

[2022 Gib LR 246]**G v. G**

SUPREME COURT (Yeats, J.): October 13th, 2022

2022/GSC/24

Family Law—financial provision—children—father’s application to reduce maintenance payments dismissed—court considered father capable of obtaining full time employment to enable him to meet his obligations

The father applied for the variation of an order for child maintenance.

The parties married in 2006 and separated in 2019. The marriage had now been dissolved. There were two children of the relationship. In January 2020, the father was ordered to pay interim maintenance in the sum of £100 per month. In June 2020, the parties agreed a consent order which provided that the father was to pay the sum of £400 of maintenance arrears and that he would continue to pay interim maintenance at the rate of £100 per month. In September 2020, arrears stood at £600. The court ordered that £500 of those arrears be paid in five installments on dates between September 4th, 2020 and October 9th, 2020. The interim maintenance of £100 per month was to continue. In November 2020, the father was ordered to pay arrears of maintenance of £400 by way of weekly instalments of £24. He was also ordered to pay interim child maintenance in the sum of £58 per week. The order provided that a failure to pay the weekly arrears instalment or the weekly maintenance payment would result in a term of five days’ imprisonment in default. In January 2022, the parties entered into a consent order which provided that in consideration of the mother waiving her entitlement to arrears of maintenance in the sum of £2,382, the father would assume responsibility for arrears of rent and utilities, the previous interim maintenance order requiring the father to pay maintenance of £58 per week would remain in force, and the mother’s application for the father’s committal to prison would be adjourned.

The mother subsequently filed an application seeking the father’s committal for contempt and the father filed an application for the variation of the maintenance order of January 2022. The court ordered that the applications be listed together.

Held, ruling as follows:

(1) Dealing with the mother’s application for the father to be committed to prison for failing to comply with the child maintenance order and the father’s application to vary the maintenance order together was a procedural

error. Committal proceedings were in the nature of criminal proceedings. A respondent's liberty was at stake. As such, a respondent had the right to remain silent. In this case, the father chose to give evidence after he had been advised that he did not have to do so. However, the hearing also concerned the father's application to vary the maintenance order. The father could not advance that application without giving evidence. He therefore had little choice and the warning that he was given that because the hearing concerned committal proceedings he did not have to give evidence unless he wished to do so was, in effect, meaningless. The committal application would be adjourned to be dealt with by another judge (para. 12).

(2) The father's application to vary downwards the periodical payment order made in January 2022 would be dismissed. The court considered the mother's evidence to be clear and given honestly. She was working long hours to provide for the children and received very little help from the father since their separation, despite the orders made by the court. The court did not consider the father to have given honest evidence and determined that he was able to obtain full time employment or a second part-time job which would allow him to meet his obligations. The court also had regard to the fact that the order was made by consent. The father had agreed to pay £58 in maintenance every week (paras. 28–31).

Cases cited:

- (1) *Hammerton v. Hammerton*, [2007] EWCA Civ 248; [2007] 2 FLR 1133, considered.
- (2) *Inplayer Ltd. v. Thorogood*, [2014] EWCA Civ 1511, considered.
- (3) *Morris v. Morris*, [2016] EWCA Civ 812; [2017] 1 W.L.R. 554; [2016] 3 F.C.R. 224, considered.

C. Pitto (instructed by Ullger Law Ltd.) for the mother;
J. Rodriguez (instructed by Verralls) for the father.

1 **YEATS, J.:** The parties were husband and wife. They have two girls aged 15 and 12. The proceedings, which have run for almost three years, concern the payment of child maintenance by [Mr. G] ("the father") to [Mrs. G] ("the mother"). This judgment relates to two applications. The first, an application by the mother to have the father committed to prison for failing to comply with an order for the payment of child maintenance made on January 7th, 2022. The second, an application by the father to downward vary the said order.

2 Both applications were heard together on August 31st, 2022. For reasons that I shall explain, this was a procedural error. As a result, this judgment will only deal with the application for the downward variation of the maintenance payable. The committal application will be adjourned to be dealt with by another judge at the first possible date.

Background

3 The parties married on July 24th, 2006. They separated in November 2019 and the marriage has now been dissolved. There are two children of the relationship. [Redacted].

4 An application for maintenance by the mother was first filed on December 16th, 2019. On January 8th, 2020, I ordered that the father pay interim maintenance in the sum of £100 per month. The father was also ordered to provide disclosure of his financial resources.

5 The matter next came to court on June 17th, 2020. The parties agreed a consent order which provided that the father was to pay the sum of £400 of maintenance arrears that had accumulated at the rate of £100 per month and that he continue to pay interim maintenance, as ordered on January 8th, 2020, at the rate of £100 per month.

6 On September 1st, 2020, arrears stood in the amount of £600. I ordered that £500 of those arrears be paid in five instalments on dates between September 4th, 2020 and October 9th, 2020. The interim maintenance of £100 per month was to continue.

7 On November 6th, 2020, Ramage Prescott, J. ordered that the father pay arrears of maintenance of £400 by way of weekly instalments of £24. The father was also ordered to pay interim child maintenance in the sum of £58 per week. The order provided that a failure to pay the weekly arrears instalment or the weekly maintenance payment would result in a term of five days' imprisonment in default.

8 On November 23rd, 2020, the father filed an application to vary Ramage Prescott, J.'s order and, on December 9th, 2020, the mother applied for its enforcement. Those applications came for hearing before Ramage Prescott, J. on March 31st, 2021. The father's evidence at that hearing was that he had lost his job in the days following the November 6th, 2020 hearing and could not afford the sums which he had been ordered to pay. The learned judge did not accept this and said the following in her *ex tempore* judgment:

“The conclusion that I draw is that [the father] has not been honest about his situation and I am of the view, in the absence of any persuasive evidence, that he is able to work and able to prioritise his work in order to be in a position where he can maintain his family. He has today offered to pay £482 in complete settlement of the arrears outstanding. I think this is an important step on the part of [the father] and finally it shows some goodwill and some desire to commit but I have to mark the fact that the first serious offer for payment in the face of all the breaches comes on the back of an order that bears a penal notice on its front and it might be that this has encouraged him to make the payment.”

Ramage Prescott, J. ordered the father to pay the sum of £482 in settlement of the arrears accumulated to that date. She dismissed the father's application to vary the order of November 6th, 2020 and adjourned the enforcement application. The order she made provided that the "penal notice" relating to the payment of the weekly maintenance remain in force (subject to a deferment of the payments due for the period April 2nd, 2021 to April 30th, 2021).

9 On May 13th, 2021, the mother made a further application for enforcement of the order of November 6th, 2020. Directions were made on July 27th, 2021 with an intention to proceed to final hearing on a date after November 1st, 2021. After a relisting, the matter was set for a hearing to January 7th, 2022. On January 7th, 2022 the parties entered into a consent order which *inter alia* contained the following provisions:

"4. In consideration of the Applicant waiving her entitlement to arrears of maintenance in the sum of £2,382 due as at 31.12.21 (the interim maintenance liability), the Respondent shall assume sole and full responsibility for the arrears of the utilities and rent as set out in recitals (1) and (2) hereinbefore (except for the balance of £318.00 which shall remain the responsibility of the Applicant) and the Respondent shall continue to pay the current arrears agreement in respect of the electricity at £20.00 per month towards arrears of electricity arrears and shall pay the outstanding amounts by entering into suitable arrangements with the relevant creditors and shall save the Applicant fully harmless and indemnified in respect of the said debts.

5. Paragraph 2 of the interim maintenance order of 6th November 2020 shall continue in full force and effect as from the 1st of January 2022 until further order and the application for the Respondent's committal to prison be adjourned with liberty to apply.

6. A penal notice shall be attached to paragraph 4 & 5 of this order."

10 On June 17th, 2022, the mother filed an application seeking the father's committal for contempt. This was listed to July 5th, 2022 but the father did not appear as he had not been personally served with the application and his solicitors had not been able to contact him. The matter was relisted to July 15th, 2022. The father appeared on that date and the application was set down for hearing to August 30th, 2022 (then later relisted to August 31st, 2022 due to counsel's unavailability). In the meantime, on July 14th, 2022, the father filed an application for the variation of the maintenance order of January 7th, 2022. This was listed to July 29th, 2022. On that date, at the behest of the parties, I ordered that both applications be listed together for hearing on August 30th, 2022.

The procedural error

11 The mother filed witness statements dated May 16th, 2022 and July 13th, 2022 in relation to her committal application. The father filed an affidavit dated July 14th, 2022 accompanying his application for a variation of the maintenance order and in response to the committal application. At the hearing on August 31st, 2022, the mother gave evidence and was cross-examined. The father was then called to give evidence. At the outset, I warned him that because the hearing concerned committal proceedings he did not have to give any evidence unless he wished to do so. The father confirmed that he wished to give evidence and did so.

12 Committal proceedings are in the nature of criminal proceedings. A respondent's liberty is at stake. As such, a respondent has the right to remain silent. Here, the father chose to give evidence after he was advised that he did not have to do so. However, the fact was that the hearing also concerned the application to downward vary the maintenance order of January 7th, 2022. The father could not advance that application without giving evidence. He therefore had little choice and the warning that he was given was, in effect, meaningless. Dealing with the two applications together was a procedural flaw.

13 This issue was discussed by the English Court of Appeal in a number of cases which I have considered after reserving judgment. *Hammerton v. Hammerton* (1) was an appeal from a decision of a County Court judge who had heard an application for contact and for committal together. Moses, L.J. said as follows in the course of his judgment ([2007] EWCA Civ 248, at paras. 16–19):

“16. Thus, the decision of the judge to hear both applications at the same time placed Mr Hammerton in an impossible position. There was no means of reconciling the need for him to establish his case for contact, in the course of which he would have to deal with the alleged breaches of undertakings and of the order, and defending himself, at the same time, in the committal proceedings. There is no hint at any stage of the transcript of anyone advising Mr Hammerton of his rights in respect of the committal proceedings, nor of the judge reminding himself of the different burden and standard of proof in the two applications.

17. The judge gave no reason why it was essential to hear both applications at the same time. He never explained why the committal proceedings were so urgent that they had to be heard at the same time
...

18. ... As I have already said, the facts of the alleged breaches were relevant to the contact proceedings. But there was no reason why the judge should not have adjourned the committal proceedings to be

heard by a different judge or even, if that was unavoidable, by HH Judge Collins himself. If he were to hear those later committal proceedings, he would have had to make clear that he acknowledged, despite any adverse findings in the contact proceedings, that the burden and standard of proof were different. The better course would have been for another judge to hear the committal proceedings.

19. In so concluding, I appreciate that there will be cases, of which this case is an example, where the allegations of breaches of either an undertaking or a court order, are relevant to the contact proceedings. But it does not follow that it is necessary to hear the proceedings for committal at the same time. The important rights enshrined in article 6 must not be sacrificed in the interests of time and costs. It may well be that, after adverse findings in contact proceedings, committal proceedings turn out to be unnecessary or, at the very least, a severe sanction might be avoided once the smoke of battle has drifted away. I am not asserting that there can never be a case where an application for contact and for committal can never be heard at the same time. But it is difficult to envisage circumstances which compel such a procedure.”

14 In *Inplayer Ltd. v. Thorogood (2)*, the High Court had heard a committal application in the course of the trial of substantive civil claims. The Court of Appeal set aside the contempt findings. The following paragraphs are taken from the judgment of Jackson, L.J. ([2014] EWCA Civ 1511, at paras. 40–45):

“40. A person accused of contempt, like the defendant in a criminal trial, has the right to remain silent . . .

41. If the committal application is heard at the same time as other issues about which the alleged contemnor needs to give evidence, he is placed in the position where he is effectively deprived of the right of silence. That is a serious procedural error . . .

42. If the contempt application had been the subject of a separate hearing and Mr Thorogood had been informed of his right not to give evidence, he might have exercised that right. He could then have dealt with the contempt allegations by way of submissions . . .

43. Mr Milford points out that Mr Thorogood was reminded of his right not to incriminate himself. That is true, but it is not sufficient. Mr Thorogood should have been told that he was not obliged to give evidence. Furthermore the litigation should not have been managed in a way that forced Mr Thorogood into the witness box.

44. Mr Milford submits that even if there had been a separate hearing of the contempt application, the result would have been the same. If Mr Thorogood gave evidence, he would have been caught out in

cross-examination. If he had declined to give evidence, the court would have drawn adverse inferences.

45. What Mr Milford says may well be true. Indeed, as things have turned out, Mr Thorogood may be a very lucky man. Nevertheless there can be no question of upholding findings of contempt against a person who has been deprived of valuable safeguards in the circumstances of this case.”

15 In *Morris v. Morris* (3), the Court of Appeal set aside a suspended committal order which had been made at the same time as a variation of a periodical payments order. Moylan, J. referred to *Hammerton* (1) and *Inplayer*, saying the following ([2016] EWCA Civ 812, at para. 66):

“66. The errors which occurred in this case arose in part because the judgment summons and the variation application were dealt with together. This was also the source of errors which arose in both *Hammerton v Hammerton* and *Inplayer Ltd v Thorogood*. As was said in *Inplayer* (para 41):

‘If the committal application is heard at the same time as other issues about which the alleged contemnor needs to give evidence, he is placed in the position where he is effectively deprived of his right of silence. That is a serious procedural error’.

Accordingly, for the same reason, the applications in the present case should not have been determined at the same hearing.”

16 I have not invited the parties to make submissions on the question of the procedural error or on the authorities that I have cited. Perhaps it could be argued that the fact that the warning was given was sufficient in this case and it cured any procedural defect. I am not certain that it does, and therefore, in my judgment, the proper course is to err on the side of caution. If the mother is successful in her application, the father faces a committal order. Such an order should not be made if there is some doubt as to whether a respondent’s fundamental rights may have been breached. Furthermore, the matter can quite easily be dealt with by another judge.

The father’s application to vary the order of January 7th, 2022

17 I shall deal therefore with the father’s application to downward vary the maintenance order made on January 7th, 2022 by consent. I shall take the evidence in the order that it was given at the hearing.

18 The mother explained that she presently works as a [redacted] earning £1,046 per month. She walked away from a lower paid job in the family business as she could not make ends meet. Her current job requires her to be on her feet throughout her shift which is hard because of certain medical conditions she suffers from. She sometimes has to complete 12-hour shifts.

The mother stated that in the days prior to the hearing she had worked for 12 days in a row. She struggles to maintain herself and her daughters on her income alone and requires assistance from the father. The father and his new partner have a son who was born in March 2021. He is enrolled at a private nursery. The mother questioned how this was being paid for.

19 The mother asserted that she was certain that the father had purposely found himself a part-time job to show that he was in employment but had a low wage. This allows him the time to do private work without declaring or accounting for that source of income. The parties met in 2003 and the mother's evidence was that the father has been doing private jobs at all times. The mother maintained that the father has no intention to pay maintenance whatever he may agree to or say in court. He is not present in their daughters' lives and was happy to agree to their surnames being changed to the mother's maiden name.

20 In cross-examination, it was put to the mother that she had only filed her enforcement application after the father had obtained his current employment, the suggestion being that all she wanted was to cause him problems so that he would lose the job. The mother's response was that she had wanted to file her application sooner and had instructed her solicitors to do so, but that the process had taken some time. She denied being an alcoholic or spending her money on alcohol when it was put to her that she had recently been convicted of driving whilst over the prescribed limit.

21 In his evidence, the father explained that following the hearing of January 7th, 2022, he registered with the employment services in Gibraltar and in Spain. Through the Spanish service, he enrolled on a course on working with air conditioning systems. He did not complete this because he took up employment with [A Ltd.] on June 22nd, 2022. He currently works there on a part-time basis. He works three days a week from 8 a.m. to 2 p.m. His net monthly income from this employment is approximately £570. Taking into account his present income, he has offered to pay the mother £100 per month in child maintenance. (He had paid a total of £200 since July 2022.) He lives with his parents in La Linea and not with his partner here in Gibraltar. He sees his son every day. He walks into Gibraltar unless he has some money for the bus. He gives his partner £50 or £60 per month to help out with the expenses for their son.

22 He has been looking for jobs in Gibraltar and in La Linea. His intention is to work full time, but at present he was only working three days a week. He has been told that after six months with the company he will be given a full-time position and a long contract. He did not have any evidence from his employer as to the opportunities he would have in the future. He had asked his employer for a letter on the morning of the hearing, but he had not been given it.

23 Prior to obtaining his current employment, the father had made enquiries about being a delivery driver but at most establishments he had been told that he needed his own motorbike. Those places that did supply motorbikes only offered part-time work. In answer to a question I posed as to why he had not obtained a second part-time job as a delivery driver in the evenings or on days he was not working, the father replied that he was often very tired and could not do so. Mr. Pitto took him through a list of vacancies at the employment service which the father had himself exhibited to his affidavit. The father said that he had gone to most of the places. When challenged as to why he had not applied for specific vacancies for labourer, the father's response was that he was a plumber not a labourer. He did confirm that he had not applied for a job as a plumber that was on the list because "maybe" he was already in his present part-time employment.

24 It was put to the father that in January 2022 he had agreed to the order that was made by the court. His response was that he had expected to find a job which would enable him to pay the maintenance and the utility arrears which he had agreed to take on. He said that he had paid the maintenance that he could afford. He denied doing any private plumbing jobs. He could not do these because his certification for "dust control" had expired and he needed to undertake a course which he could not afford.

25 The father's evidence was that he sometimes goes the whole day without having anything to eat because he cannot afford to buy any food. He receives some limited help from his elderly parents and from his partner although she too is now unemployed. The mother had exhibited a photograph of the father's partner with a bejewelled engagement ring. The father explained that he had proposed to his partner earlier this year and had given her a ring which he had bought for 30 euros in a silver shop.

26 Mr. Pitto referred to his having lost his job at [E Ltd.] in the days after the hearing of November 2020. The father insisted that he had been dismissed because he was missing work as a result of the harassment he was suffering at the hands of the mother. That as a result, he suffers from anxiety for which he is going to therapy sessions.

27 I have to assess the evidence given by the parties and decide whether I should downward vary the order for maintenance. Where I need to be satisfied of any fact or matter, I need to be so satisfied on a balance of probabilities.

28 In my judgment, the mother's evidence was clear and given honestly. I accept the evidence she gave as to the circumstances she finds herself in. I also accept her evidence that the father has always undertaken private plumbing jobs to supplement his income and I find that it is more likely than not that he continues to do so. The mother is working long hours to provide for her daughters and has been receiving very little help from the father since their separation, despite the orders that this court has made.

29 The father, on the other hand, did not appear to me to have given honest evidence. His answers in cross-examination as to why he had not applied for full time positions, or a second part-time position, were unconvincing. It was clear that he had not prioritized finding employment which would allow him to meet his obligations to his daughters as well as providing for himself and his current partner and son. On balance, I find that it is likely that he took up the part-time employment with [A Ltd.] to have a relatively low declarable income and thus avoid paying maintenance. I find that the father is able either to obtain full time employment or to work a second part-time job which would, in either event, allow him to fulfil his obligations.

30 I note that at the hearing of March 31st, 2021, Ramagge Prescott, J. came to a similar conclusion. I was provided with a transcript of her ruling by counsel but I was not addressed as to what weight, if any, I could attach to her findings. In the circumstances, I have not had regard to the learned judge's assessment and I make it clear that I have arrived at my conclusions only on the basis of the evidence given by the parties before me.

31 In my judgment, the father's application to downward vary the periodical payment order made on January 7th, 2022 should be dismissed. I have determined that he is able to obtain employment which would allow him to meet his obligations. I have also had regard to the fact that the order was made by consent. The father agreed to pay the sum of £58 in maintenance every week. At the time he was unemployed and said that he was in the process of finding employment.

Other matters

32 At the hearing, I allowed the mother to amend the summons seeking the father's committal to prison. I indicated that I would give my reasons for doing so in this judgment.

33 The summons filed by the mother sought the following:

"1. The Respondent do be held in contempt of paragraphs 4 and 5 of the Order dated the 7th day of January 2022, the Respondent has failed to comply with the terms.

2. The Respondent do comply with paragraph 5 of the Order dated 7th January 2022 made by the Honourable Mr. Justice Yeats and pays forthwith all outstanding arrears of maintenance owing and accrued from 1st January 2022 to date and monthly thereafter at the rate prescribed by paragraph 2 of the terms of the Order dated the 6th of November 2020.

3. Paragraph 5 of the Order dated the 7th day of January 2022 shall be registered in the Magistrates Court pursuant to section 45A of the Maintenance Act for the purposes of enforcement.

4. Such further order/relief as this Honourable Court sees fit.

5. Costs.”

34 In his written submissions, Mr. Rodriguez criticized the mother’s application, asserting that it was defective in that it purported to be an application for committal for contempt but it did not comply with the Civil Procedure Rules. In reply, Mr. Pitto submitted that the application was for committal pursuant to the English Debtors Act of 1869 (which is applied to Gibraltar by the English Law Application Act). Mr. Pitto then sought permission to amend his summons to reflect this. I allowed him to do so as it seemed to me to be clear that the mother’s intention had always been to rely on the Debtors Act. It had been referred to at previous hearings and had also been set out in Mr. Pitto’s written submissions. Furthermore, Mr. Rodriguez confirmed that it would not impact on his ability to deal with the applications and that no adjournment would be necessary if the summons were to be amended. Mr. Pitto amended para. 1 of the summons to read as follows:

“That the Respondent do be committed to prison pursuant to section 5 of the Debtors Act 1869 in that the Respondent has breached paragraphs 4 and 5 of the Order dated the 7 January 2022.”

35 Although I am not dealing with the committal application, I would take this opportunity to make the following observation. It would seem to me that a summons seeking a person’s committal to prison, for the non-payment of a child maintenance periodical payment order or otherwise, should set out precise particulars of what exactly the respondent has done or failed to do. How has the respondent breached the order? An applicant should not rely on the fact that it must be obvious to the defaulting party. Neither is it sufficient to simply set out the detail of the allegations in the affidavit accompanying the summons. It is of course a matter for those advising the mother as to whether a further application to amend the summons is necessary in this case.

Conclusion

36 The father’s application to downward vary the child maintenance payable to the mother pursuant to the order of January 7th, 2022 is dismissed. The mother’s application that the father be committed to prison pursuant to s.5 of the Debtors Act 1869 shall be listed before another judge to the earliest possible date.

Ruling accordingly.