

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(DIVORCE)**

CLAIM No: BVIHCT 2015/0014

BETWEEN:

FP

Applicant

and

HP

Respondent

Appearances:

Ms. Stacy L Abel for the Applicant

The Respondent appeared in person

2022 February 2

JUDGMENT

- [1] **JACK, J [Ag.]:** On 29th November 2021 I handed down a judgment. That judgment dealt with the father's application for return of the children from the United States and the payment of arrears of maintenance. It will be recalled from that judgment that the financial arrangements as between the wife and the husband were agreed and incorporated in a consent order of 24th September 2015. The agreement provided for the father to pay maintenance of \$1,800 per month in respect of the parties' four children. Five months after Hurricane Irma struck Tortola in 2017 the father ceased to pay maintenance.
- [2] By an application of 3rd May 2021 the mother sought payment of the arrears of maintenance from the father. That application came before Wallbank J who after a number of hearings on 12th May and 7th and 10th June 2021 held in a written

judgment of 29th July 2021 that the mother's claim for arrears of maintenance was limited to one year's arrears. The total due as at 30th July 2021 from the father to the mother, including further arrears, interest and costs, under the judgment of Wallbank J was agreed before me at \$29,557.56. I ordered that the father pay \$1,800 per month in on-going maintenance and \$500 per month in respect of the arrears until mid-2022 when he will have paid off a loan and be able from August 2022 to pay \$1,000 per month towards the arrears. At the hearing before me in November 2021, the mother said that she intended to make an application for leave to enforce the arrears which had accrued prior to 3rd May 2020 (one year before she brought her application). She has now issued such an application, dated 18th November 2021 and it is this application which I have now to determine.

- [3] The statutory background is this. Section 24(2)(a) of the Matrimonial Proceedings and Property Act 1995 gives the Court the power to order a party to a marriage to pay maintenance for the benefit of a child of the family. It was under this provision that the consent order of 2015 was made. Section 31(1) of the Act provides:

“A person shall not be entitled to enforce the payment of any arrears due under an order made by virtue of [*inter alia* section 24(2)] without the leave of the court, if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.”

The rule in *Henderson v Henderson*

- [4] The first question is whether it is open to the mother to issue such an application in the light of the procedural history of this case. The basic rule was settled as long ago as 1843 in the well-known case of ***Henderson v Henderson*** that:¹

“where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought

¹ (1843) 3 Hare 100 at p 115 (Wigram VC).

forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

[5] This rule applies in matrimonial proceedings as well as ordinary civil proceedings:

Norman v Norman (No 2) (Practice Note)² and **Richardson-Ruhan v Ruhan**.³

[6] In my judgment, this principle applies in the current case. Ms. Abel argues that the mother issued an application in respect of arrears as long ago as 2018. That may be so, but it was an application which appears never to have been prosecuted by the mother. Wallbank J did not consider that it prevented him from applying the twelve-month rule on enforcement of arrears. I agree. The 2018 application appears to have been abandoned by the mother.

[7] There is no good reason in my judgment why the current application for leave to bring proceedings for more than twelve months’ arrears could not have been issued earlier. The mother was represented by counsel, so even if (which is doubtful) her status as a litigant in person were relevant, this cannot be advanced as an explanation. Accordingly, the current application stands to be dismissed on this ground.

Lifting the twelve month cap

[8] Even if I am wrong in that, the mother has not in my judgment shown a sufficient case for lifting the twelve month cap on arrears. As Wallbank J said in his judgment of 29th July 2021 in this matter:

“[82] The twelve month rule appears to have as its purpose (a) to encourage applicants to act promptly to claim arrears of maintenance in the interests of the welfare of children; and (b) to avoid unmanageable debts

² [2017] EWCA Civ 120, [2017] 1 WLR 2554 at [26].

³ [2017] EWHC 2739 (Fam) at [11] (Mostyn J).

accumulating on the part of delinquent parents which could cause them and any other dependants they may have hardship in discharging.”

[9] I respectfully agree. In the current case, the mother says that her aunt has been supporting her financially and has sent her of the order of \$60,000 to help her grand-nephews and grand-niece. The documentary evidence of this is not very good, but I am willing to accept that there have been regular advances of monies from the aunt and that the mother has had to borrow on credit cards and the like. However, there is no evidence that the aunt expects repayment of the support she has been giving. Further, the order I made in November provides for the payment of just over \$29,500 of arrears, which the mother can use, if she and her aunt agree, to repay the aunt nearly half the monies advanced.

[10] In my judgment, this is the sort of case which the legislator envisaged when it provided for the twelve month limit on enforcement as of right of arrears of maintenance. The father, so far as appears from the evidence, had no good reason for the failure to pay arrears. Indeed Wallbank J appears to have recognised this by making a costs order against the father. However, the basic principle is that maintenance is paid in order to maintain the children of the family. Ordering the father now to pay maintenance due in 2018 or 2019 is of no assistance maintaining the children in 2018 or 2019. Those years are long past. No doubt the children would have had a better life-style if their father had had proper regard to his legal and moral obligations in those years. However, that is not a matter which can be put right retrospectively. The legislator has made a presumption that arrears over one year old are irrecoverable. The mother in my judgment has not made a sufficient case to disregard that presumption.

[11] Accordingly, on the merits too, I dismiss the application for leave to enforce.

[12] There will be no order for costs.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar