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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

In the Marriage of DELLY (PA and BJ)

Connor J

7, 15 April, 1975; 5, 6, 18 August, 3, 9, 17 September 1976
(1976) 26 FLR 439; 2 Fam LR 11,643; [1977] FLC 76,113 (¶90-215)

FAMILY LAW – WILFUL REFUSAL TO OBEY MAINTENANCE ORDER – WHETHER ENFORCEABLE BY ATTACHMENT: FAMILY LAW ACT 1975-1976, SS107(1), 108(1).

HELD:

1. The combined effect of sections 107(1) and 108(1) of the *Family Law Act 1975* is that if the non-payment of maintenance constitutes a contempt of court, e.g. because the defaulter had the means and ability to pay but has wilfully refused to do so, then notwithstanding s107(1), contempt proceedings may be taken under s108(1).

2. In relation to the important question as to the way in which the various acts constituting contempt of court which were committed by the respondent Paul Delly should be dealt with, they merited imprisonment for a substantial period. It was proper, however, to take into consideration in a matrimonial cause that such a course would probably not benefit the wife. Accordingly, an order was made that a writ of attachment issue but its execution be stayed for a period to enable the respondent Paul Delly to pay the amount of the arrears of maintenance, namely \$1,875 within a period of two months.

CONNOR J: In this matter the wife Beverley Jean Delly obtained a decree nisi for the dissolution of her marriage with the husband Paul Andrew Delly. Amongst the orders made in the decree nisi was the following: that the husband pay \$25 per week maintenance for the only child of the marriage.

On 18 August 1976, the wife took out the notice of motion which is now before me asking for the following orders: that the said respondent and Don Antonarkis be committed or otherwise dealt with for contempt of court and such further or other orders as to the court may seem fit. ...

The grounds on which the above orders are sought are that:

- (1), (2), (3)...
- (4) The respondent has failed to pay any maintenance for the child of the marriage pursuant to the said order dated 19 March 1975, made in this suit; and
- (5) The respondent has failed to pay any of the petitioner's costs of and incidental to any of the orders made ...

The husband appeared in person after his former solicitors on the record filed a notice that they had ceased to act as his solicitors.

The wife took contempt proceedings against her former husband and his step-brother on five grounds. ...

The fourth ground is that the respondent Paul Delly has failed to pay any maintenance for the child of the marriage pursuant to the order of Joske J of 19 March 1975. The order of Joske J was: "That the respondent pay by way of maintenance for the said child the sum of \$25 per week, the first of such payments to be made on 26 March, 1975 and to continue until the said child completes her formal education such payments to be made to the registrar of the court for payment out to the petitioner". On 20 December, 1974, an interim order had been made that Paul Delly pay \$25 per week for the child. This order was by consent. In his answer Paul Delly offered to continue to pay that amount for the maintenance of the child. It is not altogether clear whether he made any payments after 19 March, 1975. He may possibly have made one such payment. At all events I am satisfied that the payments are now in arrears to the extent of \$1,875.

The question was raised during the hearing as to whether sub-s (1) of s107 of the *Family Law Act* 1975 had the effect that contempt proceedings could not be taken in respect of non-payment of maintenance. Subsection (1) of s107 reads as follows:

"After the commencement of this Act, no person shall be imprisoned or otherwise placed in custody by reason of contravention of, or failure to comply with, an order for the payment of money made in a matrimonial cause and any person who is in a prison or other custody at the commencement of this Act as a result of contravention of, or failure to comply with, such an order shall be released forthwith".

This provision, however, cannot be read on its own as sub-s(1) of s108 provides as follows:

"Notwithstanding any other provision of law, a court having jurisdiction under this Act may punish persons for contempt in the face of the court when exercising that jurisdiction or for contempt constituted by wilful disobedience of any decree made by the court in the exercise of jurisdiction under this Act."

I think the combined effect of these two provisions is that if the non-payment of maintenance constitutes a contempt of court, e.g. because the defaulter had the means and ability to pay but has wilfully refused to do so, then notwithstanding s107 (1), contempt proceedings may be taken under s108 (1). ...

There remains the important question as to the way in which I should deal with the various acts constituting contempt of court which I find to have been committed by the respondent Paul Delly. In my view they merit imprisonment for a substantial period. I think it is proper, however, to take into consideration in a matrimonial cause that such a course would probably not benefit the wife. I propose therefore, to order that a writ of attachment issue but its execution be stayed for a period to enable the respondent Paul Delly to pay the amount of the arrears of maintenance, namely \$1,875. I think a period of two months would be appropriate.
