

## **REPORT OF THE FINANCIAL REMEDIES WORKING GROUP 31 JULY 2014**

1. The Financial Remedies Working Group (“the group”) was established by the President of the Family Division in June 2014. Chaired by Nicholas Mostyn J and Stephen Cobb J, its task being described in the “*View from the President’s Chambers (number 12)*” as being two-fold: “*to explore ways of improving the accessibility of the system for litigants in person and to identify ways of further improving good practice in financial remedy cases.... confined to matters of practice and procedure*”.
2. The membership of the group, consisting of members of the judiciary, practitioners and HMCTS officers, is as follows: Nicholas Mostyn J, Stephen Cobb J, HHJ Philip Waller, DJ Edward Hess, DJ Marshall Phillips, Amy Kissler, Lucy Reed, Maggie Rae, Paul Stewart and Jo Wilkinson.
3. The group has divided its work into four chapters as follows:-
  - Chapter I - Procedure
  - Chapter II - Litigants in Person
  - Chapter III - Standard Orders in Financial Remedy Proceedings
  - Chapter IV - Arbitration in Family Proceedings

### **PROCEDURE**

4. The group has considered the procedure applicable for financial remedy applications. The overall structure (initially introduced as a pilot project in 1996 and rolled out nationally in 2000) involving Forms E and a three stage hearing process (First Appointment, FDR and final hearing), now contained in Part 9 of FPR 2010, is well established and successful. It should continue.
5. The group considers, however, that the procedure could be improved in a number of ways. These changes would render necessary some amendments to FPR 2010. The group are content to suggest some particular amendments in due course, but await decisions in principle before doing this.

#### *Unified Procedure*

6. The group’s view is that there should be one unified procedure for all financial remedy applications. There is no objective justification for distinguishing procedurally between, for example, financial order applications after a divorce and Children Act Schedule 1 applications – there are simple and complex cases in each category.
7. In relation to applications under Part III Matrimonial and Family Proceedings Act 1984 the group’s view is that the court should ordinarily direct that, once permission has been obtained under Section 13, the application should continue under the same procedure as other financial remedy applications.

8. The group has questioned the need in the single family court era for the separate financial jurisdiction contained in Part I of the Domestic Proceedings and Magistrates Court Act 1978. This jurisdiction was formerly exercised by the Magistrates Courts and appears in any event to have been little used in recent years. It is suggested that the need for its continued existence should be reviewed as it adds little to other statutory powers and its presence may be confusing to litigants in person.
9. The group's view is that the recent inclusion of variation and Children Act Schedule 1 applications in the short cut Chapter V procedures previously limited to Magistrates Court applications should be reconsidered.
10. The short cut Chapter V procedures should hereafter be limited to international applications under the Maintenance Regulation or the Hague Convention. The group observes that the procedures for international enforcement of money orders have not been updated to take into account the arrival of the single family court and recommends that a separate review of these procedures should be undertaken as a matter of priority.
11. The group's view is that the adoption of a unified procedure should enable a substantial rationalisation of the confusing array of prescribed financial remedy application forms currently available on the Ministry of Justice website (currently 14 are available: Forms A, A1, A2, D50, D50A-K). Further work can be done on this once policy decisions are made. It is hoped that no more than two main forms of application will be necessary, but there are significant administrative and technical implications to be considered.
12. The group's view is that there should be one form of financial statement, the Form E. The existence of Forms E1 and E2 is a complication likely to be confusing to litigants in person and the advantages of their separate existence are far from obvious. Any alternative form is either similar to Form E (in which case there is little to be gained in having it) or is so simplified so as to provide inadequate information (in which case it is positively disadvantageous). The group's view is that the use of Form E1 in Children Act, Schedule 1 applications has caused more confusion than benefit and that it would be simpler to do away with the alternatives altogether. Some modest amendments to the Form E will be necessary to take into account that it will be used in all forms of application. A suggested draft for a Form E adapted for a unified procedure is set out in Annex 1.
13. In relation to international applications under the Maintenance Regulation or the Hague Convention forms are prescribed by internationally applied rules and so neither Form A nor Form E are to be used.

#### *Deemed Applications*

14. The group's view is that significant time and effort is currently being pointlessly wasted in the requirement that a Form A must be issued by both parties to a marriage or civil partnership to create power for the court to grant or dismiss an application (these documents are often expressly created "for

dismissal purposes only”). The group’s view is that once a Form A is issued by one party to a marriage or civil partnership then, save if the application is expressly stated to be limited to the seeking of a particular remedy, all possible applications by both parties are deemed to have been made and may be granted or dismissed by the court without further application. This change would need to be incorporated in a re-designed Form A.

15. This change would have some implications for the service of applications on third parties who might be affected by an order (eg mortgagees, pension trustees, trustees of family trusts or linked beneficial owners). The possibility of an order affecting such interests would still have to be identified by the party who might be seeking such an order so that requisite notice can be given to those affected.

#### *Enhancement of FDRs*

16. The group’s view is that the development of the FDR (Financial Dispute Resolution) hearing has been a very successful part of the 1996 reforms and that (save where the court has deliberately ordered otherwise in truly exceptional circumstances) the FDR hearing should feature in all cases as a compulsory requirement. Generally no listing for a final hearing should be given until an FDR hearing has taken place and has failed to bring about a resolution of the dispute.
17. The group is concerned that the recent inclusion of variation and Children Act Schedule 1 applications in the short cut Chapter V FPR 2010 procedures has the disadvantage of removing the FDR from such applications and regards this as an unwelcome development. Whilst the court can order an FDR on such applications, the procedure does not require it. This seems a retrograde move. This problem would be solved by reversing this change.
18. The group’s view is that the rules should be adapted to encourage, wherever possible, and certainly in the simpler cases, the FDR to take place on the first occasion the parties attend court. The group suggests the FPR should be adapted in a number of ways to bring this about.
19. The rules should require the parties to attend the First Appointment prepared to treat it as an FDR. They may still advance reasons at the hearing as to why further disclosure or valuations are necessary before an FDR can take place, but they should be prepared for the eventuality that the judge conducting the hearing does not accept those reasons.
20. There should be an express power for the judge to impose an FDR at the First Appointment. This should be the norm in simpler cases. There is, of course, nothing to prevent the court deciding to conduct the FDR and then directing its resumption a short time later (for example where, on closer examination, there is an important piece of evidence which can be quickly obtained or where the parties have come close in their negotiations and might resolve the dispute with a little more time).

21. Where further disclosure and/or valuation evidence are plainly necessary and are uncontroversial then the parties should be encouraged to attempt to agree in advance of the First Appointment what is to be done to reduce costs and to save court time, though the court should of course retain overall control of case management. The pilot Accelerated First Appointment procedure (currently in use at the Central Family Court – see Annex 2 below) will be reviewed in Autumn 2014. If the pilot is successful then its use may be extended.

*Applications for re-opening first instance orders*

22. The group notes that the Family Procedure Rules Committee (FPRC) is currently considering the issue of applying for re-opening first instance orders and a new draft rule is being proposed providing specifically for the court's power to set aside a final order in specified circumstances. The group understands that the outstanding policy and procedural issues are being discussed and that it is hoped that the proposed amendments will be considered by FPRC in October or November 2014. The FPRC has agreed to share information on this with this group as work proceeds.

*Applications for financial relief after an overseas divorce*

23. The group has considered the procedure in relation to applications for financial relief after an overseas divorce etc (MFPA 1984, Part III). A number of areas arise for consideration.
24. There is ambiguity in the permission to apply provisions. FPR, r 8.25(1) provides that the court may grant an application [for permission] made without notice if there good reasons for not giving notice. The title to the rule however reads 'Application to be made without notice'. This seeming ambiguity was referred to by Munby LJ (as he then was) in *Traversa v Freddi* [2011] EWCA Civ 81. The rule itself, however, does not reflect the general practice followed in the High Court and the group considers that the rule should be amended to provide that the application should normally be made without notice, with the court having power to direct that it be heard on notice.
25. The group's view is that consideration should be given to the level of judiciary to which such applications should be made, both at the permission stage and at the substantive stage.
26. Section 27 of the 1984 Act as amended from 22 April 2014 allows an application under Part III to be made in the High Court or the family court. Where an application is made in the High Court, the application for permission will be dealt with by a High Court judge: r 8.26. In the family court, the application is to be allocated to a judge of High Court level, unless there is consent both to the grant of leave and to the substantive order: Family Court (Composition and Distribution of Business) Rules 2014, r 15 and Sch 1. The group believes that consideration could be given to whether in the family court an application for leave (even where opposed) needs to be heard by a judge of High Court level.

27. At present, where an application is made in the High Court, the judge may, on granting permission, direct that the substantive application be heard by a district judge of the PRFD: FPR, r 8.28. There is no equivalent provision where proceedings are in the family court, where, as noted above, both the permission application and substantive application are to be allocated to a judge of High Court level. It appears however that judge may reallocate the proceedings to a different level of judge under FPR, r 29.19 and the Distribution of Business Rules, r 15(2). To avoid any doubt, the group considers that it may be helpful for the rules to contain a specific provision allowing a High Court judge, on granting permission in a case proceeding in the family court, to allocate the substantive application to a different level of judge. This might be achieved or supplemented by amendments to the Distribution of Business Rules.

#### *Efficient Conduct of Final Hearings*

28. The group considers that the *Statement on the efficient conduct of financial remedy final hearings allocated to be heard by a High Court judge whether sitting at the Royal Courts of Justice or elsewhere* dated 5 June 2014 should be adopted for all final hearings in the Family Court of financial remedy applications listed for three days or more. This statement is exhibited at Annex 3 below.

#### *De-linking Financial Remedy applications from the divorce/dissolution suit*

29. The group's view is that, in principle, financial order applications should be de-linked from divorce / dissolution proceedings. The group agrees with and endorses the President's view that "*it surely makes sense to have completely separate files for divorce petitions and financial remedy claims*". Ideally they should proceed as free-standing financial remedy applications. The group notes that a generation or so ago a similar de-linking exercise took place in relation to disputes about children and this provides a helpful model for the same exercise in financial remedy applications.

30. The group notes that this conclusion is consistent with the sensible plans of HMCTS (likely to be executed in the near future) to involve legal advisers in undefended divorces/dissolutions which would be dealt with in a small number of regional centres (or even ultimately in one national centre). This is a recognition of the fact that the vast majority of divorces/dissolutions are now little more than rubber-stamping exercises.

31. The group has, however, had its attention drawn to certain technical inhibitors to this suggested change. The group notes that the administrative and IT systems for issuing and recording matrimonial/civil partnership proceedings and related financial proceedings are currently closely intertwined. The creation of separate proceedings (and therefore separate case records) would, under current IT arrangements (i.e. the FamilyMan case management system), be likely to involve duplication of effort for court staff and this may have significant cost implications. The implementation of de-linking will be

significantly more straight-forward once a new IT system (which is currently being considered) has been put in place.

32. Subject to the above, the group's view is that there is no reason why financial order applications arising out of divorce/dissolution applications should be heard at the same court location as that dealing with the divorce/dissolution itself. It will plainly be necessary for the judge dealing with a financial order application to have access to information about the Decree Nisi/Conditional Dissolution, but once appropriate IT systems exist such information should be readily accessible. In the meantime the information could be accessed by amending the FPR to ensure that full information about the divorce proceedings is provided to the court by the parties at the First Appointment of the financial order application or (and this is the current HMCTS plan) by transferring the divorce proceedings in their entirety to a court able to deal with a financial application once a financial application is made. Neither of these alternatives is as satisfactory as implementing an appropriate IT system.
33. Amendments would be required to the FPR, rules 9.4 and 9.5 and to the application forms for divorce etc (D8 and related forms) and Form A (financial orders) to remove the references which link financial proceedings to divorce etc proceedings. For example, the form of application/ petition for divorce etc should no longer include an application for financial remedy. Provision may also be needed to protect the position of a party who wishes to make, but not immediately pursue, a financial application.

#### *Choice of court location*

34. Arising directly out of the group's deliberations about de-linking, and the report to the group of HMCTS plans for the regionalisation/centralisation of the divorce/dissolution process, the group noted that HMCTS current plans involve the administrative distribution of financial remedy applications from the regional divorce/dissolution centre to the court location selected to deal with the financial remedy application.
35. The group noted that this plan represents a significant change to the existing principle that a person making a financial order application sends it to the location where they wish the proceedings to take place. If points of entry are to be adopted for financial proceedings, the group believes that an applicant should still be able, in contested cases, to select a preferred court location where they wish the proceedings to take place (this may of course be a different location from that at which the application is initially filed and issued). The group accepts that the principle of having designated points of entry is a consequence of policy decisions made in relation to the operating principles of the Family Court. There are, however, important policy reasons for making an exception to recognise the need and desirability for parties to opt to take advantage of the specialist environment of the Financial Remedies Unit at the Central Family Court in London. The need for this facility has been expressly recognised, for example in "*View from the President's Chambers (number 5)*". This option could be maintained by making the unit a distinct

point of entry in addition to the proposed points of entry for divorce applications.

36. The group recommends that the Central Family Court should be its own point of entry for financial remedy applications. It is suggested that guidance should be given by Practice Direction as to which applications should be made in this way. The criteria for this purpose are likely to include disputes of high value or complexity and disputes involving international issues.

## **LITIGANTS IN PERSON**

37. The group recognises that a substantial and possibly increasing portion of financial remedy litigation is conducted by litigants in person and that procedure and documentation must be designed to ensure that this fact is taken into account.

### *Financial Remedy procedure for the LiP*

38. Generally, we believe that the current procedure for dispute resolution in financial remedy cases has been effective in reducing delay, facilitating settlement and limiting costs. These are all matters of importance for the Litigant in Person (hereafter 'LiP'). Moreover, in our view, the scheme can be reasonably easily understood by LiPs.
39. There is, of course, appropriate emphasis on dispute resolution within the process (notably through the FDR: 'Financial Dispute Resolution Appointment'), which complements well the new obligations (within *section 10 Children and Families Act 2014* and *rule 3 FPR 2010*) on parties, and the courts to endeavour to reach dispute resolution out of the courts.

### *Guides for LiPs*

40. A number of Guides are already available for LiPs to assist them in navigating the field of financial remedy dispute resolution. We do not intend to 're-invent the wheel' by preparing yet another.
41. We highly recommend the Guide prepared by Advicenow entitled 'Applying for a financial order without the help of a lawyer'; see: [www.advicenow.org.uk/advicenow-guides/family/applying-for-a-financial-order-without-the-help-of-a-lawyer](http://www.advicenow.org.uk/advicenow-guides/family/applying-for-a-financial-order-without-the-help-of-a-lawyer). This is a comprehensive step-by-step guide to financial remedy proceedings, and has useful links to other sites, including court forms, the substantive law, legal aid etc. Readers will find a useful 'worked example' setting out simply and pictorially the process of a financial remedy case. The guide to completion of the Form E provides invaluable assistance for the unrepresented litigant; note also the descriptions of the individual hearings, the relevant court documents, and the 'jargon buster'.

42. For those who are not married, reference can be made to the complementary and comparable guide <http://advicenow.org.uk/files/breaking-up-survival-guide-10-1-14-1123.pdf>.
43. We considered that it would be useful if a short Guide for LiPs could be prepared, for distribution (with the relevant court papers) once a Form A is issued. The group has prepared this, and it is appended marked 'Annex 4'. We envisage that this document could usefully be sent to LiPs when they issue their Form As and/or that HMCTS should add this to their 'CB' (Court Business) suite of documents.
44. We also commend the book written by one of our group, namely Lucy Reed, entitled 'The Family Court without a Lawyer: A handbook for Litigants in Person' (Bath Publishing: 2<sup>nd</sup> edition; June 2014); there is a dedicated chapter on financial remedy cases, and useful section entitled 'Toolkits and Resources'. Some of the material is on the web [www.nofamilylawyer.co.uk](http://www.nofamilylawyer.co.uk); the three videos prepared under the heading of 'Going to Court' which accompany the text are excellent.
45. The Government has developed a site entitled 'Money and Property when relationship ends' (<https://www.gov.uk/money-property-when-relationship-ends/overview>). This has easy-to-use links to the relevant forms. In a laudable effort to provide a simple and brief guide to this potentially difficult topic, we are concerned that some of the content on the site, including 'How the Court splits assets', is misleading.
46. Within the last couple of months, the Ministry of Justice has launched its site [www.gov.uk/represent-yourself-in-court.gov.uk](http://www.gov.uk/represent-yourself-in-court.gov.uk); this is intended, we understand, to be a 'landing page', from which the LiP selects links and other routes to pursue their particular interest/need. This site is not, in its current form, in our view helpful to LiPs with a financial remedy claim. Specifically,
  - a. It is confusing to suggest (on the opening page) that LiPs may be called 'Self-Representing Litigants' which is not the phrase of choice, and is, frankly, little used;
  - b. The comment in the same section that "Other terms you may be known by depend on whether your case is heard in a family civil or criminal court" is unhelpful. It is not clear to us to what other terms the guide is referring;
  - c. The guidance on 'McKenzie Friends' is too brief to be useful, and not altogether accurate;
  - d. The specific link on 'Divorce and separation: Money and Property' simply takes the reader to a further link which leads to a guide (in pdf form) published in March 2013 for the Liverpool Family Proceedings Court and Liverpool County Court. While the Guide undoubtedly has much good material, we fear that the LiP who finds this document at the end of their web search will ask 'Does this document apply to me?' (the guide is addressed to 'Self-Representing Litigants' who are referred to throughout the document as 'SRLs' all of which is unhelpful); Does this apply to any court other than Liverpool? Does this apply in the Family Court rather than the County Court or the



Magistrates Court?’ The Guide has not been updated to reflect the rule changes since April 2014.

### *MIAM and Non-Court Dispute Resolution*

47. Attendance at a MIAM is now required before issuing an application for financial remedy (see *section 10 C&FA 2014*), subject to exemptions (*rule 3 FPR 2010*). It is too early to assess how these new requirements have ‘bedded in’ and what impact they have made on the number of applications.
48. In light of the dramatic reduction in referrals and take-up of mediation services following the implementation of LASPO 2012 (an unintended adverse consequence of the reform of legal aid), a Mediation Task Force has been established, supported by the MoJ. It has recently (June 2014) published a helpful report to which we have had regard: (<http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf>). We hope that the recommendations of the Task Force will be swiftly implemented. Specifically, we welcome the proposal that the MoJ should consider paying for all MIAMs for a period of twelve months. Specifically in the field of financial remedy cases, we support the recommendation that the negligible £200 settlement fee for obtaining a consent order once an agreement has been reached in mediation should be increased to £300 for financial and all issues cases.
49. There needs to be greater public awareness/education about the value of non-court dispute resolution. The work of the family mediation council should be better broadcast, and its site [www.familymediationcouncil.org.uk](http://www.familymediationcouncil.org.uk) more widely advertised. The web resource – find your local mediator – on that site is extremely useful.

### *Preparation of financial remedy paperwork*

50. LiPs need the facility to find the relevant information about the necessary forms and paperwork for court process. Optimising useful sites on search engines should be prioritised. There should be wider signposting of the resources for forms on the web. The HMCTS website <http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do> does not in our view readily yield the relevant forms for a financial remedy case. The LiP will struggle to find what he/she is looking for.
51. Supporting documents and Guides should be available in a number of languages. We note that Forced Marriage Protection advice is available in Urdu, Punjabi, Bengali and other languages; financial remedy guides should similarly be translated.
52. The [www.nofamilylawyer.co.uk](http://www.nofamilylawyer.co.uk) site has useful documents, including draft documents for a FDA.

### *Form E*

53. We consider that the proposed modified Form E will be more accessible for LiPs, and we commend it.
54. As indicated above, there is useful guide to completion of the Form E in the Advicenow guide.

### *FDR*

55. The FDR is a key stage in the financial remedy journey. The conduct of the FDR between two LiPs requires particular judicial skills, as the Judge endeavours to strike the right balance in cases involving unrepresented parties between assessing (sometimes even formulating) the relevant arguments and giving relevant advice, while being the neutral arbiter, as well as facilitator of settlement; this is particularly difficult if, for instance, the financially stronger party seeks to influence the territory for negotiation with a ridiculously low offer.
56. In cases involving unrepresented parties, there is very little scope for out of court negotiations during the FDR process (i.e. once indications have been given), and Judges need to be alert to promoting negotiated outcome in court while not bull-doing or rail-roading either or both of the parties.
57. Specific judicial training in this area may be warranted, and indeed welcomed by the full-time and part-time judiciary.

### *Orders*

58. The Family Orders Project has standardised the relevant orders, and has (wherever possible) endeavoured to use language which is readily understood by LiPs.
59. Standard orders may of course be varied by the court or a party if the variation is required by the circumstances of a particular case; so when drafting orders other than those using the standard templates, or other associated documents, we encourage Judges (and practitioners where appearing on one side) to use language which is readily understood by LiPs, therefore:
  - a. LiPs are more likely to understand what is being asked of them better if their NAMES are used, rather than the terms Applicant / Respondent’;
  - b. The traditional expression “File and Serve” may be readily understood by lawyers but is perhaps less well understood by LiPs. The standard orders have been adapted to use the expression “send to the court and serve on the other party”. In some instances it may be appropriate to include in an order a case-specific simple explanation of what the word “serve” means. Typically this may simply mean sending a document in the post, but there are of course instances when this is not sufficient.
  - c. Penal notice. In a financial remedy case the applicant is entitled to the endorsement as of right, (a point which should be wider understood by judges and court staff). We consider that it is probably wise for each

order to be endorsed with a penal notice at the time it is made (often orders are seen to say “a penal notice is attached to this paragraph” which is not enough). The full content of the penal notice should be prominently displayed on the front of the copy of the order and/or spelt out in the body of each paragraph to which it applies. All the financial orders in the suggested standard orders wardrobes follow this suggestion.

- d. “Schedule of deficiencies” should perhaps be described in the definition section as “a list of all questions that have not been properly answered and an explanation of what is missing”
  - e. "Chattels" should perhaps be described in the definition section as “property and belongings other than land or houses”
  - f. “Points of dispute” should perhaps be described in the definition section as "things disagreed about and which the court needs to decide"
  - g. Further, it may be preferable to avoid “providing only that” (using instead "as long as") and “adjourn” (using instead "postpone").
60. Judges invariably are required to play a greater role in the drafting of final and other orders where the parties are unrepresented. Designated Family Judges and Court Managers need to be particularly aware of this, so that sufficient time is allowed in the court diaries for the Judge to attend to this at the end of FDR or final hearing.

#### *Case management and LiPs*

61. Inevitably judges will be required, in order to do justice between the parties, to offer a degree of latitude to the LiP whose preparation and presentation of case does not conform to the rules. That said, in financial remedy cases as in all others, the judge has a duty to manage cases ‘justly’ and ‘proportionately’, and any indulgence offered should never be allowed to compromise due process. Judges should have firmly in mind their duty actively to manage their cases (*rule 1(4) of the FPR 2010*) and use their wide case management powers (*rule 4 ibid.*) to give effect of the overriding objective; this is perhaps particularly important in cases involving LiPs.
62. We take this opportunity to warn judges against going ‘too far’ to indulge the LiP. As Kay LJ observed (Munby LJ & Lewison LJ concurring) in *Tinkler & Anor v Elliott* [2012] EWCA Civ 1289 (civil proceedings where LiP suffered mental ill health and had made a very late set aside application):

*“An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that a litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence...The fact that, if properly advised, he would or might have made a different application then cannot avail him now. That would be to take sensitivity to the difficulties faced by a litigant in person too far. [The judge] regarded this to be "a special case on its*

*facts" but it could only be considered such if one goes too far in making allowances for a litigant in person."*

63. The point above is also well-illustrated by the family case of *Re M (Placement Order)* [2010] EWCA Civ 1257 [2011] 1 FLR 1765 in which the Court of Appeal upheld the decision of a circuit judge to strike out an appeal, or purported appeal, against the making of a placement order for want of compliance both with the relevant rules and with court directions: per Wilson LJ: "*rules require compliance*" [18] even where the proposed appellant was a LiP.
64. Moreover, and as the Court of Appeal (*Re W* [2013] EWCA Civ 1177) and Family Division (*A Local Authority v. DG* [2014] EWHC 63 (Fam) and *LB Bexley v. V* [2014] EWHC 2187 (Fam)) have recently emphasised, orders are orders: "*Orders, including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders*". Compliance with court orders is to be expected of all parties, including LiPs.

#### *Judicial Training*

65. As the President indicated in his 12<sup>th</sup> 'View', in this field of family law "[w]e will need to make our judicial processes more inquisitorial". In that respect it is noted that the Course Directors responsible for Family courses at the Judicial College have been commendably proactive in educating Judges in managing cases involving LiPs. The recent Child Arrangements Programme seminar programme included a dedicated session on conducting the hearing involving the LiP, led by Professor Rosemary Hunter (Kent University) and Professor Liz Trinder (Exeter University).
66. We understand that Professor Hunter and Professor Trinder have undertaken research commissioned by the Ministry of Justice on LiPs in family cases; we await their research findings with considerable interest. We recognise that their research findings and recommendations may well inform the approach of the courts to financial remedy cases.
67. In the meantime, and in any event, we consider that judges could learn from the Californian research entitled 'Effectiveness of Courtroom Communication in Hearings Involving Two Self-Represented Litigants' conducted by Greacen Associates, LLC on behalf of the Self-Represented Litigation Network (April 2008). This emphasised the value to the LiP of the Judge approaching a hearing by:
- Framing the subject matter of the hearing
  - Explaining the process that will be followed or guiding the process
  - Eliciting needed information from the litigants by
    - Allowing litigants to make initial presentations to the court
    - Breaking the hearing into topics
    - Obviously moving back and forth between the parties
    - Paraphrasing
    - Maintaining control of the courtroom

- Giving litigants an opportunity to be heard while constraining the scope and length of their presentations, and
- Giving litigants a last opportunity to add information before announcing a decision
- Engaging the litigants in the decision making
- Articulating the decision from the bench
- Explaining the decision
- Summarising the terms of the order
- Anticipating and resolving issues with compliance
- Providing a written order at the close of the hearing
- Setting litigant expectations for next steps, and
- Using nonverbal communication effectively

And see also ‘Handling Cases involving Self-Represented Litigants: A Bench-guide for Judicial office holders (Judicial Council of California Administrative Office of the Courts) (January 2007):

[www.courts.ca.gov/documents/benchguide\\_self\\_rep\\_litigants.pdf](http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf).

68. We consider that specific training may be indicated in relation to financial remedy courses. For instance:

- a. At First Appointment, being inquisitorial in assisting parties to identify the issues, and (where appropriate) assisting in the drafting of relevant questions for the other party.
- b. The conduct of the FDR between two LiPs requires particular judicial skills, as indicated above.
- c. At the final hearing, if necessary, conducting the hearing by offering to be the conduit of questions – or following the approach of Tugendhat J in *Mole v Hunter* [2014] EWHC 658 (QB):-

*“I conducted the hearing by asking first Ms Hunter and then Ms Mole about each of the matters complained of in the counter claim. I then gave each of them an opportunity of asking questions of the other. Ms Mole chose to ask no questions. I then went through the chronology of events as I understood them to be, inviting each of them to correct or complement the understanding I had formed on my own reading of the papers and to make their submissions. Before doing this I invited each party for their consent to the procedure I proposed to adopt, although in my view CPR r.3.1 (2) (m) is sufficiently wide to make such consent unnecessary. I also indicated that I also proposed to hear both applications before me before making a ruling on either of them”*

69. Judges need to be alert to ensuring that LiPs understand the rationale for the various steps taken in financial remedy cases. Therefore:

- a. Plain English explanations for “you must do x by y” will often be necessary and helpful;
- b. The disclosure requirements should be explained (i.e. this is not a case of your ex-spouse prying but it is about making sure that the court has the right information on which to make fair decisions, and reassure / prevent misplaced suspicion)

- c. The nature of the ongoing duty of full and frank disclosure; it is important to underline the knock-on effects of non-compliance (Cost, delay, persistent suspicion);
  - d. At the First Directions Appointment, there should be a standard explanation of what the FDR is for... so that LiPs can mentally prepare for such a hearing: this should be more than just “Come prepared to settle”, but explaining that judge will be giving summary of his/her ‘feel’ for the case and what sort of outcomes might be reasonable, the fact that they may be quite direct in an attempt to help people find a way of avoiding a trial.
70. Generally, at all stages, Judges need to be alert to providing to the LiPs a summary of the *section 25 MCA 1973* criteria, and which factors will be of particular relevance / importance on the facts of the individual case. The Judge must explain the breadth of discretion and the fact specific nature of financial remedy cases.
71. Training for the judiciary on conducting financial remedy cases should include all Deputy District Judges undertaking Financial Remedy work.

#### *McKenzie Friends*

72. A separate Working Group chaired by Mrs Justice Asplin has been considering the current Guidance in relation to McKenzie Friends. That report has been commissioned by the Judicial Executive Board, which will be considering the same shortly. We reserve comments about the role of McKenzie Friends in financial remedy cases until we have seen that report.
73. As indicated above, the government guidance on their represent-yourself-in-court.gov.uk site is too abbreviated to be helpful.

#### *Family Justice Council ‘Matrimonial Needs’ Working Group*

74. We have liaised with the Working Group chaired by Roberts J. The work which we have undertaken (looking at practice and procedure) will complement the work of the Matrimonial Needs Working Group (looking at the substantive issues in ‘needs’ cases).

#### *Enforcement*

75. Obtaining an order for financial relief is occasionally only half the battle. Enforcement can be challenging, particularly if the defaulting party is defiant, obstructive, and/or determined to manipulate the situation.
76. We believe that it would be helpful for more information to be made available for LiPs about enforcement of orders at the point at which the Order is made. We are concerned that those ordered to pay are likely to be more financially powerful, and may abuse that power to repress the weaker party. There may be good sense in HMCTS issuing a guide to enforcement to send out to the parties when the final Orders are drawn.

## STANDARD FORM ORDERS IN FINANCIAL REMEDY PROCEEDINGS

77. The group has been invited by the President to “*create a comprehensive body of standard form orders*” for use in financial remedy cases. The group is content to endorse the policy need for such a body of orders to promote consistency and clarity and accessibility to litigants in person in the single family court.
78. This task represents the continuation of the extensive work already undertaken in this area by a team lead by Mostyn J. This work began with the creation of the Family Orders Project House Rules (which cover children as well as money orders). These were revised in April 2014 (see Annex 5) and the group is content to endorse these rules and to adopt them as representing a sensible, clear and helpful structure for all court orders in the family court.
79. The body of standard orders, once adopted, will have the status of forms within Part 5 of the FPR 2010. It is important to note, therefore, that by virtue of FPR, rule 5.1(2) a standard order may be varied by the court or a party if the variation is required by the circumstances of a particular case. The circumstances when a variation is acceptable are undoubtedly numerous and departure from the standard form will not prevent an order being valid and binding; but the standard forms should represent the starting point, and usually the finishing point of the drafting exercise. As the use of these orders becomes part of everyday practice their form and wording will no doubt become increasingly common place and familiar to judges and practitioners.
80. Within this overall structure, and starting from the drafts already published for consultation by Mostyn J’s team, the group has sought to complete the task of creating a comprehensive body of standard form money orders, taking into account consultation responses and the practical experience of the existing drafts.
81. The group accordingly recommends the formal adoption of the following standard orders:-
- (a) Financial Remedies Directions Omnibus – Shorter Version (see Annex 6);
  - (b) Financial Remedies Directions Omnibus – Longer Version with index (see Annex 7);
  - (c) Financial Remedies Final Orders Omnibus with index (see Annex 8);
  - (d) Children Act Schedule 1 Final Orders Omnibus with index (see Annex 9);
  - (e) Wardrobe of Enforcement Orders (see Annex 10); and
  - (f) Wardrobe of Committal Orders (see Annex 11).
82. The shorter version of the directions omnibus has been designed to meet the need for an alternative (to the comprehensive longer version) which is short enough at 8 pages of A4 to be printed and amended in manuscript in the courtroom if required. The selection of orders is intended to represent those directions most commonly used in ordinary financial remedy cases. The

longer version is intended to be comprehensive, but may be more suited to an electronic drafting process. There is, of course, nothing to prevent a paragraph from the longer version being imported into an order drafted using the shorter version.

83. The longer version of the directions omnibus and the two final orders omnibuses have been equipped with indexes which, when used electronically, will allow the user to click straight to the desired paragraph. This is intended to assist the electronic drafting process.
84. A number of those responding to the consultation process queried whether, in relation to mortgage payments and other household outgoings, the court had power to direct one party to make such payments and/or indemnify the other against non-payment. Such obligations have traditionally been included as undertakings, but their inclusion as directions in the draft standard orders implied that the court had such powers when undertakings were not offered. Mostyn J has expressed the following view in justification of this inclusion:-

*“Under the new s31E(1)(a) MFPA 1984 in any proceedings in the family court, the court may make any order which could be made by the High Court if the proceedings were in the High Court. The High Court has power to order or decree an indemnity. This is an equitable remedy originally vested in the Court of Chancery which was subsumed into the High Court by the Supreme Court of Judicature Act 1873. It was the very relief initially ordered in Salomon v A Salomon and Co Ltd [1897] AC 22 (but which was later set aside by the House of Lords as offending the rule about the separate legal personality of companies). As to mortgage and other outgoings in my view the power to order A to make payment to B plainly includes the power to order A to make payments on behalf of B. The greater includes the lesser. It was necessary to spell out the power to order the payment of mortgage and other outgoings in Part IV FLA 1996 proceedings (see s40(1)(a)) because the wider direct power does not exist in those proceedings. It would be anomalous if the power to order payment of outgoings only existed in Part 4 but not FR proceedings. It is necessary in my view for the court to have these powers if only to cover the position if someone is not prepared to give the necessary undertakings or is not participating in the proceedings.”*

### **ARBITRATION IN FAMILY PROCEEDINGS**

85. The recent development of specialist arbitration facilities targeted to financial remedy litigation demands procedural changes designed to ensure the adoption of arbitral awards in the family court in a way which is as swift and uncomplicated as possible.
86. Arbitration, whether under the IFLA scheme or otherwise is available to resolve all forms of financial disputes justiciable in the Family Court or Family Division. Therefore such schemes are capable of resolving disputes under:



- a. Part 2 of the MCA 1973 (or the civil partnership equivalent)
  - b. The Married Women's Property Act 1882, s.17 (or the civil partnership equivalent)
  - c. The Inheritance (Provision for Family and Dependents) Act 1975;
  - d. The Matrimonial and Family Proceedings Act 1984, s.12 (or the civil partnership equivalent)
  - e. The Children Act 1989, Sched.1
  - f. The Trusts of Land and Appointment of Trustees Act 1996 (TOLATA)
87. In *S v S* [2014] EWHC 7 (Fam), sub nom *S v S (Financial Remedies: Arbitral Award)* [2014] 1 FLR 1257 the President made a number of observations in relation to an application for a consent order to reflect the provisions of an arbitral award. The decision spells out what should be the approach of the court when considering an arbitral award in the light of the requirements of section 25 of the Matrimonial Causes Act 1973: see in particular para [21] of the report.
88. CPR Part 62 (and its accompanying PD 62) governs procedure in relation to "arbitration claims" made in arbitration proceedings under the Arbitration Act 1996. "Arbitration claims" here are a term of art and are defined by CPR rule 62.2(1) as meaning:
- a. any application to the court under the 1996 Act;
  - b. a claim to determine –
    - i. whether there is a valid arbitration agreement;
    - ii. whether an arbitration tribunal is properly constituted; or what matters have been submitted to arbitration in accordance with an arbitration agreement;
  - c. a claim to declare that an award by an arbitral tribunal is not binding on a party; and
  - d. any other application affecting –
    - i. arbitration proceedings (whether started or not); or
    - ii. an arbitration agreement.
89. The path presently prescribed by a combination of section 105 of the Arbitration Act 1996, the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (S.I. 1996/3215), as amended ('the 1996 Order'), and CPR rule 62.3 and PD 62 para 2 will result in an Arbitration Claim Form N8 (Appendix A to PD62) coming before a tribunal wholly unused to family business (but very likely well versed in arbitration law and practice).
90. The operative provisions of para 2 of the PD so far as applicable to the subject-matter of family disputes are that the Form N8 'may be issued at the courts set out in column 1 of the table *below* and will be entered in the list set out against that court in column 2'.

<i>Court</i>	<i>List</i>
Admiralty and Commercial Registry, London	Commercial list
Technology and Construction Court, London	TCC list
District Registry of the High Court (where Mercantile Court established)	Mercantile list
District Registry of the High Court (where arbitration claim form marked 'Technology and Construction Court' in top right hand corner)	TCC list

91. However, a transfer to a more suitable court is envisaged by the 1996 Order, para 6, which reads:

'Nothing in this Order shall prevent the judge in charge of the commercial list (within the meaning of section 62(3) of the Senior Courts Act 1981) from transferring proceedings under the Act to another list, court or Division of the High Court to which he has power to transfer proceedings and, where such an order is made, the proceedings may be taken in that list, court or Division as the case may be.'

It is to be noted that transfer can only be made another list, court or Division of the High Court; a transfer to the Family Court is not permitted.

92. Section 105 of the Arbitration Act 1996 permits the Lord Chancellor to specify by order the "court" for the purposes of the Act. However section 105 has not been amended to allow the Family Court to be specified. Only the High Court or the County Court may be specified.

93. Therefore the group recommends that para 2 of PD 62 is amended to add the High Court, Family Division to the list.

94. The group further recommends that a Family Division equivalent of Form N8 be devised and promulgated.

95. The group further recommends that the President promulgates the Guidance set out in Annex 12 to this report.

**Financial Remedies Working Group**

Nicholas Mostyn J

Stephen Cobb J

HHJ Philip Waller

DJ Edward Hess

DJ Marshall Phillips

Amy Kissar

Lucy Reed

Maggie Rae

Paul Stewart

Jo Wilkinson

31 July 2014