

Citation: *Seely v. Seely*, 2002 YKSC 46

Date: 20020815
Docket: S.C. No. 94-D2506
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

VIRGINIA M. SEELY

PETITIONER

AND:

RICHARD K. SEELY

RESPONDENT

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

[1] This is an application to vary the terms of a corollary relief order. Application is made by the payor, the respondent.

[2] The matter is not free from confusion as there are documents missing, if they did exist, and the parties indicate that if such documents existed, they can only agree with some of its terms. They disagree with other terms as suggested by one party to the other.

[3] The story commences with a separation agreement dated October 12, 1992. In the agreement, child maintenance for one child is dealt with as follows:

5.0 CHILD MAINTENANCE

5.01 The Husband shall pay to the Wife for the support, maintenance and education of the Child a total monthly payment of \$800.00 (the "Maintenance Payments") subject to the following:

- (a) Maintenance Payments shall commence on the 1st day of October, 1992, and shall continue on the 1st day of each and every month thereafter until the Child:
 - (i) reaches the full age of 18 years, no longer resides with the Wife and is no longer a full time student at a school, college or university;
 - (ii) marries or becomes self-supporting; or
 - (iii) reaches the full age of 23 years;whichever occurs first.
- (b) the Wife shall receive the Family Allowance paid by the Government of Canada or such other payments as the Government of Canada shall substitute for the Family Allowance for the Child in addition to the Maintenance Payments;
- (c) the payments required under this paragraph shall be binding upon the estate of the Husband;
- (d) the Maintenance Payments shall be included in the Wife's income for those taxation years in which they are received and deducted from income by the Husband for those years in a corresponding manner.
- (e) The amount of the Maintenance Payments shall increase on the 1st day of October, 1993, and on the 1st day of October of each subsequent year at a percentage rate equal to the annual "Consumer Price Index for Canada, All-Items (not seasonally adjusted)", as published by Statistics Canada in the month immediately preceding the increase.

[4] The following is also stated:

5.03 Subject only to a material change in circumstances affecting the welfare of the Child or the financial needs or abilities of either the Husband or the Wife, neither the Husband nor the Wife shall be entitled to vary the Maintenance Payments.

[5] The parties were divorced on February 24, 1995. By a consent corollary relief order the separation agreement regarding child maintenance was continued. The payments were ordered to be made and they were ordered to be made retroactive to the day of the separation agreement (October 12, 1992). It is this order the applicant seeks to vary.

[6] It is the recollection of the respondent that a written agreement was entered into in early 1996, which reduced this obligation to \$600.00 per month, but that the respondent's right to deduct from income was cancelled and the obligation to include in income on the part of the petitioner was eliminated. On calculations by the respondent, this arrangement maintained the net sum received by the petitioner notwithstanding that the respondent paid only \$600.00 as the tax benefit previously enjoyed by him was no longer applied and the \$600.00 per month were tax paid dollars to the petitioner. The petitioner has no recall of this.

[7] The petitioner added that the agreement (which she also could not find), in her opinion, provided for increases to \$650.00 in 1998, \$700.00 in 2002 and to \$750.00 in \$2007. These suggested portions of the agreement of 1996 were not recalled by the respondent.

[8] The Child Support Guidelines came into effect on May 1, 1997.

[9] The payments made by the respondent are as follows:

\$800	October 1992 – December 1993
\$795	January 1994
\$815	February 1994 – May 1994
\$800	June 1994 – November 1994
\$820	December 1994 – December 1995
\$673	January 1996
\$820	February 1996
\$775	March 1996 – April 1996
\$645	May 1996
\$755	June 1996
\$700	July 1996 – September 1996
\$600	October 1996 – August 2001
\$642.22	September 2001 - Present

[10] The payment of \$642.22, according to the respondent, was made to reflect the consumer price index rise in the times in question. He also made a payment of \$1,200.00 to reflect what, in his view, were the shortfalls caused by his inadvertent failure to include consumer price index payments on the \$600.00 payments he had been making since October 1996.

[11] On August 7, 2001, the Maintenance Enforcement Administrator informed the respondent that the arrears on his obligation for child support, based on the corollary relief order of \$800.00 per month since October 1992, was \$14,500.00. Later, the consumer price index add-on was calculated, bringing the arrears to \$19,682.80 as of August 17, 2001.

[12] The respondent has brought application to have the corollary relief order varied, in particular to have the order varied to reflect a change in maintenance payments, which has been in effect by agreement between the parties since 1996.

[13] There is no doubt that the court has jurisdiction to vary a corollary relief order or child support order retroactively. The parties are in agreement that the amount of arrears calculated by the Maintenance Enforcement Office is excessive. The question is what should be the child support payment and what, if any, are the arrears?

[14] The respondent seeks to maintain the alleged agreement of 1996 with the consumer price index add-on but without the increases indicated by the petitioner.

[15] The petitioner prefers to relate it to the Federal Child Support Guidelines and to calculate the sum from May 1, 1997. That the Guidelines are a material change in circumstance is without doubt. My judgment is that the alleged agreement of 1996 is not, since May 1, 1997, in the child's best interest, and that the appropriate response to the respondent's application is to employ the Federal Child Support Guidelines.

[16] It appears that if there was a binding agreement in 1996 that what it sought to do was to affect the income tax liability and benefit so as to reduce the tax obligation of both parties and that the net result was to reduce the amount of cash involved so that approximately the same amount found its way to the support of the child. However, the parties did not consider the calculations of the payment as has been done in arriving at the Guidelines.

[17] I agree with the petitioner that the fairest way to deal with this application is to grant the application and order the amount of support varied downwards from that enforced by Maintenance Enforcement back to the creation of the Guidelines. This I do without regard to the income tax positions, the consumer price index or the transactions

regarding the family home, all of which have only served to confuse the matter without benefit to the child's best interests.

[18] I find, therefore, that the petitioner's calculations are fair and I follow them. I find that the obligations and payments and resulting arrears are as follows:

DATE	MONTHLY OBLIGATION	MONTHLY PAYMENT	ARREARS
May 1997 – Dec. 31, 1997	\$617.00	\$600.00	\$ 136.00
Jan. 1998 – Dec. 31, 1998	\$643.00	\$600.00	\$ 516.00
Jan. 1999 – Dec. 31, 1999	\$718.00	\$600.00	\$1,416.00
Jan. 2000 – Dec. 31, 2000	\$751.00	\$600.00	\$1,812.00
Jan. 2001 – Aug. 31, 2001	\$751.00	\$600.00	\$1,208.00
Sept. 2001 – Dec. 31, 2001	\$751.00	\$642.00	\$ 436.00
Jan. 2002 – to date	\$680.00 (based on income of \$83,000)	\$642.00	\$ 304.00
TOTAL ARREARS			\$5,828.00

[19] In the period January 1, 1996 to May 1997, finding as I do that the alleged agreement of 1996 was not in the best interests of the child, there are arrears as follows (without the addition of the consumer price index):

Payments due: 16 x \$800.00	\$12,800.00
Less payments made:	<u>10,743.00</u>
Arrears due from January 1, 1996 to April 30, 1997,	\$ 2,057.00
Plus arrears May 1997 to current	<u>5,828.00</u>
Arrears due	\$ 7,885.00

[20] I have chosen not to assess any arrears prior to January 1, 1996 or for consumer price index from that date on, as the payment by the respondent of \$1,200.00 is sufficient reason not to do so without negatively affecting the best interests of the child.

[21] For 2001, I have chosen to apply s. 17(1) of the *Divorce Act*, but have related as income for that period to the previous year's income of \$92,542.00. In my view, the severance pay is an isolated occurrence more akin to a payment arising from a breach of contract and resultant liquidated damages.

[22] In the circumstances, the petitioner shall have her costs. The respondent has been largely unsuccessful in that he sought enforcement of the alleged 1996 agreement notwithstanding the enactment of the Guidelines. I found his evidence confusing and illogical. The position of the petitioner was one which, in my opinion, should have been accepted in the earliest stages of this matter.

[23] The parties are at liberty to return to court should there be mathematical errors discovered and also to discuss, if asked, for an order as to how the order should be paid. From September 1, 2002 on, the payments are set at \$680.00 per month, based on an income of \$83,000.00.

[24] Additional costs experienced by the petitioner, to which some reference has been made, should be dealt with by an application under Guidelines Number 7 or Guideline 10(1) and 10(2).

Hudson J.

Appearances:

E. Joie Quarton For the Petitioner

John Laluk For the Respondent