IN THE SUPREME COURT OF THE YUKON TERRITORY`

Citation: *Kelly* v. *Lyle,* 2003 YKSC 8

Date: 20030317
Docket: S.C. No. 96-D2814
Registry: Whitehorse

BETWEEN:

COLLEEN ANNE KELLY

Petitioner

AND:

KERRY ELWOOD LYLE

Respondent
(Applicant)

Appearances:
Mr. Shayne Fairman — For the Petitioner
Mr. Kerry Lyle — Self-Represented

Before: Mr. Justice R.E. Hudson

REASONS FOR JUDGMENT

[1] This is an application by the respondent for an order for costs. In fact, it is an application which was invited by the court, in giving reasons for judgment in the last application in this matter, which reasons were issued on November 14, 2002.

[2] In that order, the ultimate words were “the matter of costs may be spoken to if advised.” Therefore, the respondent is bringing an application that there be an order that costs be payable to him, as he was largely successful. And in view of the fact that

we are in court, the petitioner has in return made a competing application, saying she was successful, and that costs be payable to her.

[3] I have reviewed the file, the orders made and the authorities cited. At the hearing of the motion on November 12, 2002, there were four decisions made:

a) Arrears were cancelled. At the hearing, the petitioner consented.

b) A declaration was made that a child was no longer a child of the marriage and therefore no support need be paid. At the hearing, the petitioner consented.

c) An application for a sunset clause with respect to child support was denied.

d) An application to vary support to the remaining child was also denied. This was not consented to and properly so.

[4] It is the submission of the respondent that due to the cancellation of the arrears, the elimination of the child Krista from the order, and a setting of the child support at $304.00 — matters the respondent had always been prepared to consent to — the application was largely unnecessary and that he should therefore be entitled to costs.

[5] The presentation of the other issue with respect to which the respondent was unsuccessful resulted in a situation in which it was open to the court to order costs against him. This item was the request for a sunset clause.

[6] There is also, of course, the matter of the cost of this application.

[7] I find I can make a short determination of this matter having read the authorities. Pursuant to *Gold* v. *Gold,* [1993] B.C.J. No. 1792, the awarding of costs in matrimonial proceedings should be the same as in other civil litigations, that is to say that costs

should follow the event. In the case of *Fotheringham* v. *Fotheringham*, [2001] B.C.J. No. 2083, in which “substantial success” is found to be an objective measurement to be employed in considering the matter of costs. A rule of thumb of 75-percent is discussed.

[8] I am satisfied that with respect to the judgment rendered on November 14, 2002, there was clearly divided success so that neither party had “substantial success” or both did, depending on your point of view.

[9] I am therefore satisfied that this is a proper case for orders that each party should bear its own costs. While it is true the respondent made some offers of settlement (notwithstanding they are not in proper form) and would bear consideration in determining substantial success, nonetheless, at the hearing other matters were raised upon which he was unsuccessful. I remark also on the excessive length of the affidavit in support and that there is no plan for costs in the application as filed.

[10] The petitioner’s conduct of the matter is that she declined to consent to an award which was ultimately made but in resisting the other matters raised was successful.

[11] On that basis, and for the reasons stated above, the order is that there will be no order as to costs.

[12] With respect to this matter, I view it as an application by each party for an order for costs and each party having been unsuccessful, each party shall bear its own costs.

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Hudson J.