

30/80

FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of REID (RA and HA)

Pawley SJ, Fogarty and Dovey JJ

27 November 1978 — (1978) 35 FLR 321; [1978] FLC 77,801 (¶90-529); MC15/79

FAMILY LAW – MAINTENANCE IN ARREARS – APPLICATION FOR ENFORCEMENT – WIFE UNAWARE OF HUSBAND'S WHEREABOUTS – WIFE ONLY TOOK LIMITED STEPS TO LOCATE HUSBAND – HUSBAND LIVING IN COUNTRY TOWN FOR TWO YEARS AND HIS NAME WAS ON THE ELECTORAL ROLL AND IN THE TELEPHONE BOOK – MAGISTRATE ORDERED THAT ONLY 12 MONTHS OF ARREARS BE PAID – WHETHER THE SO-CALLED "TWELVE MONTH RULE" SHOULD BE APPLIED – WHETHER MAGISTRATE IN ERROR: *FAMILY LAW REGULATIONS*, R133.

In 1971 H. was ordered to pay to W. \$12 per week for the maintenance of each of two children. Shortly after the order was made H. ceased making any payments and thereafter made no attempt to comply with the orders. W. attempted to locate H. but was unable to do so until 1977 when she commenced proceedings for enforcement of the arrears which by then had accumulated to \$7,700. From at least 1972 to 1974 H. lived in a country town where his name was on the electoral roll and in the telephone book. The Magistrate, to whom the application for enforcement was made, held that W. had not made reasonable efforts to locate H. and allowed her to enforce only 12 months arrears in accordance with the traditional approach by the courts to the enforcement of maintenance arrears. W. appealed to the Family Court of Australia and Walsh J dismissed the appeal on the grounds that he could not interfere with the proper exercise of judicial discretion at first instance. W. then appealed to the Full Court.

HELD: 1. Although r133(12)(a) of the *Family Law Regulations* 1975 empowers a court on the hearing of a summons for arrears of maintenance to make "an order for the payment of arrears and any other unpaid portion of the moneys payable under the first mentioned order", there is a discretion in a court to order a portion only of such arrears rather than the whole or nothing.

2. The so-called "twelve month rule" which, in its application, provides that a court should normally only allow 12 months arrears of accrued maintenance, is so heavily entrenched in the matrimonial jurisdiction that in the absence of legislative change, it should continue to be applied.

Biggs v Dienes (1975) 12 ALR 590; [1976] 2 NSWLR 463; 2 Fam LR 11, and

In the Marriage of Spry and Roet 29 FLR 425; [1977] FLC 90-301; 3 Fam LN 50, referred to.

3. There is no distinction to be made between enforcement of arrears of maintenance ordered for a spouse and maintenance ordered for children of a marriage in the application of the 12-month rule.

4. Unless the Full Court could be shown either that the Magistrate had erred in the exercise of his discretion or that Walsh J had approached the hearing of the appeal on wrong principles, the Full Court could not interfere with the Magistrate's decision notwithstanding that it may well have come to a different conclusion on the evidence had it been sitting as a court of first instance.