

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**  
**IN THE MATTER** of the *Children's Law Act*,  
S.N.W.T. 1997, c.14, as amended

**BETWEEN:**

**DANYA ROBIN HARRISON**

**Applicant**

- and -

**LEROY GUY OMILGOITUK**  
**(a.k.a. LEROY GUY PASCAL)**

**Respondent**

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**REASONS FOR DECISION**  
**of the**  
**HONOURABLE JUDGE B. E. SCHMALTZ**

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Heard at: Inuvik, Northwest Territories  
February 21, 2011

Reasons filed: March 23, 2011

Counsel for the Applicant: C. Seddon

Counsel for the Respondent: D. Large, Q.C.

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**I. INTRODUCTION**

[1] Danya Robin Harrison (the Applicant) and Leroy Guy Omilgoituk (a.k.a. Leroy Guy Pascal) (the Respondent) are the parents of G.R.H.H-O. (born June 13, 2008), H.N.H-O. (born June 13, 2008), and O.H.H. (born May 31, 2009), hereinafter referred to as “the Children”. On August 6, 2009, the Applicant filed an Application seeking permanent sole custody of the Children; on September 4, 2009, the Applicant was granted permanent sole custody of the Children, with the Respondent having no access to the Children until further Order of the Court.

[2] On December 3, 2010, the Applicant filed this application for child support pursuant to the *Children's Law Act*, S.N.W.T. 1997, c.14, as amended (the *Act*). The Applicant requests that the Respondent be ordered to pay child support for the Children in accordance with the applicable *Child Support Guidelines*. The Applicant also asks that costs of this Application be ordered against the Respondent.

[3] The Applicant sought an order that the Respondent be restrained from molesting, annoying or harassing or communicating with the Applicant or the Children, pursuant to section 72 of the *Children's Law Act*; that order was granted on December 13, 2010.

[4] The Respondent acknowledges that he has a responsibility to pay child support and is prepared to pay child support, but asks that the amount be set at \$200.00 per month. The Applicant submits that an annual income of \$64,916.00 should be imputed to the Respondent, and he should be required to pay child support based on that amount pursuant to the *Child Support Guidelines*.

[5] The only issues on this Application are how much child support should the Respondent be required to pay for the Children, and whether or not the Applicant should be entitled to costs.

## II. THE EVIDENCE

[6] The Applicant and Respondent were in a relationship from October 2006, until November 2008, and have three children together. Their relationship ended in November 2008, when the Respondent was charged with assaulting the Applicant and two of the Children.

[7] The Applicant resides with the Children in Inuvik. The Respondent was in gaol from November 2008 until December 2010. The Respondent currently lives in Inuvik and is attending school full time working towards getting his high school diploma. Since the Applicant and the Respondent separated, the Respondent has not paid any child support to the Applicant.

[8] On December 9, 2010, the Respondent was served with the *Notice of Motion* and supporting material in relation to this Application. The *Notice of Motion* included a *Notice to the Respondent* requiring him to provide certain financial information within 30 days. On January 17, 2011, the Respondent requested an adjournment of this matter as he had not yet been

assigned counsel. The matter was adjourned to January 31, 2011, and an interim Child Support Order was made requiring the Respondent to pay child support of \$1,283.00 per month. On January 31, 2011, it was confirmed that the Respondent had counsel and the matter was adjourned to February 21, 2011, for hearing.

[9] On February 18, 2011, Debra Saftner, a legal assistant to the Respondent's counsel, swore an Affidavit attaching three pages of "Income Tax Return Information", all pages being "page 2 of 2"; the first page has a "File date" of 19 March 2008, the second page has a "File date" of 19 January 2010, and the third page has a "File date" of 30 April 2010.

[10] Ms. Saftner states in Paragraph 2 of her affidavit:

This office requested the Respondent to provide certain financial information in order to advise the Court his actual recent income. Annexed hereto and marked Exhibit 'A' is a composite exhibit of financial information provided to this office on February 18, 2011, consisting of income tax return information for the years 2007, 2008, and for 2009.

At the bottom of each of these three pages comprising Exhibit A is a nine digit number, presumably a Social Insurance Number, and the years 2007, 2008, and 2009, respectively. There is no name on any of the pages, or any other indication as to who the information relates to. Ms. Saftner does not state who the information was received from, though it appears to have been received via facsimile.

[11] The Respondent did not appear on this Application and his lawyer chose to appear by phone. It was not made clear to me why the information that apparently had been provided by the Respondent was not complete, and nor was I given a satisfactory explanation of exactly what the information contained in Exhibit A of Ms. Saftner's Affidavit was.

[12] The Respondent filed an Affidavit sworn February 18, 2011, on this Application. The Respondent states that he was last employed in 2007 as a security guard and earned \$16.00 per

hour, or an annual income of \$33,280.00<sup>1</sup>. The Respondent states that this type of employment is no longer available to him as he now has a criminal record. The Respondent further states that he is unemployed and living with family members who support him. He currently has a monthly income of \$1,000.00, and has not indicated that he has any expenses.

[13] The Respondent is 28 years old and has a grade 10 education. There is no evidence before me of anything that would prevent the Respondent from working, other than the fact that he has a criminal record. Nothing in the material filed indicates that a criminal record is a complete barrier to the Respondent obtaining any employment. There is no evidence that the Respondent has made any effort whatsoever to find any employment at all.

### III. WHAT IS OR SHOULD BE THE RESPONDENT'S INCOME?

#### Applicable Legislation

[14] Section 59 of the *Children's Law Act* states:

(1) A court may, on application, order a parent to provide support for his or her child and determine the amount and duration of such support.

...

(4) A court making an order under subsection (1) ... shall do so in accordance with the applicable guidelines.

[15] Section 1 of the *Act* defines "applicable guidelines" as:

(a) the guidelines established under subsection 85(1), or

...

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<sup>1</sup> Based on a 40 hour work week: \$16/hour x 40 hours x 52 weeks = \$33,280.00 per annum

[16] Pursuant to section 85 of the *Act*, the *Child Support Guidelines*, R-138-98, as amended (the *Guidelines*), are the applicable guidelines under which the amount of child support to be paid must be determined. Sections 15 to 20 of the *Guidelines* set out how the court is to determine a parent's annual income. The parts of those sections that are relevant to this Application are:

15 (1) Subject to subsection (2), a parent's annual income must be determined by the court in accordance with sections 16 to 20. ...

16 Subject to sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule C.

17 (1) If the court is of the opinion that the determination of a parent's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

...  
19 (1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child for whom the parents are both responsible or any minor child or by the reasonable educational or health needs of the parent; ...

[17] The only information regarding the Respondent's income is from his Affidavit referring to the employment he had prior to him being incarcerated in 2008, and the Affidavit of the Applicant sworn December 3, 2010, indicating that the Respondent supported the family prior to him being incarcerated. Since the Respondent has not filed copies of his personal income tax returns for the past 3 years it is not possible to determine his income pursuant to section 16 of the *Act*.

[18] On December 9, 2010, the Respondent was served with the Notice of Motion and Notice to the Respondent along with supporting material; on January 17, 2011, this matter was adjourned to January 31, 2011, as the Respondent had not yet filed any financial information; on January 31, 2011, the Respondent had counsel, yet had still not filed any financial information, and the matter was adjourned for hearing to February 21, 2011; on February 21, 2011, the

Respondent had still not filed the required financial information and the Respondent's counsel advised that he had not received any further material from the Respondent. The Respondent did not attend the hearing. Though the Respondent has indicated in his Affidavit that he has filed tax returns [presumably with Canada Revenue Agency] for the past years, on this Application he has not filed a copy of his personal income tax returns or any Notice of Assessment received for the past three taxation years, both of which he was required to file within 30 days of being served with the Application.

[19] On the information provided, when the Respondent worked, he had an annual income of \$33,280. The Affidavit of Sheila Caines states that the median annual income for adult males living in Inuvik, Northwest Territories, in 2005 as reported on the Statistics Canada website, was \$64,916.00.

[20] The Respondent states that he is currently going to school full time working towards getting his high school diploma, he is supported by his family, and he receives \$1,000 per month from Student Financial Assistance; he has not provided any information indicating he has any expenses. There is no information indicating why the Respondent can only pursue this education on a full time basis.

[21] I find the Respondent's course of conduct unreasonable considering his obligation to support his children; the Respondent is intentionally unemployed or under-employed. As Vertes, J. said in *Tybring v. Tybring*, 2003 NWTSC 67:

9 The concept of "intentional under-employment" is meant to encompass those situations where a parent chooses to earn less than he or she is capable of earning. It is an objective assessment of the reasonableness of that parent's conduct in light of all the circumstances.

10 The general principles are well-known. Parents have a joint and ongoing legal obligation to support their children. The amount of support is based not just on what a parent does earn but on what a parent can earn, having regard to such factors as the age, education, experience, skills and health of the parent as well as such matters as the availability of work and the ability of the parent to relocate.

[22] The concept of “intentional under-employment” encompasses situations where a parent chooses to earn less than he or she is capable of earning. I must make an objective assessment of the reasonableness of the Respondent’s conduct in light of all the circumstances<sup>2</sup>. Schuler, J. referred to the above passage from *Tybring* in *Vornbrock v. Jaeb*, 2008 NWTSC 95 (paras. 19 - 21), and also referred to the stricter interpretation of the phrase “intentionally under-employed or unemployed” requiring the finding of a *deliberate* course of conduct intended to enable a parent to avoid or undermine his or her support obligations, sometimes referred to as the “bad faith” test.

[23] There is no reasonable explanation for the Respondent’s complete lack of support for the Children, or for his lack of cooperation in providing the required information and documentation for this hearing. Taking into account the dearth of evidence or information provided by the Respondent in this case, I find on either test, that the Respondent is intentionally under-employed or unemployed.

[24] The Applicant asks the court to impute income to the Respondent in the amount of the median income for a male employed in Inuvik during 2005, being \$64,916.00 which, according to the Affidavit of Sheila Caines, is the last year for which such information is available. Section 19 of the *Guidelines* allows the court to impute income to a parent if the parent is intentionally under-employed or unemployed, unless the unemployment or under-employment “is required by the needs of a child for whom the parents are both responsible or any minor child or by the reasonable educational or health needs of the parent.”

[25] There is no evidence that the Respondent is unemployed or under-employed due to the needs of the Children or any other minor child. The Respondent indicates that he is attempting to obtain his high school diploma. No information is provided as to why he must attend school full time in order to obtain this, or what sort of employment he intends to pursue that he cannot pursue at the current time. I find that the Respondent is not unemployed or under-employed due to educational needs.



[26] The Respondent does not have to display deliberate or intentional misconduct before income can be imputed to him. If the Respondent has not tried hard enough, or exerted himself enough to earn income, to find employment, to keep employment, then income may be imputed to him. I should not only consider how much the Respondent has actually earned, but what his earning capacity is taking into account his age, state of health, education, skills and work history<sup>3</sup>.

[27] I find the Respondent has not made any effort to find employment. He is a young healthy man living in Inuvik; he has clearly been able to obtain employment in the past. The Respondent has a financial obligation to support the Children – this is a primary obligation. The Court will enforce child support obligations when the evidence reveals that financial obligations to the child or children have not been a priority for the parent. The sentiments of Richard, J. in *Edgi v. Grandjambe*, 2004 NWTSC 11, are also appropriate in this case: “The Respondent’s priorities are askew, and he needs to rethink them.”

[28] Having regard to the Respondent’s employment history and his income prior to his incarceration, I impute to him an annual income effective January 1, 2011, of \$33,280.00, which is a conservative amount in all the circumstances.

[29] From Ms. Saftner’s Affidavit, and assuming that the information provided relates to the Respondent, it appears that the Respondent had an annual income of at least \$12,664.00 for 2009, while he was incarcerated. No information has been provided for 2010, during which time the Respondent was also incarcerated. Being that the Respondent was incarcerated for all of 2009 and 2010, and therefore I assume had little or no control over his employment or income, I accept that his income for 2009 was \$12,664.00 and impute the same income to him for 2010.

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<sup>2</sup> *Tybring v. Tybring, supra*

<sup>3</sup> *Schick v. Schick*, 2000 NWTSC 18

#### IV. RETROACTIVE SUPPORT

[30] The Applicant and the Respondent ended their relationship in November 2008. The Applicant filed this Application on December 3, 2010. The Applicant has supported the Children on her own since the couple separated, and no evidence or information has been provided indicating that the Respondent has paid any child support since the couple separated.

[31] Every parent has an obligation to support his or her children; the obligation exists independently of any court action. It arises when a child is born. Non-payment of child support equals deprivation to the child, and requires the parent who has not met his or her financial obligation to their children to make up amounts not previously paid. This is necessary to compensate the deprived party, the Applicant in this case, who has born the complete financial responsibility to support the Children up to this point.

[32] It is not necessary that the Respondent have notice of an intention to pursue child support. Requiring notice as a prerequisite to a court's ordering a retroactive award does not support, but, indeed, undermines several of the objectives of the *Guidelines*, overlooks the nature of the financial obligations imposed under them, shifts responsibility to the custodial parent who has little or no information, and delays fulfillment of a parent's obligation to the intended beneficiary, the child. The Respondent has an obligation to support the Children and that obligation exists regardless of notice.

[33] There are important policy reasons for concluding that retroactive support should be paid for the period pre-dating the filing of a court application or claim for support. Awarding support only from the notice date, or the application date, and not when the obligation is incurred, discourages settlement and promotes unnecessary notices, applications, and litigation, and further would be punitive for children and the custodial parent. Awards dated only from the date of the application or notice fail to reflect the ongoing obligations for support or give a remedy for that right.

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[34] Denying the retroactive order, while beneficial to the Respondent, in essence, penalizes the Applicant and the Children and denies the validity of the Applicant's contribution. A parent should expect to pay what he or she is and was obliged to pay.

[35] As soon as a child is born, or as soon as the parents separate as in this case, a non-custodial parent should immediately realize that he or she has an obligation to pay child support.

[36] A non-custodial parent is required to pay child support retroactive to the date the obligation arose, unless he or she has satisfied his or her financial obligation in some other manner, or has taken all reasonable steps to fulfill the obligation, or the parties have made mutually satisfactory arrangements for child support which take the *Guidelines* and their effect into account<sup>4</sup>.

[37] The Respondent has not paid child support since the Applicant and Respondent ended their relationship. The Respondent has not fulfilled his financial obligations in any other manner. The Respondent has not taken any reasonable steps to fulfill his obligations, and no mutually satisfactory arrangements have been made for child support.

[38] The Respondent has an obligation to pay child support from December 2008, the first full month that the Applicant and the Respondent were no longer in a relationship, and the Applicant assumed the full financial responsibility for the Children.

## **V. ARREARS**

[39] Being that since the Applicant and the Respondent separated, the Respondent has not paid any child support for the Children the arrears of child support for the Children for the period

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<sup>4</sup> See *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231

from December 2008 to December 2010 will be set at \$4,910.00<sup>5</sup>. From January 2011 to March 2011, inclusive, the arrears will be \$2,004.00<sup>6</sup>. The total arrears owing are \$6,914.00.

## VI. COSTS

[40] In consideration of all the circumstances, each party will bear their own costs on this Application.

## VII. CONCLUSION:

[41] Effective January 2011, an annual income is imputed to the Respondent in the amount of \$33,280.00, and the Respondent is ordered to pay child support for the Children in the amount of \$668.00, effective January 1, 2011. The Respondent shall commence payments of \$668.00 per month on April 1, 2011, and on or before the first day of every month thereafter. The Respondent shall provide to the Applicant a copy of his filed 2011 Income Tax Return on or before June 30, 2012, and the Respondent shall provide to the Applicant a copy of his filed Income Tax Return for the preceding year on or before June 30 every year thereafter.

[42] Arrears of child support for the Children for the period from December 2008 to March 2011 are hereby set at \$6,914.00. The Respondent shall pay an additional \$193.00 per month towards the arrears, commencing April 1, 2011, and continuing to be paid monthly on or before the first day of each month thereafter for the next three years (until March 1, 2014) or until the total amount of arrears (\$6,914.00) is completely paid.

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<sup>5</sup> Pursuant to *The Guidelines* based on an annual income of \$12,600.00: 6 months @ \$185 per month (2 children), plus 19 months @ \$200 per month (3 children) = \$4,910.00

<sup>6</sup> Pursuant to *The Guidelines* based on an annual income of \$32,300.00: 3 months @ \$668 per month = \$2004.00

[43] Counsel for the Applicant shall prepare and submit the formal order on this matter, and cause a copy of the formal order to be served on the Respondent.

Bernadette E. Schmaltz  
T.C.J.

Dated at Yellowknife, Northwest Territories  
this 23<sup>rd</sup> day of March, 2011.

DANYA ROBIN HARRISON V. LEROY GUY OMILGOITUK

File: T3-FM-2009-000007

2011 NWTC 09

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