SUPREME COURT OF YUKON

Citation: *L.L.K* v. *T.A.W.*, 2011 YKSC 61

Date: 20110510
Docket S.C. 10-B0107
Registry: Whitehorse

BETWEEN:

L.L.K.

Claimant/Applicant

AND:

T.A.W.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Judith Hartling — Counsel for the Claimant/Applicant
Shayne Fairman — Counsel for the Respondent

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): I will deal firstly with the application by Ms. Hartling for an adjournment in order for Mr. W.'s affidavit, which was only filed yesterday, to be reviewed by the claimant. For the reasons just indicated by Mr. Fairman, it would seem that there is no justifiable point in putting this off any further. So, I am going to deny the adjournment and I am going to proceed to make a decision on the jurisdictional question which Mr. Fairman has raised. For the reasons which he has given me in submissions pursuant to s. 13(1)(d) of the *Interjurisdictional Support Orders Act* S.Y. 2001, c. 19, I will refuse to make any support order in favour of the claimant, noting that she has

applied for both child support and spousal support.

[2] The application for spousal support is out of time according to s. 1(1) of the British Columbia *Family Relations Act*, RSBC 1996 c. 128. Within that definitional subsection is the definition of spouse and, in paragraph (b), it reads:

> "except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together..."

It continues, but that is the relevant portion of the paragraph.

[3] In this case, there has been an action commenced by the claimant in British Columbia in the Supreme Court under file number 15127. That Writ of Summons was filed November 7, 2008, and the matter proceeded to trial on October 21 and 22, 2010, with Madam Justice Dillon rendering her reasons for judgment December 16, 2010. At paragraph 2 of that decision, Madam Justice Dillon stated:

> "The parties agreed to separate in August 2006. The separation was identified by an oral agreement to separate and highlighted by the failure to recognize the defendant's birthday that month. The defendant was supposed to leave the family home by January 2007, but remained separate and apart under the same roof, living in the basement, until August 2007 when he moved to the Yukon."

[4] So, that is clearly a finding of fact that the separation occurred in August 2006, and since the claimant did not commence her ISO action until October 18, 2010, she is out of time on the question of spousal support.

[5] On the question of child support, s. 4 of the Yukon *ISO Act* states:

> "This Part applies only where there is no support order in effect requiring the respondent to pay support for the claimant or for any children for whom support is claimed or for both."

[6] In this case, we know from the reasons for judgment of Madam Justice Dillon, dated December 16, 2010, that she did make an order for the payment of child support by the respondent in the amount of $1,120 per month. That appears at paragraph 1 of the reasons.

[7] Mr. Fairman informs me that counsel for the parties in British Columbia have to date been unable to settle the terms of the order arising out of those reasons. Nevertheless, the order has been made, and accordingly there is no jurisdiction for the claimant to bring her ISO application for child support in the Yukon.

[8] Those are my reasons on the substantive points. Is there anything else?

[Submissions by counsel re costs]

[9] I do not need to hear anything further on this point. For all the reasons indicated by Mr. Fairman, with which I agree, it seems entirely appropriate that costs be awarded in favour of the respondent. Ms. K. appears to have had the benefit of legal counsel at the time that the Form A application was signed by her on October 18, 2010, and although that was just three days prior to the trial in British Columbia, there was no previous order and the issue of the one year limitation period had not yet arisen. However, once the reasons for judgment of Madam Justice Dillon were issued on December 16 (I presume Ms. K. continued to be represented by counsel at that time because there has been reference by Mr. Fairman to counsel being involved in

attempting to settle the terms of the order on behalf of both parties in British Columbia), at that point the claimant would have been aware. Indeed, I am informed by Mr. Fairman, who has spoken with Mr. W.'s British Columbia counsel, that at the outset of the trial the claimant's counsel made a concession that on the question of spousal support she was statute-barred. So, there should be no question in Ms. K.'s mind that she could not proceed with that aspect of her ISO application in the Yukon. Yet, the application is before me and we are here dealing with the jurisdictional question.

[10] There should also have been no doubt in Ms. K.'s mind that the order was made according to the reasons for judgment of Madam Justice Dillon regarding the payment of child support. She and her counsel are taken to be cognizant of the law in this jurisdiction, including s. 4 of the *ISO Act*, which would have prohibited that aspect of the ISO application going forward as well.

[11] So, on all accounts, this entire application seems to have been entirely ill-conceived and should not have proceeded. I award costs against the claimant in the fixed amount of $800, which I will add is an entirely reasonable sum in all of the circumstances.

GOWER J.