

Response of the Family Justice Council to the Law Commission's Consultation Paper on Enforcement of Family Financial Orders

The Family Justice Council welcomes the fact that the Law Commission has taken on this project. Non payment of sums due under financial orders often causes hardship for the creditor, usually the wife/mother. Legal aid is rarely available for enforcement applications and a simplified system would be of great benefit to litigants in person. Our response to specific paragraphs in the consultation paper is as follows:-

Paragraphs 2.10 and 2.26 – Could the system of enforcement be improved or extended? Do orders to obtain information and the general enforcement application work well? How could they be improved?

In response to the questions at paragraphs 2.10 and 2.26, the FJC says that the system could be improved. We consider that the emphasis should be on reforming the present system. A new scheme or implementation of the 2007 Act do not appear to us to be realistic options at a time when savings and cuts are required by the government. The current system could be improved swiftly and at modest cost through changes to the rules.

Presently, the creditor has to consult more than one set of rules and decide from a range of enforcement methods. She has to pay a court fee and the costs of a process server and may have to attend court to question the debtor at a time when she is struggling financially. Some courts list the general enforcement application (the D50K) for directions initially and other courts are slow in issuing applications, largely as a result of staff shortages, which adds to delay for the creditor. If the debtor does not bring financial information to court, the case is adjourned and the creditor is still not receiving any money.

Paragraph 2.54 – The proposal that the debtor complete a financial statement based on a variant of the Form E.

The order to obtain information and the general enforcement application should be consolidated into one procedure governed by the Family Procedure Rules, the hearing should take place before a district judge and there should be a timetable from issue of the application to a hearing, with the debtor being required to complete a financial information form verified by a statement of truth and supported by documentary evidence, similar to a Form E. We agree with the proposal at paragraph 2.54. A committal order could be made for any non compliance by the debtor. Courts should also have a standard operating procedure under which the application will be issued and directions (such as a variation of the Form C) sent out within, say, 5 days of receipt of the application.

As a general point, the FJC is aware that litigants in person find it difficult to arrange personal service and it may be that individual courts could provide a list of process servers in their area. This applies to applications for injunctions as well as enforcement, where proof of personal service is required.

Paragraph 3.13 – Is reform needed to the procedure for the execution of documents by the court?

In response to paragraph 3.13, the FJC does not believe that reform is needed to the procedure for the execution of documents by the court. Most courts deal swiftly with applications under section 39 of the Senior Courts Act 1981 and, in our experience, many litigants are made aware of this power at the hearing where the original order is made if it is apparent that the debtor is likely to be uncooperative.

Paragraphs 3.41, 3.42 and 3.59 - Streamlining and reform of the procedure for a third party debt order and streamlining of the procedure for charging orders.

In relation to third party debt orders and charging orders, the FJC's view is that there should continue to be an interim order made by a district judge and a final hearing. The final hearing is usually short and administrative in nature but it provides safeguards that the procedure has been properly complied with and for a vulnerable creditor in debt. Further, listing a final hearing only if the debtor (or third party) raises objections will add delay for the creditor; the debtor would need to be given more time to respond and if administrative errors are made that will lead to an application to set aside the final order.

We would also retain the final hearing for third party debt orders because we support the introduction of third party debt orders against joint accounts and the hearing could be used to consider ownership of the funds, with a rebuttable presumption that 50% is owned by the debtor.

The FJC supports provisions for disclosure to the court and to the creditor of details of joint back accounts and of the debtor's bank statements and the introduction of periodical third party debt orders. We do not support the introduction of a protected minimum balance. There is an obligation in family proceedings to provide full and frank disclosure, the court will have decided that the debtor has the means to pay when it made the order or approved a financial consent order, and enforcement should have teeth.

Paragraphs 3.72 and 3.76 – Pension sharing and attachment orders in enforcement proceedings and the proposal to amend Part III of the MFPA 1984.

Our view in response to paragraph 3.72 is that we would support changes to the law to allow pension sharing and attachment orders to be made as a means of enforcement with the same restrictions as applied to the making of the original order, even if such claims have already been dismissed. If the original order provided for the debtor to make payments to the creditor but to retain his pension and he fails to comply with his obligations, enforcement should be available against the asset the creditor has retained. We agree with the proposal at paragraph 3.76 to amend Part III of the MFPA 1984.

Paragraph 3.94 and subsequent paragraphs concerning attachment of earnings orders.

Attachment of earnings orders are, in our experience, an effective method of enforcement. The court has the discretion to set the protected earnings rate and the normal deduction rate

taking into account all the circumstances of the debtor including any other sources of income and we do not support the introduction of fixed tables. We support tracking and automatic redirection of orders. The court's powers to make orders against HMRC for disclosure of information is presently limited but, if the court were able to order disclosure of the name and address of the debtor's employer, that would allow for speedy enforcement.

Paragraphs 3.112 to 3.115 – Remittance and enforcement of arrears.

Any changes to the provisions for the enforcement and remittance of arrears should, in our view, be considered together. The creditor is often deterred from enforcing arrears of periodical payments not only by the cost of enforcement proceedings but also by the fear that the debtor will cease payment altogether if he is making some payments. A debtor who is genuinely unable to make payments for a short time may similarly be deterred from applying for a downward variation because of the costs and then he may suffer hardship if enforcement is sought years later and he does not apply for arrears to be remitted. We would support an increase in the 12 month period to 5 years and we would give the court power to remit the arrears on a free-standing basis.

Paragraphs 3.124 and 5.53 – Reform of the costs rules and the need to refer to both the Family Procedure Rules and the Civil Procedure Rules.

Litigants in person (and some legal representatives) find the costs rules confusing. As a general point, the FJC would support amendments to Part 28 of the Family Procedure Rules to incorporate the relevant parts of Parts 44 to 48 of the Civil Procedure Rules into the FPR without the need to cross refer. In response to paragraph 3.124, our view is that there should be fixed costs but the court should retain the discretion to make costs orders. Summary assessment should be carried out at the conclusion of the hearing.

Paragraph 4.23 – The judgment summons procedure.

The judgment summons procedure should be maintained. It is a useful tool for wilful non-compliance although the six weeks maximum sentence is inadequate if the case has been proved to the criminal standard. We agree that the N67 should be clearer on the requirement to offer to pay the debtor's travelling expenses. The procedure needs to be human rights compliant but the creditor's and the children's family life is affected by wilful non payment and it seems unfair to them if information obtained at a hearing following the general enforcement application (the D50K) is not admissible on a judgment summons. A balance needs to be struck.

Paragraph 4.61 – Disqualification or curfew orders.

The FJC supports the proposals at section 4.61 for disqualification and curfew orders. Provided the procedure does not become too complicated for litigants in person, we would support them being part of the general enforcement application.

We do not think arrears of periodical payments should be provable in bankruptcy. Bankruptcy can be used as a tactic by the debtor to avoid meeting his obligations. In our

experience, the former spouse is in a better position if the order in the family proceedings survives the bankruptcy.

Paragraph 5.17 – Whether existing case management powers are sufficient and used effectively.

In response to the question at section 5.17, our view is that existing case management powers together with improvements to the D50K procedure would be sufficient. We would welcome the introduction of a nominated district judge with responsibility for enforcement in each court, similar to the Enforcement Liaison Judge in the Central Family Court. Many courts have district judges who specialise in public law children or costs which is of benefit to litigants and court staff and, in courts of sufficient size, a specialist enforcement judge would improve the system. The nominated judge would also be able to oversee training for court staff.

Paragraph 5.18 – Alternative Dispute Resolution.

We do not support adjournment of enforcement for ADR. The court has made an order or approved a consent order and it should be complied with.

Paragraph 5.41 – The proposal to consolidate and increase the information available to litigants in person and the public and to consider the scope for funding lawyers to provide free advice to litigants in person.

The leaflets presently available to litigants are inadequate. Advice Now and Resolution provide excellent information and we would support consolidating the information and making it available through Advice Now. HMCTS and the MOJ should provide better information on their websites signposting litigants to Advice Now and Resolution and litigants should be made aware of the sources of information in the guidance notes when they are completing the forms to start proceedings. If the system is improved so that enforcement is fully contained in the Family Procedure Rules, the procedure will be easier for litigants and lawyers to use.

Paragraph 5.48 – The proposal that HMCTS should collect and publish data on the use of the different methods of enforcement in the Family Court.

We agree that HMCTS should keep statistics so that the effectiveness of enforcement methods can be monitored and further improvements can be made.

Paragraph 5.53 - The need to refer to both the Family Procedure Rules and the Civil Procedure Rules.

The Family Justice Council considers that having to consult 2 sets of rules is difficult for litigants. If reforms are made following this consultation, it would be the ideal time to create a truly comprehensive set of Family Procedure Rules.

Family Justice Council

11th Floor, Thomas More Building

Royal Courts of Justice

Strand

London WC2A 2LL

6 July 2015