

65/77

## FAMILY COURT OF AUSTRALIA AT MELBOURNE

*In the Marriage of VERGIS (C and N)*

Emery J

18 August 1977 — (1977) 29 FLR 227; 3 Fam LR 11,398; [1977] FLC 76,467 (¶90-275)

**FAMILY LAW – MAINTENANCE ORDER IN ARREARS – ACTION TAKEN TO HAVE DEFAULTER DEALT WITH – WHETHER COURT HAS POWER TO DEAL WITH CONTEMPT OF COURT PROCEEDINGS IN RELATION TO MAINTENANCE ARREARS: FAMILY LAW ACT 1975, SS4(1), 70, 106, 107, 114; FAMILY LAW REGULATIONS R133(9), (10).**

On the 25 February 1977 the wife applied to the Magistrates' Court at Port Melbourne for an order enforcing the order of that Court made on the 4 March 1976 and on the 17 March 1977 it was ordered, after a contested hearing, that the husband pay to the wife the sum of \$3,580 being arrears of maintenance up to the 10 March 1977. This sum has not been paid. On the 24 June 1977 the wife applied for an order, *inter alia*, that the husband be punished for his contempt in that he had failed to obey the orders of the 4 March 1976 and the 17 March 1977 and that he had failed to comply with the said assessment of costs.

**HELD: Application dismissed.**

1. Looking to the intention of Parliament as set out in the Act it appears to be clear that no order can be made for the imprisonment of any person for non-payment of maintenance and that the powers of the court in contempt likewise do not apply.

2. A summons under regulation 133(9) of the *Family Law Regulations* may be directed to any person ordered to pay maintenance or other money for the benefit of a party or child or costs or to repay moneys overpaid. The summons requires the person to whom it is directed to appear for oral examination and to produce documents and when he so appears the court may make all or any of the orders referred to in sub-regulation 12 none of which involve imprisonment.

3. Regulation 133(9) then is not an enforcement regulation as such. It is no more than a provision to enable the Court to examine a person alleged to have failed to comply with an order to ascertain whether or not enforcement provisions should be taken.

4. It is not for contravention of or failure to comply with the order to pay money that the warrant issues but for contravention of or failure to comply with a summons to attend and give evidence and produce documents in circumstances not covered by the provisions of Regulation 114.

5. Accordingly, the contempt provisions do not apply to orders for payment of money and the application is dismissed.

**EMERY J:** Mr Gurvich who appeared for the wife did not press the contempt application but did not abandon it. Mr Keon-Cohen who appeared for the husband conceded that the discovery orders should be made, but opposed the making of all other orders sought. He submitted that the contempt application should be dismissed. It is appropriate to deal with a number of these applications at this preliminary stage.

As to the contempt application, it relates to two orders, for the payment of maintenance, and an assessment of costs by the Registrar pursuant to an order of this Court. That assessment pursuant to Regulation 174(10), no notice of objection been filed within 14 days after receipt thereof is deemed to be a consent to an order of the Court. However, no order has as yet been made for payment of the specified sum, and that assessment is not therefore a proper subject for a contempt application in any event, it not being as yet an order of the Court.

If the order had been made it would be in the same category as the order of payment of money made on the 17 March 1977. The contempt application is taken by way of proceedings for enforcement.

In considering the enforcement provisions of the Act it is necessary firstly to note that "Decree" is defined in Section 4(1) as meaning "Decree Judgment or Order" and includes a Decree Nisi and an order dismissing an application or refusing to make a decree or order.

Methods of enforcement are referred to in Section 106 of the Act. Insofar as relevant that section reads:-

"106. The regulations may make provision for and in relation to the enforcement of decrees made under this Act including—  
(b) in the case of a decree being a maintenance order under Part VIII—  
provision for an officer of a court ... a prescribed authority ... in his or its discretion, to institute and prosecute proceedings on behalf of the person entitled to moneys payable under that order for the purpose of enforcing payment of those moneys".

Regulations 132 to 136 prescribe methods of enforcement of maintenance by way of garnishment, seizure of property and sequestration of estates. Those regulations make no provision, as there was in the maintenance Acts of the States which this legislation replaces, for imprisonment. Such proceedings may be taken by a litigant or by a prescribed authority.

The question is do these regulations provide the only methods of enforcement available, or may a litigant in proper circumstances take advantage of the contempt provisions?  
Section 107(1) of the Act provides that

"... 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 ..."

This section refers to "contravention of, or failure to comply with" an order including a maintenance order. The word "contravention" must be given some meaning other than "failure to comply with" and in my opinion that word provides for a situation such as when a person has been fined by a court for contravention of the Act.

It is significant that Subsection 3 of this Section states:-

"This section does not affect the operation of sub-section 70(6) or sub section 114(4)".

Section 70 deals with disobedience of custody orders and sub-section (6) enacts —

"(6) If a court having jurisdiction under this Act is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with a provision of this section, that court may—  
(a) order that person to pay a fine not exceeding \$1000.00;  
(b) require that person to enter into a recognisance, with or without sureties, in such reasonable amount as the court thinks fit, that that person will comply with the relevant order, or order that person to be imprisoned until that person enters into such a recognisance or until the expiration of 3 months, whichever first occurs;  
(c) order that person to deliver up to the court that person's passport and such other documents as the court thinks fit; and  
(d) make such other orders as the court considers necessary to enforce compliance with this section."

Sub-section (8) of that section states:-

"Sub-section (6) does not prejudice the power of a court to punish a person for contempt of court."

Section 114 deals with injunctions and sub-section (4) thereof is in the same terms as sub-sections (6) of Section 70 with necessary variations only.

Again sub-section (5) of Section 114 states:-

"Sub-section (4) does not prejudice the power of a Court to punish a person for contempt of court."

There is no similar provision to sub-section 70(6) or sub-section 114(4) in Part VIII of the Act i.e. the Part dealing with maintenance and property.

The question must be asked as to why sub section 70(8) and sub-section 114(5) have been included in sections with regard to custody and injunctions.

Section 35 of the Act reads:-

"Subject to this and any other Act, the Family Court has the same power to punish for contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court."

If Sections 70 and 114 were read without sub-sections (8) and (5) respectively and in conjunction with Section 35 no conclusion could be arrived at other than that the contempt provisions applied unless there was some provision in the Act or another Act to prevent such application.

Knowing of no provision in any other Act to prevent the application of the contempt provisions I am then put on guard as it were, to see if there is some provision in the *Family Law Act* which, but for Sections 70(8) and 114(5) would prevent the operation with respect to Sections 70 and 114 of the contempt provisions.

Each of those sections provides for an order for payment of money – a fine of up to \$1000.00 in proceedings under this Act "for contravention of" and order. Such an order could only be made "in a matrimonial cause".

If it were not for the provisions of Section 70(8) and Section 114(5) a person who contravened or failed to comply with a custody order or an injunction and was fined for that breach and wilfully refused to pay such fine could not be imprisoned for contempt because of the provisions of Section 107(1).

When one looks at the Regulations made by the Parliament for enforcement it is noted that Regulation 132 which applies to maintenance also applies to a fine, to other moneys for the benefit of a party or child, to costs and to an order for the recovery of overpaid moneys pursuant to Section 82(7). That Regulation then applies to all orders which may be made under the provisions of the Act or the Regulations for payment of money including it would appear lump sum maintenance or payment of specific moneys by way of property settlement.

Looking then to the intention of Parliament as set out in the Act it appears to be clear that no order can be made for the imprisonment of any person for non-payment of maintenance and that the powers of the court in contempt likewise do not apply.

As to the contempt provisions it must be remembered that the Family Court is not a Court of Common Law or a Court of Equity as are the Supreme Courts of the States with inherent jurisdiction. The Family Court is a creature of statute and has no powers other than those given to it by statute. Thus it is that if it were not for Section 35 the court would have no powers whatever to punish for contempt of its orders and the power there given is specifically made as subject to the *Family Law Act* and any other Act.

It could be argued that as Section 107 refers to a person "imprisoned or otherwise being placed in custody" it must apply to a person taken into custody pursuant to a warrant of arrest and Regulation 133(9) would be *ultra vires* the Regulation making power if Section 107 has the effect I have stated.

This in my opinion is not the case. Regulation 133(9) reads :-

"Where a person fails to attend before a court as required by a summons under this regulation duly served on him, the court may issue a warrant directing that person to be taken into custody and brought before the court".

A summons under this regulation may be directed to any person ordered to pay maintenance or other money for the benefit of a party or child or costs or to repay moneys overpaid. The summons requires the person to whom it is directed to appear for oral examination and to produce documents and when he so appears the court may make all or any of the orders referred to in sub-regulation 12 none of which involve imprisonment.

The regulation 133(9) then is not an enforcement regulation as such. It is no more than a provision to enable the Court to examine a person alleged to have failed to comply with an order to ascertain whether or not enforcement provisions should be taken.

It is not for contravention of or failure to comply with the order to pay money that the warrant issues but for contravention of or failure to comply with a summons to attend and give evidence and produce documents in circumstances not covered by the provisions of Regulation 114.

For these reasons, in my judgment, the contempt provisions do not apply to orders for payment of money, and I propose to dismiss that application at this stage.

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