para. 5:

... there are direct benefits he is receiving from the operation of his sole proprietorship which do not appear as taxable income on his income tax returns.

This apparently was done on the basis of affidavit evidence before him and that decision made in 2001 has never been appealed.

[11] I am not to be sitting here in appeal from the order made in 2001. The changes in circumstances since that day are positive and do not therefore justify a downward variation for the sums ordered, except those that flow from the fact that the child Krysta has withdrawn from her parents' care.

[12] The support payments for Shane will now be \$304.00 and \$42.00 for extraordinary expenses, using the figures provided by the respondent on the basis of an income of \$35,000.00, which I cannot alter, there being no change of circumstances.

[13] The respondent also seeks a “sunset” clause to the Child Support Order. This is either already covered by the terms of the *Divorce Act*, s. 2(a) and if not, then is not authorized by law. Should the future disclose that a person is no longer a child of the marriage, an application can be made or an agreement can be reached to discontinue child support. The law does not allow the court to make orders based on only future possibility. Simply quoting the section as a paragraph in a court order would not avoid the possibility of a further application to this court for a variation based on circumstances at the time of such application.

[14] Therefore, the order of the court is that the arrears standing against the respondent be cancelled; that there will be a declaration that the child, Krysta, is no longer a child of the marriage effective April 2002; that the child support payments be varied downward to \$304.00 for child support and \$42.00 for the payment of extraordinary expenses proportionately.

[15] The application for a “sunset” clause is denied.

[16] The matter of costs may be spoken to if advised.

Mr. Justice R.E. Hudson

Mr. Shayne Fairman

Counsel for the Plaintiff

Mr. Kerry Elwood Lyle

Unrepresented