

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CAROL BUGGINS

Applicant

- and -

ROBERT GEORGE SIMPSON
Also known as
ROBERT GEORGE McCALLUM

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant seeks to have the Respondent cited in contempt of court for failing to provide financial information as requested by a Notice to Respondent filed on July 22, 2005 and as ordered by Foisy J. on March 31, 2006 and, as a sanction, seeks to have his pleadings struck out and a final order made for child support retroactive to the date of the parties' separation. The Respondent, who is no longer represented by counsel, did not appear on the application.

[2] The history of the proceedings is important in the context of the contempt application and so I will go into it in some detail. The Applicant and Respondent had a common-law relationship but separated in February 2002. On July 22, 2005 the Applicant filed an originating notice and affidavit in support of her claim for sole custody of the parties' two children, access for the Respondent and child support retroactive to the date of separation. The application was returnable September 2, 2005 and the Respondent appeared in person on that date.

[3] On September 12, 2005, an affidavit was filed by the Applicant to which were attached documents that had been provided to her counsel by the Respondent. These

documents included the Respondent's employee pay stubs for a number of pay periods in 2005, the most recent being July 25 to August 7, 2005.

[4] The application was adjourned a number of times. On October 15, 2005 the Respondent, then represented by counsel, filed his own affidavit and a notice of motion claiming joint custody of the children and that child support be determined based on his claim of undue hardship. In that affidavit, the Respondent says that his income is approximately \$70,000.00 per year from his employment with a housing authority. He also says that he has not filed income tax returns for the past few years but has had only the one job with the housing authority for the past two and a half years. Attached to his affidavit are T4's from his employment for 2004 and 2003 and a paystub for the September 5 to 18 pay period.

[5] The Applicant's affidavit referred to above says that the Respondent is employed with the housing authority and that she does not know how much he earns but thinks that it is probably around \$4000.00 per month (which would be \$48,000.00 per year).

[6] The only other evidence filed on the issue of income is the affidavit of a legal assistant with data from the Statistics Canada website showing the average income for adult males in the community in which the Respondent lives to be \$41,237.00 in 2001, the last year for which such information was available.

[7] The motions were eventually adjourned to October 28, 2005. It is not clear from the court file what happened between then and March 2006, but in the latter month counsel for the Respondent filed a notice of ceasing to act. That notice was not served on the Respondent until the end of May. On March 13, 2006, the Applicant filed a notice of motion seeking to have the Respondent cited in contempt of court "for failing to provide financial information as requested by Notice to Respondent filed on July 22, 2005 pursuant to the *Child Support Guidelines* and *The Children's Law Act*", or alternatively, an order that he provide said financial information.

[8] On March 31, 2006, Foisy J. made an order for joint custody and imputed annual income to the Respondent in the amount of \$41,237.00 with child support payable in the amount of \$600.00 per month. Although the formal order approved by both counsel omits any reference to it being interim, it is clear from a transcript of the proceedings of March 31 that it was an interim order only. The transcript also indicates that the Applicant sought to have the amount of \$41,237.00 imputed as the

Respondent's income. It is not clear why she took that position in light of the Respondent's admission in his affidavit that his income is approximately \$70,000.00 per year and his T4 for 2004 shows gross income of \$74,389.00.

[9] Foisy J. also ordered that:

3. The Respondent is required to provide his financial information in accordance with the Notice to Respondent filed July 22, 2005 and served on the Respondent August 2, 2005, which includes his last three years income tax returns and assessments, within 30 days of service of this Order on the Respondent. If the required information is not provided within the 30 day time frame, the Respondent will be required to appear in Court to show cause why he should not be cited for contempt.

[10] The Respondent did not provide any further financial information and the Applicant filed another notice of motion seeking to have him cited in contempt "for failing to provide financial information as requested by Notice to Respondent filed on July 22, 2005 and served on the Respondent August 2, 2005 and as ordered by Justice J.P. (*sic*) Foisy in Chambers on March 31, 2006 ...". This notice of motion was returnable on June 16, 2006 and, along with the March 31 order, was served on the Respondent. He did not appear on that date.

[11] As set out above, the Respondent has filed various pieces of information about his income, showing it to be substantially in excess of the amount the Applicant suggested it might be in her affidavit. The Applicant submits, however, that the Respondent is in contempt by reason of his failure to provide his income tax returns for the past three years even though the Respondent indicates in his affidavit that he has not been filing income tax returns. The Applicant submits that the order of Foisy J. and the Notice to Respondent served on the Respondent mean that he is compelled to file his past three years' income tax returns with Revenue Canada and then provide copies of same and any assessments to the Applicant.

[12] The Notice to Respondent, which is in the form required by the Practice Direction issued by this Court and the Territorial Court on May 21, 1999, does notify a respondent that "within thirty (30) days after service of this application on you, you are

required by the Guidelines to provide the following information: 1. A copy of your personal income tax return for each of the three (3) most recent taxation years; ...”.

[13] Sections 21(2) of the *Child Support Guidelines* made under the *Children’s Law Act*, S.N.W.T. 1997, c. 14 provides that a person against whom a child support order is sought must provide a copy of every personal income tax return filed by the person for each of the three most recent taxation years. This clearly contemplates tax returns that have been filed. The *Guidelines* do not purport to require that a respondent file income tax returns when he or she has not already done so.

[14] The order made by Foisy J. also does not purport to compel the Respondent to file income tax returns if he has not already done so. Nor does that order direct the Respondent to appear in court on a specified date to show cause why he should not be cited in contempt.

[15] Rule 704(a) says that a person is in civil contempt who fails, without adequate excuse, to obey an order of the Court, other than an order for the payment of money. There are three basic elements to civil contempt: (1) presence of a court order (2) knowledge of that court order and (3) breach of that court order. All three elements must be proved beyond a reasonable doubt: *Baton v. Kenny*, 2005 NWTSC 50.

[16] In this case, the Respondent has provided information about his income. There is no statutory or court-ordered requirement that he file the tax returns that he did not file in the past. Therefore, in the circumstances, I am not satisfied beyond a reasonable doubt that he has breached the order made by Foisy J. on March 31, 2006. I am also not satisfied that the Respondent has failed to comply with s. 21(2) of the *Guidelines*.

[17] A review of the file and particularly the transcript of the Chambers application on March 31, 2006 suggests that the Applicant has had two concerns relating to the amount of the Respondent’s income as disclosed by him. The first is that he is claiming undue hardship and the household standards of living comparison required for that claim necessitates further information about the Respondent’s income than what he has provided. It is up to the Respondent, however, as the party claiming hardship to provide sufficient information to support his hardship application, both for proof of the specific facts establishing the undue hardship and that his household would enjoy a lower standard of living than the Applicant’s household should child support not be reduced: *Hanmore v. Hanmore*, [2000] A.J. No. 171 (C.A.).

[18] At the Chambers application before Foisy J., counsel for the Applicant stated that she believes that the Respondent makes more income than what is reflected in the T4's he has filed. That may be so, and the Applicant is entitled to cross-examine the Respondent on his affidavit in an attempt to obtain evidence to that effect. But there appears to me to be no evidence in what has been filed to date from which to conclude that the Respondent's admitted income of approximately \$70,000.00 per year is not his entire income. If the concern is the income basis upon which retroactive support may be calculated and the fact that the 2003 T4 disclosed by the Respondent shows income in an amount far less than \$70,000.00, that is again a matter of proof and the Applicant has various options for pursuing that proof.

[19] The failure of the Respondent to file income tax returns may make proof of his income more difficult from the Applicant's point of view, but on the evidence before me, I cannot find him in contempt of court.

[20] Accordingly, the application for an order citing the Respondent in contempt of court must be dismissed. As the interim order made by Foisy J. is in place, any further issues such as retroactivity of child support will be left for trial.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
04 day of July 2006

Counsel for the Applicant: BettyLou A. McIlmoyle
No one appearing for the Respondent

S-0001-CV2005000198

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