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FAMILY COURT OF AUSTRALIA AT SYDNEY — FULL COURT

In the Marriage of SMIT and PICKWORTH

Evatt CJ, Pawley and Ellis SJJ

27th August 1981 — (1981) 7 Fam LR 387; [1981] FLC 76,524 (¶91-071)

CONTEMPT – PROCEDURE – WIFE APPLYING FOR INCREASE IN CHILD MAINTENANCE AND ORDER THAT HUSBAND SHOW CAUSE WHY HE SHOULD NOT BE DEALT WITH FOR CONTEMPT FOR FAILING TO COMPLY WITH EARLIER CHILD MAINTENANCE ORDER – BOTH OF WIFE'S APPLICATIONS HEARD TOGETHER – DELAY IN INFORMING HUSBAND OF CONTEMPT WITH WHICH HE WAS CHARGED – CONTEMPT POWER NOT TO BE USED WHERE APPROPRIATE TO USE OTHER REMEDIES FIRST – PROCEDURE TO BE STRICTLY COMPLIED WITH WHERE CONTEMPT POWER INVOKED – MAINTENANCE APPLICATION AND CONTEMPT MATTER SHOULD NOT BE HEARD TOGETHER – CORRECT PROCEDURE TO FOLLOW: FAMILY LAW REGULATIONS, REG. 137(2), (4), (5).

The wife applied to the Family Court of Australia for (a) an order that the husband show cause why he should not be dealt with for contempt of court for failing to comply with an order made in 1974 in that he failed to pay child maintenance; (b) an order that the amount payable for child maintenance be increased. At the hearing, the wife's applications were heard together. The affidavits of both parties were read, after which the wife gave oral evidence and was cross-examined. After the wife had given her evidence, the husband's counsel submitted that there was no evidence of contempt and called the husband to give evidence. The husband was not orally informed at that stage of the contempt with which he was charged nor was he called upon to show cause why he should not be dealt with for contempt. The husband then gave evidence in relation to both the wife's applications and was cross-examined. Then, the trial Judge stated that he formally charged the husband with contempt in that the husband had breached the order for the payment of child maintenance. The trial Judge increased the quantum of child maintenance and found the husband guilty of contempt of court. The husband was sentenced to three weeks' imprisonment. The husband appealed to the Full Court of the Family Court of Australia—

HELD: Appeal allowed. Order set aside.

(a) Resort should not be had to the contempt power where it is appropriate to use other remedies first.

Sahari and Sahari (1976) FLC ¶90-086;

Helliar and Helliar (1980) FLC ¶90-805, applied.

(b) Where the contempt power is invoked, the relevant procedure must be strictly complied with.

Sahari and Sahari (1976) FLC ¶90-086 applied.

(c) The procedure followed by the trial Judge was inappropriate in that the contempt matter and the maintenance application were heard together. Evidence given by the husband after the complaint had been made, but before he had been formally charged, was relied on in finding him guilty of contempt.

(d) The appropriate procedure which should have been followed was to deal firstly with the contempt matter before embarking upon the hearing of the application to vary the maintenance order. Having read the affidavits on which the wife relied, if at that stage the trial Judge was satisfied that a *prima facie* case had been made out, it would have been appropriate for the judge to have then opened the Court and to have proceeded in accordance with reg 137(2). Having caused the husband to be informed orally of the contempt with which he was charged and having required him to show cause why he should not be dealt with for contempt, the trial Judge should have allowed cross-examination of the wife and then proceeded in accordance with reg 137(2)(c) and (d).

(e) In proceeding in accordance with reg 137(2), it would have been necessary to put to the husband the period during which the maintenance was not paid and the amount of arrears. A contempt charge must be formulated with precision and the proceedings must be confined to the matters raised in the charge. The form instituting any application that a person be dealt with for contempt should contain brief but accurate particulars of the conduct constituting the alleged contempt and not simply a bald statement that an order had been disobeyed.

EVATT CJ, PAWLEY AND ELLIS SJJ: On 11 July 1980, the former wife (hereinafter referred to for the sake of convenience as the wife) filed an application in the Sydney Registry of this Court seeking the following orders:

- (i) An order that the respondent show cause why he should not be dealt with for contempt of court for failing to comply with Order No. 4 made in the Supreme Court on 5 June 1975 - in that he has failed to pay maintenance for each of the children in the sum of seven dollars fifty cents (\$7.50) per week.
- (ii) An order that Order No. 4 made in the Supreme Court on 5 June 1974 be varied by increasing the amount payable in respect of the children in the applicant's custody from seven dollars fifty cents (\$7.50) per week to twenty-five dollars (\$25) per week.
- (iii) That the respondent return the child, A, to the custody, care and control of the applicant or alternatively, that the applicant have access to the said child to include half of each school holiday and weekend access to be arranged between the parties."

The application came on for hearing before Hogan J on 18 December 1980, on which day his Honour made various orders including an order increasing the quantum of maintenance for the children of the marriage payable by the former husband (hereinafter referred to for the sake of convenience as ("the husband"). His Honour also found the husband to be guilty of contempt of court and ordered that he be sentenced to imprisonment for a period of three weeks commencing on 26 December 1980. The husband appealed against the order sentencing him to imprisonment, execution of the order having been stayed pending the hearing of the appeal on 19 December 1980. The appeal came on for hearing on 17 June 1981, when the appeal was allowed and the order set aside. The Court indicated at the time that it would give its reasons for setting the order aside at a future date.

It is not necessary in this case to set out the history of the matter as the basic submission on behalf of the husband related to the procedure followed at the hearing. It was submitted that the charge of contempt was not properly made out because the husband was not properly informed of the contempt with which he was charged nor was the period during which it was alleged that he had failed to comply with the order of the Supreme Court of New South Wales specified nor was the amount of the arrears alleged specified. Following an agreement reached between the parties, the only matters which proceeded before the learned trial Judge on a defended basis were the orders sought by the wife in para (i) and (ii) of her application filed on 11 July 1980.

The procedure followed at the hearing was that the applications of the wife were heard together, the affidavits of both parties were read after which the wife gave oral evidence and was cross-examined. The affidavit material and the evidence of the wife related both to the application for variation of maintenance and to the alleged contempt. After the wife had given her evidence, counsel for the husband submitted that there was no evidence of contempt and then called the husband to give evidence. He was not orally informed at that stage of the contempt with which he was charged nor was he called upon to show cause why he should not be dealt with for the contempt (see reg 137(2)).

The husband then gave evidence in relation to both the wife's applications and was cross-examined. During the course of his evidence, he admitted that between May and August 1980 he had received certain benefits from the Department of Social Services in respect of his children sufficient to have enabled him to pay the maintenance ordered by the Supreme Court of New South Wales but had not done so, having spent the moneys otherwise.

Shortly before the luncheon adjournment, his Honour said:

"Perhaps both counsel could make enquiries and if you can agree on the statement of what he earns, but at this stage before I adjourn, I think it is appropriate, Mr Smit, I formally charge you with contempt of court and (sic) that you breached the order for payment, and I charge you now so that you can confer with your counsel during the lunch hour and eventually, I will be asking you to show cause why I should not deal with you for contempt. That follows on his admitted figures, Mr Conyngham".

Upon the resumption of the hearing the following exchange occurred:

"Counsel for the husband: This is an open court for contempt now?"

His Honour: I will open the court, I have before me the whole of the evidence on all of the issues."

Thereafter the husband completed his oral evidence. His Honour then delivered judgment, varied the maintenance order and continued as follows:

"I find you guilty of the contempt of court in that you have wilfully disobeyed the order that was made in relation to payment of maintenance for your children, and particularly from the period of May of this year to August of this year, and, in my mind, the action of accepting the children's money and keeping it yourself, and spending it on yourself, is despicable. I sentence you to be imprisoned for a period of three weeks. I postpone the commencement of that sentence to 26 December 1980."

It should be borne in mind that the wife's application was filed on 11 July 1980. This Court has already commented on the desirability of discouraging resort to the contempt power where it is appropriate to use other remedies first (*Sahari and Sahari* (1976) FLC ¶90-086) and *Helliar and Helliar* (1980) FLC 90-805). It has also been pointed out that where the contempt power is invoked the relevant procedure must be strictly complied with. In *Sahari (supra)* at p75,411 the Full Court said:

"Where a court order has been disobeyed and attachment of the offender is sought the procedures set forth in reg 137(4) and (5) should be strictly complied with. Although in some cases the Court may be prepared to use its dispensing powers under reg 4, 14 and 15 such cases must be extraordinary and rare. If the respondent appears after service upon him of an application for attachment filed under reg 137(4) and personally served under reg 137(5), the hearing should proceed as set forth in reg 137(2). It seems to us that reg 137(2)(c) clearly invokes the principles of a hearing analogous to a summary criminal trial previously referred to. As to the question whether such hearing should take place in an open or closed court we draw attention to the judgment of Asche J in *Davis OK and Davis PM* (1976) FLC ¶90-050."

In the present case, it is not necessary to consider whether use of the contempt power was justified because in any event the procedure followed by the learned trial Judge was inappropriate in that the contempt matter and the maintenance application were heard together. Evidence given by the husband after the complaint had been made, but before he had been formally charged, was relied on in finding him guilty of contempt.

The appropriate procedure for his Honour to have followed was to deal firstly with the contempt matter before embarking upon the hearing of the application to vary the maintenance order. Having had read in the usual way the affidavit or affidavits on which the applicant wife replied, if at that stage he was satisfied that a *prima facie* case had been made out, it would have been appropriate for his Honour to have then opened the Court and to have proceeded in accordance with reg 137(2). Having caused the husband to be informed orally of the contempt with which he was charged and required him to show cause why he should not be dealt with for contempt, his Honour should have allowed cross-examination of the wife and then proceeded in accordance with reg 137(2)(c) and (d). In proceeding in accordance with reg 137(2)(a), it would have been necessary to put to the husband the period during which the maintenance was not paid and the amount of the arrears.

The importance of formulating the contempt charge with precision and of confining the proceedings to the matters raised in the charge or in any amendment of the charge has been stressed in a number of cases. *Lane v Registrar of the Supreme Court of New South Wales (Equity Division)*, High Court, 28 July, 1981, citing *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573, at pp579-580; [1953] ALR 743; 17 ABC 128; *Helliar and Helliar* (1980) FLC ¶90-805, pp75,077-75,078. See also *Churchman v Joint Shop Stewards' Committee of the Workers of the Port of London* (1972) 3 All ER 603; [1972] 1 WLR 1094.

Moreover, the form instituting any application that a person be dealt with for contempt should contain brief but accurate particulars of the conduct constituting the alleged contempt and not simply a bald statement that an order had been disobeyed. The failure to strictly comply with the relevant procedure in this case is clear and as a result the proceedings could not lead to a proper finding of contempt against the husband and in particular could not lead to a finding of contempt after 11 July 1980. Having regard to certain undertakings which were given to the Court by the husband and which were acceptable to the wife, it did not appear to us that the appropriate order was to remit the wife's application for re-hearing but to make the order earlier referred to.