Citation: *Dir. of Human Resources v. Horton*, 2004 YKTC 85 Date: 20041119
Docket: T.C. 02-T0012
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Lilles

In the Matter of the *Family Property and Family Support Act*, R.S.Y. 2002, c. 83

Between:

The Director of Human Resources
on behalf of C.B.
and
the Director of Family and Children's Services

Petitioners

And:

Daniel Horton

Respondent

Appearances:
Lenore Morris — Appearing for Directors of Human Resources and Family and Children's Services
Malcolm Campbell — Appearing for Respondent

REASONS FOR DECISION

[1] This matter has had a lengthy history and for that reason a brief summary will be helpful. The petitioner, C.B., was in a common-law relationship with Daniel Horton from September, 1992 to February, 1996 and in a casual relationship on and off from that time to May, 1999. A child, S.A.H., was born on May 15, 1999. The child has been in the care and custody of the petitioner, except for those periods of time when she was taken into care by the Director of Family and Children's Services pursuant to the *Children's Act*, R.S.Y. 2002, c. 31. More specifically, S.A.H. was taken into care by the Director on January 10, 2003.

[2] When the petition was first filed in May 2002, the child was living with the petitioner. Mr. Horton contested the paternity of the child, and after some delay resulting in part from negotiations as to who would pay for the paternity tests, samples were provided and a genetic test report was received on December 10, 2003. That report indicated that the respondent was the father of the child, S.A.H.

[3] On March 26, 2004, an application was made by way of notice of motion pursuant to the *Family Property and Support Act,* R.S.Y. 2002, c. 83 for:

1. A declaration pursuant to section 32 of the *Family Property and Support Act* that the respondent has an obligation to provide support for the child of the relationship with the petitioner, namely: S.A.H., born on May 15, 1999;
2. An order for permanent maintenance for the child, pursuant to sections 34 and 36 of the *Family Property and Support Act*; and
3. An order requiring the respondent, Daniel Horton, to reimburse the Government of Yukon for the cost of conducting paternity testing.

[4] This matter came before Judge Faulkner on February 2, 2004. At that time, Mr. Horton (through counsel) raised a number of procedural objections. The primary one related to the fact that the child, S.A.H., was now in the interim care of the Director of Family and Children's Services and that the Director of Human Resources was not the proper petitioner. Judge Faulkner noted that s. 34 of the *Family Property and Support Act* allows the Director of Family and Children's Services to bring an application for support where the child in question is in the director's care. Judge Faulkner considered it to be counter productive to require new petitions to be filed every time the care and custody of the child changed (which often happens when the director intervenes at a time of family crisis). The obligation of support exists whether the child is in the mother's care or in the director's care. Judge Faulkner allowed the matter to proceed, upon counsel

advising the court that she also represents the Director of Family and Children's Services with respect to the application. The matter was then adjourned.

[5] It came before me on March 1, 2004. In the interim, Mr. Horton had filed financial information for the years 2000, 2001 and 2002. Mr. Horton provided two T-4 slips for 2003 and some financial information for 2004. By way of summary, Mr. Horton's financial information is as follows:

2000	Total Income:	$ 34,149.22
2001	Total Income:	$ 34,536.11
2002	Total Income:	$ 24,807.67
2003	Two T-4s totaling:	$ 3,500.00
2004	Social Assistance:	
	January	$ 873.00
	February	$ 647.00

Mr. Horton's income in 2003 was low because he chose to look after his ill brother, who passed away in December of that year. There was no evidence suggesting that he did so out of necessity.

[6] Mr. Horton was cross-examined on his affidavit. Mr. Horton was born and raised in the Yukon; he is 36 years-of-age and is currently single. Mr. Horton's education is limited to Grade 12 equivalency. Mr. Horton has no other dependents. At the time of the March 1, 2004 hearing, he was unemployed due to lack of work. However, he has a record of working regularly over the past eight years in the oil and gas industry in Alberta, and insulating pipes in schools and other larger buildings. Mr. Horton's health is good, although he has hurt his back several times in the past. Mr. Horton acknowledged that his back problems do not interfere with the kind of work he usually does. Mr. Horton anticipates working again in Alberta, Northwest Territories or the Yukon.

[7] Mr. Horton currently lives with his other brother to whom he pays $350.00 per month as rent. Mr. Horton has no significant assets and has no debt.

[8] At the March 1, 2004 hearing, I made a declaration pursuant to s. 32 of the *Family Property and Support Act* that the respondent, Daniel Horton, had an obligation to provide support for his child, S.A.H., born May 15, 1999. Without making an order, I suggested to counsel that it was my view that s. 15 of the Yukon Child Support Guidelines may be an appropriate way of determining the respondent's income. In general, his income was seasonal, as most of his income was generated in the spring, summer and fall. In 2003, he had some back problems, but the primary reason his income was low was that he chose to stay in Whitehorse and care for his terminally ill brother.

[9] The matter was adjourned to April 14, 2004 for further submissions on four outstanding issues:

1. Whether the Director of Family and Children's Services should be added as a party;
2. What income should be attributed to Daniel Horton and accordingly, how much child support should be ordered;
3. Whether the order should be a permanent order or merely an interim order; and
4. Whether the Director of Family and Children's Services is entitled to be reimbursed for part or all of the costs incurred in obtaining paternity testing.

Should the Director of Family Services be added as a party to these proceedings?

[10] Pursuant to paragraph 15(5)(a) of the Supreme Court Rules (B.C. Reg. 221/90), the court may add parties during the course of a proceeding. Paragraph 15(5)(a) reads as follows:

> Removing, adding or substituting party
> (5) (a) At any stage of a proceeding, the court on application by any person may
> (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,
> (ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
> (A) with any relief claimed in the proceeding, or
> (B) with the subject matter of the proceeding,
> which is the opinion of the court it would be just and convenient to determine as between the person and that party.

[11] Subparagraph 15(5)(a)(ii) is to be read disjunctively (*Enterprise Realty Ltd. v. Barnes Lake Cattle Co*. (1979), 101 D.L.R. (3d) 92 (BCCA) at paragraph 9). The first part of paragraph 15(5)(a)(ii) is not applicable to the case at bar, as it applies to situations in which the party should have originally been made a party to the proceeding but was not (*Cominco Ltd. Westinghouse et al. and Phillips Cables Limited (third party) (No. 2)* (1978), 7 B.C.L.R. 305 (B.C.C.A.); *Lawrence Construction Ltd. v. Fong*, [2001] B.C.J. No. 1440, 2001 BCSC 813 at paragraphs 23-24). Here, at the time the application was filed, the Director of Family and Children's Services had not taken S.A.H. into temporary care, and therefore, there is no possibility that the director should have been a party to the proceeding.

[12] The second part of subparagraph 15(5)(a)(ii) is applicable to the case at bar because the participation of the director is necessary. In *Enterprise Realty Ltd., supra,* at paragraphs 10, 21, the court determined that this subsection must be given a narrow interpretation. Under that interpretation, a party should be

added only where the question to be adjudicated between the existing parties cannot be resolved without the addition of the new party. In this case, the Director of Family and Children's Services became involved after the petition was filed. The director had interim care and custody of the child and is entitled to collect the support payments from Mr. Horton while the child is in care.

[13] The circumstances of this case also fall squarely within the parameters of subparagraph 15(5)(a)(iii). There clearly is an issue related to the relief claimed in the proceeding between the director and the defendant.

[14] The decision to add a party to a proceeding is discretionary. Pursuant to subparagraph 15(5)(a)(iii), I must decide whether it is "just and convenient" to add the director as a party. In *Robson Bulldozing Ltd. v. Royal Bank of Canada* (1985), 62 B.C.L.R. 267 (B.C.S.C.) a paragraph 7 McLachlin, J. (as she then was) discussed the meaning of "just and convenient". She stated that the court's discretion to join a party is to be exercised upon "the proper evidence being produced". Furthermore, the "discretion should be generously exercised so as to enable effective adjudication upon all matter in dispute without delay, inconvenience and expense of separate actions and trials".

[15] In my view, it is just and convenient to add the Director of Family and Children's Services as a party to these proceedings. Section 34 of the *Family Property and Support Act* specifically provides that an application to provide support for a dependent may be made by the Director of Family and Children's Services. Since the original application by C.B., the child, S.A.H., has been taken into the temporary care of the director. I was advised that the director's plan was to return the child to the mother (applicant) at some time in the future, presumably when she is in better position to care for S.A.H. Mr. Horton was advised of the intention to add the director as a party on February 2, 2004 in proceedings before Judge Faulkner. Mr. Horton has not been taken by surprise. Adding the director at a late stage in this proceeding in no way prejudices Mr.

Horton. It does not affect Mr. Horton's responsibility to provide support for his daughter nor does it affect the quantum of support. I do not accept Mr. Horton's submission that it would be unfair to add the director at this stage of the proceedings. In my view, it is also essential to do so in order that the director be bound by any order made by this court.

[16] There is also inherent jurisdiction to add parties: see *Re C.K.W.*, [2002] Y.J. No. 3, 2002 YKTC 3 at paragraph 20:

> To grant a third party standing in a legal proceeding has significant consequences. It entitles that party to call witnesses, cross-examine witnesses called by other parties, make submissions and to be part of any settlement of the action. It also binds that third party to the judgment. Third parties are more likely to be allowed to participate in a proceeding on a more limited basis, for example, to make a written or oral presentation relating it to the matter before the court. This lesser form of standing is called intervener status.
>
> The granting of standing and intervener status is largely a procedural matter, which involves the exercise of judicial discretion. The issue underlying the exercise of this discretion is the effectiveness of the court process. Depending on the nature of the proceeding and the forum of the litigation, that discretion may be guided by rules of Court, by legislation or by common sense as part of the trial judge's inherent jurisdiction to conduct the trial in a manner that would be just, efficient and convenient. (emphasis mine)
>
> The more common reasons identified by Cromwell for exercising judicial discretion to give a party standing are:
>
> - In order to avoid a multiplicity of actions arising out of the same factual situation.
> - The need to conserve or make most efficient use of judicial resources.
> - The practical value of the applicant's involvement in the proposed adjudication, including the contribution of the applicant to a just outcome.

- The value of having the applicant legally bound by the court's decision.

[17] In the result, the style of cause in this proceeding will be amended to read:

Between:

The Director of Human Resources

on behalf of C.B.

and

the Director of Family and Children's Services

Petitioners

And:

Daniel Horton

Respondent

What income should be attributed to Mr. Horton?

[18] Mr. Horton testified that he had been working regularly for eight years in the oil and gas industry in Alberta and that he also insulated pipes in schools and large buildings. The primary reason for not working in 2003 was that he decided to care for his brother, who passed away in December 2003. Mr. Horton anticipates working again, as soon as the economy picks up.

[19] I indicated to counsel during the March 1, 2004 hearing that my preference would have been to use s. 15 of the Yukon Child Support Guidelines (pattern of income) to determine Mr. Horton's income for the purpose of calculating the quantum of child support. I am satisfied that using only Mr. Horton's 2003 income would not provide a fair determination of his income, because he voluntarily decided to step out of the work force to look after his ill brother. Using only the 2003 income would be unreasonable and unfair to his daughter, towards whom he owes a legal obligation to provide support.

[20] Mr. Horton noted that s. 15 of the Guidelines appears to be restricted in its application to income received under s. 16 – as a shareholder, director or officer of a corporation. I am satisfied, however, based on the submissions of counsel and a comparison with the Federal Child Support Guidelines that the reference to s. 16 in s. 15 of the Yukon Child Support Guidelines is a typographical error. It should refer to s. 14 instead of s. 16. The error resulted because two sections of the federal legislation were not incorporated into the *Yukon Act*.

[21] I am satisfied that any court has the authority to correct typographical errors found in legislation as a matter of statutory interpretation (Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at pp. 106-107). Two cases where the court has found a typographical error are *Q. v. The Director of Family and Children's Services*, 2004 YKSC 61 at paragraph 13 and *Morishita v. Richmond (Township)* (1990), 67 D.L.R. (4th) 609 (B.C.C.A.) at p. 618. I am prepared to take notice of this error and for the purpose of this case, correct the reference to s. 16 to read s. 14.

[22] Counsel for the petitioners suggests that in applying s. 15 to Mr. Horton, I need only average the income for the three years 2001 to 2003. Those amounts ($34,536, $24,807 and $3500) average out to $20,948. Applying the Child Support Guidelines to this quantum of income results in a support obligation of $183.00 per month. In all the circumstances, I am of the opinion that this is a fair and equitable amount and I so order.

[23] In light of my finding that Mr. Horton voluntarily chose to step out of the work force in 2003 to look after his ill brother, I am also satisfied that the court could impute income to Mr. Horton pursuant to s. 17(1) of the Yukon Child Support Guidelines. Mr. Horton chose to be "intentionally under-employed" in 2003. As I mentioned earlier, in choosing to look after his brother, he abandoned his legal obligation to his daughter. Mr. Horton had no legal obligation to look after his brother. Mr. Horton did not provide any evidence indicating that the

exceptions provided in s. 17(1)(a) applied to him. In light of my finding pursuant to s. 15 and the director's submissions, it is unnecessary to calculate the imputed income pursuant to s. 17 of the Yukon Child Support Guidelines. I am confident, however, that such a calculation would result in a support order equal or larger than that I have ordered pursuant to s. 15.

Should the order be a permanent or interim order?

[24] Counsel for the director acknowledged that some confusion arose as a result of this matter being brought back to court by way of a notice of motion. On the other hand, the court heard directly from Mr. Horton, although by way of cross-examination on his affidavit. Counsel were unable to point out any substantive differences between a permanent or interim order. Both can be amended in the case of a significant change in circumstances.

[25] In all of the circumstances, considering that this matter proceeded by way of notice of motion and affidavit evidence, the order will be an interim one.

Should the Director of Family and Children's Services be reimbursed for the cost of paternity testing?

[26] I am satisfied, based on the correspondence between Mr. Cozens, acting on behalf of Mr. Horton and Ms. Hogeboom, acting on behalf of the Director of Human Resources and the Yukon Territorial Government that there was an agreement dealing with the payment for paternity testing. That agreement was initially stated as follows in the June 12, 2002 letter:

> … As confirmed with you previously, the Director of Human Resources will initially pay for half of the cost of the procedure and will reimburse Mr. Horton if he is not the biological father…."

[27] In a subsequent letter dated January 13, 2003, Ms. Hogeboom stated:

> … We have arranged for the blood tests that need to be performed to determine paternity in the above

> case. As previously agreed, the Yukon Government has arranged with Orchard Helix to pay the cost which totals approximately $706.00 on the understanding that your client must provide his share of the cost i.e. $353.10 forthwith to us. If your client is found to be not the father of the child this money will be reimbursed….”

[28] There was no information before me suggesting that this was not the agreement. Indeed, Mr. Horton’s position was that this was the agreement but neither party abided by it. The agreement was between Mr. Horton and the Director of Human Resources but in the result, the Director of Family and Children’s Services paid for the test. Mr. Horton says that the two directors are separate legal entities – although I note that the last letter, the one dated January 13, 2003, refers to the Yukon Government as the contracting party. Mr. Horton says that it would be unfair to saddle him with this cost when it was paid for the Director of Family and Children’s Services rather than the Director of Human Resources, particularly when costs were not formally pled in the originating petition.

[29] It is clear to me that the full cost of the paternity testing was paid for by the government department because funds from Mr. Horton were not forthcoming for his share of the cost and because the child was taken into the care of the Director of Family and Children’s Services. It would be unfair, and would send the wrong message, if Mr. Horton could escape his responsibilities, contractual and moral, by avoiding payment for his share of the cost of paternity testing. In addition, the objectives of the Yukon Child Support Guidelines (s. 1) could easily be frustrated if respondents could avoid their responsibilities by delaying or avoiding payment in these circumstances. It should also be kept in mind that the purpose of the paternity testing was not to establish Mr. Horton’s paternity - affidavit evidence of C.B. spoke to that issue - but rather it provided him with an opportunity to prove that he was not the father. The test was done primarily for Mr. Horton’s benefit.

[30] Although the originating petition filed May 6, 2002 did not ask for costs, the notice of motion filed March 26, 2004 specifically requested an order reimbursing the Government of Yukon for the cost of conducting paternity testing. The actual cost turned out to be less than originally estimated, $425.00. The director will be satisfied if Mr. Horton pays one-half of this amount, $212.50.

[31] The court has a great deal of discretion in awarding costs (*Moore v. Castlegar & District Hospital* (1998), 59 B.C.L.R. (3d) 368 (B.C.C.A.) at paragraph 9). The only limitation is that the discretion: “must be exercised judicially, not arbitrarily or capriciously”. See also Rule 57 – Costs, Supreme Court Rules. Costs need not be pleaded and normally follow the event.

[32] In determining whether to order the defendant to pay half the costs of the paternity test it is important to note that the purpose of including costs in a party’s pleadings is to alert the other party that they may be liable for costs should they lose the case. Where a party is put on notice in some other fashion that they may be required to pay costs they suffer no prejudice simply because the issue was not identified in the other party’s pleadings (*V.A.H. v. Lynch* (1998), 95 Alta.L.R. (3d) 253 (Alta. Q.B.) at paragraph 47). In this case not only was the respondent put on notice that he might be held responsible for half the cost of the paternity test, but he in fact agreed to such payment.

[33] I find that the expense of the paternity testing was properly and necessarily incurred in the conduct of this proceeding. Requiring the respondent to pay only one-half of this expenditure is reasonable, if not generous. The paternity testing was primarily for the benefit of the respondent.

[34] I am satisfied that on the facts of this case, I can and should order that Mr. Horton pay one-half of the paternity testing fee, $212.50, to the Director of Family and Children’s Services.

Conclusion

[35] The judgment in this case was delayed in part because the transcripts of the proceedings were not delivered to the court until September 14, 2004. The principal reason for the delay, however, was the unreasonable position taken by Mr. Horton. Through counsel, Mr. Horton raised a number of issues; all were without merit and some were frivolous. No authorities were provided in support of the positions taken. In the result, it fell upon this court to conduct the research that should have been conducted by Mr. Horton. In these circumstances, the obligation to support his child will be backdated to the date of the filing of the notice of motion, March 31, 2004.

[36] By way of summary, this court orders as follows:

1. The Director of Family and Children's Services will be added as a party.
2. Pursuant to s. 32 of the *Family Property and Support Act*, Mr. Horton has an obligation to provide financial support for his child, S.A.H., born May 15, 1999.
3. Pursuant to s. 15 of the Yukon Child Support Guidelines, Mr. Horton will pay $183.00 per month beginning March 31, 2004.
4. This order is an interim order.
5. Mr. Horton will also reimburse the Director of Family and Children's Services for one-half of the cost of paternity testing in the amount of $212.50.
6. Mr. Horton will pay $50.00 per month (in addition to the $183.00 per month) until the cost of the paternity testing and the arrears for the support of S.A.H. (in that order) are fully paid.

LILLES C.J.T.C.