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FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of SPRY and ROET

Frederico J

31 October 1977 — (1977) 20 FLR 425; [1977] FLC 76,590 (¶90-301)

FAMILY LAW – ENFORCEMENT OF ARREARS ACCRUED FOR MORE THAN 12 MONTHS – DISCRETION UNDER SECTION 105(1) OF THE *FAMILY LAW ACT*.

HELD:

(1) An obligation to pay maintenance is not a debt in the normal sense, but a special kind of obligation with features different from those attaching to the ordinary kind of debt.

***Re Hedderwick* (1933) Ch 669; [1933] All ER 73; and**

***Re White* [1951] VicLawRp 42; (1951) VLR 306; [1951] ALR 715, applied.**

(2) The court has a discretion as to whether to enforce arrears of maintenance and as to the period in respect of which such arrears may be enforced or as to whether they should be enforced at all.

***Welsby v Welsby* [1961] VicRp 61; (1961) VR 362;**

***Greig v Greig* [1962] VicRp 70; (1962) VR 485;**

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

(3) The general rule of practice is that the court will only enforce arrears accrued in the period of twelve months prior to the bringing of the application for enforcement. However, the court ought not to encourage people against whom maintenance orders have been made to sit back and disobey those orders and to keep on disobeying them, hoping for the best.

***Jeffrey v Jeffrey* [1949] HCA 28; (1949) 78 CLR 570; [1949] ALR 701; and**

***Tingle v Tingle* (1947) 65 WN (NSW) 43, referred to.**

(4) W's. order for maintenance having lapsed upon her re-marriage in 1971, and it being purely fortuitous that by reason of the death of H's father, H. was now in a position to pay any arrears accrued as at that date, it would be contrary to the spirit of the *Family Law Act* to enforce the payment of substantial arrears of periodic maintenance when the order had lapsed for nearly six years.

(5) In the circumstances it was appropriate that W. be entitled to enforce the Supreme Court order for costs set off against any overpayment by H. of maintenance for the child G.

FREDERICO J: The court has a discretion as to whether to enforce arrears of maintenance and as to the period in respect of which such arrears may be enforced. In *Welsby v Welsby* [1961] VicRp 61; (1961) VR 362 considering an application by a wife to enforce payment of substantial arrears of maintenance said:

> 'Where the aid of the court is required to enforce payments of arrears of maintenance, the court considers that it has a discretion as to the period in respect of which arrears are recoverable in the absence of special circumstances. This rule of practice has its justification in the special purposes for which maintenance orders are made the personal support of the wife and in the injustice and oppressiveness likely to result should such arrears be allowed to accumulate over too long a period'. (See also *Greig v Greig* [1962] VicRp 70; (1962) VR 485).

In *Welsby v Welsby* and *Greig v Greig* the court was concerned with he enforcement of orders made under the *Maintenance Act* 1958 (Vic.) But a similar practice was adopted in New South Wales in relation to the *Matrimonial Causes Act* 1959. In *Biggs v Dienes* (1975) 12 ALR 590; [1976] 2 NSWLR 463 at p475; 2 Fam LR 11:

> 'there has been for many years a practice in courts, both here and in England, exercising Family Law Jurisdiction that generally payment of arrears of maintenance which have accrued over a period longer than twelve months will not be enforced by the process of the court. The reason for the practice seems to me clear enough. It is that maintenance is intended to be of a stipendiary nature to enable the wife to meet the ordinary regular outgoings necessary for her support. It is not intended that

> they should accrue into a lump sum which a wife, after a considerable period of inaction, may then seek to recover'.

It is thus clear that the court has a discretion not only as to the period in respect of which accumulated arrears under an order for periodic maintenance will be enforced, but as to whether they should be enforced at all.

Despite the general practice of limiting enforcement to a period of only twelve months, there are cases in which, having regard to the circumstances, the court will enforce payment of arrears of maintenance falling due over a more lengthy period. For instance in *Jeffery v Jeffery* [1949] HCA 28; (1949) 78 CLR 570 at p587; [1949] ALR 701 Dixon J (as he then was) said:

> 'When during a long period of separation the wife has dispensed with support from her husband a presumption naturally arises that she does not need it. Where facts are not shown which explain the absence of any request on her part for support from him and make her need for alimony appear, the court may well think that to make the suit the occasion of altering a situation that has gone on so long is not just. The references which are to be found in a number of places in the authorities to a refusal to allow the suit to be used for placing the wife in a better financial position than before its institution do not relate to wives who depended upon their husbands for support but have been left by them without adequate maintenance and yet have managed somehow to live.'

Similar views were expressed in *Tingle v Tingle* (1947) 65 WN (NSW) 43 at p44, where Bonney J said that the court should be very cautious not to encourage people against whom maintenance orders have been made to sit back and disobey those orders and keep on disobeying them hoping for the best.

In determining the exercise of its discretion the court must have regard to all relevant matters but there is a limit to how far the court can go in its examination of the circumstances.

For instance, it is by now quite unrealistic for the court to turn to a close examination of the financial affairs of the respondent during the period of currency of the order from March 1969 to December 1971 to decide whether during that period he might reasonably have had means and ability to meet his obligations under the order. Similarly, it is impracticable for the court to closely examine the means of the applicant between those years to determine whether and if so to what extent she was in a situation of need or that she suffered financial difficulty by reason of the non-compliance by the respondent during that period he might reasonably have had means and ability to meet his obligations under the order. Similarly, it is impracticable for the court to closely examine the means of the applicant between those years to determine whether and if so to what extent she was in a situation of need or that she suffered financial difficulty by reason of the non-compliance by the respondent with the order in her favour.

It is apparent however that the applicant has consistently asserted her claim for maintenance payments. There is evidence which I accept that at one stage she was to some extent reliant upon her father for financial assistance. It also appears that that respondent has been possessed of legal advice throughout and that he did not apply for a variation to suspension of the Supreme Court order, although he attributed his failure to do so to inability to afford the legal costs involved. It is not a case of a wife who has slept on her rights or who by inactivity has given her former spouse a false sense of security by lulling him into belief that she would not enforce the order.

On the other hand it would seem a fair inference from the applicant's fruitless attempts to obtain payment of arrears in the past that the respondent did not then have the means to bring the arrears up to date. Certainly he did not have the means in 1969 when the applicant had his interest in a property sold in the previous sequestration proceedings with no benefit to herself but with significant loss to the respondent. I believe that there must have been however times when the respondent could have made periodical payments had he acted responsibly in regard to his obligations.

In the present case the applicant does not seek to enforce compliance with the order since the date of her remarriage on 18th December 1971 almost six years ago. Nor would she be entitled to do, in view of her remarriage (*Family Law Act*, s82(4)). There is no suggestion that she

is in any present need. Indeed her appearance in the witness box indicated quite the contrary. In the circumstances and having regard to the special nature of an order for maintenance I do not consider that in the exercise of my discretion I should enforce payment of arrears in respect of the respondent which have accumulated up to 18th December 1971, even for a limited period. It is purely fortuitous, that by reason of the death of his father and the benefits obtained from his father's estate, the respondent is now in a position to pay the arrears which had accrued between the date of the Supreme Court order and the date of the applicant's remarriage. Perhaps with some difficulty the applicant has survived her period of deprivation but she has no current need of maintenance.

Whilst I appreciate the importance of the court discouraging deliberate contravention of its orders I am of the view that it would be in the circumstances of the present case quite abhorrent and contrary to the spirit of the *Family Law Act* to enforce the payment of substantial arrears of periodic maintenance when the order has lapsed for nearly six years. The former wife has remarried and has re-established herself. Although the former husband has not remarried he has obviously re-established his own lifestyle. Apart from the respondent's continuing liability in respect of the child, the ill-fated marriage is one best forgotten in the interests of the parties and of the community. I should emphasize that the principles upon which I have relied in the exercise of my discretion relate to periodic maintenance. Different considerations would apply were questions of lump-sum maintenance to be involved, or were the former wife to show a continuing need (see the judgment of Mahoney JA in *Biggs v Dienes* (1975) 12 ALR 590; [1976] 2 NSWLR 463 at p475; 2 Fam LR 11.
