Law Commission
Reforming the law

Enforcement of Family Financial Orders

Law Com No 370

The Law Commission

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ENFORCEMENT OF FAMILY FINANCIAL ORDERS

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THE LAW COMMISSION

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THE LAW COMMISSION

ENFORCEMENT OF FAMILY FINANCIAL ORDERS

TABLE OF CONTENTS

	Paragraph	*Page*
PART 1: AN INTRODUCTORY PART		
CHAPTER 1: INTRODUCTION		**3**
What is this Report about?	1.1	3
Why is the enforcement of family financial orders important?	1.6	4
How big a problem is this?	1.19	7
Why separate out family enforcement?	1.25	8
History of the project and the need for reform	1.29	9
Consultation	1.32	10
Our recommendations for reform and the structure of this Report	1.34	10
Acknowledgements	1.42	12
The team working on the project	1.47	13
CHAPTER 2: LEGAL LANDSCAPE		**14**
Introduction	2.1	14
Existing methods of enforcement and the rules that govern them	2.3	14
Direct enforcement methods	2.6	15
Indirect enforcement methods	2.32	20
Types of application available only to family creditors	2.37	21
Variation	2.43	22
PART 2: AN EFFECTIVE AND EFFICIENT SYSTEM		
CHAPTER 3: CLEARER RULES		**27**
Introduction	3.1	27

	Paragraph	Page
Consolidation of procedural rules	3.4	27
Consolidation of enforcement statutes	3.16	29
A new practice direction for enforcement	3.18	30
CHAPTER 4: BETTER GUIDANCE AND ENFORCEMENT BY THE COURT		**32**
Introduction	4.1	32
Better guidance	4.4	32
Enforcement by the court	4.21	35
Collection of statistics	4.41	40
CHAPTER 5: THE GENERAL ENFORCEMENT APPLICATION		**43**
Introduction	5.1	43
The current law	5.6	44
Consultation	5.10	46
Discussion	5.34	53
Recommendations	5.70	63
CHAPTER 6: ALLOCATION OF ENFORCEMENT PROCEEDINGS		**65**
Introduction	6.1	65
The current law	6.3	65
Consultation responses	6.6	66
Discussion	6.22	69
Recommendations	6.50	76
CHAPTER 7: INFORMATION ABOUT THE DEBTOR		**78**
Introduction	7.1	78
Obligation for the debtor to complete a financial statement	7.3	78
Recommendations	7.32	86

	Paragraph	Page
CHAPTER 8: INFORMATION REQUESTS AND INFORMATION ORDERS		**87**
Introduction	8.1	87
Existing methods of obtaining information from third parties	8.8	89
Consultation responses	8.12	90
Discussion and recommendations	8.17	91
Disclosure of information to the creditor	8.68	103
Preventing wrongful use of the information	8.80	106
Recommendations	8.85	108
Tracking the debtor's employment to redirect attachment of earnings orders	8.87	109
Automatic redirection of attachment of earnings orders	8.98	112
National register of attachment of earnings	8.110	115

PART 3: MORE OPTIONS FOR ENFORCEMENT

	Paragraph	Page
CHAPTER 9: PENSIONS		**119**
Introduction	9.1	119
Is there a need for new powers to enable enforcement against pensions?	9.5	120
Enforcing against pensions – the general principle	9.11	122
Discussion and recommendations	9.14	122
Giving effect to foreign orders against pensions in this jurisdiction	9.58	133
CHAPTER 10: THIRD PARTY DEBT ORDERS		**138**
Introduction	10.1	138
A protected minimum balance	10.7	139
Periodic third party debt orders	10.23	142
The type of bank accounts to which a third party debt order can apply	10.83	157

	Paragraph	*Page*
CHAPTER 11: ORDERS FOR SALE AND CHARGING ORDERS		**171**
Introduction	11.1	171
Orders for sale under section 24A	11.4	172
Extension of the scope of charging orders	11.8	173
CHAPTER 12: COERCIVE ORDERS		**178**
Introduction	12.1	178
Consultation responses	12.6	179
Discussion and recommendations	12.28	184
Coercive orders – details of our recommendations	12.38	187
The nature of the proceedings and the standard of proof that should apply	12.84	198
Other human rights and international obligations	12.123	209

PART 4: A FAIRER SYSTEM: BALANCING THE INTERESTS OF THE PARTIES

CHAPTER 13: PERMISSION TO ENFORCE AND POWER TO REMIT ARREARS		**217**
Introduction	13.1	217
Power to remit arrears	13.22	222
Power to remit arrears on application for permission to enforce	13.31	224
CHAPTER 14: STREAMLINING – THIRD PARTY DEBT ORDERS AND CHARGING ORDERS		**225**
Introduction	14.1	225
Third party debt orders	14.6	226
Charging orders	14.15	228
CHAPTER 15: JUDGMENT SUMMONS		**234**
Introduction	15.1	234

	Paragraph	Page
Consultation responses	15.8	236
Discussion	15.14	237
CHAPTER 16: COSTS		**244**
Introduction	16.1	244
Consolidation of the rules	16.6	245
A general rule	16.12	246
Fixed costs	16.23	249
CHAPTER 17: BANKRUPTCY		**251**
Introduction	17.1	251
The treatment in bankruptcy of debts arising under family financial orders	17.3	251
Should arrears of periodical payments be provable?	17.8	253
Income payment orders and maintenance payments	17.22	256

PART 5: PRACTICAL STEPS TO ACHIEVING ENFORCEMENT

CHAPTER 18: THINKING AHEAD TO ENFORCEMENT		**259**
Introduction	18.1	259
Direction to consider enforcement	18.3	259
Record of findings	18.11	260
Mention hearings	18.15	261
National insurance numbers	18.20	262
CHAPTER 19: ALTERNATIVE DISPUTE RESOLUTION		**264**
Introduction	19.1	264
ADR generally in family proceedings	19.2	264
Consultation responses	19.10	266

	Paragraph	Page
Discussion	19.16	268
CHAPTER 20: THE ENFORCEMENT PRACTICE DIRECTION		**270**
Introduction	20.1	270
The enforcement practice direction	20.2	270

PART 6: LIST OF RECOMMENDATIONS

CHAPTER 21: LIST OF RECOMMENDATIONS		**277**
APPENDIX A: LIST OF CONSULTEES AND ADVISORY GROUP MEMBERS		**291**
APPENDIX B		**297**
Figure 1 – Estimated number of applications to enforce family financial orders		297
Figure 2 – Proposed general enforcement application procedure		299
Figure 3 – Disclosure required by debtor on various enforcement applications		300
Figure 4 – Information and documentation that the enforcement financial statement should capture		301
Figure 5 – Flow Chart C		306
Figure 6 – Attachment of earnings: tracking and automatic redirection		307
Figure 7 – Worked example of periodic third party debt orders		308
APPENDIX C: EX140 FORM		**313**
APPENDIX D: COMMENTS ON THE EX140 FORM		**327**
APPENDIX E: THE RELATIONSHIP BETWEEN THE 1984 ACT AND THE MAINTENANCE REGULATION		**335**

GLOSSARY AND ABBREVIATIONS

This Glossary does not provide an explanation of the methods of enforcing a family financial order; Chapter 2 (Legal Landscape) provides an overview of the methods discussed in this Report.

"ADR": alternative dispute resolution: methods of resolving disputes without taking the case to court. The term "non-court dispute resolution" is an alternative, and is the title of Part 3 of the Family Procedure Rules, which deals with these methods.

"Beneficial interest" and "beneficial owner": ownership of any asset is split into legal and beneficial ownership. Legal owners have the right to deal with the property, but it is beneficial owners who have the true benefit of the property. The beneficial owner may or may not be the same person as the legal owner. For example, A may be the legal owner of a property but A and B may own the beneficial interest in equal shares; if the property were sold, they would each receive half of the sale proceeds.

"Child Maintenance Service": the Government organisation dealing with all new applications for maintenance assessed and calculated under a statutory formula (by 2017 any existing arrangements that are still managed by the Child Support Agency will have ended), in contrast to maintenance assessed and ordered by the court.

"Civil partnership": a legal status acquired by same-sex couples who register as civil partners which provides substantially the same legal rights as marriage.

"Civil Procedure Rules":[1] the rules of court setting out the procedure in the civil courts in England and Wales.

"Clean break": an order which imposes no ongoing financial liability on either party for the other, following a divorce or dissolution of a civil partnership.

"Codification": the collection in one statute of all the law in a particular area.

"Committal order": an order imposing a term of imprisonment.

"Commutation": the process where a member of a pension scheme gives up all or part of the pension for an immediate lump sum payment. In this Report we use this term to refer both to this process in respect of a defined benefit pension scheme and to the ways in which a lump sum can be taken from a defined contribution pension scheme, which have been extended by the new pension rules applied from 6 April 2015.

"Consent order": an order that is reached by agreement between the parties and then approved and made by the court, in contrast to an order that is imposed by the court. A consent order may be made at any stage in proceedings.

[1] Civil Procedure Rules 1998, SI 1998 No 3132.

"Consolidation": the replacement by a single statute of several statutes or parts of statutes.

"Consultation Paper": Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219.

"Contempt of court": conduct which includes disobedience to court orders and judgments, interference with the administration of justice and disrupting court proceedings.

"Creditor": in this Report, the person to whom payment is owed, or to whom the other party has an obligation, under a financial order made in family proceedings.

"Debtor": in this Report, the person who must make a payment or who has an obligation to the other party under a financial order made in family proceedings.

"Designated Family Judge": the judge with responsibility for leading the family judiciary within a court centre or group of courts.

"Designated family judge area": the geographical area for which a Designated Family Judge has responsibility.

"Dissolution": the legal termination of a civil partnership.

"Divorce": the legal termination of a marriage.

"Family Procedure Rules":[2] the rules of court setting out the procedure in family proceedings in England and Wales.

"Financial Dispute Resolution (FDR) hearing": the (usually) second hearing that occurs following the making of an application for a financial order. The first hearing, called the First Directions Appointment, is for the court to make directions as to the provision of evidence and the conduct of the case. The purpose of the FDR hearing is to help the parties to agree a financial settlement with the assistance of the judge, whose role is to provide a neutral evaluation of the case, and to mediate between the parties. This may include providing an indication to the parties of what the judge believes to be the range of possible outcomes, were the matter to proceed to a final hearing. The FDR hearing is "without prejudice" so that anything said or any admission made in an FDR will not generally be admissible as evidence at any other hearing, in order to encourage open discussion and settlement.

[2] Family Procedure Rules 2010, SI 2010 No 2955.

“Financial needs”: this term is used in the checklist of factors to which the court is directed when considering whether to make financial provision under the Matrimonial Causes Act 1973, the Civil Partnership Act 2004 and Schedule 1 to the Children Act 1989. Its meaning is not defined in statute but, in the context of divorce and dissolution, encompasses where practicable the provision of a home for each of the former spouses and any dependent children, and an income with which to meet living expenses. The question of the level at which needs should be met, and for how long, on divorce and dissolution, is a complex one, which we address in our Report on Matrimonial Property, Needs and Agreements.[3]

“Financial order” or “family financial order”: financial orders made for the benefit of a spouse or children on divorce and dissolution, usually under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004, and financial orders made under Schedule 1 of the Children Act 1989 for the benefit of children.

“financial remedy proceedings”: in this Report, court proceedings where one party has (or both parties have) applied for one or more financial orders consequent on a divorce or dissolution of a civil partnership.

“Financial Remedies Working Group”: the group established by the President of the Family Division in June 2014 to explore ways of improving the accessibility of financial proceedings within the Family Court system for litigants in person and to identify ways of further improving good practice in financial remedy cases.

“Freezing order” or “freezing injunction”: a court decision restraining a party from dealing with his or her assets.

“Her Majesty’s Courts and Tribunals Service” or “HMCTS”: part of Government responsible for the administration of criminal, civil and family courts and tribunals in England and Wales.

“Her Majesty’s Revenue and Customs” or “HMRC”: the United Kingdom’s tax, payments and customs authority.

“Injunction”: an injunction is a court order which imposes an obligation on a party either to do a certain act or to refrain from doing a certain act. The former type of injunction is called a “mandatory” injunction; the latter a “prohibitory” injunction.

“Interim order”: a court order intended to last for a limited period of time, usually until the next court hearing or the making of a final court order or until a party has carried out a particular act.

“Judgment debt”: an obligation to pay money that is created by a court order.

“Land Registry”: the organisation responsible for registering the ownership of land and property in England and Wales.

[3] (2014) Law Com No 343.

“Lay justices”: also known as magistrates. These are volunteer judicial office holders who are not necessarily legally qualified and who decide cases in panels of three.

“Legal aid”: a means of funding legal advice, representation and mediation, by which a party receives such services on a free or subsidised basis. Legal aid is usually means-tested and is administered by the Legal Aid Agency.

“Legal help”: a form of legal aid that involves the provision of legal services other than issuing, or providing representation in, proceedings, or acting as a mediator or arbitrator.

“Legal services order”: an order for one party to make a payment or payments to the other party to fund legal costs (usually for legal representation) during the proceedings.

“Lump sum order”: an order for one party to pay to the other a specified amount of money. This can be payable as a single payment, in instalments or as a series of payments.

“Maintenance”: in English law, usually a term synonymous with periodical payments. In a European law context the term may be used more broadly, to cover all payments directed at meeting financial needs.

“Maintenance Pending Suit”/“interim maintenance”: a series of payments made by one party in financial remedy proceedings to the other to meet living expenses, typically on a monthly basis, before a final family financial order is made.

“Maintenance Regulation”: Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

“Mention hearing”: a short hearing listed by the court when making an order with the aim of monitoring proceedings and compliance with that order.

“Periodical payments”: a series of payments made for a definite or indefinite period of time, typically on a monthly basis.

“Penal notice”: a warning set out in a court order to the effect that if the recipient of the warning fails to comply with the order he or she may be imprisoned.

“Pension attachment order”: an order requiring a percentage of the income or capital benefits of a pension to be paid to the other party.

“Pension sharing order”: an order dividing an existing pension, giving the person benefiting from the order a percentage of the fund to invest in a pension of his or her own.

“Personal service”: when an application or an order is served personally it is delivered to a party in proceedings in person, rather than by another method of service, such as by post.

“Practice Direction”: a document that supports and aids the interpretation of procedural rules of court (such as the Family Procedure Rules and Civil Procedure Rules).

“Remit” or “remission of arrears”: the cancellation of arrears owed.

“Return date”: a hearing for both parties to attend, following an initial hearing or consideration of an application where only one party made representations to the court.

“Service”: the transmission of a document from one party to another.

“Sole trader”: a person trading as an individual, outside of a company or partnership structure.

“Spouse”: in this Report, we use this term to mean one of the parties to a marriage or a civil partnership.

“Stay”: an order halting court proceedings, either generally or for a set period of time.

“1998 Enforcement Review”: the Review of the Enforcement of Civil Court Judgments conducted by the Lord Chancellor’s Department over a number of years from 1998 onwards.

“2003 White Paper”: the document produced by Government setting out details of future policy on enforcement entitled: Effective enforcement: improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents: a white paper (2003) Cm 5744.

“2011 Consultation”: the consultation paper produced by Government entitled: Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales (2011) Cm 8045.

“2012 Government response”: the response of Government to the responses to the 2011 Consultation entitled: Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales: the government response (2012) Cm 8274.

PART 1
AN INTRODUCTORY PART

THE LAW COMMISSION

ENFORCEMENT OF FAMILY FINANCIAL ORDERS

To the Right Honourable Elizabeth Truss MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1 INTRODUCTION

WHAT IS THIS REPORT ABOUT?

1.1 This Report considers how the law can ensure that family court orders to pay money or transfer property are complied with so that individuals can obtain the money or assets they are owed. The report outlines the results of our consultation on this topic and makes recommendations to Government for reform.

1.2 The title of this Report – "The Enforcement of Family Financial Orders" – describes the boundaries of the Law Commission's project. First, we are only concerned with the enforcement of orders, that is, the process of making people do what the court has ordered them to do. That may be to comply with an order for a one-off payment, to make ongoing periodical payments or to transfer or sell property. This Report is not about the rules governing the calculation of how much people should have to pay; we are looking at how to ensure that payment is made once a court order is in place.

1.3 Secondly, we are only looking at what we call "family financial orders", that is, financial court orders made between family members.[1] We are not considering the enforcement of other types of civil court financial order such as a claim for damages following a car accident or an order made following a commercial dispute. Nor are we considering the enforcement of non-financial issues such as the enforcement of child arrangements orders that may be made in the same context as a financial orders.

1.4 Family financial orders are most likely to arise on the ending of a marriage or civil partnership, which commonly requires some financial re-organisation between the two adults involved. A court order will be made where the parties cannot agree, or where agreement has been reached and the order is made by consent.

1.5 Family financial orders will be made for the benefit of the adults and any dependent children. Orders for the benefit of adults and children may be made in financial proceedings on the separation of spouses and civil partners. Orders for the benefit of children may also be made under the Children Act 1989, whether or

[1] By "family financial orders" we mean orders made for the payment of money or transfer of property under the Matrimonial Causes Act 1973, Civil Partnership Act 2004, and Children Act 1989.

not the parents are married or civil partners.[2] However, while some payments for the benefit of children are therefore within its scope, the project considers only selected aspects of child maintenance. Payments for child maintenance are largely administered by the Child Maintenance Service.[3] Payments due in that way do not arise under court orders and the enforcement of such maintenance is not covered by this project.

WHY IS THE ENFORCEMENT OF FAMILY FINANCIAL ORDERS IMPORTANT?

1.6 Enforcement is an often overlooked area of the law, especially in family proceedings. Once the court order for payment has been made, there is a tendency for people to think that the process is all over and the matter is finished. Of course, that should be the case; the parties should comply with their obligations and move on with their lives. But sometimes, for any number of reasons, people do not comply and then the rights and benefits secured under the order become practically meaningless unless there is an effective way of enforcing them. The law of enforcement can be essential for ensuring that people receive what they are due.

1.7 Family financial orders are made taking into account what the debtor is able to pay out of his or her resources. This means that unless the debtor's circumstances change after the order is made, the debtor should be able to comply. The debtors who can pay what is owed but choose not to, we term "won't pay" debtors. The debtors who, for some reason, really are not able to pay, we call "can't pay" debtors. It is important to distinguish between these two types of debtor. The impact of non-payment of family financial orders can be significant and so where the debtor is a "won't pay" debtor, the law needs to be robust in achieving compliance. However, where the debtor is a "can't pay" debtor enforcement action will not help; time consuming, and potentially costly, legal proceedings are likely to make the situation worse for both parties. The law needs to enable the creditor and the court to determine whether a debtor "won't pay" or "can't pay".

1.8 Where the debtor is a "won't pay" debtor, then making sure that family creditors receive what they are due is vitally important. Non-payment of a family financial order can have very serious consequences. Most such orders take account of the recipient's needs in assessing what or how much should be paid or transferred. The money that creditors are owed is often money that they need to meet their day-to-day expenses and the expenses of dependent children. By definition, if the order is not complied with, the person to whom the payment is owed will be left in need. Rent or mortgage payments may be missed; basic necessities may

[2] In financial remedy proceedings under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004, orders for the benefit of children may be made by agreement, or where the parties' circumstances take them outside of the jurisdiction of the Child Maintenance Service, for example if the paying party lives abroad. The court can also make "top up" orders if the paying party's income is beyond the maximum that the Child Maintenance Service can account for, and the court may make orders for the payment of school fees in any circumstances. Outside financial remedy proceedings, financial orders for the benefit of children can be made under the Children Act 1989, sch 1.

[3] Some child maintenance arrangements are still managed by the Child Support Agency, but all new applications are dealt with by the Child Maintenance Service.

become unaffordable; loans or State benefits may become the only means of financial support.

1.9 The impact of non-payment was noted in a number of responses to our consultation paper. Penningtons Manches[4] said that non-payment can have a "devastating impact". They referred to a recent case they had encountered where the debtor's non-payment left the creditor facing repossession of the family home. Resolution[5] said similarly that "non-payment of a sum due under a family financial order can be catastrophic especially in average cases where people are living in ordinary circumstances without significant resources". The Law Society[6] noted that non-payment can lead to the creditor "incurring financial penalties through not being able to pay bills on time, or by being forced to take out high-interest loans to bridge the financial gap". Janet Bazley QC[7] said that non-payment is "prevalent" and its "emotional and financial impact is significant. It can alter the lives of those affected".

1.10 This impact is felt by the adult to whom the payment is due. But it also affects that person's dependants, in particular, any children. International Family Law Group[8] thought that "children are the primary victims of the unduly complex enforcement law as presently exists". In International Family Law Group's view it is the impact on children that makes reform in this area "so important". Dependants suffer indirectly from the financial problems encountered by the person who should have benefitted from the financial order. Children's standard of living and care arrangements may be affected. If the family home can no longer be afforded, children may have to move schools.

1.11 Aside from the impact on individuals, the State has a direct interest in ensuring that family financial orders are enforced. As mentioned, those who are not paid what they are owed may fall back on welfare benefits for support. Both the Law Society and Resolution noted in their responses to our Consultation Paper that non-recovery of what is owed can result in increased claims for benefits and tax credits by creditors left unable to meet their financial needs. It is not possible to calculate the extent of such welfare claims, but it seems likely that the figures are significant.

1.12 Non-compliance with a family financial order is also a problem that extends beyond the individuals affected because of its impact on the justice system. Any inability to force a person to do what the court has ordered undermines the rule of law. The Law Society said:

> The fact that the law in relation to enforcement of family financial orders is so complicated may well deter creditors from taking action to obtain payment. It is conceivable that this has an impact on the

[4] A law firm with a specialist family law team.

[5] An organisation representing over 6,500 family lawyers and other professionals working in family law.

[6] The representative body for solicitors in England and Wales.

[7] A barrister practising in family law. Janet Bazley QC's consultation response was submitted with the approval of the Bar Council. The Bar Council represents barristers in England and Wales.

[8] A specialist family law firm.

> reputation of the family justice system, and the public's perception of its effectiveness and fairness.

1.13 Similarly, the Family Law Bar Association[9] said that the impact of enforcement issues on parties "undermines the whole financial remedies jurisdiction if orders made are unlikely to be enforceable".

1.14 The failure of the law to obtain payment where it is due therefore presents significant problems to individuals and society. Further, the deficiencies of the current law have an impact even in cases where individuals eventually succeed in being paid all or some of what they are owed; the process can be difficult and slow. As the following chapters explain, the rules governing the enforcement of family financial orders are difficult to access and understand, and are inefficient. In many cases legal advice and representation will not be affordable or the cost would be disproportionate to the amount owed. Changes to legal aid have meant an increasing number of litigants in person in family proceedings, including enforcement, as individuals apply to the court without representation.[10] Such applicants face the stress of dealing with complex law and court rules. Delays result from their understandable failures to navigate the system effectively and, in some cases, their applications fail as a result of mistakes in how they have attempted to use the law.

1.15 The difficulty currently faced by litigants in person seeking to enforce family financial orders was a recurring theme in consultation responses. Charles Russell Speechlys[11] said:

> We completely agree with the frustrations expressed by other members of the profession about the difficulties of enforcement. It is our experience as well that this is part of the process most often left to litigants in person as often by that stage they have exhausted both their emotional and financial resources.

1.16 The Justices' Clerks' Society[12] noted that:

> Creditors and debtors in enforcement proceedings are usually litigants in person, the system at the moment is difficult for the litigant in person to navigate.

1.17 The Family Justice Council [13] said: "a simplified system would be of great benefit to litigants in person".

1.18 A final major adverse impact of the current law is the effect on the court service. The complexity of the enforcement rules means that lawyers and even the courts themselves find the enforcement of family financial orders difficult. Inefficiencies

[9] A representative body for barristers who practise in family law.

[10] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/556715/family-court-statistics-quarterly-apr-june-2016.pdf (last visited 28 November 2016).

[11] A law firm with a specialist family law team.

[12] The professional society for justices' clerks, who are lawyers who advise lay justices.

[13] An advisory non-departmental public body; the Council's role is to promote an inter-disciplinary approach to family justice and to monitor the court system.

in the law lead to hearings taking longer than they should do and adjournments being granted where matters might have been dealt with without delay. Cases involving litigants in person are even more likely to contribute to longer hearings and delay, with an impact on the overall speed of the administration of justice and the satisfactory conclusion of individual cases. The Court of Appeal recently addressed this issue in a family matter where the husband was acting in person. Lady Justice Black noted that the fact that he was not represented meant that he "had approached [the application] on a mistaken basis".[14] As the court was without legal assistance, it had to "spend time researching the law for itself then attempting to apply it to the relevant facts in order to arrive at the correct legal answer". With the law of enforcement often being left to litigants in person and judges, the law needs to be as clear as possible, and the system as efficient as possible. An inaccessible system of enforcement results in administrative costs to the justice system as well as costs to individuals.

HOW BIG A PROBLEM IS THIS?

1.19 An ineffective enforcement system, therefore, has an impact on individuals, on the family justice system and, ultimately, on the welfare system. But how great are the problems with the current law?

1.20 At the beginning of the project, Resolution conducted a survey of its members on the topic of enforcement. While the number of Resolution members who responded (47) was not large enough to be statistically significant, the results from the survey revealed a real concern about enforcement from those who practice in the area. Only around 11% of respondents thought enforcement works well for parties who are represented, and only about 3% thought it works well for those who are unrepresented. Difficulty in accessing the law and procedure was cited as causing a significant problem for creditors by just over 90% of respondents, and just under 90% thought that difficulty was caused as a result of a limited range of enforcement methods.

1.21 No national data are available on the number of applications for the enforcement of family financial orders that are made every year, and so it is not possible to tell with any precision how many people are affected by the difficulties with enforcement. However, data from the Central Family Court collected between August 2015 and August 2016 suggest that in just over 9% of cases where a family financial order is made, enforcement action will need to be taken.[15] On that basis we calculate that family financial orders give rise to, on average, around 4,200 enforcement cases per year.[16] That means around 8,400 individual litigants engaging with the enforcement rules, many without any legal representation or assistance.

1.22 The same data from the Central Family Court indicate that 28% of enforcement applications conclude without an enforcement order being made. Some of those

[14] *Lindner v Rawlins* [2015] EWCA 61, [2015] All ER (D) 110 (Feb) at [32].

[15] It may be that the nature of the cases heard at the Central Family Court, which tend to be complex in nature, means that the percentage may not be truly representative of the number of enforcement applications brought in different family court hearing centres. There are many variables that are difficult to account for, so we use the figure of 9% illustratively.

[16] We set out our workings in Figure 1 of Appendix B.

will conclude because the debtor pays what is owed without the need for an order, and some will conclude without any order being made because the debtor is a "can't pay" debtor. However, applications will also be unsuccessful because there is a lack of information about the debtor, or the debtor's assets cannot be reached by the existing methods of enforcement, or the creditor has mistakenly made the wrong application. These types of unsuccessful enforcement application mean that the creditor is not receiving what they are entitled to.

1.23 It is difficult to calculate the amount of unrecovered debt caused by a failure to enforce family financial orders, particularly because there are no data routinely collected on the value of such orders. However, by using average data as to national wealth and applying our understanding of how family financial orders are made, we estimate that creditors are missing out on approximately £15 – 20 million[17] every year because debtors are choosing not to pay and the current enforcement rules are not effective in achieving compliance.

1.24 The figures quoted above are almost certainly a significant underestimate of the real problems caused by weaknesses in the enforcement system. These figures do not account for the family creditors who are not receiving what they are owed but who do not take enforcement action. They may not take action due to a lack of understanding of the system, a feeling that they need legal representation that they cannot afford, concerns about their relationship with the debtor, or simply a lack of faith that action will achieve compliance.

WHY SEPARATE OUT FAMILY ENFORCEMENT?

1.25 Much of the law of enforcement that applies to family financial orders applies equally to the enforcement of other civil orders (for example, for the payment of a debt owing from a commercial dispute or where the court orders one party to litigation to pay damages to another). Our project considers enforcement only in the family context. We suggested in our Consultation Paper that different considerations arise in family law that make it desirable to consider and attempt to reform this area of enforcement separately from general civil law enforcement. Consultation responses echoed this approach.

The impact of non-payment

1.26 The potential impact of non-payment of family financial orders makes them different from other civil debts. Family financial orders are usually designed to provide financial support for the creditor and any children in his or her care. As we have explained, non-payment by the debtor has the potential to cause significant hardship. Further, unlike other civil debts, when a family financial order is made the court takes into account the debtor's ability to pay — the financial order is one that the court is satisfied that the debtor can comply with.

The nature of the orders

1.27 Another important difference from other civil debts is that family financial orders may endure for a long time. For example, orders for periodical payments can last for many years or even for the lifetime of the parties. Such orders may, therefore,

[17] For the calculation of these figures please see the Impact Assessment that accompanies this Report: Enforcement of Family Financial Orders (2016) LAWCOM0058.

require repeated or ongoing enforcement action. In addition, as the parties' circumstances change over time, either may apply to vary the order.[18] The potential for the order to be varied and the debtor's liability to change as a result is an important consideration when thinking about enforcement – there may be no point in a creditor bringing costly enforcement proceedings if the circumstances mean that the arrears will be remitted and the ongoing order varied so that the debtor's liability is reduced. If a change in circumstances means that the debtor cannot pay, then there is a route through which he or she can have the situation considered by the court; the debtor should not simply stop complying with the order.

Relationship between the parties

1.28 Finally, there are many emotions at play in family proceedings, which may not feature or may not feature so prominently, in most other civil proceedings. These emotions can influence the reasons for non-payment by debtors, the action or inaction taken by creditors, and the direction and progress of enforcement proceedings. For example, the Law Society noted that "non-payment can be used by a debtor to punish the creditor for the breakdown of the relationship and to exert power over them". Often the creditor and debtor will have an ongoing relationship as parents to their children; misconceived or ineffective enforcement litigation can do great damage to that relationship which requires ongoing cooperation as parents. Care needs to be taken, therefore, to ensure that both parties have the necessary information to make good choices about enforcement and that if proceedings are started they are as fair, efficient and effective as possible.

HISTORY OF THE PROJECT AND THE NEED FOR REFORM

1.29 A project on the enforcement of family financial orders was recommended to us by the Family Law Bar Association in 2010 in its response to our consultation on our 11th Programme of Law Reform. It described the law of enforcement as "hopelessly complex and procedurally tortuous" and argued that the current system is ineffective.

1.30 We took on the project as part of the Commission's 11th Programme, but the start of the project was delayed until the completion of the project on Matrimonial Property, Needs and Agreements (the scope of which was extended at Government's request). Work began on the enforcement project in April 2014.

1.31 In the four years that elapsed between the Family Law Bar Association proposing the project and work beginning, two significant legal developments occurred; the introduction of the Family Court[19] and the changes to legal aid in family (and

[18] Some family financial orders can be varied by the court on an application by either party. On such an application the court may vary the ongoing liability and may remit any arrears that have accrued. For further consideration of the relationship between enforcement and variation of family financial orders, see Chapter 2.

[19] The Family Court, which came into being by virtue of the Crime and Courts Act 2013, exercises jurisdiction in nearly all family proceedings (some family proceedings are still reserved to the High Court). The effect of the introduction of the Family Court was to end the separate family jurisdictions that previously existed in the magistrates' and county courts. The Family Court is a national court and can sit anywhere, though most often sits in the buildings that also house Magistrates' Courts and County Courts.

other) proceedings brought about by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The introduction of the Family Court remedied some of the procedural difficulties that existed in the enforcement of family financial orders. Previously different rules of court had applied depending on whether proceedings were in the magistrates', County or High Court and the introduction of the Family Court removed this layer of complexity. However, procedural difficulties remain, and it is widely thought that the rules on enforcement in the Family Procedure Rules are in need of revision.[20]

CONSULTATION

1.32 We published our Consultation Paper "The Enforcement of Family Financial Orders" in March 2015.[21] We accepted consultation responses until 31 July 2015 – this was a longer consultation period than usual to take account of a period of purdah for the general election that was taking place.[22] We held consultation events in Cardiff, Manchester and London, all of which were well attended by practitioners and members of the judiciary. Following the period of consultation, we continued to meet with stakeholders to help us work through the detail of the recommendations.

1.33 We established an advisory group of practitioners, judges, Government officials and a representative from a debt advice agency. The group met twice to discuss issues that had arisen from the consultation and to consider a number of proposals for reform.

OUR RECOMMENDATIONS FOR REFORM AND THE STRUCTURE OF THIS REPORT

1.34 Our recommendations for reform are aimed at creating an effective system for the enforcement of family financial orders. By an effective system we mean one that produces compliance with a court order in a way that is fair to both the creditor and the debtor. Fairness requires equipping creditors with the information and options they need to stand the best chance of recovering what they are owed, but also ensuring that those debtors who cannot pay are not punished for involuntary non-compliance. It also means ensuring that neither party nor any of their dependants suffer undue hardship.

1.35 This report is divided into six Parts:

(1) an introductory part;

(2) our recommendations for a more effective and efficient system of enforcement;

(3) our recommendations for additional options for enforcement;

[20] We note the ongoing work in the area of family justice to make the system more efficient and simplify processes. For example, the recent joint statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals: Transforming Our Justice System (September 2016).

[21] The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219.

[22] Purdah is the period leading up to an election when there is a restriction on certain activities of the civil service, including arms-length bodies.

(4) our recommendations for a fairer system;

(5) our recommendations for practical steps to achieve enforcement; and

(6) a list of our recommendations.

1.36 Following this introduction, we provide an overview of the legal landscape in Chapter 2.

Part 2 – an effective and efficient system

1.37 Part 2 of the paper makes suggested recommendations for improving the system of enforcement, rather than recommendations for reform to specific methods of enforcement. In Chapter 3, we recommend consolidating the procedural rules governing enforcement within the Family Procedure Rules[23] (at present they are split between the Family Procedure Rules and the Civil Procedure Rules[24]), and the introduction of a new Practice Direction on enforcement. In Chapter 4, we recommend a number of ways to improve and expand the information and guidance available to the parties in family enforcement proceedings. Further, we consider whether the option of enforcement by the court (an option for family creditors to ask the court to take responsibility for enforcing orders for periodical payments in certain circumstances) should be expanded and we recommend ways to increase awareness of this remedy. Chapter 5 sets out our recommendations for a revised procedure for the general enforcement application. We then explore in Chapter 6 how courts might improve their practice by the introduction of an enforcement liaison judge, new guidance on the allocation of enforcement and an increase in the enforcement powers available to lay justices. Finally, we make recommendations in Chapters 7 and 8 for a new obligation on the debtor to file a financial statement and for the introduction of new information-gathering powers for the court.

Part 3 – more options for enforcement

1.38 In Part 3 of the paper we set out our suggested recommendations for expanding the range of enforcement methods available to the family creditor. Chapter 9 contains recommendations for enforcement against a debtor's pension. Chapter 10 explores third party debt orders and recommends expanding their scope so that they may operate periodically, and against joint accounts. We recommend, in Chapter 11, expanding the family court's jurisdiction to make an order for sale of the respondent's property consequent upon making a financial order, and we explore but ultimately reject the possibility of expanding the scope of charging orders. Chapter 12 sets out our recommendations for the introduction of new coercive orders that may be used to encourage payment by a debtor who the court is satisfied has the means to pay but whose assets are beyond the reach of direct methods of enforcement.

Part 4 – a fairer system: balancing the interests of the parties

1.39 Part 4 contains recommendations in respect of issues that overlie the enforcement of family financial orders. In Chapter 13, we recommend changes to

[23] Family Procedure Rules 2010, SI 2010 No 2955.

[24] Civil Procedure Rules 1998, SI 1998 No 3132.

the rule that permission is required to enforce arrears that are more than twelve months old and we recommend the introduction of a power for the court to remit, on the application of a debtor, arrears that have accrued under certain family financial orders. In Chapter 14, we consider the streamlining of applications for third party debt orders and charging orders, and recommend the introduction of a streamlined procedure for the latter. In Chapter 15, we explore issues arising from the judgment summons application. In Chapter 16, we recommend a change to the costs rules that apply in proceedings for the enforcement of a family financial order and in Chapter 17 we consider aspects of the relationship between enforcement and bankruptcy.

Part 5 – supporting enforcement in practice

1.40 In Chapter 18, we make a number of recommendations for changes to practice at the time the court makes the original financial order with the objective of reducing the likelihood of non-compliance and facilitating any future enforcement proceedings should enforcement become necessary. It has been a strong and consistent theme from stakeholders that a more pro-active approach to enforcement is required, from all involved, to ensure compliance. We consider, in Chapter 19, the role of alternative dispute resolution in the enforcement of family financial orders. Finally, in Chapter 20, we consider the content of a new enforcement practice direction.

Part 6 – a list of our recommendations

1.41 In Chapter 21, we set out a list of all the recommendations made in the Report.

ACKNOWLEDGEMENTS

1.42 Our thanks go to all who responded to our consultation or who have supported our project in other ways. As we have noted above, enforcement is an often overlooked area, and is not one which receives a great deal of attention in legal writings. However, it is a crucially important area of law and so we are very grateful to all who have put work, time and careful thought into commenting on the issues we have highlighted and answering the questions we have posed. We are grateful to Resolution for organising, at the very beginning of our project, an email survey of its members on the topic of enforcement on our behalf.

1.43 We offer particular thanks to the members of our advisory group, who met on two occasions before the publication of this Report to discuss issues arising from the consultation and to consider the detail of some of the recommendations we now make. The list of advisory group members, along with the list of consultees is at Appendix A.

1.44 We also thank the following individuals and organisations for their input into the project:

(1) His Honour Judge Waller;

(2) His Honour Judge Everall;

(3) the Family Procedure Rules Committee;

(4) the Judges of the Family Division of the High Court; and

(5) the team responsible for administering and allocating enforcement cases at the Central Family Court.

1.45 We are also very grateful to the organisations that generously hosted events at which we were able to discuss the issues raised in our consultation paper. We would like to express our gratitude to 30 Park Place Chambers, Mishcon de Reya, and Slater and Gordon Lawyers.

1.46 Finally, we thank the officials from various Government departments who have given us their time to discuss the project and consider the recommendations that we make in this Report.

THE TEAM WORKING ON THE PROJECT

1.47 The following members of the property, family, and trust team have contributed to this Report at various stages: Matthew Jolley (team manager); Spencer Clarke (team lawyer); Amy Perkins (team lawyer); Rebecca Huxford (research assistant 2014–2016); Brad Lawlor (research assistant 2015-2016); Maxwell Myers (research assistant 2016-2017).

CHAPTER 2
LEGAL LANDSCAPE

INTRODUCTION

2.1 In this chapter we provide a sketch of the current law of the enforcement of family financial orders. We do not attempt to set out in detail the law governing individual enforcement methods, but only the detail necessary to explain our recommendations for reform. A fuller account is provided in our Consultation Paper.[1]

2.2 After looking at the current law, we will briefly explore the issue of variation of an order, which we understand is a feature of the enforcement of family financial orders. Variation of an order is a process by which either party asks the court to change the terms of an order already made. This might be to change the amount to be paid or to change the time(s) when payment is due. A debtor may respond to an application by a creditor to enforce an order with an application to vary that order, though not all family financial orders are capable of being varied.[2]

EXISTING METHODS OF ENFORCEMENT AND THE RULES THAT GOVERN THEM

2.3 In general, the methods for the enforcement of family financial orders are the same as the methods available for the enforcement of all civil orders for the payment of money. The rules governing the enforcement of family financial orders are found in statute and in the Family Procedure Rules, which in some instances simply cross-refer to the Civil Procedure Rules. However, there are a number of important procedural differences between the enforcement of orders made in family proceedings and those made in other civil proceedings. These differences will be highlighted as they arise throughout this paper.[3] We have explained in the introduction to this paper why we are considering the enforcement of family financial orders as a distinct area.

2.4 There are, generally, two types of enforcement method. Direct enforcement methods target the debtor's assets directly, whereas indirect methods seek to apply pressure to the debtor to obtain his or her compliance (we call these methods of enforcement "coercive orders"). Currently, the only examples of coercive orders available in the enforcement of family financial orders are the judgment summons application and the writ of sequestration.[4]

2.5 In this section we outline the existing methods of direct and indirect enforcement. We do not make recommendations for reform for all of these methods, but we

1 The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219.

2 See paras 2.43 and following below.

3 For example, the requirement in family proceedings for the court's permission to enforce arrears that are over twelve months old in Chapter 13, and the possibility in family proceedings to make an application for such method of enforcement as the court considers appropriate in Chapter 5.

4 Sequestration can lead to enforcement directly against the debtor's assets in some circumstances. For an explanation of sequestration see para 2.35 below.

include them here to complete the picture. An important aspect of the legal landscape is bankruptcy. Although we make no recommendations to change the law, we discuss a number of issues arising from bankruptcy and family financial orders in Chapter 17.[5] We make no recommendations to change the rules that apply when a debtor or creditor has died while outstanding obligations still exist under a family financial order. The rules governing claims following the death of a party to legal proceedings are detailed and go beyond the scope of this project.[6] In general, however, where a debtor dies owing money under a family court order that debt is enforceable against his or her estate if the obligation to pay has crystallised by the time of the debtor's death.[7]

DIRECT ENFORCEMENT METHODS

An attachment of earnings order

2.6 An attachment of earnings order can be used as a method of enforcement against a debtor who is employed. The order is directed to the debtor's employer and requires the employer to pay an amount of the debtor's earnings directly to the creditor. The order will typically be used to enforce arrears owed under any family financial order, and to recover periodical payments as and when they fall due. There are no statistics for the number of enforcement orders made specifically in family proceedings but we understand that these are a frequently used method of enforcement. In civil proceedings generally, 51,737 applications and 47,884 orders were made in 2011, the last year for which data are available.[8]

2.7 Attachment of earnings orders made in family proceedings are governed by the Attachment of Earnings Act 1971 and Part 39 of the Family Procedure Rules.[9] In addition, there is provision under the Maintenance Enforcement Act 1991 to make an attachment of earnings order (or a suspended attachment of earnings order) at the same time as making an order for periodical payments where the debtor is ordinarily resident in England and Wales.

A third party debt order

2.8 A third party debt order enables enforcement directly against money owed to the debtor by a third party. The third party is required to pay to the creditor all or part of the debt owed by the third party to the debtor; payment to the creditor discharges the third party's debt to the debtor. A third party debt order can be used to enforce arrears under any family financial order but cannot recover

[5] Further, there are specific rules for enforcing orders against debtors who are in the armed forces; the main difference being that a separate regime applies to enforce against their earnings: Armed Forces Act 2006. We make no recommendations in respect of these rules.

[6] Generally for the rules governing the effect of death in relation to causes of action see the Law Reform (Miscellaneous Provisions) Act 1934.

[7] See for example *Sugden v Sugden* [1957] P 120, [1957] All ER 300.

[8] Ministry of Justice, *Judicial and Court Statistics 2011, Chapter 1: County courts (non-family work)* table 1.18, available at https://www.gov.uk/government/statistics/judicial-and-court-statistics-annual (last visited 30 November 2016). These statistics, which we cite throughout this section of the Report, relate to applications and orders for enforcement in the County Court; there are no equivalent statistics currently available for the Family Court.

[9] SI 1991 No 356.

ongoing periodical payments. A third party debt order will often be used to recover arrears of periodical payments or a (smaller) lump sum. They are not, however, frequently used with only 4,137 applications and 1,357 orders made in civil proceedings generally in 2011.[10]

2.9 The third party can be any individual or organisation[11] situated within the jurisdiction.[12] However, third party debt orders are usually directed to a bank or building society where the debtor has an account. The balance of the account is a debt owed to the debtor, which can be paid to the creditor in satisfaction of the monies owed.

2.10 Third party debt orders are governed by rule 33.24 of the Family Procedure Rules and Part 72 of the Civil Procedure Rules. The substantive rules are found in the latter.

A charging order

2.11 A charging order does not immediately recover the monies owed to the creditor; it makes an asset held by the debtor, for example property, into security for the debt. When the asset is sold, the creditor then receives the money due out of the proceeds of sale. The creditor can wait until the debtor chooses to sell the property, or the creditor may apply for an order for sale any time after the charging order has been made.

2.12 Any money due or to become due under a family financial order may be secured by a charging order. A charging order may, therefore, be used to secure a lump sum payable by instalments, including to secure instalments that have not yet fallen due. Ongoing periodical payments are unlikely to be secured by way of a charging order as there is specific provision in the Matrimonial Causes Act 1973 to make a secured periodical payments order. A charging order might be used to enforce the payment of arrears of periodical payments or, perhaps most typically, a lump sum (particularly where the lump sum is sufficiently large that a third party debt order against a debtor's bank account is unlikely to yield a sufficient sum). Charging orders are the most common method of enforcement after warrants of control and possession in civil enforcement proceedings: 90,286 applications were made and 81,092 orders were granted in 2011.[13]

2.13 Charging orders made in family proceedings are governed by the Charging Orders Act 1979 and Part 40 of the Family Procedure Rules.

[10] Ministry of Justice, *Judicial and Court Statistics 2011, Chapter 1: County courts (non-family work)* table 1.18, available at https://www.gov.uk/government/statistics/judicial-and-court-statistics-annual (last visited 30 November 2016).

[11] Except that a third party debt order cannot be made against the Crown.

[12] While the third party must be situated within the jurisdiction, the debt may be a foreign debt, but the court will only make such an order if satisfied that it will be recognised in the foreign jurisdiction so that the third party will not still be required to pay the debtor the full amount (*Société Eram Shipping Co Ltd and others v Compagnie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260).

[13] Ministry of Justice, *Judicial and Court Statistics 2011, Chapter 1: County courts (non-family work)* table 1.18, available at https://www.gov.uk/government/statistics/judicial-and-court-statistics-annual (last visited 30 November 2016).

Appointment of a receiver

2.14 A receiver is appointed in respect of a specific asset or specific assets belonging to the debtor. The receiver's function is to collect the monies receivable by the debtor in respect of that asset, or those assets, and to pay them to the court or directly to the creditor. For example, a receiver may be appointed to collect rents on properties owned by the debtor, or to collect payments from a trust fund in which the debtor has an interest. The court may direct or permit the receiver to do something, for example start legal proceedings or sell a property.

2.15 The receiver can be any individual who the court considers appropriate. The creditor may act as a receiver him or herself, but often the role is undertaken by professionals, such as accountants and insolvency practitioners. This can make enforcement by the appointment of a receiver very expensive and it is typically used only in cases where other methods of enforcement have been tried first. It is therefore often perceived as a remedy of last resort.[14] The rules contemplate that other methods of enforcement will have been tried first.

2.16 The power of the court to appoint a receiver is found in section 37 of the Senior Courts Act 1981 and the procedure is governed by Part 69 of the Civil Procedure Rules.[15]

A means of payment order

2.17 A means of payment order specifies how payments under a periodical payments order or an order for a lump sum by instalments must be made. The order may require, for example, that payments are made by standing order or that they are made via the court. Such an order ensures that a clear record is kept of payments that are made and, perhaps, increases the likelihood of payment. If payments are made via the court, a court officer may take steps to enforce the order on the creditor's behalf if necessary.

2.18 Means of payment orders are made pursuant to section 1 of the Maintenance Enforcement Act 1991.

An order for sale

2.19 If the court makes a family financial order under the Matrimonial Causes Act 1973[16] or the Civil Partnership Act 2004[17] for secured periodical payments, the payment of a lump sum, the transfer of property, or an order for payment in respect of legal services,[18] then on making that order or at any time thereafter, the court may make an order for sale. The order for sale can be made against any property in which either or both of the parties to the marriage has or have a beneficial interest. The order for sale can be used to enforce any family financial order where the above criteria are met and is not limited to ordering the sale of

[14] See *Maughan v Wilmot* [2014] EWHC 1288 (Fam), [2015] 1 FLR 567.

[15] Applied by Family Procedure Rules, r 33.22.

[16] Matrimonial Causes Act 1973, s 24A.

[17] Civil Partnership Act 2004, sch 5, para 10.

[18] An order for payment in respect of legal services is an order that one party pays or makes a contribution towards the costs of the other party's legal fees: Matrimonial Causes Act 1973, s 22 ZA; Civil Partnership Act 2004, sch 5, para 38A.

property that has been the subject of a previous order. It may be particularly useful as a one-stage alternative to obtaining a charging order and a later order for sale.[19]

A writ or warrant of control (seizure and sale of personal property)

2.20 A writ or warrant[20] of control enables enforcement by directing an enforcement officer to take control of and sell the debtor's goods.[21] The creditor then receives the proceeds, or part of the proceeds, in satisfaction of the debt that is owed. Together with warrants of possession, warrants of control appear to be the most frequently used method of enforcement in the recovery of civil debts generally.[22]

2.21 The rules governing the application and court procedure for writs and warrants of control are found in Parts 83 and 84 of the Civil Procedure Rules, which are applied to family proceedings by Part 33 of the Family Procedure Rules. The (very detailed) rules governing the taking control and sale of goods are set out in the Tribunal, Courts and Enforcement Act 2007[23] ("the 2007 Act") and regulations made under it.[24]

2.22 As we explained in the Consultation Paper, comprehensive reforms of the law relating to taking control of, and selling, a debtor's goods came into effect in April 2014. Consequently, we have not considered any proposals for reform. However, we have been told that the effectiveness of this enforcement method can be hampered by the lack of available bailiffs to execute the writs and warrants; this is an operational issue outside of our remit but we note it here as it may be an issue for consideration by Her Majesty's Courts and Tribunals Service ("HMCTS").

A writ or warrant of possession

2.23 A writ or warrant[25] of possession can be used to enforce an order that provides for possession of land. The writ or warrant authorises an enforcement officer to take possession of the land on behalf of the creditor. In the family context a writ or warrant of possession may be useful to enforce vacant possession, for example, where one party is living in a property that the court has ordered to be

[19] An order for sale to realise the charge created by a charging order is made under the Civil Procedure Rules or the Trusts of Land and Appointment of Trustees Act 1996, rather than under section 24A of the Matrimonial Causes Act 1973 or para 10 of sch 5 of the Civil Partnership Act 2004.

[20] A writ of control would be issued by the High Court; a warrant of control by the Family (or County) Court.

[21] "The debtor's goods" means property of any description, other than land, in which the debtor has an interest, though particular goods are exempt. Goods in which another person also has an interest may still be seized and sold but different rules apply.

[22] In the County Court, 129,778 warrants of control (then called warrants of execution), and 130,690 warrants of possession, were issued in 2011. Ministry of Justice, *Judicial and Court Statistics 2011, Chapter 1: County courts (non-family work)* table 1.18, available at https://www.gov.uk/government/statistics/judicial-and-court-statistics-annual (last visited 30 November 2016).

[23] Tribunal, Courts and Enforcement Act 2007, s 62 and sch 12.

[24] Taking Control of Good Regulations 2013, SI 2013 No1894 and Taking Control of Goods (Fees) Regulations 2014, SI 2014 No 1.

[25] A writ of possession would be issued by the High Court; a warrant of possession by the Family (or County) Court.

transferred to the other party's ownership.[26] That said, we suspect (although no statistics are available), that writs and warrants of possession are used much more in the County Court jurisdiction than in that of the Family Court and that they are of limited application to enforce family financial orders. We have also not been alerted by consultees to any problems with the law in this area. Accordingly, we have not considered any proposals for reform.

2.24 Part 83 of the Civil Procedure Rules contains the rules governing writs and warrants of possession. Rule 33.1 of the Family Procedure Rules applies Part 83 to family proceedings.

A writ or warrant of delivery

2.25 A writ or warrant[27] of delivery may be used to enforce an order for the delivery up of goods. If the original order required delivery up of goods or payment of the value of the goods, then the writ or warrant will be to recover the goods or the value.[28] If the original order did not provide the option of paying the value of the goods, then the writ or warrant will be for "specific delivery"[29] only. Again, we have not been alerted by consultees to any difficulties with this procedure and so have not considered reform in this area. Additionally, where the writ or warrant includes a power to seize and sell the goods, the reformed procedure that governs the taking and selling of goods under writs and warrants of control will apply.

2.26 An enforcement officer is directed to seize and, where appropriate, sell the relevant goods. The application is governed by Part 83 of the Civil Procedure Rules, which is applied to family proceedings by rule 33.1 of the Family Procedure Rules. Where the writ or warrant confers a power to take control of and sell the goods, the procedure in the 2007 Act (and subsequent regulations) applies.

An order to obtain information

2.27 An order to obtain information requires a debtor to attend court, answer questions on oath about his or her finances and produce supporting documents. The questioning usually takes place by a court officer but may be before a judge in certain circumstances.

[26] Although this method of enforcement may be available only if the order has been drafted to provide that one party may occupy the property to the exclusion of the other. See G Smith and T Bishop, *Enforcing Financial Orders in Family Proceedings* (2000) p 213.

[27] A writ of delivery would be issued by the High Court; a warrant of delivery by the Family (or County) Court.

[28] This means that goods other than those specified in the order may be seized and sold.

[29] Delivery of the exact goods specified in the order.

2.28 A creditor may apply for an order to obtain information so as to gain a better understanding of the debtor's financial position before deciding whether to take enforcement action and for what enforcement order to apply. An order to obtain information is available to aid enforcement of any civil or family debt, however, in family proceedings, it has, to a certain extent, been superseded by the general enforcement application, which is discussed below.[30]

2.29 The rules governing an application for an order to obtain information are at Part 71 of the Civil Procedure Rules.

Bankruptcy

2.30 Bankruptcy, while not strictly a method of enforcement, might be used as such by a creditor. The creditor may make a formal demand of the debtor that he or she pays the amount that is due; if the debtor does not pay then the creditor may petition for the debtor's bankruptcy. If a creditor is owed a lump sum or an amount for costs then he or she will be eligible to receive a share of the bankrupt's property towards discharging the debt owed when this is distributed during the bankruptcy process.[31] Of course, given that many bankrupts will have very little or no property, the chances of creditors recovering the sums that are owed to them using this method may not be very good. However, all debts arising from family financial orders survive the bankruptcy, unless the court orders otherwise.[32]

2.31 The rules governing bankruptcy are set out in Part 9 of the Insolvency Act 1986 and Part 6 of the Insolvency Rules 1986.

INDIRECT ENFORCEMENT METHODS

Committal on a judgment summons

2.32 A judgment summons requires a debtor to attend court where payment is due under an outstanding family debt.[33] If the creditor can prove beyond reasonable doubt that the debtor has the means to pay the sum owed, or has had the means at some time since the making of the financial order, and the debtor refuses or neglects to pay, or refused or neglected to pay when he or she did have the means, then the debtor may be committed to prison for up to six weeks, subject to being released earlier on payment of the money owed. Imprisonment does not extinguish the debt.

2.33 Instead of committing the debtor to prison, the court may make a new order for payment of the amount due under the financial order and the costs of the judgment summons, or may make an attachment of earnings order.

[30] At paras 2.38 to 2.40 and Chapter 5 below.

[31] Other family financial orders are not provable in the bankruptcy, and so, for example, a creditor who is owed money for arrears of a periodical payments order will not receive any share of the debtor's estate to meet those arrears.

[32] On being discharged from bankruptcy, a bankrupt is relieved of most of his or her debts – they no longer exist. However, debts arising from family financial orders "survive", meaning that they remain and may be enforced.

2.34 The power to commit for non-payment of certain debts is in section 5 of the Debtors Act 1869. Apart from those arising from family financial orders, very few debts are enforceable in this way. The procedure for a judgment summons application in respect of family debts is contained in Part 33 of the Family Procedure Rules.[34]

Sequestration

2.35 A writ or warrant of sequestration is a High Court remedy for contempt of court.[35] A sequestrator is appointed to take possession of, hold and deal with the debtor's property in accordance with directions from the court. A writ of sequestration applies to all the debtor's property. Although the court may give directions for the sequestrator to deal with the property in order to recover funds for the creditor, for example by raising money against an asset, the procedure is mainly aimed at applying pressure to the debtor to comply with the financial order. We understand that it is a rarely used remedy and, for this reason, we think it unlikely that there is scope for it to be used more commonly to enforce family financial orders.

2.36 The application procedure is governed by Part 33 of the Family Procedure Rules.[36]

TYPES OF APPLICATION AVAILABLE ONLY TO FAMILY CREDITORS

2.37 There are two types of enforcement application available to family creditors that are not available to creditors seeking to enforce other civil debts. The applications may result in the same orders for enforcement being made as can be made to enforce other civil debts but the procedure is very different.

General enforcement application

2.38 The general enforcement application is a procedure that allows a creditor to apply for "an order for such method of enforcement as the court may consider appropriate" rather than having to apply for any specific method of enforcement. The procedure is particularly useful for litigants in person who may not know where to start in enforcing their unpaid order.

2.39 A general enforcement application triggers a process requiring the debtor to attend court, produce documents and answer questions about his or her finances with the objective of enabling the court to decide which enforcement method is most appropriate. The court is then able to choose from a "menu" of certain enforcement methods.

2.40 The rules governing the procedure are set out in Part 33 of the Family Procedure Rules, importing provisions from Part 71 of the Civil Procedure Rules.[37]

[33] A debt owing under a "High Court maintenance order" or "Family Court maintenance order" may be so enforced. In this context, "maintenance order" is given a broad meaning: Administration of Justice Act 1970, s 28 and sch 8.

[34] At Family Procedure Rules, rr 33.9 to 33.17.

[35] A judge of High Court level sitting in the Family Court may exercise the power: Matrimonial and Family Proceedings Act 1984, s 31E.

[36] At Family Procedure Rules, rr 37.18 to 37.26.

Enforcement by the court

2.41 Similarly, an application for enforcement by the court is not a method of enforcement, but an application that can assist a creditor in obtaining enforcement of a periodical payments order. In circumstances where payment of the order is being made via the court,[38] the creditor can ask the court to take any necessary enforcement action on his or her behalf, with the request being made either when the debtor defaults or in anticipation of the debtor not paying. The creditor must still pay the costs of any enforcement. The application is likely to be of most use for litigants in person, particularly where the amount of arrears is not particularly large.

2.42 The ability for the court to enforce on the creditor's behalf is set out in rule 32.22 of the Family Procedure Rules.

VARIATION

2.43 Part of the legal landscape of enforcement is the prospect of the debtor bringing variation proceedings.

2.44 A number of family financial orders, for example (and most pertinent in this context) orders for periodical payments and orders for lump sums by instalments, are open to being varied by the court on an application by either party.[39] When considering an application to vary, the court looks at whether there have been any material changes of circumstances since the original order and the court must also look afresh at the parties' existing financial circumstances to ensure that the order is still fair.[40] On a variation application, the court has the power to remit any arrears that have accrued.[41]

2.45 An application to enforce a periodical payments order which can be varied is often met with an application by the debtor to vary the order. This tends to result in an adjournment of the enforcement application, pending the outcome of the variation application. Concern about this sequence of events arose in a few consultation responses and at our consultation events in London and Manchester. Penningtons Manches were concerned in their consultation response about variation applications being made "strategically". Further, concerns were raised that debtors often stop making any payments upon issuing an application to vary. The Family Law Bar Association proposed that a warning notice should be included on final orders to the effect that payment should continue "unless and until varied" with the exception of an agreement in writing being reached to specify how the order should be varied. This seems a sensible idea.

[37] The rules are sparse; we recommend a revised procedure and a comprehensive set of procedural rules, see Chapter 5.

[38] See paras 4.21 to 4.40 below.

[39] Matrimonial Causes Act 1973, s 31.

[40] Matrimonial Causes Act 1973, s 31(7).

[41] Matrimonial Causes Act 1973, s 31(2A).

2.46 It was suggested at consultation events that we should consider measures to prevent debtors making reactive variation applications. One consultee suggested introducing a permission requirement for making a variation application; another suggestion was to introduce a presumption that, unless the debtor had issued a variation application before enforcement proceedings, he or she could pay the amount owed.

2.47 We have given consideration to these ideas for reform, but do not recommend either. We understand and sympathise with the concerns raised but we think any reforms to applications for variation stray beyond the scope of the project. Although the point is not a new one, we think it is important to emphasise that a variation application should not inevitably lead to an adjournment of any enforcement proceedings; the appropriate action will depend on the circumstances of each case.

PART 2
AN EFFECTIVE AND EFFICIENT SYSTEM

CHAPTER 3
CLEARER RULES

INTRODUCTION

3.1 The law on enforcement can be hard to find and difficult to follow, particularly for litigants in person, but also for lawyers and the judiciary. Owing to the reduction in the availability of legal aid, a greater number of parties must participate in enforcement proceedings without the benefit of legal representation. Unnecessary complexity in the law leads to inefficiencies as litigants and the courts have to grapple with what the law is and how it should be applied.

3.2 In the Consultation Paper we noted that the number of litigants in person in the Family Court had been growing due to the reduction in the availability of legal aid, following the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In only 21% of private family law cases are both parties represented, and in over one third of private law cases both parties are litigants in person.[1]

3.3 Accordingly, the case for making the law clear and easy to find is compelling. It benefits both the parties and the courts if the law is accessible to litigants in person. In this Chapter, we examine two ways in which to achieve that objective: by consolidating the procedural rules, and by creating a narrative practice direction to steer litigants in person (and others) through the process of enforcing a family financial order.

CONSOLIDATION OF PROCEDURAL RULES

3.4 The current enforcement regime for family financial orders is found across primary legislation and in both the Family Procedure Rules and the Civil Procedure Rules. The need to consult different sets of procedural rules in enforcement proceedings has been widely criticised by both judges and practitioners.[2] Further, the relationship between the two sets of rules is not always clear, and is especially difficult for a litigant in person. For example, rule 33.1 of the Family Procedure Rules provides that:

> Parts 50, 83 and 84 of, and Schedules 1 and 2 to, the CPR apply, *as far as they are relevant and with necessary modification*[3] to an

[1] In 2014, both parties were represented in 22% of private law cases, whereas, in 2015 both parties were represented in 21% of private law cases. For the same years, the figures for neither party being represented were, respectively, 33% and 35%. Private law cases include proceedings for divorce and annulment, both with and without financial remedies, domestic violence proceedings and private law children proceedings. We note that the table records that whether a party is represented is determined by whether the field "legal representation" in FamilyMan (the Family Court computer system) is left blank – so parties without a recorded representative may not necessarily be self-representing litigants in person. See https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2015 (last visited 30 November 2016).

[2] For an example of the complexity caused by the application of the Civil Procedure Rules in the context of the costs rules see para 16.8 below.

[3] Emphasis added.

application made in the High Court and the Family Court to enforce an order made in family proceedings.

3.5 This rule appears incomprehensible to a litigant in person, who must not only read the different provisions referred to, but be able to understand their relevance and ascertain whether (and what) modifications are required - a task that is difficult even for a judge.

3.6 The rules of court on enforcement are contained in Parts 32, 33, 39 and 40 of the Family Procedure Rules. Part 33 imports, with modifications, Parts 70, 71 and 73 and 81 to 84 of the Civil Procedure Rules, which deal with specific methods of enforcement. The Attachment of Earnings Act 1971 and the Charging Orders Act 1979 are the most important pieces of primary legislation for enforcement, although it may also be necessary to consider individual sections of the Debtors Act 1869, the Senior Courts Act 1981 and the County Courts Act 1984.

3.7 We asked consultees if they find that the need to refer both to the Family Procedure Rules and the Civil Procedure Rules gives rise to problems, and whether consolidation ─ that is, including within the Family Procedure Rules all the procedural rules that could apply on the enforcement of a family financial order ─ would be helpful.

Responses to the consultation paper

3.8 The vast majority of respondents thought that consolidation would be a very useful reform.

3.9 Several consultees addressed the difficulty caused by the scattered nature of the current enforcement provisions. District Judge Robinson[4] said:

> The use of two sets of rules is a problem. The present Rules are very difficult to follow for judges and lawyers, impossible for litigants in person. Putting them together, even if exactly duplicating the CPR in places, would be a major advance in the creation of the Family Court, and would help all court users.

3.10 The Family Law Bar Association referred to the rules as “complex and confusing”. Penningtons Manches commented that “the current enforcement methods are scattered across multiple statutes, a situation made worse by the need to refer to multiple sources for the procedure”. The Judges of the Family Division of the High Court[5] thought it would be “far better for all rules to be incorporated into the Family Procedure Rules so that there is no need to refer to the Civil Procedure Rules at all”.

[4] A district judge sitting at the Central Family Court.

[5] High Court judges who hear family cases.

3.11 A number of consultees commented on the risk of divergence between civil and family enforcement if the rules of enforcement were to be consolidated in the Family Procedure Rules. Janet Bazley QC and the FLBA thought that this was a danger but recognised that "any such divergence could readily be justified on the basis of the different nature of the respective proceedings". Similarly, the Justices' Clerks' Society said that divergence in the development of the law on enforcement is not an issue as "maintenance debt differs in a number of aspects from other civil debt".

Discussion

3.12 From the consultation responses, it is evident that the need to refer to both the Family Procedure Rules and Civil Procedure Rules causes difficulties for both practitioners and litigants. The scattered nature of the rules may prevent litigants in person from understanding which rules apply and lead to defective applications, or lead to them not making an application at all. The added time taken for a practitioner to locate and understand the application of the rules may lead to increased costs for the litigant who has representation.

3.13 Since the publication of our Consultation Paper, the procedural rules governing applications for attachment of earnings orders and charging orders in family proceedings have been brought within the Family Procedure Rules. In civil proceedings, the application processes for the two orders have been centralised and the Civil Procedure Rules amended to provide for the new centralised procedure. The application processes have not been centralised in family proceedings and so separate procedure rules were needed. The rules governing the two applications in the Family Procedure Rules are materially the same as the rules that were found previously in the Civil Procedure Rules.

3.14 **We recommend that the Parts dealing with enforcement in the Family Procedure Rules should be made comprehensive so that there is no need to refer to the Civil Procedure Rules for the enforcement of a family financial order.**

3.15 We agree that consolidation creates a risk of further divergence between family and civil enforcement proceedings but, like a number of consultees, we do not consider this to be a problem; indeed, divergence has already happened for attachment of earnings orders and charging orders.

CONSOLIDATION OF ENFORCEMENT STATUTES

3.16 The Family Law Bar Association and Janet Bazley QC have suggested that there should be a consolidation of the family enforcement provisions into a single piece of legislation. We are not minded to recommend this. We agree that consolidating enforcement statutes would have benefits but, given that the law on family enforcement is shared, for the most part, with civil enforcement, we do not think it would be right to create a consolidated statute only for the enforcement of family financial orders. To recommend a consolidated statute for all civil enforcement would be beyond the scope of our project, though we suggest Government should give consideration to the issue.

3.17 Further, and importantly, much simplification of the process of enforcing family financial orders can be achieved by consolidation and reform of the procedural rules. We think that implementing reform via the procedure rules will be easier to achieve and will significantly improve the enforcement process.

A NEW PRACTICE DIRECTION FOR ENFORCEMENT

3.18 In responding to our proposal for more guidance for the public and litigants in person about enforcement,[6] District Judge Robinson suggested the use of a practice direction as a way of supporting litigants through the enforcement process; he drew an analogy with the Child Arrangement Programme ("CAP") which is a narrative statement setting out and explaining the process of private law children proceedings, contained in Practice Direction 12B of the Family Procedure Rules. The Family Law Bar Association also told us that it had received a suggestion for a detailed practice direction specifically on enforcement. Taken together, these responses suggest to us that a comprehensive practice direction, offering a "route map" for enforcement proceedings, would be helpful.

3.19 Practice directions support and supplement procedural rules, such as those set out in the Family Procedure Rules and the Civil Procedure Rules. Generally, practice directions set out the practice that may or must be followed by parties and the courts on different applications. The direction can range from the matters the court must take account of at a particular hearing to where to put the date on a witness statement. Some practice directions are technical, for example the practice direction on written evidence.[7] Other practice directions are much more narrative in style, for example, the CAP and the practice direction on international child abduction[8] which, as it sets out in the first paragraph, "explains what to do" if a child has been wrongly taken out of this jurisdiction or is being wrongly retained in this jurisdiction. We think the CAP is a good model for a practice direction that would support and supplement the procedural rules for the enforcement of family financial orders.

3.20 The CAP explains the use of both court and non-court dispute resolution and sets out the principles behind and procedure for court applications regarding arrangements for children. It sets out a glossary of terms used in the rules and practice direction. There is a flowchart summarising the process of resolving a dispute about arrangements for children and hyperlinks (on the publicly available Ministry of Justice website version of the Practice Direction) to services and court forms, including Leaflet CB7 which is a "Guide for separated parents: children and the family courts". Further, the CAP signposts services for separating parents and their children.

[6] Further details of which are found in Chapter 4.

[7] Family Procedure Rules 2010, Practice Direction 22A.

[8] Family Procedure Rules 2010, Practice Direction 12F.

3.21 We appreciate that the CAP has not been an unqualified success; some practitioners criticised the forms as being too time-consuming to complete and it has been said that the introduction of the CAP led to regional inconsistencies in courts' approaches.[9] However, we believe that a narrative statement of the procedure for bringing an enforcement application would be very helpful, particularly for litigants in person who might otherwise be intimidated by the Family Procedure Rules. It would form part of a whole consolidation effort; there are existing practice directions for some specific methods of enforcement, but there is currently no over-arching enforcement practice direction.

3.22 What might such a practice direction include? While we do not attempt in this paper to produce a draft practice direction, which would be a task for the Family Procedure Rules Committee (assisted by the legal staff of the Ministry of Justice), we do think that it is helpful to consider what information such a practice direction could provide. However, we make a range of recommendations throughout this paper that would, if implemented, have an impact on the content of the practice direction. As a result, and so that the discussion is easier to follow, we set out what the practice direction could include in Chapter 20 at the end of this Report.

3.23 **We recommend that a narrative practice direction dedicated to the enforcement of family financial orders should be included in the Family Procedure Rules.**

[9] G Morris, "An avalanche of reform: legal update, family" (2015) 165 *New Law Journal* 7635, 12.

CHAPTER 4
BETTER GUIDANCE AND ENFORCEMENT BY THE COURT

INTRODUCTION

4.1 As explained in the previous chapter, there is a lack of clarity in the rules relating to enforcement. The difficulty of navigating the rules is exacerbated by an absence of authoritative explanatory information and guidance. The need for information and guidance, particularly for litigants in person appearing in the Family Court without representation, is self-evident and in this chapter we explore ways in which that can be provided.

4.2 Consultation responses confirmed that practitioners and judges generally have less knowledge and experience of enforcement than other areas of family law. There are, therefore, opportunities to encourage more specialisation and good practice in enforcement; we consider how this could be achieved. Further in this chapter we consider the awareness and scope of the process of "enforcement by the court", which provides for the court to take responsibility for the enforcement of certain family financial orders.

4.3 Finally we address the collection of statistics. It is important to understand how the enforcement system is being used in order to know how to target better information, guidance and training and to understand how best to manage enforcement cases. The collection of statistics has an important role in that process.

BETTER GUIDANCE

4.4 All consultees agreed that better guidance for litigants and more information and training for practitioners and the courts would be beneficial. A number of consultees highlighted that information and training would be more effective if accompanied by simplified enforcement procedures and clear, accessible rules. We agree that simplification of the system is desirable, but think better guidance is essential regardless of whether our other recommendations for reform are implemented.

4.5 In the Consultation Paper we explained that there is very little public guidance published in relation to enforcement and the guidance that does exist can be difficult to find. As a result, litigants, many of whom will have no legal advice or representation, may not have the resources to understand the law relating to enforcement. We also discussed the availability of advice in person.

Advice in person

4.6 The Consultation Paper referred to different models for providing advice in person. These included greater use of pro bono lawyers, investment in the Personal Support Unit[1] and similar initiatives, and the development of court-

[1] The Personal Support Unit provides trained volunteers to provide assistance to litigants in person in civil and family courts and tribunals.

based family law facilitators.[2] Whilst there was some support, in principle, for providing advice in person, consultees also expressed a number of reservations.

4.7 There was concern about the resource implications of any face to face advice scheme and questions about how this could be managed.[3] Consultees emphasised the set-up costs as well as the need for ongoing training and monitoring. The Family Law Bar Association[4] and Janet Bazley QC saw no justification for prioritising enforcement proceedings when litigants in all types of family proceedings could benefit from advice in person. Penningtons Manches, Resolution and the Law Society all had reservations about legal advice being offered outside a lawyer-client relationship, which would be the case in respect of family law facilitators.

4.8 We recognise that, in practice, some of the models outlined would not be feasible given the current reduction in funding for public services. Any such initiatives would probably also only be developed within the wider context of advising litigants in person about all aspects of family proceedings. As a result we do not make any recommendations about advice in person. However, we note with interest initiatives such as the masterclasses offered at Bristol Combined Court Centre. These provide information on law and procedure and also an opportunity to ask questions (although not tailored to individual cases), which could be very helpful to a litigant who is struggling with the enforcement process. Resolution also told us about its Family Matters pilot scheme, which was run with the support of the Department for Work and Pensions, to assist separating parents reach agreement by providing legal information (rather than advice) and signposting to other local services. We hope Government, designated family judges and legal professionals will continue to consider ways in which face to face support can be accessed by vulnerable parties and litigants in person.

Information and guidance

4.9 We consider that there is significant scope to improve the written guidance available to litigants, a step unanimously supported by consultees.

4.10 We note that, in light of the comments in our Consultation Paper, Her Majesty's Courts and Tribunals Service ("HMCTS") has already updated Form EX327, which sets out the options available to a creditor if a maintenance order is not being paid. Following what we said, the amendment makes clear that, on issuing a general enforcement application, it would be a helpful starting point for the court for the creditor to attach a statement outlining any known details about the debtor's assets and income. Form EX327 also now directs creditors to the leaflet on attachment of earnings orders, which we noted was an omission.

4.11 As a general point, we note Resolution's comment that guidance should be for all those engaged with enforcement proceedings and not just litigants in person.

[2] In California family law facilitators, who are qualified lawyers, provide assistance with child and spousal support cases, and cases of establishing paternity. The facilitator can assist both sides in the dispute and there is no legal professional privilege between the facilitator and either party.

[3] Clarion Solicitors, the Family Law Bar Association, the Judges of the Family Division of the High Court, and Resolution.

[4] A representative body for barristers who practise in family law.

Whilst we do not disagree, we endorse the comment of Law for Life[5] that information should be aimed at those with the "least level of knowledge and experience" so as not to "lose the most vulnerable sections of the readership". The information can then be accessed by and benefit the widest range of people.

4.12 To improve and expand the information available, along with a practice direction on enforcement,[6] we recommend the introduction of two new forms of guidance; information at the time of the original order and a comprehensive guide to enforcement in paper and electronic form.

Information at the time of the original order

4.13 As discussed in the Consultation Paper, the Financial Remedies Working Group[7] suggested in its report[8] that a guide to enforcement could be sent to the parties at the time of the original order. Consultees were generally in favour of this approach and James Pirrie[9] and Rhys Taylor[10] both canvassed the possibility of information about enforcement being provided on the back of the court order.

4.14 It was noted at one of our consultation events that the first step to successful enforcement is to make sure the matter is returned to court in the event of non-compliance. Providing information on the back of the court order will focus minds and give the basic information required for the parties to find out about, and take, the necessary first steps if an order is not complied with. Although interim orders made in financial remedy proceedings may order the payment of money, for example a legal services order, for reasons of practicality we acknowledge that HMCTS may decide only to print this information on the back of final family financial orders. For practical reasons (some orders only being one page long), at this stage only a short summary would be provided. This summary should, in our view, state the enforcement methods that are available and inform the parties which method could be used to enforce different financial orders. It would also explain the basic criteria for each method of enforcement, for example that an attachment of earnings order can only be obtained where the debtor is employed. The information would point the parties to further guidance.

4.15 The information would be for the benefit of both parties and so, in addition to setting out the first steps for the creditor, it would also make clear that if the debtor cannot pay, he or she may apply to vary certain orders and should not

[5] A national charity that aims to increase access to justice by providing information on civil rights.

[6] See Chapter 3 above.

[7] The Financial Remedies Working Group was established by the President of the Family Division in June 2014. The Group's task, as set out in *View from the President's Chambers (number 12)* is "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". The group comprises members of the judiciary, practitioners and HMCTS officers.

[8] Report of the Financial Remedies Working Group (31 July 2014) Annex 8, available at http://www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp-annex8.pdf (last visited 30 November 2016). These recommendations were maintained in the final Report of the Financial Remedies Working Group (15 December 2014) available at http://www.judiciary.gov.uk/wp-content/uploads/2015/01/frwg-final-report-15122014.pdf (last visited 30 November 2016).

[9] A family law solicitor.

[10] A family law barrister.

simply stop paying what is owed. There could also be contact information for debt advice agencies to encourage a debtor who cannot pay what is due under the order to be proactive and seek assistance to resolve the problem at an early stage.

Guidance

4.16 The information on the back of the court order should refer the parties to a new comprehensive guide to enforcement published by an official source.

4.17 We note that, following our recommendation in *Matrimonial Property Needs and Agreements*,[11] Advicenow[12] and the Family Justice Council recently published guides on the subject of financial remedies. Our recommendation is that a similar resource is created for those seeking guidance on enforcement proceedings and that this should also be prepared by a body like Advicenow or the Family Justice Council.

4.18 The guidance would be much more detailed than the information on the back of the order and would set out a "step by step" approach to bringing enforcement proceedings. Consultees recommended the use of flow diagrams, videos and links to court forms. We consider it important for the guidance to be written in plain English and to be available in electronic and paper format. We envisage copies being made available in courts, legal advice centres and possibly in a wider range of locations including public buildings such as libraries.

4.19 We do not wish to prescribe the content of the guidance since this can be better judged by those who have experience in producing public information. However, we suggest that comprehensive guidance would need to:

(1) explain the enforcement options available (including the possibility of making a general enforcement application and, in certain circumstances, asking the court to enforce the order on the creditor's behalf);

(2) identify which enforcement methods are appropriate for which financial order;

(3) set out the considerations (and limitations) relevant to each method;

(4) explain the procedure; and

(5) direct parties to further information, for example the application forms.

4.20 **We recommend that to expand and improve the information and guidance available to parties:**

(1) a summary of enforcement information be provided on the back of family financial orders; and

(2) a comprehensive "step by step" guide to the enforcement of family financial orders be produced.

ENFORCEMENT BY THE COURT

4.21 Prior to the creation of the Family Court, a creditor could register in the Magistrates' Court an order for periodical payments made in the High Court or

[11] (2014) Law Com No 343.

County Court for collection and enforcement.[13] The Magistrates' Court would then order that the payments owed to the creditor be paid directly into court for forwarding to the creditor.[14] The involvement of the court in this way created a reliable record of payments made.[15] More importantly, the magistrates' court had the power to enforce the registered order on behalf of the creditor.[16] This was often the preferred course of action for creditors.[17] The creditor had to pay the cost of the registration[18] and was still liable for the costs of the proceedings taken on his or her behalf.[19] With the introduction of the Family Court, this system of registration has been abolished.

4.22 Under the current law, where the debtor resides in England and Wales, the Family Court can require that any payments that are due to be made periodically (that is, payments due under any periodical payments order or an order for a lump sum by instalments) be paid to the creditor via the court.[20] Like the previous system of registration, the involvement of the court provides a record of payments made. Where payments are being made into court under a periodical payments order (but not under an order for a lump sum by instalments)[21] the creditor can request that the court officer take enforcement proceedings on the creditor's behalf should the debtor fall into arrears. We call this method of enforcement "enforcement by the court". Such a request can be made in anticipation of non-payment by the debtor or as and when arrears accrue.[22] The creditor is liable for

[12] Advicenow is an independent, not-for-profit website, run by the charity Law for Life.

[13] Maintenance Orders Act 1958, s 1 as in force prior to 22 April 2014 (now amended by Crime and Courts Act 2013, s 17(6) and sch 10, para 4).

[14] Maintenance Orders Act 1958, s 2(6ZA)(b) as in force prior to 22 April 2014 (now repealed by Crime and Courts Act 2013, s 17(6) and sch 10, paras 5(1) and (6)(b)).

[15] Other jurisdictions adopt this approach too: for example in Australia rule 20.58 of the Family Law Rules 2004 provides that where an order specifies that maintenance must be paid to the Court Registrar or an authority, the Registrar or authority must, on request, provide the court or a party with a certificate as to the amounts that have been paid or remain unpaid.

[16] Magistrates' Courts Act 1980, s 59A as in force prior to 22 April 2014 (now amended by Crime and Courts Act 2013, s 17(6) and sch 10, para 42).

[17] G Smith and T Bishop, *Enforcing Financial Orders in Family Proceedings* (2000) pp 228 to 229.

[18] £45 being the fee applicable at 21 April 2014 before the creation of the Family Court, see Family Proceedings Fees Order 2008, SI 2008 No 1054, sch 1, fee 9.1.

[19] Magistrates' Courts Act 1980, s 59A(5).

[20] Maintenance Enforcement Act 1991 ("the 1991 Act"), ss 1A and 4A. The court can make such an order of its own motion or on an application by the creditor. The cost of making such an application is £155.

[21] The section applies to a "qualifying periodical maintenance order". A "maintenance order" is defined by reference to the Administration of Justice Act 1970, sch 8; it must be paid periodically, and this includes a lump sum payable by instalments (ss 1(2) and 1(10) of the 1991 Act). Such an order is "qualifying" if the debtor is ordinarily resident in England and Wales (s 1(2) of the 1991 Act). However, due to Family Procedure Rules, r 32.33 payment of a lump sum by instalments cannot be enforced by the court.

[22] Family Procedure Rules, r 32.33. This new provision came into force on 22 April 2014.

the costs of any enforcement proceedings taken on his or her behalf, including any court fees.[23]

4.23 Currently there are no statistics to indicate how often enforcement by the court is used. Further, there is very little information about the operation of the system. We understand, anecdotally, that a court officer takes enforcement proceedings by way of a general enforcement application.[24] In the Consultation Paper we invited the views of consultees as to two issues with the current system. The first is the seemingly very low awareness of this facility. It may be that practitioners think that enforcement by the court disappeared with the advent of the new Family Court and the abolition of the registration of orders in the magistrates' court. The second is the fact that only payments due under periodical payments orders are capable of being enforced in this way.

4.24 Reform of the current system should be seen in the context of the ever-increasing number of litigants in person. Enforcement by the court may become an increasingly attractive option as it shifts responsibility for continuing enforcement of the order from the creditor to the court; this saves the creditor the time, expense, and emotional toll of repeated enforcement applications. We do note that an increase in the number of litigants using enforcement by the court will have consequences for the court, as the remedy is labour-intensive and potentially costly.

Consultation responses

4.25 A number of themes arose from consultation responses.

Accessibility of the enforcement system

4.26 Several consultees commented on the need generally for the enforcement system to be more accessible. Creditors can make mistakes in their applications which cause delay and additional cost, or even cause them to give up on the enforcement process as it is too difficult.[25] This is avoided where the court officer has responsibility for conducting the enforcement process.

4.27 Consultees noted that creditors may not have the funds to bring repeated enforcement proceedings or take legal advice to ensure that these are conducted correctly.[26] Arguably, if the creditor can only afford "one shot" at enforcement, it is better to entrust the management of enforcement to the court, which should avoid wasted costs and make enforcement more cost-effective. Consultees also raised the issue of the emotional toll on the creditor of enforcement proceedings.[27] It was suggested that a more pro-active approach by the court would help to alleviate the "emotional strain" and may encourage more creditors, particularly vulnerable litigants[28] to pursue enforcement.

[23] Family Procedure Rules, r 32.33(6).

[24] The general enforcement application is discussed in Chapter 5.

[25] This point was made, for example, by Charles Russell Speechlys and Janet Bazley QC.

[26] International Family Law Group, Janet Bazley QC, Justices' Clerks' Society.

[27] For example, International Family Law Group and Janet Bazley QC.

[28] This term was used by Penningtons Manches to describe those who cannot effectively enforce their order by themselves and this is assumed, in this context, to refer in particular to emotional vulnerabilities.

Compliance by the debtor

4.28 International Family Law Group thought that enforcement by the court may encourage compliance as the debtor will be aware that the court is monitoring the order on an ongoing basis with authorisation to take enforcement action automatically if he or she fails to pay.

A single seamless process

4.29 There were also several examples in the responses of consultees favouring the possibility of the creditor making one enforcement application that would then enable investigation of different methods of enforcement and also deal with changes in circumstances; a "seamless" process in the words of the Family Law Bar Association. The Justices' Clerks' Society, the Magistrates' Association[29] and Malcolm Dodds[30] provided further explanation of the previous enforcement procedure in the magistrates' court[31] and praised its simplicity. It was felt that this procedure offered many advantages to the creditor.

Awareness of the remedy

4.30 Several consultees, all of whom were practitioners, commented specifically on how infrequently enforcement by the court is used. The Family Law Bar Association, Penningtons Manches and Janet Bazley QC all thought enforcement by the court was a rare or little used remedy and Tony Roe[32] commented that "since the creation of the single family court … [it] seems to have disappeared from the mind-set of a lot of practitioners".

4.31 The Justices' Clerks' Society commented that successful enforcement by the court was dependent on the creditor being aware of the remedy and Tony Roe explained how his own investigations had shown the lack of any public guidance referring to or explaining the procedure as an enforcement option.

4.32 Penningtons Manches agreed that there needed to be increased awareness of this remedy.

Extension of the court's jurisdiction

4.33 Several consultees advocated an extension of the court's jurisdiction so as to enable it to receive (and to enforce in the case of default) lump sums, although some limited this to extending enforcement by the court to lump sums paid by instalments.[33]

Obstacles to reform

4.34 Some consultees raised concerns about the system of enforcement by the court and noted resource limitations on the potential to extend it. District Judge Robinson noted that "the efficiency of this system has not been high in the past"

[29] A national charity supporting and representing magistrates, who we refer to as lay justices in this Report.

[30] Clerk to the Justices for Kent.

[31] See para 4.27 above.

[32] A family law solicitor.

[33] The Birmingham Law Society, International Family Law Group, the Law Society and Resolution. The Birmingham Law Society also specifically mentioned the enforcement of monies paid on account of costs.

and that, following the introduction of the Family Court in 2014, there were various administrative issues to resolve. One consultee commented that it had taken 14 months for the Central Family Court to take action on an old registered order. These strike us as operational difficulties that cannot be resolved by law reform, but there are clearly issues that need to be addressed. The Birmingham Law Society expressed its concern about the court's resources to administer these payments more generally.

4.35 The Family Law Bar Association did not feel that the system of enforcement by the court needed to be extended since it is likely to be useful only in "simple low value cases". The Association said that anything more complex is likely to need more input from the creditor. Janet Bazley QC agreed that enforcement by the court was particularly of use in "straightforward cases", but saw more scope for the method, provided that it was supported by a power to obtain the disclosure needed for it to be effective.

Discussion

Awareness

4.36 It seems clear that enforcement of periodical payments by the court is not at the fore-front of practitioners' minds and is likely to be an option unknown to many litigants in person. We think it is important, therefore, to raise awareness of this enforcement option. Although enforcement by the court is, we think, of most benefit to litigants in person, practitioners also need to be aware so that they can consider whether payment via the court should form part of the original order, so as to enable enforcement by the court as an option at a later stage. Litigants who are represented in the financial proceedings may choose or have to act in person in any subsequent enforcement proceedings and their representatives should be in a position to make them aware of all enforcement options.

Scope of the remedy

4.37 Currently, enforcement by the court is only available for the enforcement of periodical payments. At first sight, an extension to include lump sum orders seems an attractive option. The same benefits that apply to enforcement by the court of periodical payments orders apply equally to lump sum orders; namely, the benefits of shifting responsibility to the court, which include avoiding mistakes by the creditor; reducing the administrative and emotional burden on the creditor; and encouraging compliance by the debtor. However, as noted by consultees, there are concerns about the resource implications of extending the court's jurisdiction. In this regard, we want to ensure that the system can work most efficiently for those who would benefit most from it.

4.38 We agree with the Family Law Bar Association that enforcement by the court is likely to be most useful in simple low value cases. Periodical payments are likely to be lower in value than orders for lump sums and will typically last a number of years, meaning they are often harder for the creditor to enforce. Given the limited resources, we consider that enforcement by the court should be reserved for the enforcement of periodical payments where enforcement may be most difficult for the creditor acting alone. Although we think enforcement by the court will be of most benefit to litigants in person, we do not propose that the remedy be limited to litigants in person. We do not think it is appropriate to create such a distinction between those who have legal representation and those who do not. Our other recommendations, particularly the improvement of the general enforcement

application, are intended to improve the enforcement prospects of litigants generally and we hope these reforms may alleviate some of the difficulties a litigant in person may face in enforcing an order for a lump sum.

4.39 We are aware that by raising the awareness of enforcement by the court, even if not extending its scope, our recommendation may lead to a greater use of the remedy. That will, of course, have resource implications for HMCTS. We consider that any greater use of this remedy will likely result in savings of court time elsewhere and, as an operational matter, it will be for HMCTS to consider what, if any, action needs to be taken in response to any greater demand for the service.

4.40 **We recommend that steps are taken to increase awareness of enforcement by the court, namely:**

(1) including a reference to enforcement by the court on the information that we recommend be provided at the time of the order;

(2) identifying enforcement by the court as an option in the comprehensive enforcement guidance that we recommend be produced; and

(3) directing parties how to make an application for enforcement by the court in the recommended enforcement practice direction.

COLLECTION OF STATISTICS

4.41 Currently, statistical data on applications and orders for enforcement are not available specifically in relation to family proceedings. Such data would be useful in gaining an overall picture of what is happening in family enforcement. We asked consultees whether HMCTS should begin collecting and publishing data on the use of the different enforcement methods in the Family Court. However, we noted that the collection and publication of data would have to be subject to available resources.

Consultation responses

4.42 The responses to this question were consistently positive, with the vast majority of consultees supporting the collection and publication of data on the use of the different enforcement methods.

4.43 The Law Society thought that statistics would create useful data that could be used to improve the performance of courts. The Family Justice Council said that with statistical data "the effectiveness of enforcement methods can be monitored and further improvements can be made". Janet Bazley QC referred to the use of such data as "a suitable means of establishing an evidence base on the efficacy of each method of enforcement". The Justices' Clerks' Society also noted that statistics may be of use in determining the cost effectiveness of each enforcement method. One member of the public thought that the collection of data was "essential" and that no changes to the enforcement system should be made until the data are obtained.

4.44 The Judges of the Family Division of the High Court suspected that, although it would be particularly useful, it would be difficult to collect data to provide information about the success of any particular enforcement method, but they considered that, nonetheless, it would be useful to have data on the use of different methods. International Family Law Group noted that "each case is fact

specific and we question how useful general statistics will be in assisting creditors and/or their legal advisors in determining which method of enforcement is most appropriate".

4.45 Two consultees referred to the resource implications of the proposal. Resolution, although noting that more needs to be known about "the use of the existing raft of enforcement measures", stated that "in the context of limited HMCTS resources, we understand the need to balance this need alongside the need for other statistics and indeed to improve the core services provided by the family courts". International Family Law Group commented that they were "mindful of the substantive administrative time and cost involved in producing data in relation to the use of different enforcement methods in the Family Court". Further, they thought that "time and funds would be better invested in producing a consolidated guide as to the enforcement methods available and the procedure involved".

Discussion and recommendations

4.46 From the consultation responses, it is evident that there is a desire for the court to begin collecting and publishing family enforcement data, both as to the number of applications and the number of orders made. Such data can be used to better understand the system and the enforcement choices that creditors are making – such an understanding should lead to identifying any future changes that need to be made. However, we do not agree that all reform should be postponed until such data can be collected; as explored below, that will probably not happen in the immediate future and some change to make enforcement more effective is required now. Further, the conclusions that can be drawn from collected data are necessarily limited.

4.47 As noted in the Consultation Paper and consultees' responses, collecting and publishing statistics will require resources. We have explored with HMCTS how such a system could operate. The current computer system for family cases (FamilyMan) does not enable family enforcement cases to be recorded. Instead family enforcement proceedings are recorded on the civil computer system (CaseMan). There is therefore no way at present to gather data specifically on family enforcement cases as it would be impossible to distinguish the data from cases of civil enforcement.[34]

4.48 For the reasons above, we consider the collection and publication of family enforcement data would be beneficial but, given the need for a new IT system to enable such collection and publication, we realise there may be other priorities for the resources available.

4.49 **We recommend that, subject to IT capability and resource implications, Her Majesty's Courts and Tribunals Service should begin collecting and publishing data on the applications for the different enforcement methods in the Family Court.**

[34] It may be possible to gather data on cases that are processed at a maintenance enforcement business centre. However, this would only produce data on the enforcement of foreign maintenance orders, which are enforced under a reciprocal enforcement scheme, and the enforcement of periodical payments orders where orders are made via the court.

4.50 **We recommend that Her Majesty's Courts and Tribunals Service consider the need to collect such data when making decisions about the IT systems used to process family applications.**

CHAPTER 5
THE GENERAL ENFORCEMENT APPLICATION

INTRODUCTION

5.1 Family creditors who wish to apply for the enforcement of a debt due to them may either apply for a specific method of enforcement or may, since April 2011 on the coming into force of the Family Procedure Rules, apply for "an order for such method of enforcement as the court may consider appropriate".[1] The latter sort of application is known as a "general enforcement application" and is sometimes referred to as the D50K procedure, as Form D50K is the form on which the application is made.

5.2 The application requires the debtor to attend court, produce certain documents and answer questions on oath. This initial stage is akin to an order to obtain information,[2] but the court may then proceed to make an order for enforcement, informed by the information and documents provided by the debtor. The Family Procedure Rules do set out which orders are available on a general enforcement application, but the D50K states that on such an application the court may make:

(1) an attachment of earnings order;

(2) a third party debt order;

(3) a charging order, stop order or stop notice;

(4) a writ or warrant of execution (seizure and sale of personal property);[3] or

(5) an order appointing a receiver.

5.3 The general enforcement application has become a very popular enforcement option for family creditors.[4] We consider that for many, especially those acting without legal assistance or representation, the general enforcement application represents the best chance of recovering the sums that they are owed in circumstances where the debtor can pay but is choosing not to do so. We propose a new, consolidated procedure to ensure an efficient and consistent

[1] Family Procedure Rules, r 33.3(2)(b).

[2] Pursuant to Part 71 of the Civil Procedure Rules. For a description of the order to obtain information, see paras 2.27 to 2.29 above.

[3] This terminology is out of date and confusing. See paras 5.38 to 5.41 below.

[4] Data from the Central Family Court shows that in the 12 month period from August 2015 to August 2016 general enforcement applications accounted for 63% of all enforcement applications made at that court.

approach to the application and the introduction of new information-gathering powers for the court.

5.4 In its current form, the general enforcement application is a collection of standalone enforcement remedies brought together under one application. We envisage our recommendations changing the nature of the application to make it more of an enforcement process with powers[5] and remedies[6] of its own. While we appreciate that the process asks more of the judiciary than other enforcement remedies, we consider that to be necessary and proportionate in a climate where many creditors will be seeking to enforce orders without any professional legal representation. Further, the net result of our recommendations should be a saving of court time. First, because creditors are less likely to make erroneous applications for specific methods of enforcement if the general enforcement application is an accessible and efficient process. Secondly, because the recommendations we make for reforming the procedure of the general enforcement application make it far more likely that substantive progress can be made at the first hearing.

5.5 In this Chapter we first set out the current law on the general enforcement application and some of the difficulties with the existing rules. We then consider the points that arose from our consultation before moving to our recommendations for a reformed procedure.

THE CURRENT LAW

5.6 The general enforcement application is governed by the Family Procedure Rules and rules imported from the Civil Procedure Rules. The rules governing the procedure are surprisingly sparse. The only provision in the Family Procedure Rules is found at rule 33.3(3), which provides:

> (3) If an application is made [for such method of enforcement as the court may consider appropriate], an order to attend court will be issued and rule 71.2(6) and (7) of the Civil Procedure Rules will apply as if the application had been made under that rule.

5.7 Rules 71.2(6) and (7) of the Civil Procedure Rules provide that:

> (6) A person served with an order issued under this rule must –
>
> (a) attend court at the time and place specified in the order;
>
> (b) when he does so, produce at court documents in his control which are described in the order; and

[5] See Chapter 8 on information requests and orders.

[6] See Chapter 9 on orders against pensions.

(c) answer on oath such questions as the court may require.

(7) An order under this rule will contain a notice in the following terms, or in terms to substantially the same effect –

"If you the within-named [ ] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized."

5.8 Part 71 of the Civil Procedure Rules governs the procedure for orders to obtain information. It provides a comprehensive set of rules governing the process from the application, through service of the order, to the conduct of the hearing, and the procedure in the event of adjournment or the debtor's non-compliance and the consequences of the same. There is a certain ambiguity in the rules (and, we understand, confusion in practice) as to whether Part 71 applies in its entirety on a general enforcement application.[7] If Part 71 does not apply there is a procedural gap in the general enforcement application. This "gap" was noted by District Judge Robinson in his response to our consultation. He said:

> Many of the consequences of Family Procedure Rules Order 33.3 (2) (b) were not fully thought through when it was introduced. There is a gap between the existence of this power and the detailed provisions of the Civil Procedure Rules.

5.9 We are of the view that the whole of Part 71 does apply,[8] but the position is far from certain. The need for a clear set of rules for the general enforcement application was a theme that emerged from the responses to our Consultation Paper. As will be explained below, our proposal is for the introduction of a new discrete set of procedural rules for the general enforcement application, to be contained solely within the Family Procedure Rules. With a new set of procedural rules, the question of the application of Part 71 will fall away.

[7] For a recent example of the competing views, see the articles by District Judge Peter Glover and District Judge Neil Hickman: District Judge Glover, "Family Court money orders" (1 February 2016) *Law Society Gazette*, District Judge Hickman, "Family business" (15 February 2016) *Law Society Gazette* and District Judge Glover, "Money matters in family cases" (14 March 2016) *Law Society Gazette*. Available at http://www.lawgazette.co.uk/law/benchmarks/money-matters-in-family-cases/5054196.article (last visited 30 November 2016).

[8] On the one hand, the specific application of rules 71.2(6) and (7) by rule 33.3(3) suggests that only those rules apply, but set against that is rule 33.23, which provides that Part 71 will apply to "proceedings under this Part". The relevant part is Part 33 ("Enforcement"), within which the rules creating the general enforcement application sit, and so it is arguable that the whole of Part 71 applies to the application. We take the view that Part 71 applies to Part 33 so far as it is relevant.

CONSULTATION

5.10 In the Consultation Paper we noted that conversations with legal practitioners and court staff had revealed a difference of opinion as to whether the current procedures were satisfactory. We noted that this probably reflected the variability of local practices and that the points that had been brought to our attention were points of detail, meaning that it was hard to judge the extent of the difficulties with the procedure. The problems of which we had been made aware prior to publishing the Consultation Paper can be summarised as follows:

(1) a lack of consistency in the wording of the order sent to the debtor directing him or her to attend the hearing, with the consequence that the debtor is not always adequately informed that he or she is required to bring documents to the hearing and will be asked questions on oath;

(2) there is no guidance to creditors as to the questions they could or should ask the debtor at the hearing;

(3) the judge hearing the application does not always have the power to make the appropriate enforcement order, meaning that the application has to be transferred, which causes delay in making an enforcement order; and

(4) there is sometimes insufficient information provided by the debtor for an enforcement order to be made at the hearing, requiring an adjournment and thus delay in making the enforcement order.

5.11 We asked open questions in the Consultation Paper: Do consultees think that orders to obtain information, and the general enforcement application, work well? How could they be improved?

5.12 The responses were generally positive as to the concept and potential of the general enforcement application. The Family Law Bar Association noted that the application "gives the court the widest powers once the issue of general enforcement has been raised". Penningtons Manches said that the application had been a "welcome simplification of the enforcement procedure" and that it should "form the basis for further reforms of the enforcement system". District Judge Robinson said "the D50K procedure has been very popular with applicants, so much so that applications for oral examinations[9] have virtually

[9] An oral examination is an alternative term for an order to obtain information under Part 71 of the Civil Procedure Rules. Presumably these have become less popular because a general enforcement application replicates an order to obtain information but also enables the court to make an enforcement order without the need for a further application.

disappeared", which he did not consider to be a bad thing. Clarion Solicitors[10] said general enforcement applications were a good idea "in principle".

5.13 However, the responses also identified a number of difficulties with the current process and suggested ways in which the application could be improved. Further, the consultation events held in Cardiff, Manchester and London revealed that there is a wide range of experiences of the application across the country. In Cardiff, none of the practitioners or judiciary present had any experience of a general enforcement application. In Manchester, one solicitor who had recently used the procedure described it as "horrendous". In London, there was uncertainty as to the application of fixed costs to orders obtained under the general enforcement application.

The need for a clear and single set of rules

5.14 The most commonly cited problem with the general enforcement application was the difficulty caused by the need to cross-refer between the Family Procedure Rules and the Civil Procedure Rules. The Family Law Bar Association said it was "confusing and time consuming and adds unnecessary complexity to the process". As noted above,[11] there is a school of thought that the current rules leave a procedural gap. We understand that this uncertainty leads to a variety of practices in different courts.

5.15 There is a further confusion in practice that was brought to our attention by Gwyn Evans[12] in his consultation response. He said that the rules are not clear as to whether creditors need to issue separate specific applications (in addition to Form D50K) if they want to obtain a third party debt order or charging order as a result of a general enforcement application. This leads to a further question of whether the fee for the application is that only for the general enforcement application or, if a charging order or third party debt order is sought (or made), whether the fee for that specific application is required instead of or in addition to the D50K fee. The fee for a D50K application is currently £50, whereas the fee for an application for a charging order or third party debt order is currently £100.

5.16 On its face, Form D50K informs the parties that the court may, as a result of the general enforcement application, make an order for enforcement by any of the listed methods (as set out above). At rule 33.3(1) of the Family Procedure Rules, however, it is stated that an application for enforcement may be made in a notice of application (which Form D50K is) except "where a rule or practice direction

[10] A law firm with a specialist family law team.

[11] At paras 5.8 and 5.9.

[12] A family law barrister.

otherwise requires". The commentary to the rule in The Family Court Practice[13] suggests that applications for charging orders and third party debt orders do "otherwise require" and the respective applications must be made on specific forms in accordance with the requirements of the Civil Procedure Rules.[14]

5.17 This commentary seems at odds[15] with the commentary that then follows in respect of the general enforcement application which, it is said:

> Will result in an order to attend court for questioning to which certain provisions of Civil Procedure Rules, Part 71 will apply (see rule 33.23). As it is directed to the court considering what means of enforcement are appropriate, the questioning should take place before a judge, who may make an attachment of earnings order, direct the issue of a warrant of control, or make a charging order or third party debt order *without further formality or fee*;[16] or before lay justices, who may make an attachment of earnings order.[17]

5.18 Both sides of the debate have been recently aired in the Law Society Gazette.[18] The decision of Mr Justice Mostyn in *Kaur v Randhawa*[19] lends support to the theory that the D50K application is sufficient for all the enforcement remedies available on a general enforcement application and that no further application is needed. In that case, the court made a final third party debt order on a general enforcement application, after finding that money held in the debtor's brother's

[13] The Rt Hon Lady Justice Black, His Honour Judge Anthony Cleary, The Rt Hon Lord Wilson of Culworth (eds), *The Family Court Practice* (2015).

[14] The commentary is out of date as the rules governing the making of a charging order are now in Part 40 of the Family Procedure Rules, but the same debate as to whether a separate application is required remains the same.

[15] Though the two passages may not be inconsistent. Rule 33.3 applies not only to the general enforcement application but also to applications for specific methods of enforcement, a number of which may be applied for by way of a general application notice when applying for that specific method of enforcement but some of which must be applied for in a prescribed form. The commentary may therefore be emphasising the need to use these prescribed forms when applying specifically for these methods of enforcement. Regardless of the favoured interpretation, the provision is unclear and would benefit from clarification.

[16] Emphasis added.

[17] The Rt Hon Lady Justice Black, His Honour Judge Anthony Cleary, The Rt Hon Lord Wilson of Culworth (eds), *The Family Court Practice* (2015).

[18] District Judge Hickman, "Family business" (15 February 2016) *Law Society Gazette*. Available at http://www.lawgazette.co.uk/analysis/letters/family-business/5053603.article (last visited 30 November 2016). DJ Glover, "Money matters in family cases" (14 March 2016) *Law Society Gazette*. Available at http://www.lawgazette.co.uk/law/benchmarks/money-matters-in-family-cases/5054196.article (last visited 30 November 2016).

[19] [2015] EWHC 1592 (Fam), [2015] All ER (D) 116 (Jun).

bank account, which had been frozen by a prior application, was beneficially owned by the debtor.

5.19 It is difficult to imagine that the intention of those who introduced the general enforcement application was that separate specific applications would also have to be made either at the same time or following the hearing of the general enforcement application. The whole purpose of the general enforcement application is that it removes from the creditor the burden of having to select and apply for one specific method of enforcement. However, points raised by District Judge Glover in a Law Gazette article on the courts' powers on a general enforcement application[20] are important. How can the judge make, for example, an interim charging order without sight of admissible evidence of title to the land to be charged? How can the judge make an attachment of earnings order without the debtor having had the opportunity of eight days to file a statement in reply?[21] We have taken account of these difficulties in our recommendations for reform. There is an obvious need for a single set of procedural rules for the general enforcement application, and the development of such would provide the opportunity to remedy some of the other difficulties that lie within the current law.

Lack of advance disclosure

5.20 A number of consultees noted that the lack of disclosure of any information about the debtor's financial circumstances before the hearing is a deficiency in the current system. The debtor is not required to provide any information or documents before the hearing, meaning that neither the creditor nor the court has any opportunity to consider the debtor's position in advance. The Family Law Bar Association cited this lack of advance disclosure as a reason for there often being delay in the process. Both Resolution and the International Family Law Group proposed that there be a requirement for disclosure before the hearing.

5.21 We think there is considerable merit in requiring disclosure prior to the court hearing. It will give a creditor, either acting in person or with legal representation, an opportunity to understand the debtor's position before the hearing, consider what information is missing and formulate questions. If the court also has time to consider the case in advance of the hearing, that can only be a good thing. We consider that advance disclosure increases the chance of the first hearing resulting in an order for enforcement or recognition that the debtor cannot pay the amount owed and that enforcement action at that time is not appropriate. Even if the court cannot reach that stage, advance disclosure will enable the court to make focussed directions at the first hearing.

[20] DJ Glover, "Family Court money orders" (1 February 2016) *Law Society Gazette*. Available at http://www.lawgazette.co.uk/law/benchmarks/family-court-money-orders/5053366.article (last visited 30 November 2016).

[21] The debtor is required to reply in Form N56.

Insufficient notice of the hearing

5.22 We noted in the Consultation Paper that the notice of hearing sent to parties following the issue of a general enforcement application does not properly prepare the parties for the process. This point was echoed by Penningtons Manches in their response. They considered that the notice is "inadequate" and said it does not clearly set out the procedure:

> The court currently lists a 30 minute hearing "for directions or disposal" without reference to what the parties should expect at the hearing. It should be made clear that failure to attend hearings or provide information will be a contempt of court and that the full range of coercive measures will be available to the Court.

5.23 We consider that this lack of guidance on preparation is problematic for both the creditor and the debtor, as neither will know what to expect from or how to prepare for the hearing. At a hearing following an order to obtain information, there is a standard set of questions (Form EX140) to be put to the debtor either by the court officer or the creditor (depending on who is conducting the questioning). There is no similar set form of questions, however, applied on a general enforcement application. It may be, given the variety of practice, that some courts are making use of Form EX140 on general enforcement applications, but there is no requirement to do so.

A lack of co-operation from the debtor

5.24 Two consultees made the point that, to be a successful process, the general enforcement application requires a certain level of co-operation on the part of the debtor. With reference to both the general enforcement application and orders to obtain information, Clarion Solicitors said "both applications require a degree of cooperation from the paying party, which often results in difficulty and expense for the receiving party". The Family Justice Council noted the problem that arises if the debtor does not bring the required information to court: "the case is adjourned and the creditor is still not receiving any money".

5.25 Similarly, the Justices' Clerks' Society raised the issue of how to proceed in the debtor's absence and noted that it would be helpful if proceeding in the debtor's absence could be made a viable option. We acknowledge these points and have considered ways in which the process can be reformed so that a lack of co-operation (or attendance) by the debtor does not bring the application to a halt. We set out below[22] our recommendations for new information gathering powers for the court to bypass a debtor who is choosing not to co-operate. Further, we consider that a clear set of rules providing for the consequences of a debtor not co-operating will assist in deterring and dealing with non-compliance.

[22] See Chapter 8.

Applications listed before judges who do not have the necessary powers

5.26 We noted in the Consultation Paper that an enforcement order sometimes cannot be made at the first hearing of a general enforcement application because, among other reasons, the application may be before a judge who lacks the power to make the appropriate order.[23] This point was picked up by consultees. Janet Bazley QC said that the process is often impeded by, amongst other factors, "the fact that some of the court's range of powers are not available to every level of judiciary". The Family Law Bar Association recognised this variation in judicial powers as one of the reasons that the process can be "slow and expensive, involving numerous hearings and considerable delay". Resolution recommended that "whatever level of judge in the single Family Court a general application for enforcement comes before at first instance, they should have the power to make the appropriate order".

5.27 The difficulty arises when the application is before lay justices. As discussed later in this paper,[24] the enforcement powers of lay justices are very limited. This is a particular problem on the general enforcement application as, of all the remedies available on the application, lay justices have only the power to make an attachment of earnings order. If any of the other available orders is the appropriate order then the matter will need to be transferred to a district judge. We discuss in Chapter 6 the issue of listing of enforcement applications in general, and the desirability in some cases for the application to go back before the judge who made the original order. However, if general enforcement applications are to end up before lay judges (and we discuss this further in Chapter 6) then we consider that they should have the full range of powers to enable them to make the most appropriate order without necessarily having to transfer the application. We note, however, that a transfer may still be required in complex cases.

5.28 A related point was made by the Law Society who expressed a concern that there is a lack of experience among the judiciary in dealing with these applications. It said that general enforcement applications work well "when the relevant questioning is carried out by a judge or court officer who is familiar with these types of orders". We discuss the issue of judicial experience and enforcement in Chapter 6.

Remedies available on the application

5.29 The court's powers on a general enforcement application are not prescribed in the rules, but Form D50K states on its face the orders that the court may make. We were told by the Judges of the Family Division of the High Court that creditors

[23] This point overlaps with the general issue of the allocation of enforcement proceedings, discussed in Chapter 6.

[24] See Chapter 6.

sometimes make a general enforcement application in the hope that a judgment summons may be issued as a result. In fact, the court does not have power to make a judgment summons on a general enforcement application, and we consider that must be made clear.[25] We consider that the new standalone set of procedural rules we propose for the general enforcement action should set out the powers that the court may exercise on such an application. We also propose amendments to Form D50K, which we suggest should include a clear statement that committal upon a judgment summons is not a power available to the court on a general enforcement application.

Travel expenses

5.30 The Judges of the Family Division of the High Court said that the requirement for the creditor to pay, or offer to pay, the debtor's travel expenses needed to be made clear.

5.31 Whether or not the creditor currently needs to pay, or offer to pay, the debtor's reasonable travel expenses to court depends on the application of Part 71 of the Civil Procedure Rules. If it is taken to apply in its entirety, then the obligation in respect of travel expenses applies as rule 71.4 provides:

> (1) A person ordered to attend court may, within seven days of being served with the order, ask the judgment creditor to pay him a sum reasonably sufficient to cover his travelling expenses to and from court.
>
> (2) The judgment creditor must pay a sum if requested.

5.32 There is an obvious question as to why, in circumstances where the debtor has (on the face of it) failed to fulfil an obligation owed to the creditor, the creditor is required to meet the costs of the debtor attending court for the enforcement of that obligation. The answer seems to lie in the consequences of non-attendance by the debtor. Ultimately, pursuant to Part 71, a debtor who fails to attend may be subject to a suspended committal order. That can only be the consequence of non-attendance, however, if payment of reasonable travel expenses has been offered or made. The justification must lie in the idea that if the court can punish someone for failing to attend, the court must be satisfied that the failure to attend was wilful and not as a result of lack of financial means. It is suggested that the same is true of the requirement, under Part 71, to serve personally the order that directs the debtor's attendance. The court must be satisfied that the debtor knew of the direction to attend.

[25] A judgment summons cannot be available as a remedy on the general enforcement application because the requirement to answer questions on oath would offend against the debtor's right to assert a privilege against self-incrimination. It has been held that documents obtained on a general enforcement application can be used in subsequent judgment summons proceedings but statements provided by the debtor cannot: *Mohan v Mohan* [2013] EWCA Civ 138; [2012] IRLR 402.

5.33 We consider that this "package" of personal service, the payment or offer of reasonable travel expenses and the consequences of non-compliance, is not one that can be taken apart. We discuss below our proposals in this respect.

DISCUSSION

Introduction

5.34 Our recommendations aim to produce an efficient and effective procedure for the general enforcement application that is accessible to the creditor and debtor, regardless of whether they have legal representation. In formulating these recommendations we have had in the forefront of our minds the difficulties reported to exist with the current process. We are of the view that the general enforcement application should be an enforcement process, with the court having the necessary powers to achieve effective enforcement (or to recognise at an early stage that enforcement is not appropriate). We set out here how we envisage that process operating and conclude with our recommendations. In summary, we conclude the following reform is needed:

(1) That there be a comprehensive set of discrete procedural rules for the general enforcement application, contained solely within the Family Procedure Rules. In the procedure that we recommend, we have drawn inspiration from Part 71 of the Civil Procedure Rules and from the recently reformed rules on the service of a judgment summons application. The rules should be sufficiently detailed so that the procedure for the application is uniform across the country. The procedure should provide for disclosure from the debtor in advance of the court hearing.

(2) The application form and notice of hearing be amended so as to make clear:

(a) the nature of the application;

(b) the requirements of the creditor and debtor in advance of, and at, the hearing;

(c) the powers available to the court on hearing the application; and

(d) the consequences of non-compliance.

(3) The court have available to it new information gathering powers (information requests and information orders), and be empowered to proceed in the absence of the debtor, where appropriate.

(4) The court have extended enforcement powers on a general enforcement application, to include the power to make orders against pensions and to make coercive orders.

5.35 The reforms at (3) and (4) are considered in detail in other parts of this Report,[26] as is the form of the advance disclosure from the debtor.[27] The reforms at (1) and (2) will be further explored below.

A comprehensive set of procedure rules

5.36 It is clear from consultation responses that there is a need for the procedural rules that govern the general enforcement application to be set out comprehensively in the Family Procedure Rules. It is unnecessary and confusing for the rules to be split between the Family Procedure Rules and the Civil Procedure Rules.

5.37 We do not recommend a change to the legal basis of the general enforcement application, which is found at rule 33.3(2)(b) of the Family Procedure Rules. Rather, we propose that rule 33.3(3), which incorporates (with ambiguity) certain provisions of the Civil Procedure Rules, is replaced with a new Chapter within Part 33 dedicated to the general enforcement application in the same way that, for example, Chapter 2 is dedicated to judgment summonses. For the avoidance of doubt, the rules should set out what enforcement powers the court has on a general enforcement application.

The enforcement orders the court may make on a general enforcement application

5.38 The general enforcement application should give the court the widest possible enforcement powers. In addition to the powers that the court already has, we are of the view that the court should also be able to make coercive orders and orders against a debtor's pension. We explore these recommendations in more detail in other parts of this Report.[28]

5.39 At present, the orders that the court may make are set out on the D50K application form. We consider that the orders that are available should be set out in the rules.

5.40 One of the orders referred to on the D50K form is "a writ or warrant of execution"[29]. We think this terminology is confusing and should not be copied in

[26] See Chapters 8, 9 and 12.

[27] See Chapter 7.

[28] See Chapters 12 and 9 respectively.

[29] A writ is a remedy issued by the High Court; a warrant is a remedy issued by the Family (or County) Court.

the rules. From the description given in brackets on the D50K form, "seizure and sale of property", we understand the intention to be to enable enforcement against goods, which would be by way of a writ or warrant of control.[30] However writs and warrants of execution are wider than just enabling enforcement against goods. Writs of execution include: writs of possession; writs of delivery; writs of sequestration; and writs of fieri facias de bonis ecclesiasticis.[31] The Family Court has the power to grant warrants of possession and warrants of delivery, which are the same (in substance) as the writs of the same name.[32] Writs and warrants of possession are used to enforce rights to possession in land, and writs and warrants of delivery are used to enforce the transfer of specific goods.

5.41 In keeping with the principle that the court should have the widest possible options for enforcement on a general enforcement application, we consider that the family court should be able, on such an application, to issue warrants of possession and warrants of delivery as well as warrants of control. The rules should clearly set out that these powers are available to the court. For all the orders that a court may make on a general enforcement application, the court should consider any procedural requirements that would apply on a discrete application for that specific order.[33]

The procedure

5.42 Here we set out, in general terms, the procedure that we recommend should apply on a general enforcement application.

Application

5.43 The application should be made by a creditor on a new form.[34] The form should set out the standard information and disclosure that the debtor will be asked to provide in advance of the hearing and give the opportunity for the creditor to ask

[30] Confusion arises as the definition of "writs of execution" provided in the Civil Procedure Rules does not include a "writ of control", which enables enforcement against goods: Civil Procedure Rules, Practice Direction 70, para 1A 1.

[31] Civil Procedure Rules, Practice Direction 70, para 1A 1.

[32] The writ of sequestration is a High Court remedy for contempt and as such is not an enforcement method that may be used on a general enforcement application where a debtor is compelled to provide evidence as to his or her means. The writ of fieri facias de bonis ecclesiasticis requires a bishop to seize a debtor's ecclesiastical property in order to satisfy a High Court judgment.

[33] For example, under the Civil Procedure Rules, r 83.2(3), an application for a warrant of delivery requires the court's permission in certain circumstances. Before issuing such a warrant on a general enforcement application the court will, therefore, have to consider the requirement for permission.

[34] We envisage the form would be based on the existing Form D50K with some elements taken from Form N316, which is the form required for an application for an order to obtain information under Part 71 of the Civil Procedure Rules.

for further information or documents.[35] The form should clearly state the orders that the court may make and that committal for non-payment of a debt is not available on a general enforcement application. The application will, as now, require the creditor to set out the sum owed, how that sum is arrived at and require a statement of truth.

5.44 An important difference between making a general enforcement application and making a specific application for a charging order or third party debt order is that the latter two applications can result in an interim order being made to secure the debtor's assets before the debtor has notice of the application. This is not the case with a general enforcement application where the debtor will necessarily have notice of the application before the court considers making an order; he or she will need to provide the required disclosure in advance of the hearing. We recommend that the application form for the general enforcement application should alert creditors to this distinction. Creditors should be informed that if they have the necessary information about the debtor's assets and believe there is a risk of the debtor dissipating these assets, then they should consider making separate applications for a third party debt order or charging order at the same time as, or before, issuing a general enforcement application.[36]

Notice of hearing and directions to the debtor

5.45 The first stage in a general enforcement application is similar to an order to obtain information; on both applications, the debtor must provide evidence about his or her financial circumstances. Upon the issue of an application for an order to obtain information under Part 71 of the Civil Procedure Rules, the debtor is served with Form N39. Form N39 details the outstanding judgment or order and the amount the debtor is said to owe, directs him or her to attend court for the hearing, informs the debtor that travel expenses can be requested and sets out the documents the debtor must bring. It also provides details on how payment can be made to the creditor.

5.46 We consider that standard directions, based on Form N39, should be sent to the debtor following the issue of a general enforcement application. Modifications to Form N39 would need to be made:

(1) to take account of the advance disclosure that the debtor is required to provide;

[35] This is the current position and we think it should remain an option.

[36] If a creditor were to make a separate specific enforcement application we envisage that running in parallel to the general enforcement application. If the specific application is considered prior to the general enforcement application, the general enforcement application need only continue if the debt remains unsatisfied.

(2) to inform the debtor of the enforcement orders the court may make at the hearing and the court's powers to make information requests and orders (in the event that the debtor does not provide sufficient information); and

(3) to inform the debtor of the potential consequences of non-compliance.

5.47 We propose also that a standard form is sent to the creditor. We think this should:

(1) inform the creditor of the advance disclosure he or she is due to receive from the debtor;

(2) the fact that the creditor (or his or her legal representative) or the court may question the debtor at the hearing; and

(3) inform the creditor that they may make representations to the court as to the appropriate enforcement order to be made or other action to be taken.

Service of the application/order on the debtor

5.48 We recommend that the creditor should have a choice as to the method of service on the debtor; either by way of personal service or post. Our recommendation is modelled on the recent changes to the rules governing judgment summonses; the rules were amended by the Family Procedure (Amendment No 2) Rules 2015 [37] The creditor has a choice, but consequences flow from that decision if the debtor fails to provide the required advance disclosure or attend at the listed hearing.[38]

5.49 We have set out at Figure 2 of Appendix B a flowchart to illustrate our recommendations as to service and the consequences of non-compliance. Essentially, we recommend that in circumstances where the creditor has personally served the debtor and has offered to meet his or her reasonable travel expenses, the debtor may face committal proceedings if he or she does not attend at court. If the creditor has opted to serve the debtor by post in the first instance (or personally served the application but not offered travel expenses), there can be no committal for a failure to attend. Instead the hearing will be adjourned and the debtor must then be personally served and offered travel expenses. We consider that this model enables a creditor to choose to avoid the cost and inconvenience of arranging personal service and meeting the debtor's travel expenses (or at least offering to do so), where the creditor is satisfied the debtor will co-operate or is willing to take the risk. The process also acts as a

[37] SI 2015 No 1420, r 19.

[38] We understand that, in cases of reciprocal enforcement of maintenance, the creditor may not have a choice as to the method of service. However, service by post does not impact on the enforcement orders that the court may make.

safeguard for debtors; non-attendance can only be punished by committal where the debtor was aware of the hearing and did not lack the financial means to attend court.

5.50 We have also considered comments of the Justices' Clerks' Society in their consultation response as to the desirability of being able to proceed in the debtor's absence. We are of the view that where the court has sufficient information, provided either by the debtor in advance of the hearing or obtained by the court by way of an information request or information order,[39] the court should have the power to make enforcement orders in the debtor's absence. Our recommended process in this respect is illustrated on the flowchart at Figure 2 of Appendix B. We consider that it would always be preferable for the debtor to attend at the hearing and our recommendations are not intended to suggest that a debtor who provides the required financial disclosure need not attend court. Instead, we consider that where a debtor fails to attend, the court should not be prohibited from making enforcement orders in his or her absence where the court has the information to do so.

Disclosure by the debtor

5.51 We think it is key that the debtor provides disclosure in advance of the hearing. We consider that the debtor should be given 14 days from the date of service to file and serve the required material and the creditor should be given no fewer than seven days to consider what is provided. The hearing will, therefore, have to be listed at 21 days after service of the application on the debtor. For our recommendations on the minimum information and documentation that the debtor should be required to provide on the general enforcement application, see Chapter 7.

5.52 We are aware that the Central Family Court are currently requesting debtors to provide financial disclosure in advance of the first hearing on a general enforcement application. Under the current rules, the court cannot order such disclosure. This may be an approach that other courts wish to adopt prior to a change in the rules.

Hearing

5.53 We recommend that the hearing take place before a judge,[40] not before a court officer, as would be the usual course for a hearing on an application for an order to obtain information under Part 71 of the Civil Procedure Rules. The hearing

[39] As to our recommendations for the introduction of information requests and information orders, see Chapter 8.

[40] As to our recommendations in respect of the level of judiciary who should hear general enforcement applications and the allocation of enforcement proceedings generally, see Chapter 6.

should be before a judge so that an enforcement order can be made at the first hearing where appropriate.

5.54 By the time of the hearing the debtor should have provided to the court the information and documents required. It may be, therefore, that no further questioning of the debtor is necessary. We recommend, however, that there should remain the opportunity for the debtor to be examined on oath. In cases where it is suspected that the debtor has the means to but does not want to pay, it is likely that some cross-examination as to his or her financial circumstances will be necessary to establish the true position.

5.55 We are of the view that the court should have the power to make any of the enforcement orders that are available on the general enforcement application at the first hearing; we do not consider that the creditor should have to make any other specific enforcement applications. Both the requirement for advance disclosure and the new information gathering powers that we propose should place the court in the same position that it would be in on a separate, specific, enforcement application. The court should have the necessary information and evidence to make the appropriate orders. In the case of a third party debt order or charging order, it may only be appropriate to make an interim order at the first hearing in the same way that the court would do on a specific application for either of those orders, but in some circumstances a final order may be appropriate. For example, a final third party debt order may be appropriate if the relevant third party is aware of the proceedings and attends at the hearing.[41]

Non-compliance by the debtor

COMMITTAL

5.56 We consider that there need to be effective mechanisms for ensuring compliance for a debtor who fails to comply with the court's directions under a general enforcement application. The process for committal that is prescribed at rule 71.8 and Practice Direction 71 of the Civil Procedure Rules should, we think, apply on a general enforcement application with modifications. Rule 71.8(1) provides that if a debtor:

a) fails to attend court;

b) refuses at the hearing to take the oath or to answer any question; or

c) otherwise fails to comply with the order,

the court will refer the matter to a High Court judge or circuit judge.

[41] *Kaur v Randhawa* [2015] EWHC 1592 (Fam), [2015] All ER (D) 116 (Jun).

5.57 The High Court judge or circuit judge to whom the matter is referred may make a committal order against the debtor.[42] The committal order will be suspended, provided that the debtor attends court at a time and place specified in the order and complies with all the terms of that order and the original order.[43]

5.58 We consider that the rules should be the same on a general enforcement application save for two points. First, we are of the view that a district judge should be able to make the committal order rather than having to refer the matter to a circuit or High Court judge. We think this change will save considerable time. There is precedent for a district judge dealing with committal applications. For example in the context of attachment of earnings and committal for contempt of court, a district judge can make a committal order where the proceedings giving rise to the contempt were before a district judge.[44]

5.59 Secondly, we suggest that failing to provide the required advance disclosure is added as a specific ground for committal.

5.60 By recommending the removal of the need to refer the matter to a circuit judge or High Court judge, we do not mean to recommend that a committal order should be made automatically as a result of any non-compliance. There may be circumstances where committal is not appropriate or proportionate. For example, the debtor may not attend court but may have provided information and documents in advance, such that an enforcement order can be made in his or her absence. In such circumstances the prospect of committal would serve no purpose. Further, it may not always be appropriate to trigger the committal process because of a failure to comply with the requirements of advance disclosure. The debtor may attend at court and then provide the necessary information; any delay caused by his or her original non-compliance could be reflected in an order for costs made against the debtor. In summary, we envisage committal being used to compel the debtor to comply, rather than to punish for non-compliance.

5.61 A committal order should not, in any event, be an automatic consequence of a debtor's non-compliance with an order made under Part 71 of the Civil Procedure Rules. The Court of Appeal in *Broomleigh Housing Association Ltd v Okonkwo*[45] emphasised that a court must be satisfied to the criminal standard of proof that the debtor's non-compliance with the order has been intentional and that, in all the circumstances, it is appropriate to make a committal order. The court noted

[42] Though a committal order may not be made for failure to attend unless the creditor had paid the debtor's travel reasonable travel expenses, if the debtor had requested the creditor to pay them: Civil Procedure Rules, r.71.8.

[43] Civil Procedure Rules, r 71.8(4).

[44] Civil Procedure Rules, Practice Direction 2B, para 8.3.

[45] [2010] EWCA Civ 1113, [2011] CP Rep 4.

the other options available, namely adjourning the decision whether or not to make a committal order to another hearing or determining not to make a committal order and issuing an order in the same terms as the original order but with a penal notice attached. We do not envisage, therefore, that every instance of a debtor's non-compliance on a general enforcement application will result in a committal order.

ARREST WARRANT

5.62 In addition to rules providing for committal in the event of non-compliance, we consider that there should be an express power to issue an arrest warrant included in the rules. An arrest warrant compels the attendance of an individual before the court; it provides for the debtor to be arrested and brought before the court if the debtor will not attend willingly. The power to issue an arrest warrant is a power of the High Court. It was reasoned by His Honour Judge Birss (now Mr Justice Birss) in *Westwood v Knight*[46] that the County Court could exercise the power by virtue of section 38(1) of the County Courts Act 1984.[47] This section states that, subject to certain exceptions,[48] the county court "may make any order which could be made by the High Court if the proceedings were in the High Court". Further, HHJ Birss observed that it would be an unlikely outcome to find that while a County Court has the power to commit for contempt it lacks the power to issue a warrant to compel attendance at court for the purposes of enforcing a judgment.

5.63 His Honour Judge Birss held:

> Section 38 does not confer on the County Court a jurisdiction to hear a case it has no jurisdiction to hear. It is concerned with remedies and orders the court can make in proceedings properly before it. This committal application is properly before me, a circuit judge sitting in the County Court. If this committal application was proceeding in the High Court then the High Court could make an order issuing a bench warrant to secure Mr Knight's attendance at court. Accordingly, by section 38 of the 1984 Act, an order to issue a bench warrant can be made by a County Court. I may make such an order here in a proper case.

5.64 Following the same reasoning as that employed in *Westwood v Knight* we consider it is clear that the Family Court has the power to issue a bench warrant. Section 31E of the Matrimonial and Family Proceedings Act 1984 provides that:

[46] [2012] EWPCC 14.

[47] *Re B* [1994] 2 FLR 479.

[48] Following section 38(3) of the County Courts Act 1984, a county court shall not have power "to order mandamus, certiorari, prohibition or to make any order of a prescribed kind".

> 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, or which could be made by the county court if the proceedings were in the county court.

5.65 An arrest warrant may be more useful than starting committal proceedings because ultimately the creditor and the court want the debtor to engage with the proceedings, not for the debtor to be imprisoned. However, we consider that the ultimate sanction of committal remains necessary as an arrest warrant cannot facilitate the detention of debtors beyond securing their attendance at court. Committal, therefore, may be the only real deterrent to a debtor who attends and thereafter refuses to comply with any other direction.

5.66 Although we consider the power to issue an arrest warrant to be already available to the Family Court, we think there is merit in it being specifically included in the rules to draw attention to its availability. Anecdotally, we have been told that it is not always known to be an option. We consider it should be (and is available) to all levels of the judiciary in the Family Court who may hear a general enforcement application.

Costs

5.67 As noted above, there is some confusion as to whether fixed costs apply on a general enforcement application. For example, if the application results in a third party debt order being made, do the fixed costs for an application for a third party debt order apply? The current position is unclear. We do not consider it would be fair for the fixed costs for specific methods of enforcement to apply.[49] Those fixed costs are based on the steps required for those specific applications, which will not be replicated on a general enforcement application. The course of a general enforcement application is not easy to predict as a great deal depends on the level of cooperation from the debtor. For example, cross examination may or may not be required, the court may or may not need to exercise its powers to make information requests or information orders.[50] For that reason, we suggest that either no fixed costs apply or a new fixed cost designed for the general enforcement application is provided. However, we consider it likely that the court would often need to depart from any fixed costs scheme on a general enforcement application.

Information requests and information orders

5.68 Information requests are requests for information directed at government departments and information orders are directed at private third parties. In Chapter 8 we suggest that information requests and information orders should be

[49] See Chapter 16 for a discussion about fixed costs.

[50] See Chapter 8.

introduced for the enforcement of family financial orders but available only on the general enforcement application and only once the debtor has been given the opportunity to provide the necessary information. If he or she fails to provide what is required, the court may bypass the debtor and obtain the information from elsewhere. We discuss in Chapter 8 the details of our proposals for information requests and orders. With the information obtained, we recommend that the court should, if possible, be able to proceed to make orders for enforcement even in the absence of the debtor.

New enforcement powers – orders against pensions and disqualification from driving and foreign travel

5.69 Our proposals in respect of new enforcement powers against pensions and disqualification orders are discussed in detail in separate sections of this Report.[51] We conclude that both types of order should be available on the general enforcement application.

RECOMMENDATIONS

5.70 **We make the following recommendations for reform of the general enforcement application:**

(1) **The introduction of a new part of the Family Procedure Rules to govern the procedure.**

(2) **Clarification that on the general enforcement application the court is empowered to make any of the available enforcement orders without the need for any further application.**

(3) **A new application form and notice of hearing that will provide guidance to the parties as to the nature of the application, the orders that may be made and what is required of each of them, including:**

(i) setting out the standard information and disclosure that the debtor must provide in advance of the hearing; and

(ii) providing the opportunity for the creditor to ask for further specific information or documents.

(4) **A choice for the creditor as to the method of service of the application (by personal service or by post).**

[51] See Chapters 9 and 12.

(5) **An obligation on the debtor to provide disclosure in advance of the hearing.**

(6) **Providing for committal in the event of the debtor's non-compliance, using a modified version of the rules contained in Part 71 of the Civil Procedure Rules, to be set out in full in the Family Procedure Rules.**

(7) **An express provision in the rules to highlight the already existing possibility of making use of an arrest warrant to secure the debtor's attendance.**

(8) **Empowering the court to proceed in the absence of the debtor.**

(9) **Enabling the court to make information requests and information orders on a general enforcement application.**

(10) **Enabling the court to make orders against pensions and coercive orders on a general enforcement application.**

CHAPTER 6
ALLOCATION OF ENFORCEMENT PROCEEDINGS

INTRODUCTION

6.1 The allocation of family proceedings is governed by the Family Court (Composition and Distribution of Business) Rules 2014 ("the allocation rules").[1] Those rules only came into force on 22 April 2014 and we took the provisional view in the Consultation Paper that it was too early to consider any reform of them. Nevertheless we invited consultees' views. We noted that we had received preliminary suggestions that enforcement proceedings should be reserved to judges who have particular expertise in enforcement or that proceedings for enforcement should always return to the judge who made the original order that is being enforced.

6.2 As a result of the responses received we now consider that some reform in this area would be beneficial.

THE CURRENT LAW

6.3 The allocation rules provide that where an application is made in connection with concluded proceedings, the application will be allocated to the same level of judge who last dealt with those proceedings.[2] However, if the remedy sought cannot be granted by that level of judge, then the application will be allocated to the level of judge who can grant the remedy sought.[3]

6.4 Under the allocation rules, most family financial cases will be heard by district judges,[4] and accordingly most applications for the enforcement of family financial orders are allocated to district judges. However, as is clear from the consultation responses, some enforcement applications come before lay justices and a minority will be allocated to circuit and High Court judges.

6.5 The allocation rules provide that certain remedies may not be granted by certain categories of judge. In terms of enforcement, lay justices have the most limited powers. Lay justices can only make attachment of earnings orders, means of payment orders and orders on a judgment summons application. An order for committal on a judgment summons application may only be made by a judge of the same level as, or of a higher level than, the judge who made the original

[1] SI 2014 No 840.

[2] SI 2014 No 840, Rule 17(2).

[3] SI 2014 No 840, Rule17(4).

[4] Financial proceedings under the Matrimonial Causes Act 1973, the Civil Partnership Act 2004, the Children Act 1989 and, where the application is by consent, proceedings for financial relief after a foreign divorce or dissolution of a civil partnership under the Matrimonial and Family Proceedings Act 1984 or Civil Partnership Act 2004 respectively, are allocated, in the first instance, to district judges: rule 15 and sch 1.

judgment or order.[5] Beyond this limitation, the enforcement powers of district and circuit judges are restricted only in that they are unable to issue warrants of sequestration, which can only be issued by High Court judges.

CONSULTATION RESPONSES

6.6 Responses centred on the argument that enforcement applications need to be heard by judges who have both the necessary powers and experience to deal with the proceedings effectively and efficiently. However, there were conflicting views as to the level of judiciary best suited to the role. In addition, a number of consultees commented on the desirability of enforcement applications returning to the judge who made the original order.

6.7 In the Consultation Paper, we raised the possibility of introducing either specialist enforcement judges or enforcement liaison judges. The introduction of specialist enforcement judges would involve reserving cases of enforcement to judges specifically trained to deal with them. Enforcement liaison judges would be appointed within each designated family judge area with responsibility for enforcement.[6] These ideas received positive responses, although it was not always possible to discern whether consultees favoured the introduction of specialist enforcement judges or enforcement liaison judges; we see them as distinct roles. As explored below, we have formed the view that the introduction of enforcement liaison judges, not specialist enforcement judges, is the better approach.

Judges with the necessary powers

6.8 The Family Law Bar Association said it was important that "the judge on enforcement should have the widest possible array of methods available" which, it said, should include "orders such as pension sharing, or property adjustment that may not have been included within the final order". Similarly, Resolution said that general enforcement applications need to be allocated "to the level of judge who is able to grant the remedy sought". Alternatively "certain powers need to be extended to other levels of judge".

6.9 The Justices' Clerks' Society noted the "unnecessary delay" that is caused by lay justices having to reallocate cases where they cannot impose the enforcement order that is sought. The Society asked that consideration be given to one "tier [of the judiciary] having all the enforcement orders available to it", and specifically that consideration be given to "extending the enforcement remedies available to lay justices".

Judges with the necessary experience

6.10 The Family Law Bar Association considered that it is "important that the judge has sufficient expertise to be confident in resolving the enforcement issues". The Association's response suggested that the judiciary "struggles with the technical complexity of this area of the law" and that "enforcement is a subject many

[5] Rule 17(5).

[6] The role is currently in operation at the Central Family Court.

judges will seek to avoid where possible". This unwillingness to engage with enforcement issues can lead to "confusion and delay".

6.11 Janet Bazley QC agreed that enforcement is a "complex area of family law". In her view one of the current difficulties is that applications often come before judges who do not have "sufficient expertise and experience".

Which members of the judiciary?

6.12 District Judge Robinson expressed the view that it would be desirable for lay justices to hear more enforcement applications. He explained that lay justices, unlike district judges, have the support of legal advisers who are experienced in matters of enforcement and who can assist with presenting the creditor's case to the court.[7] He thought that district judges could be saved for enforcement proceedings with "clearly defined legal issues".

6.13 The Magistrates Association[8] similarly considered that lay justices could play a much greater role in the enforcement of family financial orders. It noted the "extensive experience" that lay justices have "within the criminal justice system in the enforcement of fines" and that until the introduction of the Family Court they "dealt with the enforcement of maintenance orders in an inquisitorial and judicial manner". The Association said:

> If our powers were to be brought into line with the professional judiciary within the Single Family Court, we would welcome the opportunity to utilise our extensive experience and competence to play a fuller part in what we see as an essential part of the work of the Family Court.

6.14 Janet Bazley QC took a different approach and suggested allocation of enforcement proceedings to "District Judges and above who have particular experience of the issues which arise in enforcement". Clarion Solicitors[9] suggested that it would be preferable for only full time district judges to hear enforcement proceedings.

Judicial continuity

6.15 The Family Law Bar Association noted that there is currently a real sense of a creditor having to "start again when it comes to the issue of enforcement". The Association was of the view that the judge who heard the financial remedy proceedings "should have the power to monitor enforcement where it appears likely to be an issue". The Association thought this should be the case regardless

[7] We understand that the lack of a court officer to present the case is a particular problem in the context of enforcing foreign maintenance orders, but that aspect of enforcement falls outside the scope of our project.

[8] A national charity supporting and representing Magistrates, who we refer to as lay justices in this Report.

[9] A law firm with a specialist family law team.

of whether the proceedings were concluded at the financial dispute resolution hearing ("FDR")[10] or final hearing.

6.16 Resolution considered that the "return of proceedings to the judge who made the original order merits further consideration". District Judge Robinson said that he generally does not return cases to the original judge for enforcement if that judge is part-time. He explained that the enforcement process "needs consistency above all"; a part-time judge may not be able to provide that consistency within the enforcement proceedings.

Specialist enforcement judges/enforcement liaison judges

6.17 The Family Law Bar Association supported the idea of specialist enforcement judges. It considered that "specialist judiciary would lead to fewer and quicker hearings", which would have "a positive impact". It also noted that large court centres "such as [the Financial Remedies Unit] and the Birmingham Family Court have identified specialist judges to lead reforms in this area", which it considered "a welcome development". The Association said that "each court centre should have a specialist enforcement judge of at least District Judge level (with a deputy to cover holidays/illness) both to hear enforcement cases and to provide information and guidance to other local judiciary on enforcement issues". It considered that judges should have "responsibility for the training and professional development of other judges and court staff on enforcement issues".

6.18 The Family Justice Council considered that a "specialist enforcement judge" in each court centre would improve the system. It thought the nominated judge would be able to oversee training for court staff. The Law Society said:

> It would be worth exploring the idea that each court should have a specialist district judge for dealing with enforcement proceedings. These district judges would be given detailed training on Family Procedure Rules, Civil Procedure Rules and enforcement. We recognise that there is a risk that having only specialist judges hear these types of cases may delay listing, but well-drafted orders should make it quicker to make future decisions related to the enforcement of an order.

6.19 Clarion Solicitors also noted the potential delay inherent in a system relying on specialist enforcement judges. They said: "we are concerned that reserving enforcement applications to only a few 'designated' enforcement judges would cause further delay for parties seeking enforcement. We think it would be preferable for all family judges to have the necessary training".

6.20 District Judge Robinson said:

[10] The (usually) second hearing that occurs following the making of an application for a financial order. The purpose of the hearing is to help the parties to agree a financial settlement with the assistance of the judge, whose role is to provide a neutral evaluation of the case, and to mediate between the parties.

> Having an Enforcement Judge at [the Central Family Court] to co-ordinate such applications has been helpful … We have a small team of regular financial specialist judges who are best suited to enforcement.

6.21 However, he noted that the specialised family judges at the Central Family Court lack the experience of civil enforcement of their judicial colleagues who sit in the County Court. Further, the Central Family Court lacks any bailiffs of its own, which makes warrants of control difficult. He said the court lacks "a specialist enforcement staff unit".

DISCUSSION

6.22 It is clear from the responses received that there is significant concern over the current allocation of enforcement proceedings and a strong feeling that allocation is an important issue to get right. The Family Law Bar Association said:

> We consider that the most significant change that should be made in the area of case management would relate to the question of judicial allocation.

6.23 We have concluded that action is needed in three areas:

(1) Greater judicial expertise in the enforcement of family financial orders.

(2) More of a focus on judicial continuity between the original financial proceedings and subsequent enforcement proceedings.

(3) Greater flexibility in the allocation of cases (where judicial continuity is not determinative of allocation).

Greater judicial expertise

Specialist enforcement judges or an enforcement liaison judge?

6.24 We do not recommend the introduction of specialist enforcement judges to whom every enforcement application must be allocated. We are concerned that such an approach risks causing delay, as highlighted by some consultees, and think that is a particular risk in smaller courts. Further, a recommendation for specialist enforcement judges would run counter to our recommendation for greater judicial continuity between the original financial proceedings and enforcement proceedings. Generally, we are of the view that all family judges hearing financial cases should be thinking more about enforcement.

6.25 However, we think the introduction of an enforcement liaison judge in each designated family judge area would have the benefits of ensuring greater judicial expertise without the problems that may arise with the introduction of specialist enforcement judges. An enforcement liaison judge would oversee and improve the management of enforcement proceedings in his or her area. We suggest that the role would include the following:

(1) A responsibility to keep up-to-date with enforcement cases, practice and procedure and to "cascade" the information.

(2) Being responsible for enforcement training for other judges (all levels) and HMCTS staff in each designated family judge area.

(3) Liaising with lay justices/ justices' clerks/the gatekeeping team on issues of allocation.

(4) Being a point of contact for other judges with enforcement questions/queries.

(5) Gaining an overview of the enforcement applications made in his or her area to build a picture of family enforcement (in the absence of available statistics).

6.26 The guidance and support provided by enforcement liaison judges, coupled with our recommendations to make the enforcement system more accessible and easier to navigate, should make enforcement applications easier for family judges to consider. In addition, we envisage that any particularly difficult enforcement cases could be listed before the enforcement liaison judge

6.27 The role of enforcement liaison judge is already in existence at the Central Family Court and we understand that the role has been very successful. We note the existence of other liaison judge roles in the Family Court system (albeit at a higher level) such as the Family Division liaison judges and the head of international judicial relations and also in the wider court system – for example, the role of the diversity and community relations judges.

Judicial continuity

6.28 We agree with those consultees who thought that there is merit in enforcement proceedings going back before the judge who made the original financial order. It would go some way in addressing the issue raised by the Family Law Bar Association that creditors often feel they are having to "start again". Greater judicial continuity between the financial proceedings and enforcement proceedings may reassure both parties that the proceedings are before a judge who has some previous knowledge of the case and will be someone with whom they are both familiar.[11] Returning a case to a judge with some pre-existing knowledge of the issues and the parties is also likely to be a more efficient use of court time. The proposal accords with our other recommendations[12] that judges hearing financial remedy proceedings should be directed to consider the issue of enforcement at the time of making a final order, and consider whether there is any need to list a further hearing specifically for the purposes of monitoring compliance with the order – all of which amounts to judges taking a more proactive and continuing role in the enforcement of their orders.

6.29 However, we recognise that striving for greater judicial continuity may create listing difficulties and therefore should be pursued only where there are clear benefits. We do not think that there is any benefit in continuity where the judge who has made the final order has done so only on consideration of the papers for an application for a consent order; that judge will not have seen the parties in court or heard them give evidence and the parties will have no experience of the

[11] Of course, there may be situations where one or both of the parties is not reassured by this but that is not a risk that we can counter.

judge. In that case we do not think there is anything to be gained by listing subsequent enforcement proceedings before the same judge.

6.30 Further, we are clear that a judge who concludes a financial case after having heard the FDR hearing should not hear any subsequent enforcement application. We have considered, but ultimately rejected, the proposal from the Family Law Bar Association that the judge hearing the financial remedies case should have the power to monitor enforcement regardless of whether the application is concluded by consent at the FDR or after a contested final hearing.

6.31 At present, rule 9.17(2) of the Family Procedure Rules provides that:

> The judge hearing the FDR appointment must have no further involvement with the application, other than to conduct any further FDR appointment or to make a consent order or a further directions order.

6.32 The purpose and the scope of this rule was considered by the Court of Appeal in *Myerson v Myerson:*[13]

> The underlying policy of the sub-rule is clear. Litigants distrustful of each other and made anxious by the complex tactics of contested litigation must be confident that conciliation within the court proceedings guarantees them the same confidentiality that they would enjoy had the dispute been referred by the judge to mediation by a mediation professional. So the intention and the meaning of the sub-rule are clear. The judge who has been armed to conciliate by the provision of all the privileged communications can only do one of three things: set up a further FDR appointment, make a consent order or make an order for further directions, practically speaking directions for trial.

Lord Justice Thorpe was clear that any issues of enforcement must be listed before another judge.

6.33 We consider that the policy underlying the rule preventing the FDR judge from making any further substantive orders is extremely important. The benefits of returning an enforcement application to an FDR judge who will not have heard evidence from either party and whose time spent with the parties and considering the papers will vary greatly from case to case is not sufficient to risk undermining the important role that the rule plays.

6.34 We have formed the view that enforcement proceedings should be listed before the judge who heard the financial remedy proceedings where those proceedings were concluded at a final hearing, either by agreement or as determined by the court. We consider that in those circumstances there is sufficient merit in the

[12] See our recommendations in Chapter 18.

[13] [2008] EWCA Civ 1376, [2009] 1 FLR 826.

enforcement application returning to the original judge. However, we would add the caveat that, where such listing would lead to unreasonable delay, the application should be listed before a different judge. We consider that this approach to listing should be provided for in the allocation rules.

Greater flexibility in the allocation of cases

Extending the enforcement powers of lay justices

6.35 Numerous consultees were concerned that enforcement applications sometimes end up before judges who do not have the necessary powers to deal with them. This causes delay, wastes court time and creates greater costs for the parties. The problem seems to lie in particular with general enforcement applications being allocated or transferred to lay justices. At present, of the enforcement methods available on a general enforcement application, lay justices can only make attachment of earnings orders. If any other order needs to be made, the case will have to be transferred to a judge of a higher level, most likely a district judge.

6.36 Both the Magistrates' Association and the Justices' Clerks' Society specifically requested that consideration be given to extending the enforcement remedies available to lay justices in the context of enforcing family financial orders. Given that lay justices are hearing general enforcement applications (and following our fourth recommendation as to allocation below, may hear more general enforcement applications), it makes sense to consider whether lay justices should have the powers to grant all of the enforcement orders that are available on such an application. At present, the court's powers on a general enforcement application are not clearly set out in the Family Procedure Rules. The application form (Form D50K) sets out that the court has the power to make charging orders, third party debt orders, orders for receivership, and writs and warrants of execution. The term "writs and warrants of execution" is not entirely clear[14] but we recommend that warrants of control, warrants for the possession of land and warrants of delivery should all be available on a general enforcement application. We recommend in Chapter 9 that orders for enforcement against a debtor's pension should be made available on a general enforcement application, and in Chapter 12 that orders disqualifying a debtor from driving and prohibiting a debtor from travelling out of the UK ("coercive orders") should also be made available, in some circumstances, on a general enforcement application.

[14] See the discussion at paras 5.38 to 5.41 above.

6.37 The Justices' Clerks' Society pointed out that the power to issue a warrant of control is not available to lay justices in the family context whereas it is at their disposal when enforcing criminal fines. In civil proceedings, the only enforcement work undertaken by lay justices is in respect of unpaid council tax, where they have the power to make a liability order leading to an attachment of earnings order or committal, under the Council Tax (Administration and Enforcement) Regulations 1992 To extend the enforcement powers of lay justices for the enforcement of family financial orders to include the power to make charging orders, third party debt orders and orders for receivership would, therefore, give them greater powers in respect of the enforcement of family financial orders than they have in the enforcement of any other civil financial orders.

6.38 In considering the powers that lay justices should have to enforce family financial orders, it is important to note that we are of the view that enforcement cases should be allocated to lay justices only where that is considered appropriate by a judge of the level of district judge or above.[15]

WARRANTS OF CONTROL AND WARRANTS OF DELIVERY

6.39 As noted above, lay justices already have experience of granting warrants of control for the enforcement of criminal fines, and applications for the remedy can be quite straightforward.

6.40 Warrants of delivery are used for the enforcement of an order for the transfer of specific personal property or payment of the value of that specific property. Depending on the terms of the order, the warrant may direct for the seizure and delivery up to the creditor of specific property or the seizure and sale of property to ensure payment is made to the creditor.

6.41 We are of the view that lay justices are equipped to make warrants of control and warrants of delivery for the enforcement of family financial orders.

CHARGING ORDERS AND THIRD PARTY DEBT ORDERS

6.42 The complexity of third party debt orders and charging orders can vary greatly. If there is no dispute as to the debt owed by the third party to the debtor or the ownership of the debtor's asset (or assets) that the creditor seeks to charge, then the making of the orders need not involve any complicated legal issues. However, where there are disputes they may involve points of contract and property law that lay justices will not necessarily have experience of determining.

6.43 There is no obvious argument as to why lay justices, supported by their legal advisers, are not equipped to hear straightforward applications and make orders for third party debt orders and charging orders. However, we can see an argument that lay justices are not sufficiently experienced to resolve complicated applications for these orders, particularly in situations where preliminary determinations on issues such as ownership need to be made. On balance, and to enable greater flexibility in the allocation of enforcement proceedings, we are

of the view that lay justices should be given the powers to make these orders. However, in considering the allocation of enforcement applications the complexity of the application should be borne in mind. The same assessment of the complexity of the matter should apply when lay justices consider the exercise of their powers; if an application involves the determination of issues that are beyond the experience of a bench of lay justices (which may not always be apparent at the time of allocation), that application should be transferred up to a district judge in the usual way. In doing so the lay justices may decide to make a protective interim order before transferring the application.

ORDERS FOR RECEIVERSHIP AND WARRANTS FOR THE POSSESSION OF LAND

6.44 In respect of orders for receivership[16] the complexity of the receiver's task will vary, but on every application the court has to assess the suitability of the nominee and be satisfied that sufficient security is provided to cover any liability for the receiver's acts or omissions. Consideration of these issues is very likely to lie outside lay justices' usual experience. We understand, anecdotally, that orders for receivership are rarely made on a general enforcement application and so it will rarely be problematic for lay justices, even if hearing more general enforcement applications, to be unable make such orders. Given the inherent complexity of the orders and the rarity with which they are sought and made we do not recommend that lay justices are given the power to make orders for receivership.

6.45 Similarly, we do not recommend that lay justices are given the power to issue warrants for the possession of land. If the creditor has had to take enforcement action to obtain possession of the land then it is likely that competing claims to the land will have to be determined and we understand that such decisions are likely to be outside the experience of lay justices.

ENFORCEMENT AGAINST THE DEBTOR'S PENSION

6.46 We do not recommend that lay justices have the powers to make orders against a debtor's pension in enforcement proceedings. As set out later in this Report,[17] we consider that the pension orders available on a financial remedy application, namely pension sharing and pension attachment orders, should be available to the court on a general enforcement application. District, circuit and High Court judges all have experience of making such orders in financial remedy proceedings and are, therefore, familiar with the law and procedure that applies. Orders against pensions may require expert evidence and they always need to be considered against the backdrop of the debtor's general financial circumstances. Lay justices do not have experience of this kind of work.

15 See paras 6.48 and 6.49 below.

16 For a description of orders for receivership, see paras 2.14 to 2.16.

17 See Chapter 9.

COERCIVE ORDERS

6.47 We recommend that lay justices have the powers to make orders to disqualify debtors from driving and prohibit them from travelling outside the UK. Lay justices have experience of making orders of disqualification from driving in their criminal jurisdiction and applications for both coercive orders involve the determination of facts and consideration of the circumstances of the individuals involved, which lay justices are used to doing in much of their family work. Applications under the Child Support Act 1991 for disqualification from driving and committal may currently be allocated to lay justices.[18]

Permitting listing of enforcement applications before lay justices

6.48 There was disagreement between consultees as to whether it would be better to direct more enforcement proceedings to lay justices, or whether enforcement applications should be heard only by district judges or higher levels of the judiciary. We think that greater flexibility in listing would be beneficial. Enabling lay justices to hear more enforcement applications would mean more listing choice for gatekeeping teams who will know the demands placed on the different judges and levels of the judiciary to whom they may allocate cases. More choice may mean less delay and more efficient use of court time. Beyond providing more choice, some stakeholders believe that lay justices are better equipped to hear straightforward enforcement applications as they have the assistance of a legal adviser. The legal adviser can assist with the management and the presentation of the case, which can be particularly useful in cases of enforcement by the court.[19] In those cases neither party will necessarily attend and, contrary to what is envisaged by the rules,[20] there is not always a court officer available to present the case; District Judge Robinson noted that where such cases are before district judges this can result in the judge being "presenter, judge and executioner".

[18] The Family Court (Composition and Distribution of Business) Rules 2014, sch 1.

[19] Enforcement by the court is discussed in Chapter 4.

[20] Family Procedure Rules, r 32.33.

6.49 However, as noted above, we are of the view that some enforcement applications will involve legal issues outside the experience of lay justices. It would not be appropriate for such applications to be allocated to lay justices where those issues are apparent from the application. Further, any applications that are likely to require a number of hearings and would benefit from judicial continuity are unlikely to be suitable for allocation to lay justices. As a result we consider that cases must be designated as appropriate to be allocated to lay justices by a judge of at least the level of district judge. We do not envisage this rule being difficult to comply with as it would form part of the normal "gatekeeping"[21] process.

RECOMMENDATIONS

6.50 **We recommend:**

(1) The appointment of an enforcement liaison judge in each designated family judge area.

(2) An amendment to the rules so that applications for enforcement are allocated to the same judge who determined the original financial case where the case was concluded at a final hearing, unless such an allocation would cause unreasonable delay.

(3) An extension of the enforcement powers of lay justices to enable lay justices to make the following orders for the enforcement of family financial orders:

(a) charging orders;

(b) third party debt orders;

(c) warrants of control;

(d) warrants of delivery;

(e) orders disqualifying a debtor from driving; and

(f) prohibition on travelling out of the United Kingdom.

[21] The President of the Family Division has issued guidance (22 April 2014) on allocation and gatekeeping in the Family Court (albeit in the context of care proceedings). The guidance provides that "a gatekeeping team will consist of the Designated Family Judge, his nominated deputy, the Justices' Clerk (or his nominated legal adviser) and an equal number of District Judges nominated by the Designated Family Judge, and legal advisers who will be identified by the Justices' Clerk in agreement with the Designated Family Judge".

(4) An amendment to the rules so that an application for enforcement may be listed before a lower level of judge than the judge who made the order that the application seeks to enforce, but that a judge of at least the level of district judge must authorise an application to be listed before lay justices.

CHAPTER 7
INFORMATION ABOUT THE DEBTOR

INTRODUCTION

7.1 Information about the debtor is essential for effective enforcement.[1] Information enables both the creditor and the court to determine whether the debtor is able to meet his or her obligations under the original order and if so, to determine the most appropriate method of enforcement. In this Report, we explore a number of ways to ensure that the creditor and the court are furnished with greater and more accurate information about the debtor's financial circumstances.

7.2 In this Chapter, we discuss our recommendation to introduce an obligation for the debtor to complete a financial statement upon the issue of enforcement proceedings. We consider that it is desirable to give the debtor an opportunity to provide the necessary information before seeking information from elsewhere; the debtor will have the most accurate information and there is a cost in obtaining information from other sources. However, co-operation from the debtor will not always be forthcoming and so, in Chapter 8, we explore obtaining information from third parties.

OBLIGATION FOR THE DEBTOR TO COMPLETE A FINANCIAL STATEMENT

Introduction

7.3 In the Consultation Paper we considered imposing an obligation on debtors to complete a financial statement on every application for enforcement. At present, there is no such general obligation. The table at Figure 3 of Appendix B shows the disclosure requirements that arise on various enforcement applications under the current rules.

7.4 We discussed in the Consultation Paper what form such a financial statement could take. We considered that Form E[2] would be too onerous and goes beyond what is required for the purposes of enforcement, requiring, for example, the production of 12 months' bank statements for every bank account in which the debtor has an interest, details of the educational arrangements for the parties' children and the completion of narrative sections on, among other things, the standard of living enjoyed by the parties during the marriage. However, we noted the existence of variants of Form E used for other family financial proceedings

[1] J Baldwin and R Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 *Civil Justice Quarterly* 159.

[2] This is the detailed form that each of the parties must complete in financial remedy proceedings on divorce or the dissolution of a civil partnership. It requires comprehensive information about their financial resources (with documentary evidence) and financial needs so that the court can decide what financial orders may be appropriate.

and considered that such a variant could form the basis of a new statement for enforcement proceedings.[3]

7.5 In the Consultation Paper we provisionally proposed that:

(1) an obligation be placed on the debtor to complete a financial statement where the creditor makes an application for enforcement proceedings; and

(2) that the form of the financial statement be based on a variant of the Form E.

Consultation responses

7.6 All but one of the consultees who responded to this question agreed with the general principle that there should be financial disclosure by the debtor where the creditor makes an application for enforcement proceedings. The one consultee[4] who objected did so based on his experience of the time and cost of providing financial disclosure in financial remedy proceedings. He suggested that if the debtor is required to provide financial information then the creditor should be required to provide the same in case the creditor's financial circumstances have changed.

7.7 We do not agree with that suggestion; the creditor's financial position is not relevant to the enforcement application. If a debtor considers that the order should be varied as a result of a change in the creditor's financial circumstances, then the debtor should make an application to vary the order,[5] not unilaterally decide not to pay. As to the time and cost of providing the disclosure, we appreciate it is a burden on the debtor and are mindful that it must be proportionate. It is, however, the debtor's non-compliance that has led to the enforcement action and so we do not think it is unreasonable to ask the debtor to provide some financial disclosure in those circumstances.

The principle of disclosure

7.8 Resolution identified "insufficient information about the debtor's circumstances" as being the "biggest barrier to creditors who wish to obtain payment" and said that some disclosure would help. The Justices' Clerks' Society commented that a lack of information limits both the creditor's and the court's ability to make informed decisions about enforcement. International Family Law Group noted that one of the "primary difficulties" for creditors is "working out whether they will be throwing good money after bad" if the debtor does not, in fact, have any resources. It said that comprehensive financial disclosure by the debtor may enlighten the creditor in this respect.

[3] We considered at paragraph 2.53 of the Consultation Paper the Form E1, used in applications for financial relief for the benefit of a child under schedule 1 of the Children Act 1989 and the Form E2 used in proceedings for the variation of an order for a financial remedy. Both forms require less information and less supporting documentation than Form E. However, we concluded that neither would be suitable without amendment as a debtor's financial statement.

[4] A member of the public.

7.9 However, while noting the desirability of having a financial statement from the debtor at the earliest possible stage, Clarion Solicitors[6] said that the completion of such a statement requires "proactivity and co-operation from the debtor", and it foresaw difficulties in ensuring compliance. They urged us to consider the introduction of a presumption that the debtor can pay as a starting point and an opportunity for the debtor to rebut that presumption by providing financial disclosure.[7] Clarion Solicitors also considered that it would be difficult to strike "a balance between a statement which provides sufficient information to be meaningful without being an overwhelming burden". Penningtons Manches struck a similar note of caution when they said that to require completion of a Form E would be an onerous and costly requirement and could "introduce additional delay into the process where extensive additional disclosure is not necessary, for example where the parties have recently been through proceedings and Forms E have recently been exchanged". However, despite their concerns, both Clarion Solicitors and Penningtons Manches supported the proposal for disclosure in principle.

The form of disclosure

7.10 The issue of what form a debtor's financial statement could take produced a variety of responses and no consensus among consultees. Opinion was divided as to whether the Form E should be used, a variant of the Form E or a new form designed specifically for the purpose.

7.11 Those who favoured making use of the existing Form E gave broadly two reasons for this preference. The first being that it is not unreasonable to require a debtor who says that he or she does not have the ability to pay, in circumstances where the original order was made after a full consideration of the parties' financial positions, to support that argument with full and frank disclosure.[8] In a similar vein, it was said by some members of the Family Law Bar Association (its response was split on this point) that while some of the information required by the Form E may prove irrelevant on a particular enforcement application, it will be difficult to know which information is relevant without a complete overview of each case. The second reason for favouring use of the Form E was a concern over the increasing number of variants of the Form E that are currently in use.

[5] Not all orders are capable of being varied. For example, a lump sum order (that is not due to be paid in instalments) cannot be varied.

[6] A law firm with a specialist family law team.

[7] We consider the introduction of such a presumption in Chapter 15.

[8] Janet Bazley QC specifically made this point.

The Financial Remedies Working Group[9] recently expressed the view that there should be only one form of financial statement.[10]

7.12 Responses from consultees who did not favour the use of Form E centred around the argument that the information required in a Form E is in excess of what is needed on an enforcement application. The members of the Family Law Bar Association who were opposed to the idea that a full Form E should be used on enforcement proceedings said that such a requirement would be "lengthy, cumbersome and costly to prepare and digest". They considered that it should be possible to "fill in the key details on a single page in the form of an asset and income schedule". The International Family Law Group said requiring Form E to be completed would be "disproportionate". A member of the public said that Form E1 had taken him eight weeks to complete.

7.13 The Money Advice Trust[11] favoured a "straightforward standardised mechanism for establishing income and outgoings" and suggested using the principles behind the Common Financial Statement.[12] However, it noted from our proposals in the Consultation Paper that the kind of financial statement under consideration goes "far beyond the relatively simple approach required in ordinary debt cases", and for that reason it said that it would leave consideration of what would be suitable to experts in the field.

7.14 The Law Society suggested that a new form would need to be designed specifically for enforcement proceedings, and it should be a variant of the Form E. The Law Society said the form would need to distinguish between proceedings that were purely enforcement and proceedings where there is a cross-application to vary.[13]

Documentation in support

7.15 Despite differing views on the form the financial statement should take, there was more of a consensus on the documentation debtors should be required to provide to substantiate their financial position. There was considerable support for the idea that, whatever the form of the statement, the documentary evidence in support should be less than that currently required to support a Form E. Even the half of the Family Law Bar Association who favoured making use of Form E for the financial statement recognised that there was scope to limit the documents

9 Established by the President of the Family Division in June 2014, its task being "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": View from the President's Chambers (number 12). The group comprises members of the judiciary, practitioners and HMCTS officers.

10 Report of the Financial Remedies Working Group (31 July 2014) Annex 8, available at http://www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp-annex8.pdf (last visited 01 December 2016). These recommendations were maintained in the final Report of the Financial Remedies Working Group (15 December 2014) available at http://www.judiciary.gov.uk/wp-content/uploads/2015/01/frwg-final-report-15122014.pdf (last visited 01 December 2016).

11 A UK charity that helps people to tackle debt and manage money.

12 This is a budgeting tool used by debt advice agencies; see http://www.cfs.moneyadvicetrust.org/cfs_faqs/ (last visited 01 December 2016).

required in support, for example reducing the required bank statements to a run of three or six months instead of the 12 months required by Form E.

7.16 The Law Society set out specific information and documentation that it thought a creditor should be able to request on an enforcement application:

> If the debtor's financial position is unclear, the creditor should be able to request at least two month's bank statements to show incomings and outgoings from the debtor's accounts. Information on earnings should be attached to the financial statement. If the debtor is self-employed it is not always obvious whether it would be relevant to see their accounts or tax returns, so the creditor should be able to access both.

7.17 Other specific proposals for the required level of disclosure included:

(1) contracts of employment, the last three months' pay slips and the last three months' bank statements;[14] and

(2) proof of income including name of employer(s), copy of contract and last three payslips or, for those who are not employed, documentary evidence of income from all sources for the previous year.[15]

Disclosure on the general enforcement application

7.18 In responding to the proposal for the debtor to complete a financial statement, the Family Justice Council and Resolution both provided responses that pertained specifically to disclosure in the context of the general enforcement application. The Family Justice Council said:

> 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. … 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)[16] sent out within, say, 5 days of receipt of the application.

[13] For discussion on the relationship between enforcement and variation proceedings, see Chapter 2.

[14] The International Family Law Group.

[15] Some members of the Family Law Bar Association.

[16] Form C is the notice of a First Appointment in financial remedy proceedings. It timetables disclosure and steps the parties need to take leading up to the hearing.

7.19 Resolution commented that, at present, given the absence of a prescribed form, in advance of an "information gathering hearing"[17] the debtor "may go and provide nothing". In its view a "basic statement of means with some documentary evidence such as recent pay slips and the most recent tax return should be sufficient". It considered that such a statement would "ideally be a much shorter variant of the Form E limiting the documents to be attached".

Discussion and recommendations

7.20 We remain of the view that information about the debtor is crucial to successful enforcement and that the current disclosure requirements are unsatisfactory and need to be bolstered. However, we have moved away from our proposal to the extent that we think that the debtor should automatically be required to complete a financial statement only on a general enforcement application, not on separate, specific enforcement applications.

The obligation to arise automatically only on a general enforcement application

7.21 The provisional proposal in the Consultation Paper was broadly drawn. It suggested that the requirement for the debtor to file a financial statement would arise automatically on every enforcement application. On reflection, and in light of the consultation responses received, we now think that the requirement should arise automatically only on the issuing of a general enforcement application but that the court should have the power to direct the same disclosure on other enforcement applications if appropriate in all the circumstances. There are a number of reasons for this revision.

7.22 The idea behind the proposal is to ensure that the creditor and the court have the necessary information to know whether enforcement action is possible and appropriate and, if it is, to identify the best method of enforcement. In addition, it enables a debtor who cannot meet the obligations under the original order to set out his or her case at an early stage. Unlike a creditor who opts for the general enforcement application, creditors who choose to make an application for a specific method of enforcement are likely to have made that choice based on information that they already have. For example, a creditor who applies for a charging order will have information as to the debtor's ownership of a particular asset, and a creditor who applies for a third party debt order must have some evidence of the debt that is owed by the third party. Therefore, where the creditor has made a specific enforcement application, general financial disclosure from the debtor to facilitate enforcement is not necessarily required.

7.23 When we proposed that the requirement to complete a financial statement should apply on all enforcement applications we were aware that it may not be necessary to require full financial disclosure on every enforcement application, but we considered that it could only enhance the creditor's prospects of successfully recovering what was owed and at the same time provide an opportunity for the debtor to have his or her case heard. However, from the responses to the question of what form the financial statement should take,

[17] By "information gathering hearing" we have taken Resolution to mean the first hearing on a general enforcement application where the debtor is required to attend court, produce documents and answer questions on oath.

consultees' concerns as to the potential delay, cost and unnecessary burden of the proposal have come to light. On reflection, we consider that these concerns are relevant not only to the form of the financial statement but also to when the obligation should automatically arise. We think that the concerns outweigh the potential benefits (to both parties) of requiring full financial disclosure from the debtor on every enforcement application.

7.24 We consider that the general enforcement application will be the enforcement application made most often, especially by those acting without legal advice and representation.[18] It is the application which gives the court the widest array of enforcement powers and enables the court to assist the creditor who is not well informed about the enforcement options available. It is essential on such an application that the creditor and the court have as complete and accurate a view of the debtor's financial circumstances as possible, and so we consider that there should be an obligation for the debtor to file a financial statement on such an application. We think that statement should be completed in advance of the hearing and, if completed fully by the debtor, should provide the court with the required information and documentation to consider and, where possible, to make the appropriate orders for enforcement.

7.25 There will be some creditors who, with or without professional legal assistance, have sufficient information about the debtor's financial circumstances and the enforcement system to make a specific enforcement application. For reasons of minimising cost and delay and maximising the chance of successful enforcement, it is important that these applications are as streamlined as possible. Therefore, outside the general enforcement application, we do not recommend that an automatic disclosure obligation should be imposed. However, it may be that the specific method of enforcement chosen by the creditor is unsuccessful or runs into difficulties and in those circumstances, it may be appropriate for the court to order the debtor to complete a financial statement. Completion of the statement will then enable the creditor to appraise the situation and consider his or her options for further enforcement attempts. We think the court should have the power to require disclosure on specific enforcement applications.

The form of the financial statement

7.26 As noted above, there was no consensus from consultees as to the form of the financial statement. It was our view in the Consultation Paper, and it remains our view, that Form E is too onerous and requires information that is not relevant to an enforcement application – we consider that there is a danger that such full disclosure may have the unfortunate effect of blurring the distinction between the enforcement application and variation proceedings. However, we also note the concerns about any further variants of the Form E.

7.27 Given that neither option discussed in the Consultation Paper found a great deal of support we have considered what other form the proposed financial statement could take. The Working Group noted that "confusion" is caused by the variants of Form E. We think a completely different form, which we term an "enforcement financial statement", may avoid confusion as it will be clearly designed and

[18] For a discussion on the general enforcement application and the reforms we recommend, see Chapter 5 above.

demarcated only for the purposes of enforcement. Form E and its variants are designed to capture information to assist the court in considering the appropriate redistribution of assets, whereas a form designed for the purposes of enforcement will be aimed at locating and ascertaining means to pay. We are aware that the Central Family Court is currently making use of an amended Form E2 to collect information from the debtor on general enforcement applications that are issued in that court. In the absence of any new form, that approach seems sensible, though we consider that the Form E2 does not capture all of the information that it would be desirable for the court to have at the first hearing of a general enforcement application.

7.28 The Form EX140, which sets out the standard information collected by court officers on an application for an order to obtain information,[19] may provide a good starting point for the enforcement financial statement.[20] The first stage of a general enforcement application is akin to an order to obtain information and the same type of information is required. However, we are not of the view that the EX140 could be used just as it is; amendments would need to be made to ensure the court and the creditor have all the information that is necessary to proceed with the enforcement action that the court determines to be most appropriate. Although we note the possibility of using the EX140 as a model for the enforcement financial statement, we do not make a specific recommendation as to the form the statement should take. We think that capturing the right information and requiring the right documents are the most important features of the enforcement financial statement, rather than the exact form.

7.29 We set out at Figure 4 of Appendix B the information and documentation that we recommend the form should require debtors to provide. We received very helpful, detailed comments from the Money Advice Trust as to the content of the EX140,[21] many of which have informed the list of information that we suggest the enforcement financial statement should require. A copy of the comments is at Appendix D. Some of the suggestions for amendments made by the Money Advice Trust could usefully be made to the EX140, which will continue to be used in civil proceedings. Such a revision of the EX140 is not within the scope of a project on the enforcement of family financial orders, but it is something we encourage HMCTS to consider.

7.30 At present a creditor can, when making the general enforcement application, request that specific questions are asked of the debtor and that he or she is directed to provide specific documents. We are of the view that this should remain an option for the creditor.

7.31 Of course, the debtor's co-operation is required for the financial statement to be effective. To ensure the debtor appreciates the seriousness of not providing a full and frank account of his or her financial circumstances, we recommend the form, like the other financial statements used in family financial proceedings, includes a warning that if the debtor is found to have been deliberately untruthful, criminal

[19] For a description of an order to obtain information, see paras 2.27 to 2.29 above.

[20] A copy of Form EX140 can be found at Appendix C.

[21] We asked them for comments in the context of a representative of the Money Advice Trust being a member of our advisory group.

proceedings may be taken under the Fraud Act 2006. The form should also require the debtor to sign a statement of truth. In addition we recommend that a statement be included to make the debtor aware that the information that he or she provides may be checked by the court by way of an information request or order.[22] We do not envisage that checking the information provided would be the normal course, but it may occur where the debtor's conduct causes the court to doubt the veracity of the information provided or where information is missing.

RECOMMENDATIONS

7.32 **We recommend:**

(1) A new form of financial statement - an "enforcement financial statement" - should be created, specifically designed for the purposes of enforcement. The enforcement financial statement should require the debtor to provide the information and documentation set out in Appendix B, Figure 4.

(2) The creditor should retain the right to ask the debtor to provide additional information or documentation and the financial statement should provide for this.

(3) The financial statement should warn the debtor of the consequences of being deliberately untruthful and should inform the debtor that the information provided may be checked by way of information requests or orders.

(4) Debtors should be required to complete the financial statement on every general enforcement application.

(5) There should be no automatic requirement for the debtor to complete the financial statement on specific enforcement applications but the court should have the power to order the debtor to complete the financial statement if appropriate in all the circumstances.

[22] See Chapter 8 for a discussion of information requests and information orders.

CHAPTER 8
INFORMATION REQUESTS AND INFORMATION ORDERS

INTRODUCTION

8.1 Improvement to the methods by which a creditor can obtain accurate information about the debtor is a priority for reform of the system of family financial orders. Under the current law, the debtor can be ordered to attend court to produce any information that is needed to enforce the order, either as a result of an application by the creditor for an order to obtain information under Part 71 of the Civil Procedure Rules or as part of the procedure triggered by the general enforcement application.[1] However, a debtor may refuse or fail to provide such information, and while courts may seek to coerce debtors into compliance with these orders, for example by holding them in contempt, it may be more efficient and reliable to bypass the debtor and obtain the information required direct from other sources. In this Chapter we consider how the court may obtain information that the debtor should have provided but has failed to provide on a general enforcement application. We then go on to consider a specific form of information request to enable the courts to track a debtor's employment in circumstances where an attachment of earnings order has been made.

8.2 Systems of obtaining information from third parties to facilitate enforcement already operate in other contexts. For example, the Child Maintenance Service ("CMS") has wide information-gathering powers. To facilitate enforcement, the CMS can obtain information from, among other bodies, employers, banks and credit reference agencies.[2] In addition, the CMS benefits from an exchange of information with Her Majesty's Revenue and Customs ("HMRC").[3] We understand that these powers are key in taking action to enforce child maintenance orders.[4]

8.3 In the Consultation Paper we discussed the sections of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") which provide for the introduction of information requests and information orders in civil and family proceedings.[5] These provisions are part of a wider scheme in the 2007 Act, which enables a creditor to apply to the court for assistance in deciding what action to take to enforce a judgment debt. On such an application, the court may request information from a government department (an information request), or order a private third party to provide information (an information order), to "help [the court] to deal with the creditor's application".[6] The court, making use of the information obtained, would then inform the creditor as to the best course of

1 See Chapter 5 for a discussion of the general enforcement application.

2 Child Support Information Regulations 2008, SI 2008 No 2551.

3 Welfare Reform Act 2012, s 127.

4 There is also a power for inspectors to enter premises, ask questions and obtain documents under the Child Support Act 1991, s 15.

5 Tribunals, Courts and Enforcement Act, ss 95 to 105.

6 Tribunals, Courts and Enforcement Act, s 96(3).

enforcement action. Subsequently, the court may make use of the information to facilitate any action that the creditor chooses to take. These provisions are not yet in force, but they have been described as "the Government's best idea about how to assist those seeking to enforce a judgment debt".[7]

8.4 Family creditors have the benefit of being able to make a general enforcement application.[8] Such an application enables the court to determine the best method of enforcement and make the relevant order. The general enforcement application therefore, like the scheme under the 2007 Act, enables the Family Court to assist creditors in choosing an enforcement method, but goes further than the 2007 Act as it provides for an enforcement order to be made on the same application. Because of the availability of the general enforcement application to family creditors, we think the wider 2007 Act scheme is unnecessary in family proceedings. However, the power to make information requests and information orders would be of great use within the general enforcement application.

8.5 We discussed in the Consultation Paper the background to the introduction of the 2007 Act and noted that the relevant provisions for information requests and information orders have not yet been brought into force. The reason given by the Government in 2012 for not bringing these provisions into force was the lack of resources to do so.[9] Therefore, in considering whether to recommend the introduction of information requests and information orders for the enforcement of family financial orders, we have been aware of the need for a system that does not make undue demands on the resources of Her Majesty's Courts and Tribunals Service ("HMCTS") and those government departments and third parties who might be subject to such requests and orders.

8.6 The 2007 Act provides for much of the detail of the operation of information requests and information orders to be contained in regulations that have not yet been made. In considering that detail we have departed a little from what we understand was envisaged under the 2007 Act. We believe that a simple and more direct system for requesting information from government departments and third parties can be devised. We set out below our view of what such a system might look like.

8.7 The provisions of the 2007 Act do not provide for the information obtained by way of information requests and information orders to be disclosed to the creditor. The scheme of the 2007 Act is that the information is used by the court to provide the creditor with "information about what kind of action it would be appropriate to take in court to recover that particular debt".[10] The court may then use the information to make an enforcement order if the creditor chooses to apply. In the Consultation Paper we discussed whether, in the context of family proceedings,

[7] J Baldwin and R Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 *Civil Justice Quarterly* 159.

[8] For a discussion of the general enforcement application and our recommendations for reform of the same, see Chapter 5.

[9] Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales: The Government Response* (2012) Cm 8274.

[10] Tribunals, Courts and Enforcement Act 2007, s 95.

the information obtained should be disclosed to the creditor rather than simply being made available to the court. We asked consultees for their views. This is a difficult issue and one on which we received mixed responses. Nevertheless, we have concluded that there are compelling arguments in favour of the information being disclosed to the creditor. We address the issue of disclosure to the creditor later in this section, after a discussion of our recommendation for the introduction of information requests and orders.

EXISTING METHODS OF OBTAINING INFORMATION FROM THIRD PARTIES

8.8 There are existing methods for obtaining documents (and so also to obtain the information contained in documents) from third parties.

8.9 Both the Civil Procedure Rules and the Family Procedure Rules contain powers that enable the court to make orders for disclosure and inspection of documents against a person who is not a party to the proceedings, where to do so is permitted by statute.[11] Under the Family Procedure Rules, the court may order such disclosure where it is necessary "in order to dispose fairly of the proceedings or to save costs".[12] Under the Civil Procedure Rules, the same test applies with the additional requirement that the disclosure sought is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings.[13]

8.10 The power to obtain disclosure of documents from third parties under the Family Procedure Rules and Civil Procedure Rules has been interpreted restrictively. Ordering disclosure against a third party usually involves balancing competing interests and the courts have shown a reluctance to order disclosure unless there is a significant public interest in doing so.[14] Accordingly, we understand that such applications are not frequently made. We take the view that there is a place for information requests and information orders, both because of their focus on information rather than the disclosure and inspection of documents (which may well be unnecessary for the purposes of enforcement) and because we would expect there to be a justified need for such requests and orders to be made routinely by the courts. Our recommendations involve setting up a system within which the bodies that can be approached, and the information that can be provided, are prescribed. This approach should limit the amount of judicial scrutiny required and therefore be easier to manage than existing methods of obtaining information from third parties.

8.11 There is limited existing provision for obtaining the address of a debtor whom the creditor cannot trace. The creditor can request, through the court, that certain

[11] Family Procedure Rules, r 21.2 and Civil Procedure Rules, r 31.17. The relevant statutes are the Senior Courts Act 1981, the County Courts Act 1984 and the Bankers' Books Evidence Act 1879. The first two statutes set out the court's power to make such orders, with the circumstances in which it may be used to be set out in rules of court. The Bankers' Books Evidence Act 1879 provides for the court to order that a party be permitted to inspect and take copies of any entries in bankers' books.

[12] Family Procedure Rules, r 21.2(3).

[13] Civil Procedure Rules, r 31.17(3).

[14] *Frankson v Secretary of State for the Home Department* [2003] EWCA Civ 655, [2003] 1 WLR 1952; *Re Howglen Ltd* [2001] 1 All ER 376 Ch; *Lindner v Rawlins* [2015] EWCA Civ 61, [2015] All ER (D) 100 (Feb).

government departments disclose the debtor's address.[15] Greater provision for assistance with information about the debtor is available to those who are seeking the reciprocal enforcement of a maintenance obligation from another EU country using the Maintenance Regulation.[16] Under the Regulation, the information that must be made available is the address of the debtor, the debtor's income, the identification of the debtor's employer and/or of the debtor's bank account(s) and the debtor's assets.[17] This information can only be used by the court to facilitate the recovery of maintenance claims and only the existence of such information, rather than the information itself, can be disclosed to the applicant under the Maintenance Regulation.[18]

CONSULTATION RESPONSES

8.12 We asked for the views of consultees as to whether the provisions of the 2007 Act relating to information requests and information orders should be brought into force for the enforcement of family financial orders. The overwhelming majority of consultees thought that the relevant provisions should be brought into force. We set out here some of the responses received to the general proposal of introducing information requests and information orders. We address responses to the details of how they should operate as we explain the details of our recommendations.

8.13 Consultees echoed our view that information is key to successful enforcement. The Family Law Bar Association and Janet Bazley QC agreed that information requests and information orders represented "the Government's best idea" for enforcement. Janet Bazley QC thought the proposals were "proportionate and sensible". District Judge Robinson said "anything which provides independent sources of information should be welcomed". Penningtons Manches commented that "the provision of information from independent third parties such as HMRC, financial institutions and credit agencies would be invaluable aids to enforcement".

8.14 It was noted by the Justices' Clerks' Society that the measures would assist the court to proceed in the absence of the debtor. The Society said it would:

[15] Such an application can be made under Practice Direction 6C of the Family Procedure Rules to the Department for Work and Pensions, the Office for National Statistics, the United Kingdom Passport Agency and the Ministry of Defence. It can also be made, using the inherent jurisdiction of the High Court, to HMRC.

[16] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The Regulation governs the jurisdiction and enforcement between EU member states of "all maintenance obligations arising from a family relationship, parentage, marriage or affinity" (recital 11).

[17] Council Regulation (EC) No 4/2009, art 61(2). The public authorities that must provide the information are set out in the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, SI 2011 No 1484 ("the 2011 Regulations"). They are the Secretary of State (limited to information held for functions relating to social security, child support, employment or training) and Revenue and Customs officers.

[18] Council Regulation (EC) No 4/2009. The prohibition on onward disclosure is subject to the application of procedural rules before a court. The 2011 Regulations permit disclosure (other than a summary that does not identify the individual) only where this is ordered by the court or required by any other enactment: the 2011 Regulations, sch 2, para 3(2).

> Welcome any proposals which move away from the current system which is dependent on the debtor's willingness to engage and allows the court to make an informed and appropriate decision which both debtor and creditor are able to understand.

8.15 Penningtons Manches thought that the proposals may "avoid the need for coercive steps to be taken to obtain information from the debtor".

8.16 The response of the Money Advice Trust was cautious. Though in principle in favour, the Trust expressed concern that information orders should not be used to obtain information from certain third parties such as debt advice services, or professionals such as solicitors and accountants. The Trust also noted a concern that the process may be "cumbersome", and that the risk of a "duplication of effort, resources and time" would need to be considered when the rules are looked at in detail.[19] The Money Advice Trust was not alone in raising the issue of limiting who may be asked to provide information. Three other consultees[20] explicitly mentioned that information orders should not apply to those who hold "privileged or sensitive information", such as solicitors, accountants and debt advice professionals. [21] The Justices' Clerks' Society said that "protection must be afforded to the debtor in terms of data protection and which third parties may be approached".

DISCUSSION AND RECOMMENDATIONS

8.17 Given the overwhelming support for the introduction of information requests and orders in proceedings for the enforcement of family financial orders, we have no hesitation in concluding that the relevant provisions of the 2007 Act should be brought into force in a modified form for the enforcement of family financial orders so as to give the Family Court the necessary powers to make such requests and orders. Before setting out the details of our recommendation, we first consider the relationship between information requests and information orders and the debtor's right to privacy.

The debtor's right to privacy

8.18 The issue of the debtor's right to privacy was raised in the Government's 2003 White Paper. The paper explained that the introduction of what were then termed "data disclosure orders" ("DDOs") had been considered in the context of the right to respect for private and family life under article 8 of the European Convention on Human Rights ("ECHR"):[22]

[19] We were aware of these concerns of the Money Advice Trust prior to publishing the Consultation Paper as it had raised them in response to the Government consultation in 2011. We noted the concerns in our Consultation Paper and the member of the public who was not in favour of the provisions of the 2007 Act coming into force said that he agreed with the Money Advice Trust as to the difficulties of the procedure.

[20] The Family Law Bar Association, Janet Bazley QC and the Justices' Clerks' Society.

[21] All financial information about the debtor is, in one sense, sensitive in nature. Perhaps what sets apart these sources of information is the professional, confidential relationship that each would have with the debtor.

[22] Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 8 of the ECHR establishes the right to privacy; however, it is a qualified right, and the DDO operates under one of the justifications for an interference, in this case the rights of the creditor. The test to be met under Article 8 is therefore one of proportionality. To be proportionate, disclosure should be limited to the minimum required.[23]

8.19 Obtaining information about the debtor from a third party without the debtor's consent is an interference with the debtor's right to privacy. However, obtaining that information so as to protect the creditor's right to effective enforcement is a justified interference, so long as it is proportionate. Our recommendations respect the need for proportionality by:

(1) limiting the information that can be obtained to that which is the minimum necessary to facilitate enforcement; and

(2) only allowing the information to be sought once the debtor has been given the opportunity to provide the information him or herself.

8.20 It will not be necessary in every case for an information request or order to be made, even if the debtor is not fully compliant. If there is sufficient information to assess the options for enforcement and make any order required, we do not envisage the court making an information request or information order. We take the view that it is far better for the information sought to come from the debtor where possible. The debtor will be in possession of the most up-to-date information about his or her financial circumstances. Beyond that practical reason, in general, co-operation from the parties is likely to lead to a better outcome. The judge considering the case will be able to assess the need for an information request or information order.

8.21 In circumstances where information is obtained about joint accounts,[24] the privacy of the other account holders will also be infringed. This interference is also justified in principle. It is necessary to protect the rights of the creditor and is proportionate. In considering the issue of proportionality, we have given thought to whether the disclosure should not include the identities of the other account holders in the first instance. Obviously, if any enforcement action were to be taken against the joint account, the identities of the other account holders would need to be known so that they could be notified. However, we have concluded that there is a need to know the identity even before that stage so that the creditor and the court can appraise whether enforcement action should be taken against funds in the joint account. It is necessary to know who the other account holders are so that the nature of the account and the appropriateness of enforcement action can be assessed.[25]

[23] Effective enforcement: improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents: A White Paper (2003) Cm 5744, para 276.

[24] See paras 8.38 to 8.40 below.

[25] This is not unprecedented. Information about joint accounts is provided to HMRC and CMS for the enforcement of unpaid tax and unpaid child maintenance respectively. Though we note that in these contexts the information is being disclosed to state officials only and not, as our recommendations would permit, to private individuals, namely creditors.

Information providers

8.22 The 2007 Act envisaged a prescribed list of government bodies and private organisations to whom information requests and information orders could be directed. We are not minded to depart from that idea. We think a workable system of information requests and information orders needs to be simple and contained.

8.23 The 2003 White Paper provided a model of how DDOs could operate.[26] That model included details of the government departments and other third parties from whom information could be obtained, namely:

(1) Department for Work and Pensions ("DWP");

(2) Inland Revenue, now Her Majesty's Revenue and Customs ("HMRC");

(3) credit reference agencies; and

(4) banks and building societies.

8.24 We agree with the list of information providers[27] identified in the 2003 White Paper, subject to adding two further information providers to that list, namely, Land Registry[28] and pension providers. Both of these bodies, in common with those identified in the White Paper, hold information that may be relevant to the enforcement of family financial orders. Pension providers are a necessary addition given our recommendation that enforcement should be possible against a debtor's pension assets.[29] Land Registry holds information on the ownership of property; if the debtor owns, or has an interest in, a property, that asset may be charged to secure what he or she owes to the creditor.

8.25 Information would be obtained from Land Registry by searching the index of proprietors' names ("IOPN").[30] An IOPN search reveals a list of titles, to property or land, which are owned by the name searched against. So searching for a debtor's name may reveal a property that the debtor owns. However, an IOPN search does have limitations; it might reveal properties that are owned by other individuals with the same name as the debtor and it will not show any unregistered property that the debtor may own. Despite these limitations, we think that an IOPN search will yield useful information in some cases – even if only as a starting point for further investigations – and so, we recommend that Land Registry is included as an information provider.

[26] That model is set out in Flow Chart C, found at Figure 5 of Appendix B of this Report.

[27] For "bank or building society" we adopt the same meaning as that of the Civil Procedure Rules in respect of third party debt orders, namely we mean any person carrying on a business in the course of which he or she lawfully accepts deposits in the United Kingdom.

[28] A Government department (non-Ministerial) responsible for the registration of the ownership of land in England and Wales.

[29] For our recommendations in this respect, see Chapter 9.

[30] An individual may search the IOPN without a court order but only in respect of their own name, the name of a corporate body, or the name of some other person in whose property they can satisfy the registrar that they are generally interested: Land Registry, Practice Guide 74: searches of the index of proprietors' names (24 June 2015). We understand that on that criteria, a creditor would not be able to search the IOPN in respect of the debtor's name.

What information?

8.26 In court proceedings generally, only evidence that is relevant to the issues in a case will be admissible. Our recommendations, therefore, are grounded in ensuring that only relevant information is obtained and that no more is obtained than is necessary for the purposes of enforcement. As noted above, the disclosure of information by way of information requests and orders should be limited to the minimum necessary so as to ensure that the interference with the debtor's (and any third party's) right to privacy is justified and proportionate. To ensure that this is the case, and to make the system workable, we recommend that there be prescribed categories of information that can be sought from each of the information providers.

8.27 All of the information that we recommend a court should be able to obtain under an information request or an information order is necessary for the court and the creditor: to assess whether the debtor is a "won't pay" or a "can't pay" debtor; to consider what enforcement action may be taken; and to facilitate any enforcement action that is appropriate. For example, information from DWP as to any benefits received by the debtor may help to establish whether the debtor "won't pay" or "can't pay" and may point to avenues for enforcement, for example, if the debtor receives working tax credits that will inform the creditor and the court that the debtor has a job and so an income that could be enforced against. If HMRC provide information that the debtor receives rental income then the creditor and court will know that the debtor has both an income stream and an interest in a property that it may be possible to enforce against.

8.28 In some circumstances, the court will first have to request or order information from one information provider in order to make a further request or order to another. We set out below the information that we recommend should be possible to obtain from each information provider.

Department for Work and Pensions

8.29 DWP is one of the government departments identified in the 2003 White Paper as an information provider. The paper envisaged that DWP would confirm the debtor's address and provide confirmation of whether the debtor was in receipt of benefits. Further, if the debtor had a national insurance number, the request would be forwarded from DWP to HMRC for information about the debtor's employment.

8.30 In the context of enforcing family financial orders, we do not imagine that DWP will often be the first stop for information about the debtor. In most cases the debtor's address will be known to the creditor or to the court and often the debtor's national insurance number will also be known.[31] However, if either are not known, then obtaining this information from DWP would be extremely useful (essential in the case of the debtor's national insurance number) as a starting point before sending a request to HMRC for further information. We do not recommend establishing a system of requests between DWP and HMRC for the purposes of enforcing family financial orders. The number of cases where

[31] We recommend an amendment to Form E to make capturing the parties' national insurance numbers more likely during the financial remedy proceedings. For more on this recommendation, see paras 18.20 to 18.23 below.

information is needed from DWP would be very small and would not justify the development and implementation of such a system.

8.31 Information about any benefits that the debtor receives will not facilitate any direct enforcement as it is not possible to enforce directly against benefit income.[32] However, such information would help the court build a picture of the debtor's financial position and enable the court to determine whether the debtor is a "can't pay" or "won't pay" debtor. Further, it is information that the debtor should have already provided on a general enforcement application. In keeping with what was envisaged in the 2003 White Paper, therefore, we consider that requests to DWP should be able to seek:

(1) the debtor's address;

(2) the debtor's national insurance number; and

(3) confirmation of whether the debtor is in receipt of benefits and the amount of those benefits.

Her Majesty's Revenue and Customs

8.32 The 2003 White Paper suggested that HMRC would provide "employer details". We recommend that the scheme should go further than that as HMRC holds a great deal of the information that the debtor should have provided him or herself and that would facilitate the enforcement of family financial orders. The Courts Act 2003[33] provides for HMRC to share information with HMCTS for the purpose of enforcing criminal fines. The Act enables the sharing of "finances information" which is defined as information which:

> (a) is about a person's income, gains or capital, and
>
> (b) is held —
>
> > (i) by Her Majesty's Revenue and Customs, or
> >
> > (ii) by a person providing services to the Commissioners for Her Majesty's Revenue and Customs in connection with the provision of those services,
>
> or information which is held with information so held.

8.33 For the purposes of information requests and orders in family enforcement proceedings, we are of the view that it should be possible to obtain the following information:

[32] For example, direct enforcement is not available by using an attachment of earnings order or third party debt order. There is nothing, however, that prevents a third party debt order being used against a bank account that contains income from social security benefits.

[33] Courts Act 2003, sch 5, para 9A.

(1) If the debtor is employed, the amount of income received from employment in the tax year to date, and the name and address of the debtor's employer.

(2) If the debtor has filed a self-assessment tax return in either of the last two tax years, then the following information from each of these as available:

(a) If the debtor is self-employed, the name of the debtor's business and the net profit made.

(b) Any capital gains tax paid.

(c) Any income received from a trust.

(d) Any income received from a partnership, and the name of the business.

(e) Any income received from UK property, and the number of properties rented out.

(f) Any income received from a private pension.

(g) Any other taxable income, and any description provided of the nature of that income.

(h) Any declared payments into registered and overseas pension schemes.

(i) Any bank account details provided.

8.34 All of the information identified above is aimed at identifying assets and income against which enforcement action may be taken. For example, if the debtor has paid capital gains tax he or she must have sold an asset, and enforcement could be possible against the proceeds of sale.

Credit reference agencies

8.35 Credit reference agencies may be a useful provider of information in circumstances where little is known about the debtor's finances. Credit reference agencies hold information about an individual's credit history. When a person applies for credit — for example a bank account with an overdraft, a credit card or a mortgage — the individual will likely be required to give his or her consent to information provided in the course of that application being passed to a credit reference agency. Credit reference agencies are, therefore, a source of information about the financial institutions with which an individual has relationships and can provide information that may reveal assets held by the individual; for example, disclosure of a mortgage is likely to indicate that there is a valuable asset.

8.36 The CMS accesses information from credit reference agencies, which we understand to include including details of any bank accounts held by the debtor (and the balances of those accounts) and any mortgage liabilities, loans, credit cards and hire purchase agreements. We envisage that in the context of the enforcement of family financial orders, information obtained from credit reference agencies would, in most instances, facilitate further information orders being made direct to other information providers.

8.37 We consider that the information most pertinent to the enforcement of family financial orders will be:

(1) details of any bank or building society accounts held by the debtor;

(2) details of any mortgages granted by the debtor;

(3) details of any other secured loans for which the debtor is liable; and

(4) details of any hire-purchase agreements and other consumer credit agreements and the date which they are due to come to an end.

Banks and building societies

8.38 We suggest that the Family Court should have the power to order banks and building societies to provide details about any secured loan for which the debtor is liable and details for every account in which the debtor has an interest, namely:

(1) the account number and any other information needed to identify the account;

(2) the balance of the account on the date the bank or building society is served with the order; and

(3) if the account is held jointly with others, that fact and the name(s) of the other account holder(s). It is necessary for the court and the creditor to know the names of the other account holders to ascertain whether enforcement may be taken against the funds in the account and to notify the other account holders if any enforcement action is taken.

8.39 The requirement to disclose the balance on all accounts in which the debtor has an interest goes beyond that which is currently required of banks and building societies on receipt of an interim third party debt order. On such an application, the bank or building society is only required to disclose the balance of the account if there are insufficient funds in the account to meet the debt due. However, the situation is different on a general enforcement application, where we recommend the introduction of information requests and information orders. First, on a general enforcement application debtors are required to disclose the balance of all accounts in which they have an interest. If a debtor fails or refuses to disclose that information, we consider that the creditor and the court should be able to obtain it directly from the debtor’s bank or building society. There is no such requirement for a debtor to provide the same information on an application for a third party debt order. Secondly, on an application for a third party debt order the court and creditor need only know whether there are sufficient funds in the account to comply with the specific order applied for. By contrast, on a general enforcement application the court and creditor need a full picture of the debtor’s financial circumstances.

8.40 Requiring disclosure of the balance of a debtor’s accounts in the context of enforcing debts is not unprecedented. HMRC are able to ask banks and building societies to provide details of a debtor’s accounts, including the balance of those accounts, in order to recover unpaid tax that is due. Similarly, the CMS is able to obtain this information from banks and credit reference agencies.

Land registry

8.41 The information sought from Land Registry would be for an IOPN search to be conducted against the debtor’s name. As noted above, the search results may relate to property owned by a different individual of the same name. It may,

therefore, be necessary for the court to undertake further enquiries to determine whether the debtor has any interest in the property. For example the court may make an information order to a bank or credit reference agency to find out whether the debtor is liable for any mortgage over the property.

Pension providers

8.42 We propose that pension providers be required, by way of an information order, to disclose the existence of any pension arrangement held by the debtor with that provider, the number of the arrangement, the type of scheme (for example, occupational or personal or final salary), and the cash equivalent value. If it is considered that enforcement action may be taken against the debtor's pension by way of a pension sharing or pension attachment order then further information may be required to enable that order to be made.[34] We envisage that the creditor would need to provide some evidence that the debtor has a pension with a particular provider before the court would make an information order; it cannot be a purely speculative exercise.

When should information requests and orders be available?

8.43 We are of the view that information requests and orders should be available to the court on a general enforcement application. We do not recommend that a creditor who has not issued a general enforcement application should be able to ask the court to make an information request or information order. Although this is a departure from the scheme envisaged under the 2007 Act, we think this limitation ensures that information requests and orders are made only when necessary (that is, when a debtor has failed to provide the information that he or she is required to disclose), and minimises the risk of them being misused.

A workable system

8.44 It has been recognised for some time that accurate information is essential to successful enforcement, and that the debtor cannot always be relied upon to provide that information. Since 2003, the Government has been considering legislation to enable courts to obtain information directly from third parties for the purposes of enforcing debts due under court judgments or orders, and since July 2007, legislation has been in place to achieve this aim. However, due to a lack of resources, the legislation has not yet been brought into force. There seems to be little doubt that a system enabling the provision of information directly from third parties is desirable. The question is, is it feasible? We think that a system can be devised that is workable and proportionate.

8.45 We discuss below how the operation of information requests and information orders could work, based on discussions we have had with stakeholders and existing systems for sharing information. We think that the most efficient operation is likely to require different approaches for different information providers. When the Government considered the idea of DDOs[35] in 2003, there was a suggestion that the organisations subject to requests would, in some circumstances, make requests for information between each other before the

[34] As in financial remedy proceedings, further information could be obtained by using the Pension Inquiry Form (Form P).

information was returned to the court. For example, it was suggested that the court would send a request to DWP, which might then send a request to HMRC. Given the relatively low number of information requests and orders that we estimate may be made, we do not envisage the need for requests to be passed between third party organisations in this way.

8.46 We are aware that the system of information requests and orders as set out in the 2007 Act has not yet been implemented because of the cost of introducing the system. From consulting with the recommended information providers we are of the view that the recommendations that we make to establish systems for sharing information for the purposes of enforcing family financial orders can be achieved for a lower cost than previously considered. For example, the impact assessment that accompanied the 2011 Consultation estimated a cost of £500,000 to establish an information sharing system with HMRC,[36] whereas we consider the information could be shared via the existing system already established to obtain information for the enforcement of criminal fines. The relatively small numbers of information requests likely to be made to HMRC for the enforcement of family financial orders mean that they could be accommodated within the system. The cost of expanding that system will be negligible in comparison to the cost assumed in 2011 for establishing a new system.

8.47 Further, we are recommending that information requests and information orders be integrated into the general enforcement application. This means that there will not be separate applications requiring further court resources.[37] Instead, information requests and information orders should speed up the enforcement process and save court time. In addition, we do not recommend that information providers share information between themselves, which saves complication.

Information from Her Majesty's Revenue and Customs, Department for Work and Pensions and Land Registry

8.48 There is an existing system for information to be provided by HMRC to HMCTS in order to enable the enforcement of court fines by way of attachment of earnings orders.[38] The information enables HMCTS to consider whether an attachment of earnings order is appropriate and, if so, the information can facilitate the making of the order. HMCTS have been receiving information from HMRC for this purpose since June 2014. Over that period the average number of outstanding fines with ongoing enforcement action, where the last enforcement action was an

[35] See para 8.18 above.

[36] Ministry of Justice, *Impact Assessment for the consultation on whether to introduce Information requests and orders*, IA No: MOJ 78, 2011; see https://consult.justice.gov.uk/digital-communications/county_court_disputes/supporting_documents/Enf_IA_info_requests_and_orders.pdf (last visited 01 December 2016).

[37] This was a key cost identified in the 2011 impact assessment.

[38] Courts Act 2003, sch 5, part 3A. The Secretary of State, a Northern Ireland Department and HMRC are permitted to share social security and financial information respectively with HMCTS.

attachment of earnings order has increased from 11,000 to 68,000, an increase of over 500%. We think that the system in place for sharing this information could stand as a model for information requests from the Family Court.

8.49 HMCTS sends requests to HMRC from a central point once a month. HMCTS provides the name, address, date of birth and national insurance number for each individual about whom it seeks information. HMRC sends the relevant information back to that central point. HMRC confirms the name and address it holds for the individual, provides any relevant telephone numbers held, and if the individual is employed, it provides details of the individual's employer, the income the individual receives and the tax paid in the tax year to date. If the individual is self-employed, HMRC provides the individual's trading name and address, and the date of the last tax return filed. HMRC is able to provide information on employment or self-employment on 62% of the requests that are sent.

8.50 We consider that this system of sending requests from a central point and receiving information back to that central point would be a good model for information requests to facilitate the enforcement of family financial orders. A judge who makes such a request would send the details to the designated central point,[39] the requests received would be conveyed periodically from the central point to the relevant government department, and then the information that is provided would be disseminated back to the judge who made the original request. We have been told by HMRC that dealing with periodic requests coming from, and conveying information back to, a central point would be much more efficient than dealing with requests on impromptu bases from different courts.

8.51 HMCTS seeks information from HMRC on about 50,000 individuals each month. It is likely that the number of requests from the Family Court would be far lower.[40] Although the information that we recommend HMRC should provide under an information request from the Family Court is slightly different, it is similar in nature to the information that HMRC already provides to HMCTS and could form part of the same system. Conversations we have had with HMRC suggest that it could comfortably manage information requests from the Family Court.

8.52 We think a similar centralised system could be used to obtain information from DWP and Land Registry. A centralised system would mean that individual judges and courts would know exactly where to send their requests, which could then be collated and sent on at appropriate intervals. As the information being exchanged will be uniform in nature for each request, this strikes us as likely to be the most efficient system. Further, as for HMRC, it is likely that it will be easiest for DWP and Land Registry to share information through a central point.

Information from banks, building societies and pension providers

8.53 We do not think that sending information orders to banks, building societies and pension providers from a central point would necessarily have the same benefits as a centralised system for information requests. The recipients of information

[39] Where that central point, or those central points, would be are operational decisions on which we make no recommendations.

[40] We estimate that there are, on average, 4,200 applications to enforce family financial orders every year, see para 1.21 above, and not every enforcement application would result in an information request or information order being made.

orders will be varied and so there is less merit in grouping the orders before sending them on.

8.54 As to how the orders would be managed by the Family Court, it might be most efficient for each Family Court hearing centre or designated family judge area to have a nominated individual within that centre or area to whom judges send their requests and orders. That individual would then manage the sharing of information with the relevant third party. We do not make any recommendations on that detail of the operation, but note that judges will need to be certain of where they are to send requests and orders and of what needs to be provided in order to obtain the information that is sought.

8.55 Banks, building societies and pension providers will be familiar with responding to court orders that require disclosure of information; for example, banks and building societies have to provide disclosure when served with a third party debt order[41] and pension providers often have to provide information during financial remedy proceedings. Most will therefore already have systems in place for meeting such demands. For example, Santander UK told us they have a team dedicated to dealing with civil court orders.

Information from credit reference agencies

8.56 Information orders directed at credit reference agencies could be operated in the same way as suggested above for banks, building societies and pension providers. However, an alternative model is available. One leading credit reference agency explained to us the systems it has in place for sharing information with certain public bodies. Rather than responding to requests for information, the credit reference agency provides the public body with direct electronic access to an agreed set of data. Officials are given training on how to access the data and search for the information they require. For the enforcement of family financial orders this could involve a point of access for HMCTS, and the ability to find, for example, what mortgage liabilities the debtor has.

8.57 We think such a system could work well for the purposes of enabling enforcement of financial orders in the Family Court. An estimate of the costs of setting up such a system are a £10,000 to £15,000 set-up fee, depending on the number of users. In addition there would be the cost of training officials on how to use the system and then an individual fee per data enquiry, which is based on an estimate of 500 to 1,000[42] orders per year, is estimated to be £10 per enquiry.

When can an information order be refused?

8.58 The 2007 Act sets out the permitted reasons for failing to respond to an information order under the Act. Those to whom the order is directed may not respond where:

(1) they do not hold the information;

[41] Civil Procedure Rules, r 72.6.

[42] The estimate of the number of orders is calculated from assuming around 4,200 enforcement cases per year. The estimate of costs was provided by a leading credit reference agency.

(2) they are unable to ascertain whether the information is held because of the way in which the order identifies the debtor; or

(3) the disclosure of the information would involve unreasonable effort or expense.

8.59 We take the view that these reasons are legitimate and propose that they are adopted for the scheme which we are proposing.[43]

What can be done with the information?

8.60 The 2007 Act sets out the ways in which the court may use the information it has obtained, namely:

(1) to make another request or order;

(2) to provide the creditor with information about what enforcement action it would be appropriate to take to recover the debt;[44]

(3) to carry out functions in relation to any action taken by the creditor to recover the debt; and

(4) to disclose the information to another court where the creditor is taking action in that court.

8.61 In addition to the uses of the information set out at (1) to (4) above, disclosure of the information obtained is also be authorised if it takes place further to an enactment, court order or court proceedings, if the information is already lawfully in the public domain or if it has been disclosed in accordance with (yet to be made) regulations.

8.62 However, under the 2007 Act, information obtained from HMRC may be used only for the purposes of making another request or order unless consent is given by HMRC Commissioners for the information to be used in one of the other listed ways.[45] It was never envisaged that this consent would be given on a case-by-case basis, but rather that the Commissioners might agree to the information being used for the other purposes, perhaps once the detail was provided in regulations. If, pursuant to our recommendations, legislation clearly sets out the uses to which a court may put the information obtained, we do not think this extra layer of consent from HMRC should be required.

8.63 The information obtained under an information request or information order is invariably sensitive and confidential information. It is important, therefore, that limits are placed on how the court and the creditor may make use of that information. In respect of the court, we consider that the uses outlined in the 2007

[43] There is no obligation, by its very nature, to respond to a departmental information request. See Tribunals, Courts and Enforcement Act 2007, s 99(2), which states: "The recipient of the request *may* disclose to the relevant court any information (whether held by the department or on its behalf) that the recipient considers is necessary to comply with the request" (emphasis added). That said, we would expect Government departments to comply with such requests.

[44] In the Tribunals, Courts and Enforcement Act 2007 this does not mean disclosing the information obtained to the creditor.

[45] Tribunals, Courts and Enforcement Act 2007, s 101(7) and (8).

Act are appropriate. In addition, we think that in the context of a general enforcement application the court should be able to pass the information to both parties and use the information to make an enforcement order without the need for any further application by the creditor. We set out our conclusions on the use the creditor should be able to make of the information when we consider the issue of disclosure to the creditor generally.

8.64 The 2007 Act creates an offence of unauthorised disclosure, which applies to any person to whom information is disclosed. It is a criminal offence to use that information for any purpose other than that authorised by the Act. The penalty for making an unauthorised disclosure is up to two years' imprisonment, a fine or both.[46] We are of the view that this offence should apply to the use of information by officials, but not to the use of information by creditors. We explain the reason for this distinction below when we consider the issue of onward disclosure of information to the creditor.

Costs

8.65 There is an issue as to who bears the costs of an information request or information order. We do not make any recommendations on this issue, but consider here how it could be addressed. The relevant costs are the court's costs of making the request or order and the costs of the information provider in responding.

8.66 We envisage that costs incurred by other government departments in providing information would be met, in the first instance, by a periodic fee being paid by HMCTS.[47] For information orders, the system could enable the information provider to charge a fee, prescribed in the rules, for responding to each individual order. For certain information providers it might be possible to recover that fee directly from the debtor's assets controlled by that provider; for example, a bank might be able to recover the fee from the debtor's account and a pension provider from the debtor's pension fund.[48]

8.67 If the costs are ultimately recouped from the parties, then it seems most probable that these will be met initially by the creditor, either by the fee for the general enforcement application being increased or by a separate fee being charged on the making of an information request or information order. However, the cost can ultimately be recovered from the debtor.[49]

DISCLOSURE OF INFORMATION TO THE CREDITOR

8.68 We asked in the Consultation Paper whether, in the context of enforcing family financial orders, information obtained by way of an information request or information order should be disclosed to the creditor. Such a step would go

[46] Tribunals, Courts and Enforcement Act 2007, s 102.

[47] This is how the information sharing between HMRC and HMCTS for the purposes of enforcing criminal fines is currently financed.

[48] For example, a bank may deduct a sum of £55 from the balance of the relevant account for administrative expenses in complying with an interim third party debt order: Senior Courts Act 1981, s 40A.

[49] We are of the view that the cost should be recovered from the debtor in all cases, unless the creditor has acted unreasonably in taking enforcement action.

beyond the scheme of the 2007 Act, which does not provide for onward disclosure from the court to the creditor. We discussed in the paper why, in family proceedings, it may be justified for the creditor to have the information. On the whole, the responses that we received were in favour of the information being disclosed to the creditor.

Consultation responses

8.69 There were three reasons given by consultees for opposing onward disclosure to the creditor. Clarion Solicitors[50] considered that in striking the balance between the debtor's right to privacy and the creditor's right to enforce the order, the balance comes down on "leaving the information in the hands of the court … provided the court has sufficient resources to deal with that information proactively". The member of the public who objected said that the greater level of acrimony in family proceedings meant that there was a greater risk that the information would be "leaked" to third parties, including the parties' children, leading to a risk of damaging family relationships. Dr Wendy Kennett's[51] reasoning was quite different. She said that disclosure should be to the court rather than the creditor to create a more efficient "automated and routine" system, though she acknowledged that at present the creditor is "the main decision-maker within the enforcement system".

8.70 A number of consultees who supported onward disclosure thought that, in the context of a defaulting debtor, any balancing of the debtor's right to privacy and the creditor's rights to enforce payment clearly fell on the side of the creditor. In addition, International Family Law Group noted that in family financial proceedings, where full and frank financial disclosure is required, "any arguments about violations of privacy to the debtor lose much (if not all) of their weight …". The Justices' Clerks' Society also noted the general "expectation of full and frank disclosure" in the Family Court. The Society suggested that if the debtor objected to disclosure to the creditor then the matter could be determined by the court having considered the debtor's representations.

8.71 Several consultees[52] thought that disclosure should be made to the creditor because this places the creditor in an informed position to make decisions, or at least make representations to the court, as to whether and how to enforce. As noted above, the Family Law Bar Association and Janet Bazley QC thought that to deny the creditor this opportunity may be a breach of the creditor's Article 6 rights. District Judge Robinson considered that, unless there were specific enforcement officers to make use of the information, disclosure only to the court would "not assist much and add to the [court's] burden". He thought that disclosure should be "to the parties direct". Resolution supported disclosure to the creditor "on a confidential basis".

[50] A law firm with a specialist family law team.

[51] An academic at Cardiff University.

[52] The Family Law Bar Association, the Law Society, Janet Bazley QC, the Justices' Clerks' Society and International Family Law Group.

Discussion and recommendations

8.72 We have formed the view that information obtained by a court under an information request or information order should be disclosed to the creditor (and to the debtor, who must be able to verify its accuracy), unless the court is satisfied there is good reason for it not to be disclosed. This is a departure from the scheme under the 2007 Act and we do not make the recommendation lightly. We acknowledge that the information that will be obtained will be of a personal and confidential nature and that some information may be considered particularly sensitive.

8.73 Creditors should only receive information that is relevant to and necessary for their general enforcement application. However, we consider that in most cases this will be true of all the information that has been obtained under an information request or information order. The recommendations that we make limit the information that may be obtained to what we have concluded to be relevant and necessary.

A fair hearing

8.74 In principle, we do not think it is right for information to be before the court on a general enforcement application and not also be disclosed to the parties. Two consultees suggested that such a result may breach the creditor's rights under Article 6 of the ECHR.[53] A right to "adversarial proceedings" has been identified as a key strand of Article 6. The right to adversarial proceedings includes "the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed … with a view to influencing the court's decision".[54] It is a fundamental legal principle that all parties should have the opportunity to consider all information that is before the court. Information obtained under an information request or information order will likely influence the court as to whether to make an enforcement order, what kind of order, and on what terms. Withholding that information from the creditor could lead to an unfair hearing.[55]

An efficient system

8.75 Beyond the point of principle, it is neither efficient nor practical for the information to be withheld from the creditor. If the information is not disclosed to creditors, it will be the sole responsibility of the court to marshal and decipher that information. This causes two problems: first, it is an extra burden on the court, and second, it means there is no opportunity for creditors to supplement the information obtained with any extra information they may have as a result of their

[53] The execution of judgments is within the scope of Article 6: *Hornsby v Greece* App No 18357/91).

[54] *Ruiz-Mateos v Spain* (1993) 6 EHRR 505. This definition of adversarial proceedings has been cited in many subsequent cases: see *McMichael v the United Kingdom* (1995) 20 EHRR 205; *Vermeulen v. Belgium* [1996] ECHR 7 (App No 19075/91)*; Lobo Machado v Portugal* (1996) 23 EHRR 79 (App No 15764/89); *Kress v France* (Grand Chamber decision) ECHR 2001-VI.

[55] In this respect, the context of the general enforcement application is perhaps different from the scheme provided for under the Tribunals, Courts and Enforcement Act 2007. Under the 2007 Act, the court obtaining the information is doing so purely to guide the creditor as to what enforcement application to make; it is not determining any enforcement application.

relationship with the debtor. The information obtained may mean something to the creditor that it would not mean to the court. Further, it is difficult to conceive how the court would make and settle an enforcement order without disclosing to the creditor at least some of the information on which the order is based. For example, would the name of the debtor's employer be redacted from the creditor's copy of the attachment of earnings order, or the details of the property redacted on a charging order? It would be unusual in the extreme for the creditor not to know the details of the order made for his or her benefit.

The nature of the proceedings

8.76 Family financial proceedings demand full financial disclosure from both parties; full and frank disclosure is essential in enabling the court to perform its statutory exercise of determining a fair outcome. As a result the creditor and debtor in the context of family enforcement proceedings will already have a substantial degree of knowledge about each other's respective financial positions. This is different from other civil enforcement proceedings, where it is much less likely that the parties will have had disclosure of each other's financial circumstances.

8.77 On a general enforcement application debtors will first be given the opportunity to provide the required disclosure themselves. Only if the debtor fails to make the required disclosure will information requests and information orders be considered. That means the debtor will have the opportunity to make representations about whether the information request or information order should be made, and it means there will be an opportunity for the debtor to make the court aware of any reason why the information obtained should not be disclosed to the creditor.

8.78 We recommend that the court be permitted to disclose the information to the creditor, not that the court must do so; if, therefore, the court were to consider that there was a good reason for the information not to be disclosed then it may decide to withhold the information. If the debtor asks for the court to withhold the information, the court will have to weigh the risk of the creditor abusing or making unauthorised use of the information and the harm that may result from that misuse, against the harm that is caused in not disclosing the information. Our recommendations are based on disclosure to the creditor being the default position; if the information is not so disclosed then the court will have to make the best use of the information to facilitate enforcement without disclosing it to the creditor.

8.79 **We recommend that the court be authorised to disclose to parties the information obtained under an information request or information order.**

PREVENTING WRONGFUL USE OF THE INFORMATION

8.80 There is in all family financial proceedings and civil proceedings generally a duty on the parties not to make any use of a document disclosed for purposes beyond those of the proceedings for which it has been disclosed.[56] In family financial proceedings this duty is embodied in an implied undertaking, which prevents "the use of documents for any collateral or ulterior use not reasonably necessary for

[56] The limitation on using the document also applies to the information contained within the document.

the proper conduct of the action".[57] In other civil proceedings, a very similar duty is imposed by the Civil Procedure Rules.[58] Breach of the implied undertaking amounts to a contempt of court.[59]

8.81 The implied undertaking in family financial proceedings applies to any document disclosed by either party under compulsion.[60] By analogy, we consider that the same undertaking would apply to information obtained under an information request or information order. However, given that the information, in these circumstances, will have been provided by a third party without the debtor's consent, there is an argument that more explicit provisions are required to prevent any wrongful use of the information by the creditor.

8.82 As noted above, the 2007 Act creates a criminal offence of unauthorised disclosure. However, as the 2007 Act does not provide for the onward disclosure of information to the creditor, this offence would not have been intended to apply to litigants. Instead, it would have been intended to apply to court officials who would handle the information received. We are of the view that in the context of enforcement of family financial orders a different approach is warranted, although we note that HMRC take a different view and would prefer there to be criminal consequences for wrongful use of information by creditors. We acknowledge that criminal sanctions are the usual mechanism for protecting information that is disclosed from HMRC.[61]

8.83 We think making unauthorised disclosure by a creditor a criminal offence is disproportionate and would mean that a very different regime would apply to wrongful disclosure in this context than to the wrongful disclosure of information at any other stage of financial remedy proceedings. We consider that the wrongful disclosure of information obtained under an information request or information order should, like a breach of the implied undertaking, be a contempt of court. However, to ensure that creditors are fully aware of how they may and may not use the information obtained, and to ensure that sanctions can automatically follow if creditors misuse the information, we are of the view that the court should order creditors only to use the information in a certain way. The order should contain a penal notice warning creditors that they may face imprisonment if they make unauthorised use of the information.[62]

8.84 In giving the court power to make such an order, the legislation should set out how the creditor may use the information obtained. We consider that the only authorised use of the information should be to use the information to further the general enforcement proceedings in which the information has been obtained or to initiate or further any other enforcement proceedings in respect of enforcing the same debt or debts. In some circumstances it may be appropriate for the

[57] Matthews P and Hodge M, *Disclosure* (2012) para 19.18.

[58] Civil Procedure Rules 1998, r 31.22.

[59] *Appleton v Gallagher* [2015] EWHC 2689 (Fam), [2016] EMLR 3.

[60] *Clibbery v Allen (No 2)* [2002] EWCA Civ 45, [2002] 1 FLR 565.

[61] See for example section 19 of the Commissioners for Revenue and Customs Act 2005.

[62] We envisage that committal proceedings for unauthorised use would be brought pursuant to Part 37 of the Family Procedure Rules.

creditor to make use of the information to enforce a different debt that arises under the same financial order, for example, if those proceedings are ongoing at the same time or if they are started soon after the information is obtained. However, we think the court's permission should be required to make such use of the information. The requirement for permission should ensure that the information is not misused but that also efficient use can be made of the information in appropriate circumstances.

RECOMMENDATIONS

8.85 We make the following recommendations to establish a system of information requests and information orders for the enforcement of family financial orders.

8.86 **We recommend:**

(1) Information requests and information orders, as provided for in the Tribunal Courts and Enforcement Act 2007, should be brought into force for the enforcement of family financial orders.

(2) The Family Court should have the power to make an information request or information order on a general enforcement application.

(3) The Family Court should be able to direct information requests and information orders to the following bodies:

(a) Department for Work and Pensions;

(b) Her Majesty's Revenue and Customs;

(c) Land Registry;

(d) credit reference agencies;

(e) banks and building societies; and

(f) pension providers.

(4) The categories of information that the Family Court may order or request should be prescribed in regulations.

(5) An information provider should be able to decline to comply with an information order in circumstances where:

(a) the body in question does not hold the relevant information;

(b) the body in question is unable to ascertain whether it holds the information because of the way the order identifies the debtor; or

(c) where disclosure of the information would involve unreasonable effort or expense.

(6) The court may disclose the information obtained to the parties in the proceedings, and in addition may use the information in the following ways:

(a) to make another request or order;

(b) to provide the creditor with information about what enforcement action it would be appropriate to take to recover the debt;

(c) to carry out functions in relation to any action taken by the creditor to recover the debt; and

(d) to disclose the information to another court where the creditor is taking action in that court.

(7) The offences in the Tribunal Courts and Enforcement Act 2007 be retained for the unauthorised use by officials of information obtained under an information request or information order.

(8) The court should have the power to order that creditors may only use the information obtained under an information request or information order for certain authorised purposes; a penal notice should be attached to the order warning creditors that they may face imprisonment if they use the information for any other purpose.

(9) That parties be authorised to use information obtained under an information request or information order:

(a) for the purposes of furthering the proceedings in which the information request or information order was made;

(b) for the purposes of initiating or furthering other proceedings to enforce the same debt or debts that were the subject of the proceedings in which the information request or information order was made; and

(c) for any other purpose, with the permission of the court.

TRACKING THE DEBTOR'S EMPLOYMENT TO REDIRECT ATTACHMENT OF EARNINGS ORDERS

Introduction

8.87 The 2007 Act introduced the concept of "tracking", which is a specific form of information request directed to HMRC for the purpose of redirecting an attachment of earnings order when a debtor changes employment. Section 92 of the 2007 Act[63] enables the court to request disclosure of whether the debtor has a current employer and, if the debtor is currently employed, the employer's name and address. A request may be made if an attachment of earnings order lapses as a result of the debtor changing employment, in circumstances where the debtor or the debtor's employer does not provide the required information for the order to be redirected. However, section 92 of the 2007 Act has not been brought into force.

[63] This section inserts new sections 15A to 15D into the Attachment of Earnings Act 1971.

8.88 Under the current law, the debtor is under an obligation to inform the court of any change in his or her employment.[64] A failure to do so can result in a fine or imprisonment, but we noted in the Consultation Paper that such sanctions are rarely applied in practice.[65] If the debtor does not comply then it is the creditor who will have to discover information about the debtor's new employment to ensure that the attachment of earnings order can be redirected and payments continue to be received.

8.89 In the Consultation Paper we asked whether the tracking provisions under section 92 of the 2007 Act should be brought into force for family financial orders. We consider in this section the responses we received and explain our recommendations in relation to tracking. Some points will not, however, be covered in detail since the issues raised and the processes we envisage being put in place are the same as for information requests and orders, discussed earlier in this chapter.

Consultation responses

8.90 There was unanimous support from consultees on the question of bringing section 92 of the 2007 Act into force. It was suggested that section 92 would make dealing with lapsed attachment of earnings orders quicker and easier. Money Advice Trust also commented that, if a debtor is in financial difficulties and also dealing with the stress of a new job, tracking would remove the additional burden of notifying the court, a requirement he or she could inadvertently overlook. While we agree that tracking will enable the attachment of earnings order to continue to operate in situations where the debtor has innocently failed to notify the court of his or her new employment, we do not consider that it should be a replacement for the obligation on the debtor and his or her employer to provide the necessary notifications to the court – those obligations should remain.

8.91 Tracking would be essential to enable an automatic redirection of the attachment of earnings order to the debtor's new employer, an idea that we explore below. Some consultees raised the possibility of the debtor objecting to tracking where it could have a negative impact on the debtor's employment. However, tracking will not of itself make the debtor's new employer aware of the attachment of earnings order. The debtor's employer would only become aware of the order once the information obtained by tracking had been used. This concern is, therefore, better addressed in the discussion on automatic redirection.

[64] Attachment of Earnings Act 1971, ss 15 and 23.

[65] The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219, 79.

Discussion

8.92 Although tracking is very similar to information requests and orders, the purpose is to ensure the effectiveness of an existing enforcement order rather than to choose an appropriate method of enforcement. An application to track the debtor's employment must therefore be a discrete application available to any creditor who has the benefit of an attachment of earnings order who has stopped receiving payments under that order.[66] In circumstances where payments are monitored by the court and the court would currently take steps to find out information about the debtor's change of employment, tracking will also be available to the court of its own motion.

8.93 The different purpose of tracking also means that, unlike information requests and orders, there is no need for any information to be disclosed by HMRC beyond that information envisaged by the 2007 Act. Establishing a new employer's name and address is all that is required to redirect an attachment of earnings order. The tracking provisions could therefore be brought into force with no amendments to the 2007 Act, although the regulations providing the detail of the system would still need to be made. From an operational point of view, any tracking requests could be submitted to HMRC through the same central point as information requests.

8.94 We have considered whether there should be any further criteria to determine when a tracking application can be made. We are conscious that requests to HMRC might be unsuccessful if a debtor takes a short break between jobs and we do not envisage creditors making numerous repeat applications to HMRC to check whether or not the debtor has obtained new employment. As a matter of practice, careful thought would need to be given by both the creditor and court as to when a tracking application is made and whether or not to renew that application at a later date if the original application is unfruitful.

8.95 We consider that both the costs of obtaining tracking information, and the disclosure to the creditor of this information, raise the same points as discussed in relation to information requests and orders. We therefore adopt the same approach for tracking as we have recommended for information requests and orders.[67] We do, however, note that section 92 of the 2007 Act creates an offence of unauthorised use or disclosure. Court rules or the relevant court order will therefore need to authorise specifically onward transmission of the tracking information to the creditor.

8.96 **We recommend that section 92 of the Tribunals, Courts and Enforcement Act 2007 be brought into force for the purposes of enforcing family financial orders.**

[66] This is unlike our recommendation in respect of information requests and orders which we recommend be available only on the general enforcement application. See our recommendations at Chapter 8.

[67] See paras 8.68 to 8.84 above.

8.97 **We recommend that the court be authorised to disclose any information obtained by way of "tracking" to the creditor.**

AUTOMATIC REDIRECTION OF ATTACHMENT OF EARNINGS ORDERS

8.98 At present, an attachment of earnings order will lapse when the debtor changes his or her employment unless and until the court makes a further order directed to the new employer.[68] This further order clearly requires the court to have the details of the new employer. The debtor and any new employer with knowledge of the attachment of earnings order are under an obligation to provide these details to the court,[69] but they could be obtained even without the debtor's co-operation if our recommendations on tracking are implemented.[70] Where the information is available, the court has a general discretion as to whether or not to redirect the attachment of earnings order made previously and, if it chooses to do so, the court can also vary that order of its own motion.[71]

8.99 We discussed in the Consultation Paper the possibility that the court's discretion to redirect the order could instead be an obligation and we referenced the rule in Australia that the court *must* issue a notice naming the new employer.[72] This rule aims to ensure that the creditor continues to receive payments due by reducing the cost and delay of redirecting an order. We asked for consultees' views on whether automatic redirection of an attachment of earnings order was desirable and practicable when a debtor changes employment.

Consultation responses

8.100 The majority of consultees were in favour of automatic redirection and expressed the view that, accompanied by a system of tracking, automatic redirection was practicable as the court would have the information necessary to re-direct the order. District Judge Robinson noted that it was "very dispiriting" for a creditor (who has the benefit of an attachment of earnings order) to deal with a debtor changing jobs. The International Family Law Group ("IFLG") referenced the time and cost that creditors must "endure when debtors change employment".

[68] Attachment of Earnings Act 1971, s 9.

[69] While an attachment of earnings order is in force a debtor is required to notify the court of every occasion on which he or she leaves employment or becomes employed or re-employed, and any person who becomes the debtor's employer and has knowledge of the attachment of earnings order and the court that made it is also required to notify the court of the debtor's employment: Attachment of Earnings Act 1971, s 15.

[70] See paras 8.87 to 8.97 above.

[71] Attachment of Earnings Act 1971, s 9 and Family Procedure Rules, r 36.16(3).

[72] The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219, 3.100.

8.101 One consultee[73] thought that automatic redirection of orders would be "time-consuming and costly to implement". The Birmingham Law Society[74] proposed that HMRC could "administer or monitor the position" and so potentially envisaged HMRC taking responsibility for the automatic redirection of attachment of earnings orders. As we explain in more detail below, while HMRC taking responsibility may seem to be an attractive proposal, we do not adopt this approach in our recommendations.

8.102 Three consultees[75] suggested that debtors should have the opportunity to request that the order be suspended where it would otherwise be re-directed to a new employer. This opportunity would offer protection where automatic redirection was "unnecessary or undesirable". Money Advice Trust pointed out that there is little advantage in attaching income where that income source would be under threat if the employer becomes aware of the order.

Discussion

8.103 We consider that an obligation to redirect an attachment of earnings order automatically, where the court has the necessary information, would be beneficial. The debtor ought to be providing updated details in order for this to happen under the current law in any event. Automatic redirection also prevents an existing enforcement order being frustrated by a change of employment. We understand from consultees that the feeling of "starting afresh" can be particularly disheartening for creditors. Creditors are likely to feel even more frustrated if faced with a debtor who changes employment relatively frequently.

8.104 A duty to redirect attachment of earnings orders should result in a more efficient system that can respond more quickly to a change of employment by the debtor. For automatic redirection to operate effectively, it should be supported by tracking in appropriate cases. The flowchart at Figure 6 of Appendix B shows how we envisage that these powers would operate, as well as setting out the process for automatic redirection following disclosure by the debtor or the debtor's employer.

8.105 As the flowchart shows, tracking and therefore the role of HMRC will be essential in some cases. However, there will be cases where the debtor provides the details of his or her new employer voluntarily and HMRC has no involvement in the redirection. We consider it preferable for the administration of court orders to remain within the court, both in principle and in light of the resource implications and likely objections from HMRC if asked to administer attachment of earnings orders. We do not envisage HMRC taking any responsibility for the automatic redirection of orders. Its role will be limited to responding to tracking requests from the court.

[73] A member of the public.

[74] An association representing legal practitioners from Birmingham and the surrounding area.

[75] The Money Advice Trust, the Family Law Bar Association and Janet Bazley QC.

8.106 We have carefully considered the proposal for a safeguard allowing the debtor to object to automatic redirection. We have been told that some debtors are concerned that the employer may form a negative view of the debtor as a result of such an order. We also understand that for some roles, for example those within security, the fact of non-compliance with a court order may render an individual unsuitable for employment.[76]

8.107 If a debtor, who is subject to an attachment of earnings order, complies with the obligation to inform the court of any change in his or her employment then the debtor can at the same time ask the court to suspend the order and not re-direct the order to the debtor's new employer. The court has the power to vary an order when a debtor changes employer and we do not propose to change that power. The court could, upon receiving the debtor's request, insert terms that provide for the order to be suspended unless there is further default by the debtor. If the debtor does not comply with the obligation to inform the court of any change in his or her employment, then we recommend that the court may, following notification from the creditor that he or she has stopped receiving payments under the existing attachment of earnings order, make a request to HMRC for information about any new employment that the debtor may have. In those circumstances, on receipt of information from HMRC, the court may re-direct the order without the debtor having an opportunity to ask for it to be suspended. The procedure that we recommend is shown in Figure 6 of Appendix B.

8.108 We think this recommended procedure strikes the right balance between protecting the interests of the debtor (and creditor, who will not benefit from the debtor's employment being affected) and ensuring that an attachment of earnings order remains effective where the debtor changes employment. The debtor should provide the necessary information to re-direct the order him or herself, in which case the debtor will have the opportunity to ask the court to suspend the order. We consider that the original order should make it very clear to debtors that they have an obligation to inform the court on any change of employment, and that if they fail to do so, the court may obtain information from HMRC and automatically re-direct the order.

8.109 **We recommend that the court must redirect an attachment of earnings order to a debtor's new employer where it has the information to do so, unless the court is satisfied upon an application by the debtor that such a redirection is not necessary or appropriate.**

[76] https://www.citizensadvice.org.uk/debt-and-money/action-your-creditor-can-take/creditor-takes-money-from-your-wages/#h-how-an-attachment-of-earnings-order-affects-your-job (last visited 01 December 2016).

NATIONAL REGISTER OF ATTACHMENT OF EARNINGS

8.110 In the Consultation Paper we explained that an enforcement review conducted by the Government in 1998 proposed a national record of attachment of earnings orders, but that this proposal had not been pursued.[77] We invited views from consultees on the idea of a national register of attachment of earnings orders.[78]

8.111 Consultees' views were almost evenly split on this point, although those who responded positively were not particularly enthusiastic in their support. A national register was not considered to be a high priority for reform and many consultees felt the time and cost of setting up this register would outweigh the potential benefits. One member of the public had concerns about privacy and Money Advice Trust thought that there was no justification for limiting such a national register to attachment of earnings orders.

8.112 The potential benefits of a national register of attachment of earnings order are that:

(1) creditors would know if the debtor is employed and therefore susceptible to an attachment of earnings order; and

(2) creditors would know whether there were already attachment of earnings orders in operation against the debtor, which may mean that another attachment of earnings order may not be very effective.

8.113 These benefits of a national register of attachment of earnings orders are less persuasive in the context of family financial orders. Our proposals for information requests and orders would enable a creditor to make a general enforcement application and find out if the debtor was employed. Further, the enforcement of "maintenance" orders[79] is given priority over other debts where multiple attachment of earnings orders operate against the same earnings. A family creditor is, therefore, in a favourable position and need not be concerned about other attachment of earnings orders that relate to non-family debts. It is not clear, therefore, whether the additional information that a national register could provide would be of particular assistance to family creditors.

8.114 Upon considering the consultation responses, we do not propose to pursue this idea any further.

[77] The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219, 3.102.

[78] There is already a national register of judgments, orders and fines, which is maintained by Registry Trust Limited and provides details of unpaid civil judgments and orders. This does not include family orders.

[79] As defined by schedule 1 of the Attachment of Earnings Act 1971.

PART 3
MORE OPTIONS FOR ENFORCEMENT

CHAPTER 9
PENSIONS

INTRODUCTION

9.1 The Family Court has existing powers to make orders against pension assets within financial remedy proceedings on divorce or the dissolution of a civil partnership.[1] Such orders take two forms.

(1) Pension sharing orders: one party's pension fund is divided and a proportion of it is moved into a new pension fund belonging to the other party.

(2) Pension attachment orders: the pension fund administrator must pay a fixed proportion of any capital or income payment due to the pension holder directly to the other party when the payment to the pension holder is made. The court has a power, as part of a pension attachment order, to require a party to exercise his or her right of commutation under the relevant pension arrangement.

In this chapter we use the term "pension orders" as a collective term for pension sharing orders and pension attachment orders.

9.2 Pension attachment orders have been available in financial remedy proceedings since 1 July 1996 and pension sharing has been available since December 2000.[2] In this section we discuss whether these powers should now also be used for the purposes of enforcement. We conclude that it should be possible to enforce against pension funds by means of pension sharing orders and pension attachment orders. We are of the view that it should be possible to enforce against pensions to recover the debt due under any family financial order, even if the court could not have made a pension order in the original financial proceedings.

9.3 We consider the restrictions that should apply to the exercise of the court's powers against pensions on enforcement which, we conclude, should be different from the restrictions currently applied when the court exercises its powers against pensions at the time of making a financial order. We also address the changes to

[1] Matrimonial Causes Act 1973, ss 24B(1) and 25B(4); Civil Partnership Act 2004, sch 5, paras 15 and 25(2). In some cases pension assets will be taken into account by offsetting, whereby one party is awarded a greater share of the non-pension assets on the basis that the other party's pension assets are left untouched.

[2] Pensions Act 1995 (Commencement) (No 5) Order 1996, SI 1996 No 1675, article 4; Welfare Reform and Pensions Act 1999 (Commencement No 5) Order 2000, SI 2000 No 1116, article 2; Welfare Reform and Pensions Act 1999, s 85(3)(a).

the law that came into force in April 2015 increasing the flexibility to withdraw pension funds.

9.4 Finally, we consider an extension to the court's powers to allow the court to implement an agreement or enforce an order made in the context of a divorce in a foreign jurisdiction but in respect of a pension fund situated in England and Wales.

IS THERE A NEED FOR NEW POWERS TO ENABLE ENFORCEMENT AGAINST PENSIONS?

9.5 Currently, it is unlikely that a creditor could enforce a family financial order by recovering funds from a debtor's pension. The court can only make pension sharing and pension attachment orders under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004,[3] so a creditor would have to make a new application under one of those Acts. However, the terms of any original family financial order are likely to prevent either party having the right to bring any future claim under either of those Acts and are likely specifically to prevent either party from bringing a future claim against the other's pension. Future claims are prevented because it is usual for the court's powers to make further orders under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004, whichever is the relevant act, to be dismissed at the time that the original order is made.[4] Without a specific power to make orders against pensions at the time of enforcement, therefore, it is likely that the debtor's pension assets will be shielded from enforcement action. This inability to enforce against a pension is undesirable because a pension is often one of the most significant assets held by a party. We therefore proposed in our Consultation Paper that the Family Court should have specific powers to enforce against pension assets.

9.6 In response to our comments in the Consultation Paper about the inability to make pension orders to enforce family financial orders, two consultees referred us to the case of *Blight v Brewster*.[5] This is a civil case (a decision of Gabriel Moss QC sitting as a deputy judge of the Chancery division) and may not be familiar to many family law practitioners. In that case, the court found a way to

[3] *Goyal v Goyal* [2016] EWCA Civ 792, [2016] 4 WLR 140. The Court of Appeal overturned a mandatory injunction directing the husband to transfer or assign his pension policy, situated in India, to the wife and pay all the income from it to her. The judge had made the order relying on the wide injunctive powers under section 37(1) of the Senior Courts Act 1981. The Court of Appeal held that there was no jurisdiction outside of the Matrimonial Causes Act 1973 for the judge to make the order that he did.

[4] However, the court retains a power to make a pension sharing order or pension attachment order for a lump sum, on an application to vary under section 31 of the Matrimonial Causes Act 1973. A pension attachment order for income can be varied under this section. For the equivalent provisions under the Civil Partnership Act 2004, see sch 5, part 11.

[5] [2012] EWHC 165 (Ch), [2012] 1 WLR 2841.

enforce a debt due under a court order against funds in the debtor's pension. The court ordered the debtor to elect to draw down a lump sum from his pension,[6] with authorisation for the creditor's solicitor to make that election if the debtor failed to do so as ordered.[7] This order created a debt owed by the pension fund to the debtor that could then be subject to a third party debt order. In appropriate cases, therefore, there are existing methods to require the debtor to take a lump sum from his or her pension and ensure that this is paid to the creditor.

9.7 We encourage practitioners and the judiciary to promote and share innovative ideas as to how existing powers can be used regardless of the implementation of any of our recommendations. However, despite the potential for creative use of existing methods of enforcement, we think there are advantages in giving the court the power to make pension orders, which can be made directly against a debtor's pension fund for the purposes of enforcement. First, a pension sharing order enables the creditor to enforce against pension assets before the debtor reaches retirement age. This means creditors can secure the funds they are owed at an earlier stage. Further, where the creditor is older than the debtor the creditor will be able to draw a lump sum or receive an income from his or her share of the pension at an earlier time than the debtor would have been able to access those funds. Secondly, a pension attachment order for the purposes of enforcement will avoid the artificial two-step approach employed in *Blight v Brewster*, and should be more efficient.

9.8 To ensure that pensions are not beyond the reach of enforcement, we therefore consider that specific powers against pensions should be made available to the court in family enforcement proceedings.

9.9 In recommending that orders may be made against a debtor's pension in enforcement proceedings, we are aware that a pension may be the only significant asset that a debtor has available. It might be said that a pension has a special character, in comparison to the debtor's other assets, in that it consists of funds that the debtor has earmarked, and may need, for his or her retirement. The particular nature of pensions invites careful consideration of whether to allow enforcement against them. However, creditors can also face significant financial hardship as a result of non-payment of family financial orders and so we take the view that, as a general principle, the possibility of enforcement against pension assets is necessary.

9.10 The Court of Appeal has recently confirmed that although pensions are a protected class of asset in the context of insolvency, that same protection does not exist prior to a debtor becoming bankrupt. The court held that a pension

[6] The court made use of its wide powers to grant an injunction under section 37(1) of the Senior Courts Act 1981; the debtor was ordered to draw down a lump sum.

[7] The court was clear that it was not assigning the right to make the election, simply authorising another party to act on the debtor's behalf.

entitlement in respect of which a bankrupt has a present right to draw income but has not elected to exercise that right cannot be considered as part of the bankrupt's income, and the trustee in bankruptcy cannot exercise the right to draw income on the bankrupt's behalf. However, the court noted the decision of *Blight v Brewster* and said that enforcement prior to bankruptcy was a different matter. Although the court did not rule on the correctness of *Blight v Brewster*, it was assumed it was correct. [8]

ENFORCING AGAINST PENSIONS – THE GENERAL PRINCIPLE

Responses to consultation

9.11 In the Consultation Paper we sought views on whether the court should have powers to make pension sharing and pension attachment orders at the time of enforcement and on the restrictions, if any, that should apply to such powers.

9.12 There was unanimous support amongst consultees for the principle of extending the court's powers so that pension orders could be made in enforcement proceedings.

9.13 The reasons given by consultees in support of reform were, in summary:

(1) pensions are often one of the, if not the most, valuable assets in family financial proceedings;

(2) pensions are likely to remain intact even if the debtor has been reckless with capital and income available to him or her;

(3) some parties demonstrate a particularly defensive stance towards their pensions: that is, that they often wish to avoid any redistribution of their pension assets to the other party. This attitude may encourage more voluntary compliance with family orders by otherwise reluctant debtors if they believe their pension funds to be vulnerable on enforcement proceedings; and

(4) a debtor has failed to pay what is due under a court order and so if there are assets available these should be open to claims by the creditor.

DISCUSSION AND RECOMMENDATIONS

9.14 In the Consultation Paper we discussed, but ultimately discounted, the possibility of introducing new powers that would permit the removal at any time of cash lump sums from a pension fund to be paid to the creditor for the purposes of enforcement. It remains our position that we do not intend to introduce new orders against pensions, but to make greater use of the orders that exist by

[8] *Horton v Henry* [2016] EWCA Civ 989, [2016] Pens LR 311.

enabling them to be used in family enforcement proceedings. We think that to allow any other deductions from the debtor's pension would not be consistent with the legal structure and treatment of pensions. In this section we explain our recommendations in more detail.

A new method of enforcement

9.15 A pension sharing order on enforcement will, in the same way as happens on the making of a financial remedy order, transfer a specified percentage of a debtor's pension fund to a new fund in the creditor's name. The new fund can be managed by the creditor and accessed upon his or her own retirement. A pension attachment order will, again as happens at the time of a financial remedy order, give the creditor the right to receive, directly from the pension scheme, a share of any lump sum or income payments that are paid to the debtor from the scheme. In both cases, the figures used in the pension order will be calculated from the size of the debt owed by the debtor and the proportion of the pension fund, or any payments made from it, that the creditor requires to satisfy that debt.

9.16 There are some potential difficulties in making pension sharing orders for the purposes of enforcement. It will not necessarily be straightforward to calculate what pension share the creditor needs in order to satisfy the debt that is owed. While pension schemes do produce cash equivalent values, these cannot always be relied on.[9] Cash equivalent values may be particularly unreliable for certain types of fund, for example, defined benefit schemes such as a final salary or career average schemes.

9.17 There is a risk that the debtor may lose more than the creditor benefits from the enforcement action. The debtor may suffer a greater loss if the debtor's pension is under a defined benefit scheme. In those circumstances expert evidence would probably be required to calculate the benefits and losses to the creditor and debtor respectively, to enable the court to make a fair pension order. This scenario can already occur in pension sharing within financial remedy proceedings and we consider that any extra loss that is suffered by the debtor may be justified by the fact that it is the debtor's non-compliance that has led to the enforcement action. In cases where the sums in issue are not large then the cost of obtaining expert evidence may be disproportionate; the court will need to consider whether enforcement against the pension is appropriate in such circumstances.

9.18 It is important to bear in mind that there is a cost of implementing pension orders and the potential increase in numbers of such orders means there could be an increase in the burden on pension schemes. However, consultees suggested that the current system of charges could be applied in the same way as they are if a

[9] The difficulties are caused by factors such as applying different rates of inflation and penalties that may apply to the fund in various circumstances.

pension order is made as part of the family financial order. In this system the costs are met from the pension fund or the parties meet the cost in proportions determined by consent or by the court.

9.19 It is also important to acknowledge that for creditors, pension orders are unlikely to be their first choice for enforcement. A pension order will not result in any payment to the creditor until he or she reaches retirement age (in the case of pension sharing orders) or until the debtor reaches retirement age (in the case of pension attachment orders). If, for example, the pension order is made to enforce a lump sum that was intended for the purchase of a house, a pension fund may be of no practical use to the creditor in the short term. In practice, therefore, a creditor is perhaps unlikely to favour obtaining a pension order unless there are no liquid assets that can effectively be enforced against. For this reason, pension orders might be an enforcement tool that would not be used very often.

9.20 Notwithstanding the practical issues and the limitations for the creditor we have reached the view that orders against pensions should be available for the enforcement of family financial orders. It has been settled policy for some time that pension sharing orders should be available upon the dissolution of a marriage or civil partnership and the court has much experience in making the orders and addressing the consequent issues. We do not therefore believe that the potential difficulties in calculating and implementing the orders outweigh the benefits for enforcement. Although a pension order may not be a creditor's first choice for enforcement, a pension may be the only accessible asset to enforce against. In view of those points, we see no good reason why that pension should not be used to meet what the debtor owes. A pension order could ensure that the creditor receives what is owed, albeit perhaps at a later date or in a different form than was originally intended.

9.21 **We recommend that pension sharing orders and pension attachment orders be made available for the purposes of enforcing family financial orders.**

9.22 However, we consider that the making of these orders should be subject to certain restrictions.

Restrictions on the making of a pension order for enforcement

9.23 Pension orders were a relatively late addition to the Family Court's redistributive powers and, since their introduction, they have remained subject to various restrictions. Neither a pension sharing order nor a pension attachment order can be made against a pension that has already been shared between the same parties.[10] A pension sharing order also cannot be made against any pension fund that is subject to a pension attachment order, regardless of whether the attached

[10] Matrimonial Causes Act 1973, ss 24B(3) and (4), 25B(7B) and 25C(4).

payments have yet begun and whether that order was made between the same parties.[11] There is no restriction on a second pension attachment order being made.

9.24 In the Consultation Paper we asked consultees what restrictions should apply to the exercise of the power to make pension orders on enforcement. We asked whether they should be the same as those that currently apply at the time of making a financial remedy order. Consultees' opinions were divided; some felt that the existing restrictions should remain, some felt these should be relaxed and some felt that there should be more restrictions at the time of enforcement than apply at the time that a family financial order is made.

9.25 We consider the restrictions that should apply in four different scenarios:

(1) where a pension sharing order has previously been made between the same parties ("previous pension sharing order – same parties");

(2) where a pension sharing order has previously been made in respect of one party's pension fund for the benefit of another person who is not a party to the enforcement proceedings ("previous pension sharing order – different parties");

(3) where a pension attachment order has previously been made between the same parties ("previous pension attachment order – same parties"); and

(4) where a pension attachment order has previously been made in respect of one party's pension fund for the benefit of another person who is not a party to the enforcement proceedings ("previous pension attachment order – different parties").

Previous pension sharing order – same parties

9.26 Some consultees[12] specifically referred to the existing restriction on a second pension sharing order being made against the same pension in a case between the same parties. Consultees favoured abolishing, in the context of enforcement proceedings, the prohibition on further pension orders against a pension that has already been shared between the parties. They all proposed that this restriction should not apply if pension orders are to be made at the enforcement stage. The

[11] Matrimonial Causes Act 1973, s 24B(5).

[12] The Family Law Bar Association, Gavin Smith, Janet Bazley QC, the Judges of the Family Division of the High Court and District Judge Robinson.

Association of Pension Lawyers[13] did not see "any legal difficulty in principle" in allowing a second pension sharing order in the same case.

9.27 We agree that this restriction should not apply at the enforcement stage. If retained, it would significantly limit the effectiveness of pension sharing orders for the purposes of enforcement. In around 20% of cases, financial orders made between spouses or civil partners contain a pension sharing order. In 20% of cases the current restriction would therefore prevent a pension sharing order being made on a later enforcement application. In fact, the impact of the restriction is likely to be even greater. The Office for National Statistics has found in recent years that only around half of the population have a private pension.[14] If we assume that only half of the cases before the Family Court involve any pension assets at all, then the original financial order will have shared the pension in 40% of those cases. The result is that it would be impossible to make a pension order for enforcement purposes in 40% of cases where pension assets might otherwise be available.

Previous pension sharing order – different parties

9.28 There is no restriction on making a pension sharing order in the original financial proceedings in circumstances where the relevant pension fund has already been shared in previous proceedings for the benefit of a person not a party to the enforcement proceedings. So, if A's pension has already been shared with B when A and B were divorced, that does not prevent C seeking a pension sharing order against the remaining funds in A's same pension when A and C divorce. The nature of pension sharing orders means that two entirely separate pension funds are created, and the debtor's remaining pension fund may be subject to a pension sharing order in exactly the same way as if it had never been shared before. As a result, we do not recommend that there be any restriction on a pension sharing order being made in enforcement proceedings due to the relevant pension already having been subject to a pension sharing order.

Previous pension attachment order – same parties

9.29 Resolution addressed the subject of prior attachment of earnings orders in its response, suggesting that restrictions should be imposed to prevent the court making an order against pensions in enforcement proceedings where:

(1) "a pension attachment … has already been implemented";

[13] A national association representing pension lawyers throughout the UK.

[14] Office for National Statistics, *Statistical Bulletin* (11 September 2014), http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171778_375746.pdf (last visited 01 December 2016).

(2) "the making of an order would ultimately disadvantage a creditor who is already the beneficiary of an existing pensions order"; and

(3) "the making of an order would prejudice a third party … [for example] a first spouse with the benefit of a pension attachment order".

9.30 These restrictions would prevent any order being made against a debtor's pension for the purposes of enforcement where a prior pension attachment order had been made either between the same parties or between one of the parties and another person. We do not fully agree with Resolution's suggestion.

9.31 The law, at present, prevents a pension sharing order being made in family financial proceedings if the pension fund in question is already subject to a pension attachment order. We think that a pension sharing order should be available for the purposes of enforcement where the prior pension attachment order is between the same parties. We do not think there is any reason why such an order should not be available for the purposes of enforcement.

9.32 However, we note that it may not be of overall benefit to the creditor to make a pension sharing order in those circumstances. Making a pension sharing order would deplete the capital in the debtor's pension fund, meaning that any future payments due to the debtor from the pension fund would be reduced and, as a result, the payments due to the creditor under the pension attachment order would also be reduced. Whether or not the creditor would be better off overall by virtue of the pension sharing order, taking into account the reduction in the benefits due to him or her under the pension attachment order, would depend on the facts of every case. Pension attachment orders can be varied,[15] and it may be that varying the original attachment order at the same time as seeking a subsequent pension sharing order would achieve the best result for the creditor. In cases where the creditor seeks a pension sharing order subsequent to a pension attachment order already having been made, expert evidence might be required.

9.33 As to making a second pension attachment order between the same parties, we suggest that it would be most efficient simply to vary the original pension attachment order. We take the view that in those circumstances, for the purposes of enforcement, the court should be able to vary the original attachment order,[16] without the need for that to be preceded by the usual procedure that would otherwise be engaged on an application for variation.

[15] Matrimonial Causes Act 1973, s 31.

[16] For example, by increasing the attachment order, so that the amount by which the order was increased would be used to meet a debt due under the financial remedy order.

Previous pension attachment order – different parties

9.34 We agree with Resolution that no pension sharing order should be available against a pension that is already subject to a pension attachment order made in proceedings between different parties – this covers Resolution's third point, namely that an order should not be made where it would prejudice a third party. If the debtor's first spouse has the benefit of a pension attachment order, then the debtor's second spouse should not be able to obtain enforcement by way of a pension sharing order, which will necessarily reduce the value of the pension fund and therefore the value of the first spouse's order.

9.35 However, we cannot see any reason in principle why the second spouse could not secure enforcement by way of a pension attachment order against the debtor's pension, where a first spouse already has the benefit of a pension attachment order against the same pension, provided that this order did not operate to reduce the first spouse's "share" of the pension. For example, if the first spouse was to receive 50% of any funds received by the debtor from his or her pension, then the second spouse could have a pension attachment order that effectively operated against the debtor's remaining 50% share.

9.36 There is no restriction in financial remedy proceedings on making a pension attachment order against a fund already subject to a pension attachment order and we do not recommend that such a restriction be imposed in enforcement proceedings.

General restrictions

9.37 While most responses in respect of "restrictions" related to the issue of previously made pension sharing or attachment orders, we note the suggestion by International Family Law Group that there should be two general restrictions if pension orders are available on enforcement. These are that orders should be made against pensions only if:

(1) the debtor's financial statement does not show sufficient other assets to enforce against; and

(2) the administrative costs of doing so are proportionate to the arrears in question.

9.38 We agree that these are factors that a judge should be taking into account when considering making an order against the debtor's pension. However, we do not think that there is a need for these restrictions to be set out in statute as restrictions on making a pension order, which may render them inflexible to the circumstances of different cases.

Recommendations on restrictions

9.39 **We make the following recommendations as to the restrictions that should apply on the making of a pension order for the purposes of enforcing a family financial order**:

(1) Pension sharing and pension attachment orders should be made available for the purposes of enforcing a family financial order regardless of whether the court's powers to make such orders were

dismissed as part of the final order concluding the financial remedy proceedings.

(2) There should be only one restriction applying to the making of pension orders for the purpose of enforcing a family financial order, as a result of previous pension orders having been made. The restriction should be that no pension sharing order may be made if a third party (that is, someone other than the two parties to the enforcement litigation) has the benefit of a pension attachment order against the same pension fund.

(3) In determining whether to make a pension sharing or pension attachment order the court should consider:

a) whether the debtor has other assets against which enforcement could be taken; and

b) whether the costs of making the order are proportionate to the debt that is owed.

Enforcement of orders under the Children Act 1989

9.40 Generally in this project we have not drawn any distinctions between different types of family financial orders and how they may be enforced. However, in considering the introduction of pension sharing orders and pension attachment orders for the purposes of enforcement, it is necessary to think separately about the enforcement of orders made under Schedule 1 to the Children Act 1989 ("Schedule 1 orders"). Separate consideration is necessary because, unlike in financial proceedings following a divorce or dissolution of a civil partnership, the court has no powers to make orders against the parties' pensions in the original financial proceedings.

9.41 Schedule 1 orders can be made between married or unmarried parents to provide financial support for the care of a child.[17] The court does not have the same extensive re-distributive powers on a Schedule 1 application as it has on an application for financial provision on divorce or the dissolution of a civil partnership, and the court has no power to make orders against the parties' pensions. We did not consider explicitly in the Consultation Paper whether the lack of powers to make orders against pensions in a schedule 1 claim should have any bearing on whether an order against a debtor's pension should be available on an application to enforce a schedule 1 order; no responses, therefore, specifically addressed this point. However, we raised the issue with our

[17] Applications can also be made by other persons with responsibility for caring for the child and orders may be made against the child's parents and those who have treated the child as a child of the family, for example step-parents.

advisory group and the majority thought that pension orders should be available to enforce a Schedule 1 order, for the following reasons.

(1) A pension order may not, in most cases, produce funds during the child's minority and so will not directly benefit the child. However, as a result of non-compliance with a Schedule 1 order the creditor may accrue debts or suffer financial hardship because he or she must still support the child financially even if the payments due are not received. Funds from the debtor's pension should be available to ensure the creditor receives at least part of what he or she was owed.

(2) If pension orders are not made available for enforcement then a debtor who owes money under a Schedule 1 order will be able to evade complying with his or her obligations by hiding funds in a pension. This is one of the problems identified with the current law generally and there appears to be little justification for retaining this "loophole" only in relation to Schedule 1 orders.

9.42 Although we were made aware of some concerns regarding computation and offsetting, we do not envisage these matters to be any more difficult for schedule 1 orders than for other family financial orders. As with any pension orders used for the purposes of enforcement, there may also be relatively few cases where enforcement against a pension is the most appropriate method, but stakeholders and consultees have indicated that they consider it a useful tool for certain cases. We do not intend, by enabling enforcement against pensions, to effect any change to the principles that govern schedule 1 applications, nor to give any increased prevalence to pension assets at the time of the original order. In particular, we do not intend to suggest that change is required to the disclosure requirements applying on a Schedule 1 application such as to require any further information on pension assets then is already the case. Our recommendation is simply intended to increase the range of assets against which enforcement may be taken, once a court has decided what is due on established principles and if the debtor should fail to pay.

9.43 **We recommend that the scope of the new enforcement powers against pensions should extend to the enforcement of orders under Schedule 1 of the Children Act 1989.**

The importance of judicial management

9.44 We are conscious of the unique nature of pension assets and their purpose to provide a means of support for an individual in his or her retirement. We also believe that, in many cases, the creditor will prefer a method of enforcement that produces payment in the short term and that the administrative costs of enforcing against pensions should also be a consideration. Therefore, we do not think that pension orders, in the vast majority of cases, would or should be the creditor's first choice as a method of enforcement.

9.45 For that reason, we propose that, for the purposes of enforcement, pension orders are made available only within the general enforcement application, not on a discrete application. On a general enforcement application, the court should be in a position to look at the full picture of the debtor's finances. This information will enable the court to consider whether a pension order is appropriate and

proportionate and ensure that pension orders are only considered as an option amongst the various remedies. Our view is that confining pension orders to the general enforcement application strikes the correct balance between the interests of all those who would be affected by the making of pension orders for the purposes of enforcement without statutorily limiting their use to cases where no other assets are available (which we think would be undesirable).

9.46 **We recommend that pension orders on enforcement are available only on a general enforcement application.**

New pension flexibilities

9.47 Since 6 April 2015, individuals aged 55 and over have been able, where the rules of their defined contribution pension schemes allow, to draw down up to 100% of their pension fund, meaning that this money can be received as a cash lump sum, subject to the payment of tax.[18]

9.48 The Association of Pension Lawyers said that the creditor "should have the same, and not greater rights, than the original scheme member" in terms of choosing to exercise the flexibility. We agree. As a result, any use of the new commutation flexibility when making pension orders for the purposes of enforcement is limited by two factors.

(1) The flexibility is only available for those over 55. The new flexibility will only increase the options for immediate (rather than deferred recovery) where parties can meet the age criteria.

(2) The new rules are subject to an election by the pension scheme to permit the application of those rules. The experience of the Association of Pension Lawyers, confirmed by press reports, is that many pension providers are not allowing, or are limiting, commutation and "very few schemes are offering anything other than the option of taking a one-off lump sum".

Tax liabilities

9.49 A careful approach would be required in considering the tax consequences of pension attachment orders[19] in relation to commuted lump sum payments. Now that up to 100% of a pension fund can potentially be commuted with tax charged on any amount over 25%, those taxes could be significant. This gives rise to two issues. The first is that the court should take account of the potential tax consequences in deciding whether to make an order against the debtor's pension

[18] Prior to this it was only possible to take a maximum lump sum of 25% of the pension fund, which was not subject to tax.

[19] A pension sharing order has no tax consequences until the member of either fund decides to draw funds from it as income when it will be taxed in the usual way.

and in what terms; an order should not be made where the tax consequences would be disproportionate to the debt that is due. The second is if the amount of the debt is "withdrawn" by the debtor, but for immediate payment to the creditor, who should ultimately bear the burden of any tax due? If this burden falls upon the debtor then he or she faces an additional charge on top of the original debt owed. Although expressed in the context of a pension sharing order, the Association of Pension Lawyers considered it appropriate for the "party benefitting" to be liable, which suggests it would be the creditor. But if the creditor must pay the tax, then he or she could receive considerably less than is due under the family financial order. [20]

9.50 Judges in the Family Court are not unfamiliar with the need to account for the tax consequences arising from a family financial order, such as capital gains tax payable on shares or property if these are to be transferred between the parties (outside the scope of certain tax exemptions) or sold. Judges also allocate responsibility for other costs, such as experts' fees or the administration costs of implementing pension orders. The decision is fact specific and there is not one rule that suits all cases. We consider the same reasoning applies to any tax consequences that would arise from pension attachment orders made in enforcement proceedings; those consequences would be best dealt with by judicial discretion.

9.51 **We recommend that in determining whether to make an order against a debtor's pension for the purpose of enforcing a family financial order, the court should take account of the tax consequences that would arise as a result of the order.**

9.52 **We recommend that the decision as to which party should bear the cost of any tax due as a result of orders made against the debtor's pension for the purposes of enforcing a family financial order be left to the discretion of the judge making the order.**

Pension Protection Fund compensation

9.53 Currently, in financial remedy proceedings, orders akin to pension sharing and pension attachment orders can also be obtained in relation to compensation due under the Pension Protection Fund ("PPF"). The PPF is a form of insurance scheme to ensure payment under certain pension schemes if they are insolvent and have insufficient funds to make the member payments. The court can make "pension compensation sharing orders" and "pension compensation attachment orders" ("pension compensation orders") to enable one party to benefit from the

[20] Additional rate tax payers (with taxable income over £150,000) are taxed at 45%, on payments over the tax-free amount of 25%.

other's PPF compensation.[21] We envisage these orders against PPF compensation being available for enforcement purposes in the same way that we have set out above for pension sharing and pension attachment orders.

9.54 The restrictions that apply to the pension compensation orders are in substance the same as the restrictions that currently apply to pension sharing orders and pension attachment orders. We conclude that for the purposes of enforcing family financial orders the restrictions on the making of pension compensation orders should be modified. The aim of the modifications should be to achieve the same outcome, in substance, as the modifications that we recommend to the restrictions on pension sharing orders and pension attachment orders being made for the purposes of enforcing a family financial order.

9.55 Pension sharing orders and pension attachment orders that are made against a pension fund before insolvency will still take effect against the PPF compensation if the fund becomes insolvent, but may be capped at a prescribed level.[22]

9.56 **We recommend that pension compensation sharing orders and pension compensation attachment orders be available for the purposes of enforcing a family financial order, regardless of whether the court's powers to make such orders were dismissed as part of the final order concluding the financial remedy proceedings.**

9.57 **We recommend that there should be only one restriction to apply to the making of such orders for the purpose of enforcing a family financial order, as a result of previous pension orders, or pension compensation orders, being made. The restriction would be that no pension compensation sharing order could be made if a third party (that is, someone other than the two parties to the enforcement litigation) has the benefit of a pension compensation attachment order or a pension attachment order against the same PPF compensation or the pension fund from which the PPF compensation derives.**

GIVING EFFECT TO FOREIGN ORDERS AGAINST PENSIONS IN THIS JURISDICTION

Introduction

9.58 Whilst issues of cross-border enforcement are generally outside the scope of our project, we considered one discrete issue in our Consultation Paper. We understand that there is a particular problem with pension providers in England

[21] Unlike a pension attachment order, a pension compensation attachment order cannot attach to death-in-service lump sums as PPF compensation does not include a payment of such lump sums.

[22] Pensions Act 2004, sch 7, para 21; Matrimonial Causes Act 1973, s 25E.

and Wales often refusing to recognise pension orders made outside this jurisdiction. The English courts may, in some cases, make an order reflecting the foreign pension order and pension providers could then act on the basis of this order – but this is only possible where the English court has jurisdiction to make the required pension order. The jurisdiction of the English court following an overseas divorce in the context of which the foreign pension order would likely have been made is governed by the Matrimonial Family and Proceedings Act 1984 (the "1984 Act") and, in some circumstances, by the EU Maintenance Regulation.[23] The Maintenance Regulation applies where the issue under consideration is a "maintenance decision". We consider the Maintenance Regulation in more detail below and in Appendix E, but we note here that at present the Regulation offers further grounds of jurisdiction that may disappear in the event that the Regulation were to cease to apply, which would make the difficulty under review even more pressing.

9.59 Part 3 of the 1984 Act sets out the grounds of jurisdiction that allow a party who has divorced in another country to apply for a financial order in England and Wales.[24] Those grounds are that:

(1) one of the parties is domiciled in England or Wales;

(2) one of the parties is habitually resident in England or Wales and has been for at least 12 months prior to the application; or

(3) that a former matrimonial home is situated in England or Wales and at least one of the parties still has an interest in that property.[25]

9.60 In many international cases, where one party has a pension fund in this jurisdiction, it is possible that none of these grounds will apply.

9.61 If the English pension provider will not recognise the foreign order, the intention of a foreign court to make provision for the distribution or sharing of a pension fund based in England and Wales will therefore be frustrated, unless an English court is able to make a pension order to reflect the foreign order. If the English court cannot do so, this could undermine the entire financial agreement reached

[23] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[24] The provisions can also be used by parties who have had a recognised divorce in a foreign jurisdiction both where the foreign court has made financial provision and where no such financial provision has been made. However, in the latter situation, and if jurisdiction is available, the English court will make the order it thinks fit, which does not involve any question of enforcement or implementation of a foreign financial order.

[25] Matrimonial Family and Proceedings Act 1984, s 15(1).

by the parties or imposed by the foreign court. A number of consultees shared with us their experience of this problem arising in practice.[26]

Consultation responses, discussion and recommendation

9.62 The Consultation Paper provisionally proposed an amendment to section 15(1) of the 1984 Act to add the existence of an English pension arrangement as a further ground of jurisdiction for financial relief after an overseas divorce. We acknowledged that this jurisdiction could be limited so that the English courts could be restricted to making orders only against the English pension, or orders up to the value of that pension. There was unanimous support for the proposed introduction of a new ground of jurisdiction from the consultees who responded to the proposal.

9.63 Resolution thought the court should, in such circumstances, be "restricted to dealing with the English pension arrangement". We agree and are of the view that a new ground of jurisdiction should not go beyond giving the court the power to make orders against the relevant pension.

9.64 District Judge Robinson said that in circumstances where there is no foreign order against the relevant pension but one party seeks a pension order here,[27] the English court would need to know that the foreign court had not already taken into account the lack of provision from the English pension (for example, by way of offsetting);[28] otherwise there would be a risk of "double counting". The receiving party might have been compensated with other assets in the foreign order, but then bring a claim for provision from the English pension. We acknowledge that this is an issue; if the parties disagree on whether the pension has already been accounted for, then the English court will have to resolve the issue. However, this is a difficulty that can arise on any claim for a financial order following an overseas divorce.

9.65 The recommended new ground of jurisdiction could be limited to a jurisdiction only to make an order in respect of pensions where that "mirrors" a foreign order to the extent that the foreign order seeks to operate against an English pension arrangement. However, such a restriction would limit the scope of the new provision. If the foreign order does not contain any pension provision, perhaps because that jurisdiction does not, in principle, permit pension orders or orders

[26] In particular, International Family Law Group and James Pirrie referred to how often they are respectively consulted about such issues.

[27] This could be where one party claims that it was part of the agreement that an English order would be sought, or where one party claims that the foreign court did not take any account of the English pension.

[28] By providing a party with other assets to offset the lack of any pension order in his or her favour.

against foreign assets, then the proposed new ground of jurisdiction under the 1984 Act would be of no assistance.

9.66 **We recommend the introduction of a new ground of jurisdiction under section 15 of the Matrimonial and Family Proceedings Act 1984, namely that one of the parties has an interest in a pension arrangement situated in the jurisdiction. In such circumstances the court's powers under the Act would be limited to making an order against that party's pension.**

The Maintenance Regulation

9.67 The Maintenance Regulation[29] is a piece of EU legislation directly applicable[30] in England and Wales that regulates the jurisdiction and enforcement between member states of "all maintenance obligations arising from a family relationship, parentage, marriage or affinity".[31] What amounts to a "maintenance obligation" for the purposes of the Regulation is wider than what is typically considered to be "maintenance" in English family law. Under the Regulation maintenance obligations include any orders that are made to meet the needs of the parties. An order will meet the needs of the parties for the purposes of the Regulation if the needs and resources of the parties have been taken into consideration when determining the amount of provision or the provision is designed to enable a spouse to support him or herself.[32] The Maintenance Regulation is specifically referred to in section 15(2) of the 1984 Act in the context of establishing jurisdiction when considering any maintenance decision: if the Regulation applies to a claim, then the "requirements [of the regulation] are to determine whether the court has jurisdiction to entertain the application".

9.68 A pension order is capable of being a maintenance obligation, though will not necessarily be so in every case. We would suggest that a pension order is most likely to be a maintenance order in more modest cases where the pension income is needed by a party to support him or herself.

[29] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[30] This means that the regulation does not require national legislation to become law in an individual Member State.

[31] Council Regulation (EC) No 4/2009, recital 11.

[32] *Van den Boogaard v Laumen* [1997] QB 759. The decision was concerned with enforcement under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, but the interpretation has been applied unchanged to the meaning of maintenance under the Maintenance Regulation. For an example of this, see *Moore v Moore* [2007] EWCA Civ 361, [2007] 2 FLR 339.

9.69 The Maintenance Regulation came into force on 18 June 2011 and the detail of how the rules interact with domestic law including Part 3 of the 1984 Act remains, in some respects, to be worked out. The conclusions that are reached may impact on the utility of our proposal, but they will be determined in a much wider context. In summary, it is not clear whether a "maintenance order" may be made by an English court following an overseas divorce in circumstances where a prior maintenance order has been made in another member state. We explore these issues in more detail at Appendix E, in addition to dealing briefly with the implications for our recommendation of the UK exiting the EU.

CHAPTER 10
THIRD PARTY DEBT ORDERS

INTRODUCTION

10.1 In the Consultation Paper we considered a number of ways in which the utility of third party debt orders could be increased, and how the application for the orders could be made more efficient.

10.2 A third party debt order requires a third party who owes money to the debtor to pay some or all of that money directly to the creditor. Payment by the third party to the creditor discharges, up to the amount paid, the third party's debt to the debtor and the debtor's debt to the creditor. Third party debt orders are made in two stages. An interim order is made (usually without a hearing) to freeze the relevant funds in the hands of the third party, and a final order is then made (after a hearing), which directs payment from the third party to the creditor. The debtor and the third party have the chance to make representations to the court before a final order is made. After hearing from everyone involved the court may decide not to make a final order, or may direct for certain issues to be tried before deciding how to resolve the case.

10.3 Third party debt orders are often made against funds that a debtor has in his or her bank account. The balance of the account is a debt that the bank or building society owes to the debtor.[1] For ease of reference, in this chapter we refer to account holders owning the funds in the bank account. When we say "bank account" we mean both bank and building society accounts and any account with any other business which lawfully accepts deposits in the United Kingdom.[2]

10.4 In this section we explore the options for increasing the scope of third party debt orders and set out our recommendations for reform. We do not recommend any change to the basic structure of the application for a third party debt order; our recommendations are based on the current two-stage approach. However, we do consider introducing a protected minimum balance at the time an interim order is made.

10.5 This chapter deals with the following areas of reform:

(1) the introduction of a protected minimum balance;

(2) the introduction of periodic third party debt orders;

(3) the extension of third party debt orders so that they may attach to joint accounts; and

(4) the introduction of a power for the court to order the disclosure of bank statements on making a third party debt order.

[1] *Drakeford v Cotton* [2012] EWHC 1414 (Ch), [2012] 3 All ER 1138.

[2] This is the scope of the rules that apply to "bank or building society accounts" in respect of the third party debt orders in the Civil Procedure Rules.

10.6 In addition, we consider in Chapter 14 the streamlining of applications for third party debt orders and charging orders.

A PROTECTED MINIMUM BALANCE

10.7 The Consultation Paper asked whether, in circumstances where a third party debt order is applied to funds in a bank account, a certain level of funds should be protected from being taken to enforce the debt owed to the creditor. We noted that the concept of a protected balance occurs in the equivalent Scottish law. In the Scottish law of arrestment[3] a certain balance in an account is protected from enforcement, currently set at £494.01. Similarly in English law, where unpaid child maintenance is enforced against funds in a debtor's bank account under the Child Support Act 1991 ("CSA 1991") a level is set below which a deduction must not be made (although at a far lower level than in the Scottish legislation).[4]

10.8 A protected minimum balance, in the context of a third party debt order, aims to preserve funds for debtors to meet their needs during the time that funds in their bank account are frozen by an interim third party debt order. During that time, under the current rules, debtors can apply for a hardship payment out of their frozen funds to meet their needs. On an application the court can make a hardship payment order permitting the bank to make a payment (or payments) from the account. The application must be supported by detailed evidence, proving the debtor's financial position and explaining why he or she needs a payment. This application should include documentary evidence such as bank statements, wage slips and mortgage statements.[5] In the Consultation Paper, we envisaged that the introduction of a protected minimum balance would provide an additional safeguard for debtors, not that it would replace hardship payments out of the frozen funds.

Consultation responses

10.9 Responses were mixed, but a majority favoured introducing a protected minimum balance.[6]

10.10 Some consultees agreed in principle with the introduction of a minimum protected balance, but preferred judicial discretion to impose a protected balance in an appropriate case rather than setting a compulsory minimum balance in all cases. The Judges of the Family Division of the High Court took a different view. They agreed it was "hard to know at what level this would be set" but found it "logical" to have a protected minimum balance.

[3] In Scotland, arrestment is a form of enforcement that can take place against any moveable property of the debtor that is in the custody of a third party. It covers enforcement procedures similar to, in England and Wales, freezing orders, third party debt orders, warrants of control and attachment of earnings orders.

[4] Child Support (Collection and Enforcement) Regulations 1992, SI 1992 No 1989, regs 25D, 25Q and 25Z. The amounts that are protected are £55 for a lump sum deduction order and £40 or £10 for a regular deduction order depending on whether the deduction period is monthly or weekly. Specified administrative costs that the bank or building society can take are added to these protected sums.

[5] Civil Procedure Rules, Part 72 and Practice Direction 72A.

[6] The Birmingham Law Society, Clarion Solicitors, District Judge Robinson, the International Family Law Group, Judges of the Family Division of the High Court, the Money Advice Trust and Tony Roe.

10.11 The Money Advice Trust[7] favoured a protected minimum balance that would exist alongside hardship applications to offer extra protection for the debtor. It relied on the concept of the protected minimum balance in the Scottish arrestment proceedings. The Trust also felt that where an account contained benefit income then that should be protected.

10.12 International Family Law Group favoured a protected minimum balance, but proposed that its introduction should be accompanied by a possibility for the creditor to apply for permission to take an account below that level. It thought this provision necessary to avoid a debtor maintaining a number of different accounts with balances just below the prescribed minimum for the purpose of frustrating enforcement.

10.13 Clarion Solicitors[8] focused on protected a minimum balance as a condition for the introduction of periodic third party debt orders, but considered further detail was required in terms of how it was proposed that the minimum figure would be calculated.

10.14 On the other hand, the Family Justice Council were concerned that a minimum protected balance would undermine the obligation to pay in circumstances where the court found in the original proceedings that the debtor had the means to pay. They said "enforcement should have teeth".

10.15 The remaining opponents of a minimum balance referred specifically to the existing mechanism to obtain relief by way of hardship applications, which they said should be retained. These consultees thought that there would various factors affecting what level of funds it is appropriate for the debtor to retain in the context of enforcement. For example, the asset in question (perhaps one of a number of bank accounts) may not be the only resource available to the debtor either in this jurisdiction or elsewhere.

Discussion and recommendations

10.16 While nearly all consultees considered that there should be some form of protection for the debtor's needs, consultees were split as to whether this protection should be provided by a protected minimum balance.

10.17 We conclude that, particularly in light of the recommendations that we make to extend the scope of third party debt orders, a protected minimum balance should be introduced. We consider it undesirable that an application for a hardship payment should have to be made in every case where a debtor requires access to funds that have been frozen following the making of an interim third party debt order.

[7] A UK charity that helps people to tackle debt and manage money.

[8] A law firm with a specialist family law team.

10.18 We are of the view that our recommendations to extend third party debt orders to joint accounts and to operate periodically give rise to a greater need to introduce a protected minimum balance.[9] The effect of these proposals, if implemented, could be to increase the likelihood of third party debt orders being made against debtors' current accounts and will mean third party joint account holders will feel a direct impact. The availability of periodic orders could lead to more applications against current accounts because applying against a current account becomes more attractive when there is the possibility of a periodic order being made to "catch" income that the debtor receives into that account on a regular basis. The freezing effect of an interim third party debt order is likely to be more serious in respect of a current account as it may deny the debtor access to any funds with which to live, rather than, say, to deny the debtor access to a savings account.[10] Further, the freezing of funds in a joint account means that the other account holder will be barred from accessing his or her funds despite not being a party to the litigation between the creditor and the debtor. We consider it important that joint account holders have access to some funds without having to make an application for a hardship payment out of the frozen funds

10.19 We see the force in arguments that a protected minimum balance is a blunt instrument for the protection of the debtor's (and other account holder's) needs. Its focus on the balance in any one account is unable to take account of the debtor's overall circumstances. So, for the debtor who has one account into which all his or her income is paid, and out of which all outgoings are paid, the concept is meaningful as a protective method. For the debtor with financial resources held across a number of different accounts or assets the protective nature of the concept is less clear. A protected minimum balance, if applied to each account, may mean that the debtor benefits from a disproportionate level of protection, while the interests of the creditor in recovering what is owed to him or her suffer. The suggestion from International Family Law Group that the creditor should be able to apply for the protected balance to be removed would, in theory, help remedy this problem. However, at the time of making the interim order (when the protected balance will apply) the court will not have the opportunity to hear from the debtor. As a result, we do not think the suggestion is workable.

10.20 We have taken account of the view of the Family Justice Council that a protected minimum balance could undermine the debtor's obligation to pay the debt. We consider that the function of any protected minimum balance is to protect the debtor during the period that his or her bank account is frozen following the making of an interim third party debt order; its function is not to be determinative of the amount that the creditor may recover. If, therefore, the protected minimum balance remains unused by the debtor when the court considers making a final order we think those funds should be recoverable by the creditor as part of the final order.

10.21 We recommend that the level of the protected balance is fixed. At the time of making the interim order the court will have little information on which to base the level of the protected balance, and an interim order is made without a hearing in

[9] Both recommendations are discussed later in this chapter.

[10] We suspect under the current law that savings accounts are more likely to be the subject of a third party debt order given that they might hold a relatively larger and more stable sum of money.

the vast majority of cases. We leave Parliament to decide the level at which the protected balance should be set. We consider the balance should be sufficient to meet a basic level of needs (while recognising that each debtor will have different needs). The protected minimum should be more than a token amount while not so much as to remove any incentive for the creditor to apply for a third party debt order because the majority of the funds sought will be covered by the protected balance; the value at which the protected balance is set must not render the remedy ineffective. The Scottish figure could provide a starting point for consideration. It may be appropriate that the protected balance for an account should be different depending on whether it is the debtor's sole account or a joint account. In the latter scenario, consideration should be given to setting the amount at a higher figure. We think that doubling the figure, however, would be disproportionately generous.

10.22 **We recommend the introduction of a protected minimum balance to apply between the making of an interim and final third party debt order, with the amount to be fixed in legislation.**

PERIODIC THIRD PARTY DEBT ORDERS

Introduction

10.23 The limitations within the existing law of third party debt orders were highlighted by the Family Law Bar Association in its proposal that the Commission take on this project. The Association said that third party debt orders:

> Are of limited benefit given they can only be made for a fixed sum (ie once arrears have accrued over time) and not periodically (this is especially so in respect of the self- or un-employed who have no "income" against which an attachment of earnings order can be made, but who may have savings/fees going into a bank account against which only ad hoc enforcement can be levied once arrears have accrued to a sufficiently high figure to justify another application, but only assuming those funds are not spent in the interim).

10.24 The limitations arise because the current law enables only the enforcement of an existing debt owed by the debtor to the creditor against an existing debt owed by the third party to the debtor. For example, it is not possible to secure the payment of future periodical payments, nor is it possible to enforce against money that becomes owing to a debtor, for example money that is deposited in his or her bank account after the interim third party debt order is served.

10.25 The possibility of reform to enable periodic third party debt orders has been raised in Government consultations: 87% of the respondents to the 2011 consultation welcomed the proposal that such orders be introduced.[11] Similar schemes are in place to permit the enforcement of unpaid tax and unpaid child maintenance by allowing periodic deductions to be made from a debtor's bank account. In the case of unpaid tax, HMRC are able to recover debts from people and businesses directly from their bank using "direct recovery of debt" ("DRD") in

[11] Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales: the government response (2012) Cm 8274

certain circumstances where the debt owed is more than £1,000.[12] For the enforcement of child maintenance debts by the Child Maintenance Service, an "order for regular deductions from accounts" permits deductions to be taken either weekly or monthly.[13] We understand that the Child Maintenance Service has found orders for regular deductions to be very effective. We will refer to these schemes throughout this chapter as we discuss our recommendations.

Consultation responses

10.26 We asked for consultees' views about the introduction of periodic third party debt orders. Janet Bazley QC said it "would be of great benefit in avoiding the need for repeated applications" and the Family Law Bar Association called it "a sensible proposal".

10.27 None of the consultees who shared their views on the issue[14] objected in principle to the introduction of periodic third party debt orders. Where the responses were cautious, there were various reasons for this approach. An important concern was the ease with which the order could be avoided by debtors changing their financial arrangements. This possibility was raised by the Judges of the Family Division of the High Court and was the reason that Resolution felt that introducing third party debt orders (and a protected minimum balance) were not "straightforward or 'must haves' for reform". District Judge Robinson thought that such orders would be "uncommon", perhaps also due to the practical difficulties. However, these concerns did not lead consultees to object to the proposal. Penningtons Manches, for example, said the fact that debtors may be able to manipulate their finances to avoid such an order "should not prevent the court from having this power at its disposal". Pennington Manches thought that the orders would make enforcement "feasible" against debtors who are self-employed or who receive regular investment income, and would provide a form of "ongoing security", which in general the enforcement tools do not provide.

10.28 Another issue raised was the burden placed on third party institutions. However, the Family Law Bar Association and Janet Bazley QC considered that any burden would be "proportionate" in circumstances where the creditor could be suffering considerable hardship as a result of non-payment. International Family Law Group recognised the burden, but thought that nonetheless periodical third party debt orders "could be a useful tool".

10.29 A final factor when considering periodic third party debt orders was fairness to the debtor. Clarion Solicitors supported the method "provided there is a protected minimum balance". The Money Advice Trust also highlighted that a periodic third

[12] The DRD scheme is provided for by schedule 8 to the Finance (No 2) Act 2015.

[13] Child Support Act 1991, ss 32A to 32D.

[14] Clarion Solicitors, District Judge Robinson, the Family Justice Council, the Family Law Bar Association, the International Family Law Group, Janet Bazley QC, the Judges of the Family Division of the High Court, the Law Society, the Money Advice Trust, Penningtons Manches, Resolution and Tony Roe.

party debt order combined with a streamlined procedure[15] could be detrimental if the debtor was repeatedly required to challenge the intended deductions and ask for multiple hearings. The argument advanced was that "many people are not in the financial or emotional position to take proactive measures in this way".

Discussion and recommendations

10.30 We recognise the concerns of some consultees as to how periodic third party debt orders will operate, and the fact that the debtor can take steps to evade the effect of the order in some circumstances. However, we think that these orders have the potential to assist in recovering sums owed and ensure the payment of future obligations. Further, they will allow for much greater efficiency as the creditor will not need to make a new application and return to court every time the debtor is due to receive another payment from the identified third party. The ability of the debtor to evade the order arises most in the context of orders directed at funds coming into the debtor's bank account. That is, however, just one example of how periodic third party debt orders could operate. We take the view that the limitations of the order are not a sufficient reason not to recommend the expansion of third party debt orders to introduce orders that can operate periodically.

10.31 **We recommend expanding the scope of third party debt orders in two ways:**

(1) to enforce future debts owed by the debtor to the creditor as and when they fall due (for example, payments under a periodical payments order); and

(2) to allow enforcement against future debts owed by a third party to the debtor.

10.32 These two expansions would allow third party debt orders to operate in four different ways. Here we consider examples of each, and then in the table below we set out how the orders would operate. Afterwards, we consider a number of aspects of the orders in more detail.

10.33 **To enforce an existing debt owed to the creditor against an existing debt owed to the debtor.** This is the enforcement option provided for by the current law. A creditor who is owed £3,500 in arrears of periodical payments may, for example, enforce that debt against funds of £10,000 in a debtor's bank account. Or a creditor may choose, in appropriate circumstances, to enforce against a self-employed debtor by directing the third party debt order at money owed to the debtor by a client. For example, a debtor who is a carpenter may be owed £3,000 by a client for the making and fitting of a kitchen; the court could order that client to pay the £3,000 to the creditor in part satisfaction of the arrears that are owed.

[15] A streamlined procedure in this context would mean that a final order could be made without a hearing unless the debtor or third party raised any objection, in which case a hearing would be listed. We discuss the introduction of a streamlined procedure for applications for third party debt orders and charging orders at Chapter 14. Ultimately, we do not recommend a streamlined procedure for applications for third party debt orders.

10.34 **To enforce future debts that become owing to the creditor against an existing debt owing to the debtor.** The creditor who is owed arrears and £500 per month under a periodical payments order may want to ensure that future payments are received without having to make repeat applications to court. This outcome could be achieved by enforcing periodically against an existing debt that is owed to the debtor. For example, if the debtor has £10,000 in his or her savings account, and once the arrears of £3,500 are paid there is £6,500 left in the account, then the order for £500 per month could be enforced against that balance for the next 13 months, or for such lesser period that the court ordered. The debtor's savings would be frozen to the extent necessary to ensure the periodical payments are made for whatever period the court considers appropriate.

10.35 **To enforce an existing debt owed to the creditor against future debts that become owing to the debtor.** The same creditor who is owed £3,500 of arrears may not be able to enforce the debt in the ways suggested above if at the time the creditor makes an enforcement application, the debtor is not owed money (or not owed enough money) by any third party. Perhaps the debtor has no savings but has a regular and substantial income that is spent without thought to paying what is due to the creditor. A periodic third party debt order would allow a creditor to enforce against that income as and when it became owing to the debtor. For example, if the debtor regularly receives investment income, the order could be directed to the manager of those investments who is responsible for paying that income to the debtor. The investment manager would be required to pay the creditor £3,500 when he or she next paid money to the debtor, or a lesser amount on a specified number of occasions.

10.36 **To enforce future debts that become owing to the creditor against future debts that become owing to the debtor.** Currently, a third party debt order can only operate to secure funds that are owing to the creditor at the time of the application. Enabling third party debt orders to operate periodically will enable the enforcement of monies owed to the creditor as and when they fall due, for example monthly under a periodical payments order. If the debtor has savings then payments may be enforced against those savings. However, te debtor may not have any savings that the creditor can enforce payments against, but have an income from which the periodical payments should be met. For example, if the debtor is a taxi driver working freelance for a taxi firm then a periodic third party debt order could be directed to the taxi firm to ensure that when the debtor is paid every week or month, the money owed to the creditor is paid directly to him or her. If the debtor has multiple sources of income, the third party debt order could be directed to the debtor's bank account to periodically deduct funds from the income that is deposited.

10.37 Enforcing against a debtor's income (which we have characterised above as enforcing against a future debt that becomes owing to the debtor) is already possible where the debtor is in employed work. In those circumstances, a creditor may apply for an attachment of earnings order,[16] which requires the debtor's employer to pay a certain amount of the debtor's earnings to the creditor on every pay day. However, no such similar method of enforcement is currently available against self-employed debtors who fall outside of the attachment of earnings

regime. It has long been acknowledged that enforcing against self-employed debtors, especially enforcing ongoing periodical payments orders, is difficult and often not successful. This problem was at the forefront of our proposal in our Consultation Paper to enable periodic third party debt orders.

10.38 An alternative way to solve the problem of enforcing against self-employed debtors would be to broaden the scope of the Attachment of Earnings Act 1971 so that more debtors may fall within the attachment of earnings regime. We have rejected this approach for two reasons.

(1) The 1971 Act was enacted 45 years ago and is not designed to accommodate ways of working beyond a traditional employment relationship. It would be difficult to make the Act a sufficiently flexible tool to catch the many different ways in which people now work, for example to catch those who are self-employed. In contrast, third party debt orders are capable of being moulded to suit different circumstances.

(2) Earnings are defined in the 1971 Act as “wages” or “salary”. To move beyond those types of payment would be to change the nature of the Act. In contrast, money owed by a third party to a debtor such that the debtor is legally entitled to call for that money is by its nature a debt regardless of the relationship between the debtor and the third party.

10.39 We have therefore formed the view that the preferred method of reform to facilitate enforcement against the income of a self-employed debtor is by reform to third party debt orders, rather than to attachment of earnings orders. Further, enabling third party debt orders to operate periodically assists with the enforcement of periodical payments against a debtor’s existing assets in addition to enabling enforcement against a self-employed debtor’s income.

How the orders would operate

10.40 The tables set out, in summary, how we envisage the orders working in practice:

(1) where the third party is a bank; and

(2) where the third party is not a bank.

10.41 The detail of the orders that we recommend is discussed in the following section.

10.42 The shaded boxes (which illustrates the operation of a one-off rather than a periodic third party debt order) are the only possibilities available under the current law, though the interim protected balance (that we recommend be introduced) does not currently apply.

[16] Under the Attachment of Earnings Act 1971.

Table 1: Third party is a bank

	Third party owes existing debt to the debtor – for example £10,000 in a bank account.	Third party owes future debt to the debtor – for example a regular sum of £2,000 per month is paid into the debtor's account by way of self-employed earnings – the bank then owes that debt to the debtor.
Debtor owes existing debt to the creditor – for example £3,500 arrears of maintenance.	The arrears of £3,500 can be enforced against the funds in the account. On the making of the interim order, the account will be frozen to the value of £3,500. [1] On the making of the final order, the £3,500 will be paid to the creditor.	The third party debt order would bite periodically and a fixed sum would be paid to the creditor from the funds in the account at that time. If there are insufficient funds in the account then, the full amount in the account would be paid to the creditor. The duration of the order could be for a fixed term or for such time until the debt owed is discharged.
Debtor owes future debts to the creditor – for example periodical payments of £500 per month.[2]	The future debts of £500 per month can be enforced against the funds in the account as and when they fall due. On the interim order, all of the funds in the account will be frozen, subject to the interim protected balance. The debtor may make a hardship application if the freezing makes it necessary for him or her to do so. On making the final order, and after hearing from both parties, the court will determine how much of the account should remain frozen and for how long. Each month, for the duration of the third party debt order, the periodical payments order will bite against the account and £500 will be paid to the creditor. The duration of the order would be for such term as the court considered appropriate. We do not envisage that the third party debt order would necessarily last for the duration of the periodical payments order.	The third party debt order would bite periodically and a fixed sum would be paid to the creditor from the funds in the account at that time. If there are insufficient funds in the account then the full amount in the account would be paid to the creditor. The duration of the order would be for such term as the court considered appropriate. We do not envisage that the third party debt order would necessarily last for the duration of the periodical payments order.

[1] Freezing would be subject to the interim protected balance, which would not operate in this case unless the protected balance were set at £6,500 or above, which is not a level we envisage.

[2] The future debt cannot be enforced until it is owed. To ensure that does not occur, it will be necessary to enforce it in arrears.

Table 2: Third party is not a bank

	Third party owes existing debt to the debtor – for example repayment of a personal loan owing to the debtor in the amount of £10,000	Third party owes future debt to the debtor – for example an agency for whom the debtor works as a self-employed carer and gets paid weekly.
Debtor owes existing debt to the creditor – for example £3,500 arrears of maintenance.	The arrears of £3,500 could be enforced against the £10,000 owed to the debtor. On the making of the interim order, the third party would be directed not to make any payment to or for the benefit of the debtor pending the making of the final order. On the making of the final order, the £3,500 would be paid to the creditor.	Subject to the final protected balance, the third party debt order would bite every time the third party pays money to the debtor. On each occasion, either a fixed sum or a proportion of the payment made would be paid by the third party to the creditor. The final protected balance would mean that in a given period the third party will not start paying money to the creditor until a certain amount has been paid to the debtor. The duration of the order could be for a fixed term or for such time until the debt owed is discharged
Debtor owes future debts to the creditor – for example periodical payments of £500 per month.[3]	On the interim order, the third party would be directed not to make any payment to the debtor pending the making of the final order. The final order would direct the third party to pay money to the creditor on every occasion that the third party pays money to the debtor in repayment of the debt. The order could require a proportional or a fixed amount to be paid to the creditor. However, money paid to the creditor cannot be any greater sum than is owing to the creditor at the date the money is paid. The duration of the order would be for such term as the court considered appropriate. We do not envisage that the third party debt order would necessarily last for the duration of the periodical payments order.	The third party debt order would bite every time the third party pays money to the debtor. On each occasion, subject to the final protected balance either a fixed sum or a proportion of the payment made would be paid by the third party to the creditor. The final protected balance would mean that in a given period the third party will not start paying money to the creditor until a certain amount has been paid to the debtor. The duration of the order would be for a fixed term.

[3] The future debt cannot be enforced until it is owed. To ensure that does not occur, it will be necessary to enforce it in arrears.

To what debts can a periodic third party debt order attach?

10.43 At present, a third party debt order can only take effect against debts that are owed by the third party at the time the interim order is served. As explained above, we recommend that a periodic third party debt order is introduced that will take effect against any debts that the third party owes to the debtor at the time the interim order is served *and* debts that become due to the debtor from the third party throughout the duration of the order. However, as to what type of debts can be enforced against, we do not recommend any change from the current position.[17] In other words, it must be something that the law recognises as a debt, that is, money that the debtor is entitled to demand. This scope means that periodic third party debt orders could be used against a wide range of debts and the terms of the order will need to take account of the type of debt that is being enforced against.

10.44 A periodic third party debt order has the benefit of catching debts as and when they fall due so that it is not necessary for a creditor to have to time precisely his or her application. For example, a creditor may not know exactly when a debtor would receive dividends from a company in which he or she has a shareholding. A periodic third party debt order directed to the company would allow the creditor to recover from those funds whenever they are paid throughout the duration of the order.[18] We envisage periodic third party debt orders being a flexible tool. It will be necessary for the court, on every application, to determine the detail of the order depending on all the circumstances and the nature of the debts owed, both to the creditor and to the debtor.

Enforcement against future debts owed by the third party to the debtor

10.45 We have drawn a distinction between banks and other third parties in considering how periodic third party debt orders should operate against future debts.

BANKS

10.46 Where the third party is a bank, we consider that the order should take effect at set regular intervals and will take effect against any funds in the debtor's account on that date. For example, on the 1st of every month, the order will operate to deduct a payment of £500 from the funds in the debtor's account on that date (if there are insufficient funds in the debtor's account to pay the full amount due).

THIRD PARTIES THAT ARE NOT BANKS

10.47 Where the third party is not a bank, we recommend that the order attaches to any payments made by the third party to the debtor in repayment of a debt as and when they are paid, subject to what we have termed the "final protected balance".[19] We do not think it appropriate to compel these third parties to make

[17] The general rule is that a third party debt order may be directed at "any debt due or accruing due to the judgment debtor from the third party": Civil Procedure Rules, r 72.2(1)(a).

[18] The declaration of the dividend creates an immediate debt: *Re Severn and Wye and Severn Bridge Ry Co* [1986] 1 Ch 559, unless it is expressed as payable at a future date, in which case a shareholder has no right to enforce payment until the due date for payment arrives: *Re Kidner, Kidner v Kidner* [1929] 2 Ch 121.

[19] See paras 10.70 to 10.74 below.

payments to the creditor at set regular intervals. Depending on the identity of the third party and the nature of the debt, there may be competing pressures on funds available to the third party. For example, it would not be appropriate to direct that the company in which the debtor has a shareholding must make dividend payments on set dates, or that the agency, through which the debtor works, must always pay the debtor on the same day every week or month. The order that we recommend is sufficiently flexible to attach to these payments as and when they are made.

10.48 **We recommend that a periodic third party debt order may:**

(1) operate against funds in a debtor's bank account by requiring payment to a creditor of a fixed amount at set regular intervals; and

(2) operate against other debts by requiring payment to a creditor of a fixed or proportionate amount of any sum that the third party pays to the debtor in payment of a debt, as and when payment to the debtor is made.

How future debts owed by the debtor to the creditor are enforced

10.49 The future obligation is not capable of being enforced until payment falls due under the order. How this limitation affects the terms of the order will differ depending on whether or not the third party is a bank. It is less straightforward where the third party is not a bank.

THIRD PARTIES THAT ARE NOT BANKS

10.50 The periodic third party debt order will operate against payments as and when they are made to the debtor by the third party. These payments may be made at regular or irregular intervals. Even if they are made at regular intervals, it may not be the same regular intervals at which money becomes due to the creditor. As a result, the order will have to stipulate the maximum payment that can be made to the creditor in specified periods.

10.51 For example, take a creditor who seeks to enforce a periodical payments order of £500 per month where the order requires payment on the 28th of every month. If the periodic third party debt order is made on 1 January, then (ignoring any arrears due) the order will only be able to take effect from the 29th of that month after the next payment of £500 has fallen due on the 28th; the order should not require payment to the creditor before that date. The order may provide for a certain amount to be paid to the creditor every time a payment is made by the third party to the debtor, or it may provide that a proportion of any money paid to the debtor is paid to the creditor. Either way, the order must stipulate that no more than a maximum of £500 is paid to the creditor between 29 January and 28 February and so on in each calendar month.

10.52 The need to stipulate the maximum amount payable to the creditor in a specified period means there is no mechanism in the order to recover any arrears that accrue during the lifetime of the order. For example, if in one month the third party makes no payment to the debtor and therefore the creditor receives nothing, in the next month the creditor would be entitled to recover more money (as a month of arrears will have accrued). However, to enable the orders to

provide for arrears would make them very burdensome for the third party to administer. It would be complicated to require the third party to keep track of the total due to the creditor at any given time. If arrears accrue, then the creditor will have to take other steps to enforce those arrears, or the term of the periodic third party debt order is extended so as to recover the arrears.

BANKS

10.53 Regardless of whether the enforcement is taking place against an existing debt (a capital sum in the debtor's account) or a future debt (monies being deposited into the debtor's account) the periodic third party debt order will take effect at regular intervals. That means the court can set the order so that no more is recovered by the debtor than is due at any given point.

10.54 For example, to enforce the same order of £500 per month due on the 28th of every month, the court could direct that the order take effect on the 29th of every month and require a payment of £500 to the creditor, or such amount as is in the account if less than £500. As with third parties that are not banks, and for the same reason, we do not think the orders can provide for the recovery of arrears that accrue during the lifetime of the order.

Protecting the parties

10.55 It is imperative that in considering how periodic third party debt orders should operate the interests of both parties are protected as far as possible. However, as their interests are in some respects competing, a balance must be struck between:

(1) ensuring that the creditor receives what he or she is owed; and

(2) ensuring that the debtor is not left in a state of need.

10.56 The considerations are different depending on whether or not the third party is a bank and so we will consider the issues separately on that basis. It is also important to consider any protections necessary for the third party.

WHERE THE THIRD PARTY IS A BANK

10.57 If the enforcement is of future periodical payments against an existing debt, say a sum of money in a savings account, then balancing the interests of the parties can be easily managed. We consider this balance can be achieved by the court having the power to freeze funds beyond the making of the final third party debt order, combined with giving both parties the opportunity to make representations as to the amount that should be frozen. Freezing the funds means they are protected for the creditor to enforce against, but only after the court has heard from the debtor as to the use (if any) that he or she intended or needs to make of those funds.

10.58 This power is an extension to the court's current power to freeze funds that are owed to the debtor. As it stands, funds can only be frozen until the making of the final order. Our recommendation appears to us to go beyond what was envisaged by the Government in its 2011 Consultation, where it is said that for periodical third party debt orders to work requires "a degree of compliance from the

debtor".[20] However, the example given in that consultation is enforcing against funds periodically coming into the debtor's account and so the freezing of a capital sum may not have been considered. Under the CSA 1991, where a regular deduction order is made, there is no element of freezing.[21] However, under a lump sum deduction order under the same Act (which in all other respects operates in the same way as a one-off third party debt order) the order can continue to freeze the debtor's bank account beyond the making of the final order if, at the time the final order is made, there are insufficient funds in the account to satisfy the debt owed by the debtor.[22]

10.59 We consider that this recommendation provides the "ongoing security" that Penningtons Manches noted was missing from the current law on enforcement. The court will need to give careful consideration to the exact terms of the order – freezing a sum to ensure the payment of future debts is a curtailment of the debtor's financial freedom and the power should be used only where and to the extent that it is proportionate to do so.

10.60 For example, what might a court do if the sum in the debtor's account is £20,000, there are arrears of £5,000 and a continuing periodical payments order for £500 per month? Once the arrears are paid, there will be £15,000 remaining in the account. If the whole £15,000 were to be frozen, then the order would secure periodical payments for the next 30 months. Whether that is fair will depend on all the circumstances, including whether the debtor has a day-to-day need, or a specific one-off need for any of the funds and the extent of the debtor's historic non-compliance. It may not be fair to freeze the whole amount and a court may opt, for example, to freeze only £3,000 to secure payments for the next six months, or £6,000 to ensure the creditor receives what is due for the following year.

10.61 There may be a concern that freezing funds to protect periodical payments is effectively capitalising maintenance without requiring the creditor to make an application to vary.[23] However, an application to vary and capitalise maintenance is, in most cases, appropriate only where there is sufficient capital to meet the debtor's full liability under the periodical payments order. The term of the periodical payments order may be lengthy and, consequently, the amount required to capitalise the order very large. There will not be sufficient available capital in the vast majority of cases. An application to vary can also be a long and costly process. Where the debtor has defaulted on his or her obligations and there are funds that can be used to ensure that the creditor receives what is due for a period of time, we consider those funds should be available for enforcement.

10.62 If enforcement is against future debts that become owing to the debtor, for example if the order is directed at a current account into which the debtor's

[20] Solving disputes in the County Courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales (2011) Cm 8045, 204.

[21] Regular deduction orders are explained further below.

[22] Child Support Act 1991, s 32F.

[23] Under the Matrimonial Causes Act 1973, s 31.

income is deposited, then it is more difficult to manage the protection of both parties' interests. There are two risks:

(1) the debtor may withdraw all the funds in the account after they are deposited and before the third party debt order takes effect; and

(2) the third party debt order may take effect so as to deprive the debtor of the funds he or she needs to meet everyday living expenses.

10.63 To combat these two risks we considered imposing restrictions on what the debtor could withdraw from his or her account in any given period and imposing a continuing protected minimum balance so that the funds in a debtor's account could never be reduced below a certain level as a result of the third party debt order. However, it became apparent through discussions with banks that it would be very difficult for these measures to be operated. As a result, we have decided not to pursue them. Instead we have decided to follow the model in the CSA 1991, which simply provides for the regular deduction order to operate against whatever funds are in the debtor's account as and when the order takes effect.[24]

10.64 Although the absence of any restrictions on what the debtor can withdraw leaves it open to the debtor to take steps to avoid the order, we do not think that all debtors will take that step. We understand that evasion is not something that the CMS has frequently encountered. For debtors who vehemently do not want to pay, this method of enforcement may not be effective. For those who do not comply through disorganisation or apathy, however, we think it will be successful in recovering funds. Further, we take the view that where there are no enforcement alternatives, this option is better than no enforcement action at all. However, unlike the scheme under the CSA 1991, and as a result of being unable to restrict the debtor's access to the funds in his or her account, we do not consider that a protected balance should operate on the debtor's account. The debtor will have full access to the funds to ensure that his or her needs are met before the third party debt order takes effect. We consider that to impose a minimum balance without any countervailing protection for the creditor would be to tip the balance too far in the debtor's favour.

WHERE THE THIRD PARTY IS NOT A BANK

10.65 The considerations involved in protecting the parties are different where the third party is not a bank, as the debtor does not have access to the funds owed until they are paid by the third party who should, if acting in compliance with the third party debt order, make the required payment to the creditor at the same time. As a result, there is no risk of the debtor taking deliberate steps to defeat the order. In considering the necessary protections, it is helpful to consider separately what is needed when the third party owes an existing debt to the debtor and when the third party will owe debts in the future.

[24] The Family Court does already have the power to order the debtor to make payments by way of a standing order, and to direct the debtor to open an account for such purposes: Maintenance Enforcement Act 1991, s 2(4). However, these powers are more limited than the recommendation that we make: first, they can only be exercised in respect of periodical payment order or lump sum orders by instalments and only in circumstances where the debtor is ordinarily resident in England and Wales; second, the orders are directed to the debtor rather than directly to the bank.

10.66 However, in both cases we take the view that it would not be appropriate for any freezing of the relevant funds to operate beyond the making of a final order where the third party is not a bank. First, it may be hard to identify the exact funds that the third party owes to the debtor: those monies may be mixed with other funds held by the third party. Secondly, the third party may need those monies for another purpose. Thirdly, the third party may simply not have all the funds that are owed. Fourthly, a third party is less likely than a debtor to try to thwart a periodicl third party debt order and so there is less of a need to take protective action.

Third party owes existing debt to the debtor

10.67 Consider, for example, a creditor who seeks to enforce arrears of £1,000 owed under a periodical payments order and to secure future payments of £200 per month that will become owing. The creditor knows that the debtor's brother owes the debtor £5,000 and that the money is due to the debtor. Under our proposal, on the making of the interim order, the debtor's brother will be directed not to make any payments to the debtor or in any other way reduce the debt that he owes to the debtor. We do not propose that the funds are frozen such that the third party cannot make use of them in any other way. We are concerned that such a restriction would be unduly harsh on the third party. On the making of the final order, the £1,000 of arrears that the creditor seeks to enforce would be paid by the third party to the creditor[25] and the ongoing obligation of £200 per month would be attached to the remaining debt of £4,000 that the brother owes to the debtor, on whatever terms and for whatever period as the court decides.[26] However, unlike where the third party is a bank, we do not recommend that the remaining debt of £4,000 is frozen in the hands of the third party.

10.68 We acknowledge that not recommending any freezing mechanism in this scenario may enable a certain level of collusion between the debtor and the third party, in that they may agree that the third party will not make payments to the creditor. However, that keeps the debtor as well as the creditor out of his or her money and as and when any payment is made to the debtor, payment must also be made to the creditor. We think this approach is the right balance to strike given that any freezing of the funds could have the effect of penalising the innocent third party. The effect on the third party of any freezing mechanism could be particularly harsh where the third party is a company and there are competing business demands on the company's funds.

10.69 However, to offer some protection to the creditor, in the situation where a creditor seeks to enforce future obligations against an existing debt owed to the debtor by a third party other than a bank, we think that the court should be able to direct the third party to notify the creditor three days before making any payment to the debtor in respect of a debt that the third party owes.[27] A requirement to notify would put the creditor on notice that he or she will receive payment from the third party when the payment is made to the debtor. It would also give the creditor an

[25] Subject to representations made by the brother, for example, that he does not have the funds to pay £1,000.

[26] The terms may be that whenever the brother makes a repayment to the debtor he pays to the creditor 50% of that sum, up to a maximum of £200 in any one month.

[27] A third party debt order attaches to all debts due or accruing.

opportunity in appropriate circumstances to take steps to ensure that the debtor does not dissipate funds that are being paid to him or her.[28]

Third party owes future debt to the debtor

10.70 This situation arises where the creditor seeks to enforce arrears or secure an ongoing obligation against monies that are periodically paid to the debtor by a third party who is not a bank. The example used in the table above is the agency which regularly pays money to the debtor who works for them as a carer on a self-employed basis.

10.71 The court will tailor the terms of the periodic third party debt order according to the debtor's average level of income from the third party. The court will need to take account of the debtor's needs as well as what is owed to the creditor when fixing the sum or percentage that will be paid to the creditor by the third party. However, there may be instances where the debtor's income falls below what is anticipated in any given period; for example, if the debtor is unwell and unable to work for two weeks out of a month. We think there needs to be a mechanism to protect the debtor in those circumstances, in a similar way that a protected earnings rate operates to protect the debtor on an attachment of earnings order. We consider, therefore, that a level needs to be set so that the third party does not make any payments to the creditor until payments to the debtor over a given period have reached that level. For the purposes of this discussion, we call this level the "final protected balance".

10.72 For example, a creditor may seek to enforce a periodical payments order for £500 per month by way of a periodic third party debt order against the payments made by the care agency to the debtor. The court may find that, on average, those payments total £2,000 per month. However, the court may also find that the debtor needs a minimum of £800 per month to meet his or her living expenses and so set a final protected balance at £800. That would mean that until £800 had been paid to the debtor in any given month, the care agency would not make any payments to the creditor. In respect of any payments to the debtor in excess of £800 in any given month, the court may set the periodical third party debt order to require the care agency to pay all of, or a percentage of, all payments it makes to the debtor directly to the creditor, up to a maximum of £500 per month.

10.73 For a worked example of a periodic order operating against the income of a self-employed please see Figure 7 of Appendix B.

10.74 To protect the third party from accidental non-compliance, the obligations on the third party should be clearly stated on the face of the order. The steps the third party needs to take must be set out in detail so that he or she knows exactly what must be done. A third party debt order creates an enforceable debt between the creditor and the third party. If the third party fails to pay the creditor as required

[28] For example, if a creditor's periodical payments order for £500 per month is attached to an outstanding debt of £4,000 owed to the debtor, the creditor may recover up to £500 from sums paid to the debtor in payment of the £4,000 every month. If, unexpectedly, the third party pays the entire £4,000 in one lump sum, the creditor may wish to take steps to obtain a different order to ring-fence the £4,000 for enforcement. For example, the creditor may apply for a periodic third party debt order directed at the bank account into which the monies will be paid.

by the order then the creditor may take enforcement action against the third party. If a third party were to fail to comply with any order to notify the party in advance of making payments to the debtor (we recommend that the court should have a power to make such an order[29]), this would be a contempt of court and punishable in the usual way.

10.75 **We recommend the following powers be available to the court on making a periodic third party debt order.**

(1) Where the order is made against funds in a bank account, the power to freeze funds beyond the making of the final order.

(2) Where the order is directed to a third party who is not a bank, the power to direct that the third party must notify the creditor three days in advance of making any payment to the debtor.

(3) Where the order is directed to a third party who is not a bank, the court may set a level of funds that must be paid to the debtor by the third party before the third party makes any payment to the creditor (a "final protected balance").

Duration of a periodic third party debt order

10.76 The court will need to balance the interests of all the parties on setting the duration of the order. We consider that relevant factors should include:

(1) the degree of the debtor's non-compliance (both the extent of the arrears and the period of time over which the debtor has not complied);

(2) the impact on the creditor of the debtor's non-compliance and the potential impact of any future non-compliance;

(3) the impact on the debtor of the imposition of the order; and

(4) the impact on the third party of the imposition of the order.

10.77 An order to enforce an existing debt owed by the debtor to the creditor (for example, a lump sum) against future debts owed by the third party to the debtor may remain in effect until the debt owed to the creditor is discharged in full[30] or for a set period of time.[31] In making an order to enforce future debts, the court will have to determine whether the periodic third party debt order will last for the duration of the order that it is being used to enforce, or for a shorter period. As noted in the table above,[32] we do not envisage the periodic third party debt order lasting for the whole duration of the underlying order in most cases.

[29] See pars 10.67 to 10.69 above.

[30] In the Family Court, interest ceases to run on a judgment debt once a third party debt order is made, unless the order does not succeed in recovering any funds: County Courts (Interest on Judgment Debts) Order 1991, SI 1991 No 1184, art 4.

[31] Though if for a set period there would have to be provision for the order to end if and when the creditor had recovered all he or she was due.

[32] For the Table, see *"How the orders would operate"* at para 10.40 above.

10.78 **We recommend that the duration of a third party debt order be at the discretion of the court, but that in determining the duration the court should have regard to:**

(1) the degree of the debtor's non-compliance;

(2) the impact on the creditor of the debtor's non-compliance and the potential impact of any future non-compliance;

(3) the impact on the debtor of the imposition of the order; and

(4) the impact on the third party of the imposition of the order.

Criteria for making the order

10.79 We consider that a periodic third party debt order should only be made once the debtor has defaulted on payments due under the family financial order. Default on the payments is required under the current law before a third party debt order is made and we do not recommend any change.

10.80 An attachment of earnings order can (in certain circumstances) be made without any default by the debtor.[33] By analogy, therefore, it is arguable that a periodic third party debt order designed to operate in a similar way to an attachment of earnings, but against a self-employed debtor, should be possible without any default by the debtor. However, the impact of some types of periodic third party debt order, such as freezing a sum in the debtor's account to meet future obligations, are significant. We consider, therefore, that there must be some default from the debtor before such an order can be made. We think it would be confusing to have different criteria for the making of different types of periodic third party debt orders.

10.81 We consider that any instance of default in respect of the debt that the creditor seeks to enforce is sufficient to enable the application for a third party debt order to be made. The extent of any default will be a factor for the court to consider when determining whether to make the order and on what terms.

10.82 **We recommend that a periodic third party debt order may only be made to enforce a debt arising under a family financial order following default by the debtor in respect of that debt.**

THE TYPE OF BANK ACCOUNTS TO WHICH A THIRD PARTY DEBT ORDER CAN APPLY

10.83 In the Consultation Paper we noted that third party debt orders cannot be used against a joint account,[34] unless both joint account holders are debtors of the creditor in relation to the same debt. The latter situation is very unlikely to apply where a debt arising from a family financial order is concerned. Family debtors can therefore "shelter" funds in joint accounts so that they are safe from enforcement by the creditor. Although sheltering funds is unfair, there are real difficulties with making joint accounts subject to third party debt orders. Most

[33] Maintenance Enforcement Act 1991, s 1.

[34] *Hirschorn v Evans* [1938] 2 KB 801.

obviously, there is the risk of unfairness to the joint account holder who does not owe a debt to the creditor: how does the court identify whether funds taken from the court belong to the debtor and should therefore be available to pay his or her debts? In addition, it is likely that the making of third party debt orders against joint accounts would require banks and other financial institutions to execute more orders and that such orders may take more court time (though savings of court time on other applications may be made as a result).

10.84 The attitude of the Government towards extending third party debt orders to joint accounts has varied over time,[35] but in the latest consultation by Government in which this question was addressed, 93% of respondents agreed that joint accounts should be within scope.[36] A power already exists in legislation for the Child Maintenance Service to make deduction orders against joint accounts when enforcing assessments for child support.[37] The power is not yet in force, but the DWP have recently consulted on whether to bring it into force.[38] The DRD scheme allows enforcement against funds in joint accounts for the recovery of unpaid tax.[39]

Consultation responses

10.85 We asked consultees whether third party debt orders should be introduced against joint accounts and suggested a rebuttable presumption that the funds in the account are held by the account holders beneficially in equal shares. While support was not unanimous, the majority of consultees supported the proposal.[40]

10.86 The reasons given for opposing the extension of third party debt orders concerned the practicalities of doing so and the potential unfairness to the joint account holder. The Birmingham Law Society[41] (which objected to the proposal) emphasised the "real difficulties" and the Law Society, although agreeing in principle, saw "particular complexities" with enforcing against joint accounts. International Family Law Group, whilst recognising a gap in the law, was concerned about potential unfairness. A particular point raised in its response was the potential effect on the joint account holder's credit rating if payments are

[35] The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219, para 3.30.

[36] Solving disputes in the County Courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales: The Government Response (2012) Cm 8274.

[37] The regulations required by s 32E(2)(b) of the Child Support Act 1991 to enable the power to be exercised have not yet been made.

[38] Department for Work and Pensions, *Deduction orders against joint accounts, Public Consultation*, June 2016. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/532552/consultation-on-deduction-orders-against-joint-accounts.pdf (last visited on 01 December 2016).

[39] Finance (No 2) Act 2015, sch 8.

[40] Clarion Solicitors, District Judge Robinson, the Family Justice Council, the Family Law Bar Association, Janet Bazley QC, the Judges of the Family Division of the High Court, Penningtons Manches, Resolution and Tony Roe. Two further consultees, International Family Law Group and the Law Society, were cautious about the proposal without rejecting it.

[41] An association representing legal practitioners from Birmingham and the surrounding area.

stopped from the joint account. The Money Advice Trust, which objected to the proposal, foresaw "fundamentally unfair and unjust results" and, in particular, mentioned the potential adverse impact on the joint account holder and his or her family, including dependent children. It said it could "see no justification" for the presumption that the funds in a joint account are held beneficially in equal shares.

10.87 On the other hand, in support of the proposal, Clarion Solicitors acknowledged this is a "vexed issue" but were concerned about the "obvious avoidance technique" of sheltering funds in a joint account. District Judge Robinson also referred to the "frequent abuse" by debtors sheltering funds in a joint account. The Family Law Bar Association, Janet Bazley QC and the Judges of the Family Division of the High Court all referred to the ease with which enforcement can be avoided by using joint accounts.

10.88 Another argument advanced to support this reform was the fact that it is already possible for a charging order to be granted in respect of jointly owned property: Tony Roe suggested it was illogical therefore for a third party debt order not to be available against a joint account.

10.89 District Judge Robinson, the Law Society and the Judges of the Family Division of the High Court all expressed support for the principle of third party debt orders against joint accounts, but raised concerns about the potential cost and uncertainty which could make it an undesirable option for the creditor. The Judges of the Family Division of the High Court pointed out that the "devil is in the detail".

10.90 Consultees often qualified their support for the proposal in some way.

(1) The consensus was that there would need to be a rebuttable presumption that the debtor owned only half (or the relevant proportion) of the funds in the account.[42]

(2) Clarion Solicitors suggested enforcement against a joint account should be possible "on the proviso that [it] is an option of last resort".

(3) The majority of consultees who responded to this question particularly emphasised the importance of giving the debtor (or joint account holder or other third parties) the opportunity to make representations and challenge any decision.[43] Generally, it was felt a hearing would be necessary for this purpose.[44] The Judges of the Family Division of the High Court suggested that the argument over beneficial ownership[45] of

[42] Clarion Solicitors, District Judge Robinson, Family Justice Council, the Family Law Bar Association, Janet Bazley QC, the Judges of the Family Division of the High Court, Resolution and Tony Roe.

[43] District Judge Robinson, the Family Justice Council, the Family Law Bar Association, the International Family Law Group, Resolution and Tony Roe.

[44] However, Resolution referred to "the debtor having the opportunity to argue otherwise" and Tony Roe referred to "the other joint holder(s) could be given liberty to apply". Those responses may envisage some form of hearing, but do not specifically require it.

[45] See the discussion of the ownership of funds in a joint account at paras 10.98 to 10.108 below.

the funds "could give rise to expensive and complicated litigation, possibly out of all proportion to the amount at stake".

(4) The Law Society proposed, in the context of potential for argument over the source of the funds in a joint account, that "a minimum amount below which such orders should not be pursued" might be sensible.

10.91 We also asked consultees whether, in any event, there should be provision for disclosure by the bank of details of any joint account(s) held by the debtor and another person, when a third party debt order is made against a bank. The Birmingham Law Society did not support enforcement against joint accounts and so, in that case, thought information about the accounts held in the joint names of the debtor and another person would not be useful to the creditor. The majority of consultees specifically supported an obligation on the bank to disclose a list of any joint accounts held by the debtor and another person. International Family Law Group did, however, suggest limiting this obligation to "significant joint bank accounts". It considered that "where [they have] a balance below, say £500, the benefit to the creditor is outweighed by the inconvenience to and invasion into the financial situation of an innocent third party".

Discussion and recommendations

The types of joint account to which a third party debt order could attach

10.92 We have considered to which type of joint accounts, being accounts in which the debtor is an account holder but not the sole account holder, it should be possible to direct a third party debt order.

10.93 In its discussion of the application of third party debt orders against joint accounts in the 2003 White Paper, the Government noted the practical difficulties of identifying whether a debtor has an interest in a business or partnership account[46] and the fact that partners are not jointly liable for debts accrued when not acting in the usual course of business.[47] The Government concluded that such difficulties prevent such accounts from being joint accounts to which third party debt orders could attach. It also said that trustee accounts, where the account is held legally by the person or persons identified on the account but on behalf of others who beneficially own the funds, should also fall outside the range of accounts susceptible to a third party debt order.

10.94 There are similar restrictions on accounts that can be subject to a regular deduction order or a lump sum deduction order under the CSA 1991.[48] While there is an exception for accounts used by the debtor as a sole trader, other accounts used wholly or partly for business purposes may not be the subject of a deduction order. We note that the recent consultation on enabling deduction orders to be made against joint accounts under the CSA 1991 did not deviate from the distinction between personal and business accounts.

[46] Because the account may be registered in the trading name of the business, rather than in the name of the debtor and any partners.

[47] Presumably, a debt owed to a family creditor will not have been incurred in the usual course of business.

[48] Child Support (Collection and Enforcement Regulations) 1992, SI 1992 No 1989, reg 25X. The legislation is not yet in force.

10.95 Other than the restriction that third party debt orders cannot be used against a joint account, there is currently no limitation on the accounts that can be the subject of a third party debt order. It is probably due to the fact that third party debt orders can only apply to sole accounts that other restrictions have not been considered; accounts used for business (other than as a sole trader) or trust purposes are unlikely to be sole accounts in the name of one individual.

10.96 We consider that whatever the nature of the joint account the issues that arise are the same, namely to what extent the funds in the account are beneficially owned by the debtor and which liabilities attached to the account belong to the debtor. These are going to be the issues regardless of who is/are the other account holder(s). We take the view, therefore, that an application for a third party debt order should be possible against any type of joint account where the debtor is named as an account holder. However, the court will only be able to make a third party debt order against funds in a joint account in respect of funds that represent a debt to the debtor and, importantly, where the debtor is beneficially entitled to those funds. As a result, some joint accounts will bear no fruit for the creditor. Wherever possible, careful thought will need to be given as to whether an application is likely to be successful against the joint account in question.

10.97 **We recommend that it should be possible to apply for a third party debt order against the funds in any account in the debtor's name, regardless of whether the debtor is the sole or a joint account holder. The court should have the power to make a third party debt order in respect of any funds that:**

(1) are a debt owed to the debtor; and

(2) are funds to which the debtor is beneficially entitled.

The ownership of funds in a joint account

10.98 In the Consultation Paper we suggested that a realistic approach to determining what proportion of funds in a joint account should be capable of attachment by a third party debt order would be to presume that the debtor and the other account holder(s) own the funds in equal shares. Where there are two account holders, therefore, each would own 50% of the balance of the account. The part of the account not owned by the debtor would be protected from being paid to the creditor under the third party debt order.[49]

10.99 By way of context, it is necessary to consider how funds in a joint bank account are owned. The bank's obligation to release funds to the account holders will depend upon the terms of the account and the bank will not be concerned, beyond those terms, with the extent to which each account holder owns the funds. For example, the terms of the account may enable each account holder to withdraw funds unilaterally, or the terms might require both parties' consent before funds are released. Here, however, we are concerned with the ownership of the funds as between the account holders.

[49] It would not, however, be protected from the freezing effect of the interim third party debt order.

10.100 Ownership of any asset is divided into legal and beneficial ownership. Legal owners have the right to deal with the property, but it is beneficial owners who have the true benefit of the property. Hence, it is the beneficial owners of funds in a bank account who are entitled to the money. Often legal and beneficial ownership is vested in the same person or people, but sometimes they are split. For example, A and B may be the legal owners of a house and so be able to sell it,[50] but A, B and C may be the beneficial owners in equal shares, so that if the house was sold each would receive one third of the sale proceeds. Or A and B may be the legal and beneficial owners of a house, but they may own the beneficial ownership in unequal shares so that if the house was sold the sale proceeds would be divided between them unequally, perhaps with A being entitled to two thirds and B to one third.

10.101 Legal ownership of any asset takes the form of what is known as a "joint tenancy". Therefore, the funds in a joint account are held by the account holders as joint tenants. [51] This means that the account holders have an equal, undivided (or collective) right to deal with the funds in the account and on the death of one of the account holders full legal ownership will remain with the other(s). However, it is determining how the beneficial ownership is held that may cause dispute.[52]

10.102 Beneficial ownership of an asset can be held by people as joint tenants or as "tenants in common". Therefore, while at law holders of a joint bank account will be joint tenants, they may hold the funds beneficially as joint tenants (mirroring the legal ownership), or as tenants in common. Tenants in common can share the beneficial ownership of property in any proportion. Hence, if the beneficial ownership is held by the account holders as tenants in common, the shares in which they hold the funds could be anything from 0:100 to 50:50. On the death of a tenant in common his or her share passes to his or her estate and will then be inherited under his or her will or according to intestacy rules.

10.103 Where beneficial ownership is held as a joint tenancy, it can be changed into a tenancy in common by a legal mechanism known as "severance". If funds in a joint bank account are held as a beneficial joint tenancy at the time of the third party debt order, then we consider that the effect of the order would be to sever the beneficial joint tenancy. Severing the joint tenancy would leave the account holders holding the funds as tenants in common in equal shares.[53] How the beneficial ownership is held and, if held as tenants in common, then in what shares, will depend on the intentions of the account holders at the time they

[50] Under Trusts of Land and Appointment of Trustees Act 1996, s 6, A and B have "all the powers of an absolute owner". The exercise of their powers is, however, subject to the proper discharge of their equitable duties and consultation with C.

[51] M Bridge, L Gullifer, G McMeel, and S Worthington *The Law of Personal Property* (1st ed 2013) p 622.

[52] The mere fact that a joint account is in joint names is not conclusive of the beneficial interests in the property: *Re Figgis (deceased)* [1969] 1 Ch 123. An individual may have a beneficial interest in an account held in the sole name of another person: *Paul v Constance* [1977] 1 WLR 527. However, we do not envisage third party debt orders being used in such a case, that is, against a debtor who does not hold legal title but may have a beneficial interest.

[53] *Nielson-Jones v Fedden [*1975] Ch 222 at 228E by Walton J.

opened the account and throughout its operation.[54] Often the account holders will not have formed firm intentions, or there will not be sufficient evidence to satisfy the court of what those intentions were. In such circumstances, a number of presumptions operate.

10.104 The presumptions depend, among other matters, on the relationship between the account holders and the general way in which the account has been operated. For example, if the account is held by a married couple[55] and operated as a "common purse", then it will be presumed that the account holders hold the funds beneficially as joint tenants. We consider that the same presumption would apply to a cohabiting couple.[56] If, however, the account is held by two people, not in an intimate relationship (say friends or siblings) and the contributions are obviously unequal, then it will be presumed that the account holders hold the funds beneficially as tenants in common in the same shares to which they have contributed to the account.[57] As stated above, the presumptions are subject to the actual intentions of the account holders. For example, it may be that one sibling intended to gift the money he or she put into the account, so that the other sibling is beneficially entitled to 100% of the funds.

10.105 We envisage third party debt orders being used against joint accounts most often in one of three scenarios. First, where the debtor has set up an account with a new partner and put all of his or her funds into that account. In that situation, if the account is being operated as a "common purse", then absent any evidence of the account holders' actual intention, it is likely to be presumed that the funds are held beneficially as joint tenants, which is in line with our recommended presumption.[58] Secondly, where the debtor has a joint account with a new partner, but the additional named person on the account was added for convenience only. For example, where the debtor deposits all the sums into a joint account so that his or her new partner can pay bills from that account.[59] Thirdly, where the debtor has deliberately tried to shield funds from enforcement by putting them into a joint account with, perhaps, a friend or sibling. In the second and third situations, the presumption we suggest is unlikely to be the correct outcome, but we consider it to provide the best protection to all the parties involved, while the true position is determined. In the case of accounts of convenience and where there has obviously been an attempt to shield funds, it should not be difficult to identify the true beneficial ownership of the funds. We consider that the benefits of extending third party debt orders to joint accounts justify the complexity that may arise in some cases.

10.106 If the other account holder, the debtor or the creditor, disputes the presumption of equal shares, then they should have the opportunity to make representations to

[54] EP Ellinger, E Lomnicka, CVM Hare Ellinger's Modern Banking Law (5th ed 2011) p 328. An example of this can be seen in *Stoeckert v Geddes* (No 2) [2004] UKPC 54, [2004] All ER (D) 207 (Dec)(2004-05) ITELR 506.

[55] *Jones v Maynard* [1951] 1 Ch 572.

[56] For the reasons given in *Stack v Dowden* [2007] UKHL 17, [2007] 2 WR 831.

[57] EP Ellinger, E Lomnicka, CVM Hare, *Ellinger's Modern Banking Law* (5th ed 2011) p 327.

[58] If one party had initially contributed a significant sum to the account then the presumption may be easily rebutted.

[59] *Heseltine v Heseltine* [1971] 1 WLR 342 CA.

the court as to why the share of the funds in the account available to satisfy a third party debt order should be greater or less than the presumed share. The burden of proof will lie on the party seeking to depart from the presumption. We note that the opportunity to make representations features in the legislation on the enforcement of child support arrears by an order for regular deductions or by a lump sum deduction order from a joint account.[60]

10.107 In the context of child maintenance, a deduction from a joint account should be no more than "appears to be fair in all the circumstances". In determining what is fair, the Secretary of State must have particular regard to the amount contributed to the account by each of the account holders.[61] The recent consultation on enabling enforcement against joint accounts provided that the Child Maintenance Service ("CMS") will make an initial decision as to the share of the funds in the bank account owned by the debtor by requesting and considering bank statements for the account. If the debtor's share cannot be established, then it will be assumed that the funds are owned in equal shares by the account holders. Each account holder will then be issued with a notice detailing the order that the CMS proposes to make and invited to make representations on the proposed order.[62] Under the DRD scheme, it is assumed that funds are owned in equal shares by the account holders, expressed by assuming that the debtor has a share of 1/n, where n is the number of account holders.

10.108 **We recommend a presumption, in the context of an application for a third party debt order to enforce a family financial order against an account on which the debtor is not the only account holder, that the account holders own the funds in the account in equal shares, but with an opportunity for the creditor, debtor and the other account holders to make representations as to the ownership of the funds.**

10.109 The opportunity to make representations will be at the final hearing of the application. Prior to that hearing, where an interim order is made against an account it will freeze, in the normal way, the amount of the debt claimed by the creditor. The interim order may freeze the entire account, either because the balance on the account is equal to or less than the debt owed, or because the bank is administratively unable only to freeze a fixed sum.[63] The freezing of the entire account highlights the need, discussed earlier, for an interim protected balance and the ability of the debtor and the joint account holder(s) to apply for a hardship payment order. Once the court has decided the question of the ownership of the account it will be able to decide how much of those frozen funds are available to meet, in full or in part, the debt owed to the creditor.

[60] Child Support Act 1991, ss 32B(1) and 32F(1).

[61] Child Support Act 1991, s 32F(3) and (4). Regard must also be had to such other matters as may be prescribed, but none have yet been.

[62] Deduction Orders against Joint Accounts, Public Consultation, June 2016, p.9. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/532552/consultation-on-deduction-orders-against-joint-accounts.pdf (last visited 7 October 2010).

[63] We understand that banks who only have the capability to freeze the entire account may then operate the account manually to enable the debtor to make use of those funds that are surplus to the debt to be recovered.

10.110 **We recommend that all account holders should be able to apply for a hardship payment order in circumstances where an interim third party debt order is made against a joint account.**

10.111 We consider that the recommendation to enable enforcement against funds in a joint account is compatible with the "innocent" account holders' right to the peaceful enjoyment of property under article 1 protocol 1 of the European Convention on Human Rights ("ECHR")[64]. Our recommendations to recover funds from joint accounts for the benefit of creditors do not deprive the joint account holder of any property of theirs because only funds that the court has determined belong to the debtor will be enforced against. The freezing of funds in a bank account amounts to a "control of use" rather than a "deprivation of property".[65] States are afforded a wide margin of appreciation in controlling the use of citizens' property when acting in the general interest.[66]

10.112 A control of use is allowed if "in accordance with the general interest". Case law has generally focussed on whether the control of use is in pursuance of a legitimate aim and whether it strikes a fair balance between the competing interests involved. Our recommendation to enable third party debt orders to be directed to funds held in a joint account and the subsequent need temporarily to freeze funds in a joint account has the legitimate aim of ensuring compliance with a court order and protecting the rights of the creditor to receive what he or she is due. We consider that the recommendation strikes a fair balance. The funds belonging to the innocent account holder would only be frozen temporarily and during that time he or she would have access to funds up to the value of the protected minimum balance and the ability to make an application for a hardship payment order. Freezing the funds is necessary to ensure that they are not dissipated before ownership of the funds can be established.

Disclosure of details of joint accounts

10.113 Given that we recommend the extension of the scope of third party debt orders to include joint accounts we consider that banks and building societies should have an obligation to disclose the details of any joint accounts held by the debtor and another person, where a third party debt order is made against that institution. Currently, they only have to disclose details of accounts in the debtor's sole name.

Joint accounts and periodic third party debt orders

10.114 We are of the view that it should be possible to obtain a periodic third party debt order against funds in a joint account. Such an order may be necessary for a creditor to enforce ongoing periodical payments or to recover outstanding arrears. Otherwise, for example, a self-employed debtor's income deposited regularly into a joint account would be shielded from enforcement unless the

[64] Convention for the Protection of Human Rights and Fundamental Freedoms.

[65] *Trajkovski v The Former Yugoslav Republic of Macedonia* Application No 53320/99.

[66] *Broniowski v Poland* Application No 31443/96.

creditor made repeat applications.[67] We note that the recent consultation on enforcing child maintenance against funds in joint accounts contemplates regular deduction orders being made.[68] Periodic third party debt orders would operate in a very similar way.

10.115 We have explored above the importance of determining the ownership of funds in a joint account. When the court determines the ownership of an asset it is merely declaring the parties' position at that time not creating the parties' interests. That means that the nature and quantum of the parties' interests may change over time. For example, one party may stop depositing sums into the joint account and so his or her beneficial interest may decrease. This potential for a change in ownership is an important factor to bear in mind when considering periodic third party debt orders against joint accounts.

10.116 We envisage periodic third party debt orders being made against a joint account on the basis that the debtor makes regular contributions to the joint account.[69] Therefore, the court will base the periodic order on those regular contributions, rather than on any continuing assessment of the parties' respective shares. If those contributions were to cease, then the debtor or the third party would be able to return to court to ask for the order to be varied or discharged. It is not intended that payment to the creditor should be made from the innocent account holder's funds.

10.117 In practice, we think that on the making of a periodic third party debt order against a joint account, the debtor and the innocent account holder will probably separate their funds. The joint account holder can, therefore, take action to protect their position, in a way that a creditor cannot.

10.118 If the joint account is not one to which either party makes regular contributions but is, for example, a savings account with a significant balance, the court may determine that a periodic third party debt order should operate by freezing the debtor's share of the funds (or a portion of them) to enable the recovery of future periodical payments or instalments of a lump sum. In that case, it will be important that the other account holder's funds are not frozen and not used to enforce the periodical payments. The funds will need to be separated before the periodic third party debt order takes effect. We consider that such an order will not be feasible where the joint account is regularly used, for example to deposit regular income and make regular payments such as rent or mortgage payments, utility bills and other day to day expenses.

[67] As well as being costly and inefficient for the creditor and the court, this would also be inconvenient for the debtor and the other account holder. If the debtor's income were to all come from one source then the third party debt order could be directed at that source.

[68] Department for Work and Pensions, *Deduction orders against joint accounts, Public Consultation*, June 2016. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/532552/consultation-on-deduction-orders-against-joint-accounts.pdf (last visited on 01 December 2016).

[69] With the exception of the circumstances described at para 10.118 below.

Effect on the joint account holder's credit rating

10.119 International Family Law Group raised a concern that the making of a third party debt order against a joint account may affect the joint account holder's credit rating. We acknowledge it may do so, but we take the view that when a person opens a joint account he or she is voluntarily doing so in the knowledge that such a step is not without risk. For example, one of the account holders may become a bankrupt, exposing joint funds to the risk of being taken by the trustee in bankruptcy as part of the bankrupt's estate. More simply, one joint account holder may withdraw all the funds from the account, depriving the other account holder of his or her share if the terms on which the account is set up enable one account holder to do so. The making of a third party debt order against a joint account can be understood as another risk of holding funds jointly and that any detrimental effect on the joint account holder's credit rating can be justified by the need for effective enforcement. The risk may be sufficient to stop a third party from colluding with a debtor to shield the debtor's funds from enforcement.

Should enforcement against funds in a joint account be subject to a minimum account balance and be an option of last resort?

10.120 We understand the respective views of the Law Society and Clarion Solicitors that, given the potential for dispute and complexity, third party debt orders should not be made against joint accounts in which the funds held are below a certain amount and that such orders should be an option of last resort. Although these concerns may prove to be the case in practice, we do not think it is helpful to place such limits on these orders in legislation. We would prefer the judge to determine whether, on the facts before him or her, the use of a third party debt order against a joint account would be warranted. If there were only a small balance of funds in such an account, particularly in proportion to the debt which the creditor was seeking to recover, a judge may be unlikely to exercise his or her discretion to make such an order. On the other hand, if the majority of the debtor's funds are held in a joint account and these are clearly the most appropriate target for enforcement, then it seems unhelpful to provide that such an order should only be made as a last resort.

Disclosure of statements

10.121 Currently, where an interim third party debt order is served on a bank or building society, these institutions must search for accounts in the debtor's name and provide details of those accounts to the court. In addition to the account number, the bank or building society must state, for each account, whether there is a sufficient amount in the account to cover the amount specified in the order and, if not, the balance of the account.[70] In the Consultation Paper we asked whether this obligation on financial institutions should be extended so that the bank and the building society must also supply a debtor's bank statements for a specified period.

CONSULTATION RESPONSES

10.122 There were no strong objections to the disclosure of bank statements upon service of a third party debt order. The more negative responses came from

[70] Civil Procedure Rules, r 72.6(2).

International Family Law Group, which felt information requests and orders and a streamlined procedure would render this disclosure unnecessary, and from Resolution, which simply did not see this issue "as a high priority for reform".

10.123 However, there was some variation in the level of support amongst the majority of consultees who supported the proposal. The Birmingham Law Society, the Family Justice Council and Penningtons Manches expressed their support for the proposal without qualification.

10.124 District Judge Robinson was concerned to ensure that there was "protection against 'fishing expeditions'" and indicated that disclosure of statements should be framed as a power for the court to order when making the interim order rather than it being automatic. The Judges of the Family Division of the High Court considered disclosure to be "a useful addition to the powers of the court", which suggests a discretionary element to the provision. Tony Roe also did "not feel entirely comfortable … at least on an automatic basis" with this idea. In contrast, Janet Bazley QC thought that the obligation upon the bank should arise automatically pursuant to the interim order.

10.125 In respect of the period for which bank statements should be disclosed, District Judge Robinson suggested that statements could be provided for "say, 3 months" whereas the Family Law Bar Association suggested 28 days.

10.126 Both the Law Society and the Money Advice Trust raised practical concerns. The Law Society said "the design of any formal request of information from the defaulting party is important to making the system work well". The Money Advice Trust agreed with the conclusion in the Consultation Paper that such an obligation may be "tricky to implement" alongside streamlining and other proposals. However, it did not object to the disclosure of bank statements "where this will assist with transparency, if the measures can be made to work in practice".

DISCUSSION AND RECOMMENDATIONS

Why should statements be disclosed?

10.127 The disclosure of bank statements is an interference with the right to privacy of the relevant account holders. However, such an interference is justified where it is necessary to achieve the legitimate aim of effective enforcement. It is worth noting that under the scheme proposed by the DWP in its recent consultation on enforcing against joint accounts there would be an automatic disclosure of bank statements.[71]

10.128 We think that disclosure of bank statements may be necessary to determine applications for periodic third party debt orders. On such an application, the court may need to consider the debtor's bank statements to work out the mechanics of the periodic third party debt order, for example, when the order should be made in order to maximise the opportunity to recover funds. An awareness of the

[71] Department for Work and Pensions, *Deduction orders against joint accounts, Public Consultation*, June 2016. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/532552/consultation-on-deduction-orders-against-joint-accounts.pdf (last visited on 01 December 2016).

movement of funds into and out of the account will allow the court to tailor the order so that deductions from the account can be made at times when there are likely to be sufficient funds available.

10.129 The introduction of information requests and information orders would not answer the need that we have identified above. We recommend that information requests and orders are only to be available on a general enforcement application, not on a standalone application for a third party debt order.[72] In addition, they are intended to elicit information rather than documentary evidence. We do not envisage, therefore, that statements would be provided in response to an information order directed to a bank.

10.130 On reflection, we do not think there is such a need for the disclosure of statements where the application is for a one-off third party debt order. In those circumstances the enforcement will be against the funds that are existing in the debtor's account at the time the interim order is served and there is no need to track the account movements. If the application is unsuccessful and the court suspects that funds have been moved to defeat the application, or the court needs an overview of the debtor's financial circumstances, then the court can direct the debtor to complete a financial statement.[73] In the case of a dispute over the ownership of funds in a joint account the disclosure of bank statements will probably be required. However, this disclosure will be a necessary part of the trial of that issue and the court does not need a specific power to order disclosure in those circumstances.

How would disclosure of statements work?

10.131 We take on board consultees' concerns that the ability to obtain bank statements should not encourage "fishing expeditions" by the creditor curious to learn about his or her ex-partner's finances without any real intention of enforcing what might be, for example, a very small amount of arrears. We are also alive to the invasion of the joint account holders' privacy that would be caused by disclosure of joint account statements.

10.132 We are of the view, therefore, that the court should have the power to order the disclosure of the debtor's bank or building society account statements, rather than disclosure being an automatic consequence of the creditor making the application for a third party debt order. This power should not be exercisable by the court at the time of making an interim order, but instead either at the final hearing or at another interlocutory hearing. If orders for disclosure were made at the interim stage, then the order would have to be made without notice to the debtor in line with the usual procedure for interim third party debt orders. However, debtors and joint account holders should have the opportunity to make representations to the court regarding disclosure if they wish to do so. If this procedure means that an additional hearing is required before the final order can be made, then, we are of the view, that ths is justified by the need to strike the right balance between the rights of the debtor and any joint account holder(s) and those of the creditor.

[72] See our recommendations in Chapter 8.

[73] See our recommendations in Chapter 7.

10.133 We are of the view that the statements obtained should be disclosed to the creditor, unless there is a good reason for them not to be not disclosed. In accordance with our recommendations, the court should only obtain statements where they are necessary to determine whether to impose a periodic third party debt order and on what terms; in those circumstances we consider it is right in principle for the creditor to have the same information that is before the court. We discuss this issue in greater detail in Chapter 8[74] in respect of information obtained under an information request or information order and we think the same principles apply. The creditor should be directed to use the information only for the purposes of the enforcement proceedings; it should be made clear to the creditor that any other use would amount to a contempt of court.[75]

10.134 In their responses, consultees considered what might be the appropriate period of time for which statements should be provided. Periods such as 28 days and three months were suggested. Given that we recommend that disclosure of statements should be at the court's discretion, we do not think it is helpful for us to stipulate the period for which disclosure can be given. While we think that these sorts of period are sensible, the court will be best placed to decide in each individual case the specific period for which it would be appropriate to order disclosure.

10.135 **We recommend the introduction of a specific power for the court to order disclosure of bank statements when considering making a periodic third party debt order after allowing the parties to make representations as to whether disclosure should be ordered.**

[74] At paras 8.68 to 8.84 above.

[75] See further the particular discussion of preventing wrongful use of the information at paras 8.80 to 8.84 above.

CHAPTER 11
ORDERS FOR SALE AND CHARGING ORDERS

INTRODUCTION

11.1 A number of enforcement methods involve the sale of assets to realise funds for the creditor. Such enforcement can be by the seizure and sale of goods,[1] by an order for sale following the making of a charging order[2] or by an order for sale under section 24A of the Matrimonial Causes Act 1973 ("section 24A").[3] In our Consultation Paper we explained that we would not be considering any reform to enforcement by way of seizure and sale of goods since this method of enforcement has already recently undergone extensive reform. In respect of charging orders we asked consultees whether their scope should be increased so that they may be used to enforce against a wider range of assets. In respect of section 24A we noted that it could be used more frequently as a method of enforcement, and although we did not specifically invite comments on the issue it was picked up by some consultees. One envisaged using section 24A to achieve a particular outcome in the context of pensions[4] and Gavin Smith[5] suggested it could have a much wider role as an enforcement tool than at present.

Current law

11.2 Section 24A[6] permits the court to make an order for sale of property at the same time as, or subsequent to, a legal services order[7] or a family financial order providing for secured periodical payments, a lump sum or the transfer of property. The order for sale does not, however, have to operate against an asset that is the subject of the order that "triggered" the power. The power is, therefore, fairly wide but there are limitations since a party with the benefit of only an unsecured periodical payments order, or an ancillary order such as an order for costs, cannot make use of section 24A.

11.3 The power to order a sale was introduced in 1981 following the recommendations of the Law Commission in our Report, Orders for Sale of Property Under the

[1] Enforcement by seizure and sale of goods is by way of a writ or warrant of control. A writ is issued by the High Court and a warrant by the Family Court.

[2] Under the Charging Orders Act 1979.

[3] The equivalent provision in the Civil Partnership Act 2004 is at sch 5, part 3.

[4] For further consideration see the Analysis of Responses document that accompanies this Report. The point was made by Rhys Taylor.

[5] A family law barrister.

[6] Section 24A(1) provides: "Where the court makes under section 23 or 24 of this Act a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion".

[7] Matrimonial Causes Act 1973, s 23A/Civil Partnership Act 2004, sch 5, part 8. For a description of a legal services order see the Glossary.

Matrimonial Causes Act 1973.[8] Although not the primary objective of introducing the power, which was to enable the sale of property and the distribution of proceeds, it was envisaged that the power to order a sale might be used as an enforcement mechanism; we said that this would achieve directly what could only be achieved indirectly if pursuing a charging order application. The scope of section 24A as a method of enforcement is wider than the scope of charging orders as the latter enable enforcement only against a limited class of assets.

ORDERS FOR SALE UNDER SECTION 24A

Discussion

11.4 In the 1981 Report, we recommended that the power only be available to the court "whenever it makes an order which involves capital assets". This recommendation was understandable given that the primary purpose for introducing the power was to enable the release of equity in matrimonial property (the power enables the court to direct the sale of property so that lump sums may be paid to the parties out of the proceeds). However, if an order for sale may be used subsequently to enforce an unpaid lump sum by requiring the debtor to sell an asset that is not related to the original lump sum order, then it is difficult to see why an order for sale should not be used in the same way to enforce arrears of maintenance. Further an order for sale is now available to enforce legal services orders, which may provide for payments to the creditor on a periodic basis. In his response to our Consultation Paper, Gavin Smith argued that restricting the orders that give rise to the court's power to make an order for sale under section 24A is unnecessary because such an order should be available to enforce any family financial order.

11.5 The current restrictions in section 24A seem to prejudice certain creditors unfairly. It is arguable that a creditor with the benefit of orders for a lump sum and unsecured periodical payments could use section 24A to enforce arrears of the periodical payments, whereas this option would not be available to a creditor who only has an unsecured periodical payments order. Although we suggest that section 24A would benefit from clarification on this point, the equivalent provisions in the Civil Partnership Act 2004 strongly support this interpretation. We do not consider this to be satisfactory and do not think that a creditor's ability to use section 24A as an enforcement tool should depend solely on whether, at the time of the family financial order, certain capital orders were made.

11.6 Section 24A offers an opportunity to extend the court's enforcement powers. As noted above, it offers wider scope for enforcement than charging orders. Further, although writs and warrants of control offer another way of enforcing against the proceeds of goods that are sold, they require the services of bailiffs which can cause cost and delay. Under section 24A the court can order the debtor to sell the asset and make direct payment to the creditor out of the proceeds of sale.[9] We see no reason why the order for sale should not be extended so that it can be used to enforce any order for the payment of money under a family financial order including arrears of unsecured periodical payments orders and orders for

[8] Orders for Sale of Property Under the Matrimonial Causes Act 1973 (1979) Law Com No 99.

[9] Matrimonial Causes Act 1973, s 24A(2)(a).

costs. We do not, however, envisage that the power would be exercised to secure funds for future periodical payments.

11.7 **We recommend that section 24A of the Matrimonial Causes Act 1973, and paragraph 10 of Schedule 5 to the Civil Partnership Act 2004, be extended so that an order for sale can be made at the same time as, or subsequent to, any order for the payment of money within financial remedy proceedings**.

EXTENSION OF THE SCOPE OF CHARGING ORDERS

Introduction

11.8 A charging order can be used to secure the payment of a lump sum, arrears of maintenance and costs. The order does not lead to immediate payment of the sum owed by the debtor but instead provides security over an asset to enable the creditor to recover that debt when the asset is sold. Only certain assets can be charged using the order: land, funds in court and certain securities.

11.9 The making of a charging order is a two-stage process, consisting of an interim order and a final order. The interim order will be made without a hearing. A creditor who has obtained a final charging order can then apply for an order for sale to realise the asset. Such applications are, however, far less frequently made (at least in the civil context) than those for a charging order.[10] We discuss in Chapter 14 the recommendation to streamline the application process for charging orders.

11.10 We asked in the Consultation Paper whether consultees thought that there was any scope to use assets other than land and securities as security for family judgment debts.

Consultation responses

11.11 This question attracted a mixed response. Some consultees[11] thought there was scope to charge assets other than land and securities but a small majority[12] were opposed to any extension.

11.12 District Judge Robinson argued that there needed to be a better system for enforcing against other assets, particularly vehicles. He favoured a clear, codified procedure for security against vehicles, boats and similar assets, and thought that the costs would be acceptable.

11.13 Similarly, the Judges of the Family Division of the High Court thought it should be possible to devise a simple scheme for enforcing a financial remedy order against a debtor's motor vehicle. By analogy to the proposal to ban a debtor from driving, they thought that taking away a debtor's vehicle could be a powerful incentive.

[10] Ministry of Justice, *Judicial and Court Statistics 2011, Chapter 1: County courts (non-family work)* table 1.18, available at https://www.gov.uk/government/statistics/judicial-and-court-statistics-annual (last visited 01 December 2016).

[11] The Birmingham Law Society, District Judge Robinson, Gavin Smith, the Judges of the Family Division of the High Court and Resolution.

They thought a possibility may be authorising a bailiff to clamp and/or seize such a vehicle. They commented that the French system, at first sight, has real attractions.[13] They acknowledged that the costs of the exercise would have to come from the proceeds of sale of the vehicle rather than from the civil justice system.

11.14 Resolution thought that consideration might be given to enabling the freezing of bank accounts to help secure the payment of family judgment debts.[14]

11.15 Gavin Smith thought that the court should be vested with the power, at the time of making any financial remedy order, to "charge assets of any kind owned by the debtor pending compliance with the order" and that the court should be expressly required to consider whether it should make such an order.

11.16 Arguing against reform, the Family Law Bar Association and Janet Bazley QC did not believe there was scope to use assets other than land and securities as security for family judgment debts. The International Family Law Group stated that "owing to the lack of registration of assets other than land or securities" they failed to see how the scope of charging orders could be extended. In any event, they thought that the power already exists to seize the debtor's assets to pay debts.

11.17 The Law Society thought it would be difficult to identify what other assets could be used. It noted that, for example, business assets cannot be considered if the business is incorporated. The Law Society also argued that, for any assets to be used in enforcement, they would need to be registered in a formal way and be easily valued. It thought that, in the majority of cases, a family only has property to use as security.

11.18 One member of the public thought it would be too complicated to extend the charging orders beyond land and securities.

Discussion

11.19 We agree with those consultees who believe that it would be difficult to extend the scope of charging orders. In reaching this conclusion we have asked ourselves the following questions.

(1) Is it currently possible to enforce against the asset in question by any other enforcement method?

(2) Is it practical to extend the scope of charging orders to that asset?

(3) Are there any advantages to extending the scope of charging orders to include that asset?

[12] The Family Law Bar Association, International Family Law Group, Janet Bazley QC, the Law Society, one member of the public and Tony Roe.

[13] See para 11.21 below.

[14] We address the freezing of bank accounts in our discussion of the reform of third party debt orders in Chapter 10.

11.20 We explain here why we do not consider it necessary or practical to extend them to vehicles and boats, which at first glance, may seem an attractive option. We have started from the position that for a charging order to be effective there must be a system for registering the charge so that any future owner of the asset knows that a debt is secured against it.

Motor vehicles

11.21 The extension of charging orders to cover vehicles received the most attention from consultees. We gave this possibility careful consideration, bearing in mind that the charging of motor vehicles is possible in France, either by a declaration to the prefecture (a unit of regional administration in France, acting as a local council for each French "department") or the immobilisation of the vehicle. The first procedure allows the creditor to prohibit the prefecture from issuing a registration document for the vehicle for two years and is more often used where the vehicle cannot be located, while the second prevents a vehicle from being sold or used to secure a debt (often as a prior step to the attachment or seizure of a vehicle, to be used where the vehicle has been located).[15]

11.22 However, we do not think the extension of charging orders to cars in this jurisdiction is feasible because the Driver and Vehicle Licensing Agency ("DVLA") vehicle registration scheme does not provide a suitable method of recording a charge over a vehicle. When the owner of a vehicle sells (or transfers) it, he or she must inform the DVLA, who will send the V5C vehicle registration certificate ("the logbook") to the new owner. The logbook records the registered keeper of the vehicle, that is, the person who is actually keeping or using the vehicle, rather than the owner (for example, for a company car, the logbook would record the details of the employee who is using the car, rather than the company).

11.23 The logbook does not record other information, such as outstanding finance on a vehicle or other encumbrances. As a result it is not designed to record information such as a charge, and even if that were possible, a buyer may only receive the logbook after he or she has purchased a vehicle.[16] Without the creation of a new registration system[17] there is, therefore, no effective way for a charging order to create a registrable charge against a vehicle and so it would be of no benefit to the creditor to extend the scope of charging orders to cars or other vehicles. We do not think it is necessary to recommend the creation of such a new system (given the time and cost that would require) as it is already possible to enforce against a vehicle by the use of a warrant of control.

[15] French Code of Civil Enforcement Procedure (Code des procédures civiles d'exécution), arts L223-1 and L223-2.

[16] The Law Commission has recently reported on bills of sale, which are ways that individuals can use goods that they own, including vehicles, as security for a loan: Bills of Sale (2016) Law Com No 369.

[17] There may be a record of encumbrances in the form of a registration with asset finance registries such as HPI, Experian and CDL but this is a practice that has developed within the motor trade rather than a legislative requirement. We also understand that there are more basic checks possible by text message, which reveal only if the vehicle has been stolen or suffered a total insurance loss. However, none of these methods are widely used by the public.

11.24 There are exceptions to goods which can be seized and sold by a warrant of control, which include some vehicles such as those used by a disabled person or for police, fire, ambulance or health emergency purposes. Where a vehicle or vessel is used as a person's only or principal home, it will also be exempt from being sold under a warrant of control.[18] However, we would not wish to circumvent these exceptions to the use of a warrant of control by seeking to include these exceptions within the scope of charging orders.

11.25 Finally, there is a practical reason why a creditor may be unlikely to seek to enforce against a vehicle using a charging order (if that were possible); cars are generally a depreciating asset and therefore it is hard to see why a creditor would prefer to take a charge over a car rather than make an application for it to be seized and sold under a warrant of control. Even where a particular vehicle is, in fact, an appreciating asset, because it is, for example, a vintage car, we take the view that a creditor would be better served by using a warrant of control to seize the vehicle and achieve immediate enforcement.

Boats

11.26 We also considered the position of boats. There is, perhaps, more scope for a charge created by a charging order to be registered against a boat because of the existence of the UK Ship Register. Part I of this register allows proof of title and for a boat to be used as security for a marine mortgage. Where a boat is registered under this part of the register a potential buyer will therefore be able to check for any encumbrances against the title to the boat. It would therefore be feasible for charging orders to be registered against the title to such boats. However, boats only have to be registered under Part I where they are over 24 metres in length, are owned by a company rather than a private individual, or where a lender has taken security over the boat and requires a marine mortgage or charge to be registered against it.[19]

11.27 Without any new system being created, the existing arrangements would only feasibly allow a charge created by a charging order to be registered against a particular class of boats. We therefore take the view that it would not be cost-effective to extend the scope of charging orders to include boats. Further, boats may already be enforced against in the same way as vehicles by a warrant of control.

[18] Taking Control of Goods Regulations 2013, SI 2013 No 1894, regs 4 and 5.

[19] There is also a Part III of the register, which is intended to be used to prove a boat's nationality when sailing outside UK waters. It can only be used where the boat is less than 24 metres long and is owned by a private individual; it does not record encumbrances and is therefore clearly not useful in the context of charging orders. Information and guidance on the registration of boats is provided on the Government website, www.gov.uk; see https://www.gov.uk/register-a-boat/the-uk-ship-register (last visited 01 December 2016).

11.28 We understand that there can be difficulties with enforcement by way of warrants of control due to a lack of bailiffs to implement the orders. However, we do not think that extending the scope of charging orders is the best way to combat the problem. We are of the view that the extension we recommend to the court's power to order a sale under section 24A of the Matrimonial Causes Act 1973[20] is a better way to increase the options for enforcing against the debtor's property.

[20] The equivalent provision in the Civil Partnership Act 2004 is at sch 5, part 3.

CHAPTER 12
COERCIVE ORDERS

INTRODUCTION

12.1 Coercive orders are designed to enforce court orders, including family financial orders, by applying pressure to debtors to obtain their compliance. Coercive orders are an indirect route to enforcement. They are necessary because some debtors, who really do not want to pay, may arrange their finances in such a way that direct enforcement methods will not work, for example, by moving most of their assets overseas. Where the court is satisfied that a debtor can pay what is owed but is choosing not to do so (perhaps as a result of evidence about the debtor's lifestyle or obvious manipulation of his or her finances), a coercive order may be the only route to enforcement. At present, the only coercive orders available to enforce a family financial order are a judgment summons application and sequestration.[1] Both of these have difficulties. A judgment summons requires proof to the criminal standard that the debtor has the means to pay, which is a high hurdle for a creditor to reach, especially if he or she is a litigant in person. Further, imprisonment of the debtor is not often a desirable outcome. Sequestration is an expensive and complicated method of enforcement that involves effectively seizing all of the debtor's assets.

12.2 In our Consultation Paper we provisionally proposed the introduction of new coercive orders to enable the courts to disqualify a debtor from driving or from travelling abroad, or to impose a curfew on the debtor. The proposals were based on remedies that have been enacted as methods of enforcement in other contexts, or in other jurisdictions.

12.3 Disqualification from driving is already used in England and Wales as a means of enforcement under the Child Support Act 1991 ("CSA 1991"),[2] and in other jurisdictions to enforce the payment of both child[3] and spousal[4] support. As for prohibiting the debtor from travelling abroad, the current law provides two methods of preventing a debtor from leaving the jurisdiction: the writ ne exeat regno (which is Latin for "a writ to prevent him or her leaving the kingdom")[5] and an order made under section 37 of the Senior Courts Act 1981 requiring a debtor

[1] For more on the judgment summons application see paras 2.32 to 2.34 above and Chapter 15 below and for a description of sequestration see paras 2.35 and 2.36 above.

[2] Child Support Act 1991, s 39A.

[3] In the United States of America, all states are required by federal law to have procedures to withhold, suspend or restrict drivers' licences as a sanction for failure to pay child support: C Solomon-Fears, *Child Support Enforcement and Driver's License Suspension Policies* (Congressional Research Service R41762, April 2011) p 2, available at http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R41762_gb.pdf (last visited 01 December 2016).

[4] For example, in Canada. See http://www.mcss.gov.on.ca/en/mcss/programs/familyResponsibility/Enforcement/drivers_licence_suspension.aspx (last visited 01 December 2016).

[5] The writ is issued under the inherent jurisdiction of the High Court.

to surrender his or her passport.[6] Although both may be used in the course of family financial proceedings, neither is a free-standing method of enforcement; they can only be applied for in existing proceedings, and the writ ne exeat regno is specifically only available "before final judgment".[7] The availability of an order under the 1981 Act, being the modern form of the order, has effectively rendered the writ ne exeat regno obsolete. There are provisions in the CSA 1991 to ban a debtor from travelling overseas in certain circumstances but these provisions are not yet in force.[8] Similarly, the use of curfew orders to enforce child maintenance is provided for in legislation that has been enacted but which is not yet in force.[9]

12.4 As we have considered in more detail the operation of the proposed new coercive orders, we have concluded that a power to prevent a debtor from travelling outside the United Kingdom ("UK") should be framed as a prohibition, not a disqualification. For the rest of this Chapter we refer to an order prohibiting the debtor from travelling out of the UK but it is the same order that we proposed in the Consultation Paper.

12.5 In this section we consider the responses we received, first in respect of the general principle of introducing new coercive powers and then in respect of introducing the three specific orders identified in the Consultation Paper. We discuss responses about the detail of the proposed orders, for example when and on what terms they may be imposed, when we outline our recommendations on those points.

CONSULTATION RESPONSES

The introduction of new coercive orders – general comments

In favour of new coercive powers

12.6 The majority of responses were, in principle, in favour of the introduction of new coercive powers to enforce family financial orders.

12.7 The Family Law Bar Association and Janet Bazley QC thought that coercive orders would give the court and the creditor enforcement options in circumstances where "the debtor's financial resources are held within structures that make direct enforcement impossible and/or where the debtor's lifestyle is inconsistent with [the debtor's] apparent means". The Judges of the Family

[6] The court has power to prohibit an individual from travelling and to seize a passport in other circumstances, for example as ancillary to a search order: *Bayer v Winter* [1986] 1 WLR 497.

[7] Debtors Act 1869, s 6. In *B v B (passport surrender: jurisdiction)* [1998] 1 WLR 329, the issue of a writ after judgment in *Thaha v Thaha* [1987] 2 FLR 142, was criticised.

[8] Child Support Act 1991, s 39B, inserted by Child Maintenance and Other Payments Act 2008, s 27. We understand that the provisions have not been brought into force due to a change in the operation of passport control. The scheme under the current legislation would require, in some circumstances, the confiscation of debtors' passports at passport control; soon after the legislation was passed the responsibility for passport control was transferred from the immigration authorities to border control. As a result, it was considered that the scheme was no longer appropriate.

[9] Child Support Act 1991, s 39.

Division of the High Court thought that the coercive orders proposed would all be useful additional weapons in the armoury of the court. They were clear, however, that the orders should be coercive rather than punitive.

12.8 The Justices' Clerks' Society encouraged the introduction of alternative measures to imprisoning a debtor. Considering the cost involved in imprisonment and the fact that debtors do not pose a risk to society, the Society thought it would be helpful to have other enforcement sanctions available which encourage payment.

12.9 Resolution said:

> In our members' experience, creditors find the threat of prison to be draconian but unrealistic, and unlikely to reduce tensions or change the debtor's attitude. Adding disqualification orders to the package of available coercive measures would, in our view, provide more affordable, appropriate and practical options to promote compliance.
>
> We are not persuaded that there is no point in introducing new orders at all or in the absence of a wholesale simplification of the existing system. Coercive measures might fit the circumstances of the case and would provide a wider range of tools in the court's armoury for dealing with wilful non-payers.

12.10 Stone King[10] commented that "prison can never be the answer where there are children" but thought that our coercive orders could be appropriate. The Family Justice Council supported the introduction of coercive orders, provided that "the procedure does not become too complicated for litigants in person"; the Committee said it would support the coercive orders "being part of the general enforcement application".

Against new coercive powers

12.11 Only three consultees opposed the introduction of new coercive powers for the enforcement of family financial orders, and Clarions said they had mixed views. Charles Russell Speechlys were not in favour of the powers being introduced as they did not consider that they would assist in "high profile cases which take up a considerable amount of court time." They referenced a case with which they are involved where enforcement is proving very difficult because the debtor and all his assets are outside of the jurisdiction. They suggested that "serious financial sanctions and travel bans operating outside the UK might have some effect", but acknowledged that these may give rise to human rights issues. One member of the public said that the "court should review the original judgement before stricter enforcement and coercive powers are considered as the circumstances may have changed." He argued that the debtor may not have had the money or time to make a variation application.

12.12 The strongest opposition came from the Law Society. We set out here the Society's full response, so that its concerns can be considered:

[10] A law firm with a specialist family law team.

We disagree with these proposals and we doubt that they would be effective. The aim of the system should primarily be to ensure that, where payment is possible, they are made and the most effective way of doing that is to go directly to the debtors' assets. The effect of these would be to create a quasi-criminal jurisdiction in an area where criminal sanctions already exist. The courts are, for good reason, reluctant to use those sanctions.

Our concerns are:

(a) We are unaware of evidence to suggest that such sanctions would be successful.

(b) There will be very few cases where a court will be able to impose the sanctions because the effects on a livelihood and dependants are likely to be significant.

(c) Where they are imposed they are unlikely to make the debtor any more willing to pay and will certainly adversely affect any continuing relationship between the parties.

(d) Imposing sanctions for the periods of time envisaged might be of little consequence in the context of orders that are likely to run over many years, as there is nothing to suggest that debtors will be more compliant after the period of sanctions is over. On the other hand, extending the period further is likely to have consequences for the individual's human rights.

(e) Courts are likely to have to apply the criminal burden of proof before imposing such sanctions which would take time and expense for the parties.

(f) There could be difficulties in enforcing the sanctions with, in effect, a further series of criminal offences being created. It also seems possible that allegations of breaches of coercive orders could create further satellite litigation.

(g) In practice, therefore, we doubt that the threat of these sanctions would encourage payment or that the sanctions themselves would create anything other than further expense, including to the state, without significant benefit.

12.13 The Law Society summarised its position as being: "[we] do not agree that coercive measures should be introduced without first seeing whether enforcement can be improved by making the existing remedies easier to use".

12.14 We concur with the Law Society that the enforcement system should primarily be aimed at ensuring that payment is made where possible and that the most effective way to do that is to go directly to the debtor's assets. There will, however, be cases where that is not possible and we consider that in those circumstances there need to be other methods of enforcement available. We do not envisage coercive orders being used routinely, and we accept that there will be many cases where they will not be appropriate. However, as is borne out by the responses of those in favour of introducing coercive orders, we believe there are likely to be cases where the orders, or the threat of the orders, are effective in securing compliance. We do not agree with the Law Society that a criminal standard of proof will necessarily have to be applied, and in that respect we consider that the orders will be of greater utility than judgment summons. As to the evidence of the effectiveness of coercive sanctions, we note that a number of consultees who practise in family law considered that coercive orders would be effective.

12.15 We now go on to discuss the individual powers proposed in the Consultation Paper. All the consultees who were opposed in principle to the introduction of new coercive powers opposed each individual power. Those in favour, supported one or more of them.

Disqualification from driving

12.16 All the consultees who were generally in favour of introducing new coercive orders supported the introduction of disqualification from driving orders.

12.17 The Justices' Clerks' Society explained that lay justices are familiar with using an order for disqualification from driving, either suspended or immediate, as a sanction against non-payment of Child Support Agency/Child Maintenance Service assessments. It commented that this results in far less cost to the state than imprisonment. District Judge Robinson noted that the Child Maintenance Service has found disqualification from driving to be an effective threat and Penningtons Manches thought that, in the right cases, the threat of being disqualified from driving could prompt reluctant payers to comply with their obligations.

12.18 International Family Law Group supported the proposal and thought that it was consistent with the 2007 Hague Convention on Child Support and Other Forms of Family Maintenance.[11] It commented that creditors will "obviously have to carefully balance the incentive disqualification from driving will provide against the possibility that it may restrict the debtor to travel to or undertake work (and thereby reduce their income)." Birmingham Law Society made a similar point. The Society thought that disqualification generally could be a very effective method of enforcement but was concerned that disqualification from driving could be "counter intuitive to the judgment creditor in terms of the impact that may have regards to the debtor's ability to work".

[11] Article 34 of the Convention requires Contracting States to make available effective measures to enforce decisions under the Convention, which may include: "denial, suspension or revocation of various licenses (for example, driving licenses)".

12.19 A member of the public, who generally opposed the introduction of any new coercive orders, raised specific concerns about disqualification from driving. He said that the Family Court would need to look at the consequences for the debtor including: increased costs; any other obligations he or she may have (such as looking after an elderly relative); the increased expense of travelling to work; and the difficulty in making money that may result. He also thought that the court should take into account the level of consequence such an order would have on different people: "for example someone with a bad leg, relatives, increased expenses; otherwise, there could be an arbitrary level of impact".

12.20 We agree that the appropriateness of disqualifying the debtor from driving will need to be carefully considered in each case. We conclude that the court should take account of all of the circumstances in considering whether a coercive order should be made, including the effect on the debtor's ability to earn a living and the effect on any dependants of the debtor.

Prohibiting the debtor from travelling out of the United Kingdom

12.21 Similarly, all those consultees who were in favour of new coercive orders were in favour of introducing orders to prohibit a debtor from travelling out of the UK. The Justices' Clerks' Society said that any sanction which encourages payment, and is enforceable and proportionate, would be welcomed as a means of securing payment especially in cases where debtors will not pay and the creditors are aware that the former have gone on expensive foreign holidays.

12.22 Penningtons Manches thought that the prohibition could be "particularly effective". In their experience, many non-paying debtors have an international lifestyle and keep assets off-shore to avoid direct enforcement. They said there would be "substantial inconvenience to debtors if they could have their wings clipped by a travel ban" which, in their view, would be a significant incentive to compliance. International Family Law Group also supported the introduction of the power, which they considered could prove a powerful incentive to certain debtors to pay.

Curfew orders

12.23 Consultees' responses to the suggestion of curfew orders in the context of the enforcement of family financial orders were far more mixed than for the other two types of coercive orders. Only a small majority were in favour of the introduction of curfew orders and many of those were cautious in their response.

12.24 International Family Law Group thought that curfew orders might be a useful addition when dealing with "perhaps a younger/less wealthy debtor who does not regularly drive or travel internationally". As a result, the firm "cautiously" supported their introduction. The Justices' Clerks' Society was also in support and noted that lay justices are familiar with the making of curfew orders as an element of community orders in criminal proceedings. It noted that, in order to increase its enforceability, a curfew order requires electronic monitoring.

12.25 Although in principle the Family Law Bar Associaiton supported the introduction of curfew orders, it questioned whether we should expend our efforts on formulating proposals for new curfew orders if they are unlikely to ever be brought into effect because of the cost of implementing a regime to ensure compliance with such orders. It was the Family Law Bar Association's view that the power to make a curfew order that exists in the CSA 1991 has not yet been brought into force due, at least in part, to resource implications. The Association said "the need for effective monitoring of compliance with this order whether by way of electronic tagging or otherwise would involve substantial costs to the public purse".

12.26 Resolution was not opposed in principle to the introduction of curfew orders, although the views of its members on this point were more mixed than in respect of orders disqualifying debtors from driving and prohibiting them from travelling out of the UK. They thought that curfew orders would be perceived as draconian and punitive rather than coercive to produce compliance. Further, they noted that these orders and the monitoring of compliance with them would give rise to a greater logistical and costs burden than the other two types of order. Clarion Solicitors[12] had concerns that "a curfew order may be too draconian, although potentially justified as an option of last resort".

12.27 Penningtons Manches did not support the introduction of curfew orders. They thought curfew orders could appear punitive rather than coercive in nature. Further, they considered that curfew orders amounted to "a judgment summons by the back door, effectively imposing house arrest without the safeguard that the debtor's ability to pay must be proved beyond reasonable doubt".

DISCUSSION AND RECOMMENDATIONS

12.28 The vast majority of consultees supported the introduction of orders disqualifying debtors from driving and prohibiting them from travelling out of the UK. We have concluded that such orders should be available to the Family Court for the enforcement of family financial orders. We are of the view that the coercive orders would be effective powers to assist the court in achieving compliance[13] from "won't pay" debtors. Both orders would provide an incentive for debtors to pay what they owe and both should prevent debtors from spending money that they could use to pay a family financial order for non-essential purposes (if driving or leaving the UK were essential to a particular debtor, then the order would not have been made). This is particularly the case in respect of orders prohibiting travel, which would have the effect of prohibiting debtors from taking foreign holidays while money remains owed.

[12] A law firm with a specialist family law team.

[13] It would be important for the Family Court to establish that the debtor is not subject to a driving disqualification order as a result of any other legal proceedings.

12.29 Debtors who are not British nationals may have more need to travel outside the UK. We recommend that the power to prohibit debtors from travel should be available in respect of debtors who are not British nationals[14] but we note that difference considerations may apply and there may be more factors militating against the prohibition being imposed. Similarly, a non-British national may have more reason to apply for temporary relief from the prohibition. Each case will, of course, turn on its own facts.

12.30 **We recommend the introduction of orders disqualifying debtors from driving and prohibiting debtors from travelling out of the United Kingdom for the enforcement of family financial orders ("coercive orders").**

12.31 We explain the detail of our recommendations below.

12.32 As to curfew orders, the responses received have given rise to concerns. There was a general feeling that the orders are, or seem, more "draconian" and "punitive" than the orders disqualifying the debtor from driving and prohibiting the debtor from travelling out of the UK. It is not our objective to punish debtors or to give the impression of punishing debtors; the aim of coercive orders is to encourage compliance. Further, a number of consultees expressed concern about the feasibility of curfew orders and queried whether the required resources would be available. The issue of resources was a matter we were aware of when making the proposal. However, when coupled with the substantive concerns raised by consultees about the nature of curfew orders we consider that the issue of resources becomes more pressing. We consider that, in the absence of clear support for the introduction of curfew orders, the chance of them being properly resourced is likely to be low.

12.33 As a result, we do not recommend the introduction of curfew orders for the enforcement of family financial orders.

12.34 Before exploring the detail of our recommendations for coercive orders, we consider a preliminary issue: why is it appropriate to recommend the introduction of coercive orders for the enforcement of family financial orders when they would not be available for the enforcement of other civil debts? Following the detail of our recommendations, we consider whether proceedings for these orders would be, for the purposes of the European Convention on Human Rights, civil or criminal proceedings, and we explore generally the relationship between the proposed coercive orders and human rights and other international obligations.

[14] Though we do not recommend that the court should have the power to seize a foreign passport, see paras 12.74 to 12.79 below.

Why are coercive orders appropriate in family proceedings?

12.35 Generally, the methods available for the enforcement of family financial orders are the same methods as are available for the enforcement of all civil orders. The introduction of coercive orders for the enforcement of family orders would give the Family Court greater powers to enforce financial orders than the civil courts. The scope of our project only extends to the enforcement of family financial orders, and so we cannot make recommendations as to the introduction of coercive orders more widely. However, a difference in available enforcement methods is not unprecedented and different considerations apply in family proceedings that can justify different methods of enforcement.

12.36 At present, there are two coercive methods available to enforce a family financial order: sequestration and a judgment summons. Sequestration is available as an enforcement method for any civil debt; however a judgment summons has a very limited application outside family proceedings. The availability of a judgment summons for the enforcement of family financial orders already, therefore, sets family proceedings apart from enforcement of the vast majority of debts that arise in other civil proceedings.

12.37 The nature of family debts is different from other civil debts. First, most family financial orders are made to meet the needs of the creditor and any dependent children of the family.[15] If these orders are not met then real financial hardship can ensue. While this may be true of some civil debts, for example in a personal injury case, "need" is not often the basis for the making of an order in other civil proceedings. Secondly, a family financial order will have been premised on the basis that the debtor can afford to pay. A debtor's ability to pay will not often be a relevant factor when the court makes orders in other civil proceedings. As a result, there should be fewer family cases where the debtor is a true "can't pay" rather than a "won't pay" debtor. Thirdly, the emotional context of family proceedings and the ongoing nature of certain obligations can mean that a debtor is perhaps more likely to take steps to frustrate the implementation of an order. We take the view that all of these differences justify providing different tools in the family context.

[15] Although there are no statistics directly on this point, it is widely recognised to be the case. For example in the recently published guide from the Family Justice Council, *Sorting out Finances on Divorce*, (2016) it is said at page 9: "This guide focuses on the most typical financial situation on divorce: where the resources available (that is all of the couple's income, savings, investments, property and pensions) do not exceed what the two spouses each "need" following their separation". Available at https://www.judiciary.gov.uk/wp-content/uploads/2016/04/fjc-financial-needs-april-16-final.pdf (last visited 5 December 2016).

COERCIVE ORDERS – DETAILS OF OUR RECOMMENDATIONS

Threshold test – when should the court be able to make a coercive order?

12.38 In the Consultation Paper we provisionally proposed that the court should be able to make coercive orders when the court is satisfied on the balance of probabilities that the debtor has the ability to pay and has not done so. This, we consider to be the "threshold test" – if the court is so satisfied, then it has the power to make a coercive order. However, we went on to propose that the court should only exercise that power if it considers it to be in the interests of justice to do so (the "interests of justice test"). In this section, we look first at the details of the recommended threshold test and then consider the interests of justice test.[16]

12.39 Consultees' responses on the threshold test, and further thinking on our part, have raised three issues:

(1) the meaning of "has the ability to pay";

(2) the standard of proof; and

(3) the suggestion that a creditor should have to have already attempted to obtain payment by way of "a conventional enforcement order", or a finding that "a conventional enforcement order" would not be effective.

Has the ability to pay

MEANING OF ABILITY TO PAY

12.40 We did not define "ability to pay" in the Consultation Paper, and no consultees queried the term. However, it is important to be clear about what we mean.

12.41 The meaning of the phrase cannot be as wide as the meaning of the parties' "resources" that the court would consider in financial remedy proceedings. In that context, "resources" include funds that the parties may have access to but which are not beneficially theirs.[17] However, we consider that the meaning of "ability to pay" is wider than the debtor having the necessary funds in his or her own name; it extends to the debtor being beneficially entitled[18] to the funds and having the ability to access and make use of them.

12.42 For example, a debtor may seek to evade enforcement by shielding his or her funds in an account in the name of a new partner or a relative. If those funds exist in the partner's or relative's account at the time the court is considering making the order, and the court is satisfied that the funds remain beneficially owned by the debtor, then we would consider that the debtor has the ability pay. In these situations, the money does not cease to be the debtor's, the account holder is a bare trustee.[19]

[16] See paras 12.54 to 12.60 below.

[17] See for example, *Thomas v Thomas* [1995] 2 FLR 668.

[18] Beneficial ownership is defined in the Glossary.

[19] *Purba v Purba* [2000] 1 FLR 444.

12.43 However, where the debtor has sought to dispose of funds to evade enforcement and has transferred the beneficial ownership such that the funds are now beyond his or her reach, then we do not consider that the debtor has the ability to pay. In such circumstances, it may be appropriate for the creditor to make an application to set aside the disposition before taking further enforcement steps.[20]

12.44 A further element of the meaning of "ability to pay" is whether and to what extent the court should take account of other financial demands on the debtor. If, for example, the debtor has a property that could be sold, but it is the debtor's home, does the debtor have the ability to pay? Or if the debtor could be making payments to the creditor from income but the debtor is instead using that income to pay other bills, does the debtor have the ability to pay? In those circumstances, we consider that the debtor does have the ability to pay, but the court may choose not to exercise its discretion to make a coercive order. Once the threshold test is met, the court must consider all the circumstances of the case in determining whether to make a coercive order and on what terms.

ABILITY TO PAY AT THE TIME OF CONSIDERING THE APPLICATION FOR A COERCIVE ORDER

12.45 We proposed in the Consultation Paper that the court must be satisfied that the debtor has the ability to pay *at the time of making the order*. This is different from the test on a judgment summons application, where an order for committal may be made if the court is satisfied that the debtor has had the means to pay at any time since the making of the original order, regardless of whether the debtor has the means at the time the court is considering the application.[21] It is also the case that an order committing the debtor to prison or disqualifying the debtor from driving under the CSA 1991 may be made on the basis that the debtor has had the means to pay at any time since the debt was due.[22] We consider that this makes the sanctions on a judgment summons application, or under the CSA 1991, potentially punitive. An order may be made to punish the debtor for not making the required payment when he or she had the means to do so even though at the time of making the order the debtor no longer has the means to pay.

[20] Such an application could be made under section 37 of the Matrimonial Causes Act 1973.

[21] *Woodley v Woodley* [1992] 2 FLR 417.

[22] *Karoonian v CMEC* [2012] EWCA Civ 1379, [2013] 1 FLR 1121.

12.46 Only two consultees seemed to query our proposal that the enquiry must focus on the debtor's ability to pay at the time the court is considering making the order. Penningtons Manches said that the proposed new coercive methods of enforcement should be available where "the court is satisfied on the balance of probabilities that the debtor had or has the ability to pay". The Justices' Clerks' Society[23] said coercive orders should be available where "the court has made a determination that the debtor has had the means to pay and has failed to do so." We do not agree with these proposals. We appreciate that our formulation does mean that no coercive order could be made against debtors who have chosen not to pay at a time when they could have done so prior to the court considering the matter. However, we consider our proposed test is a necessary safeguard to prevent the orders being used as a punitive measure against debtors who, for whatever reason, cannot pay at the time the application is heard.

Standard of proof

12.47 We proposed in the Consultation Paper that the court should have to be satisfied *on the balance of probabilities* that the debtor has the ability to pay. Some consultees thought that the criminal standard of proof should apply in proceedings for a coercive order. The Judges of the Family Division of the High Court said in response to the proposed introduction of coercive and curfew orders that it would be a serious matter to make such an order. They took the view that "on balance … such orders should only be made where the non-compliance is proved to the criminal standard". They thought the proposed orders "draconian" and thought that all contain "significant restrictions on the liberty of the subject". The judges did not explain whether their view was influenced by human rights considerations.

12.48 The Law Society considered that "the courts are likely to apply the criminal burden of proof before imposing such sanctions which would take time and expense for the parties". A member of the public, who opposed the introduction of any new coercive orders, said that a curfew order should only be made on "beyond reasonable doubt grounds" as he considered it a "criminal sanction". No other consultees objected to our proposal that the civil standard of proof should apply.

12.49 Resolution thought that the issue of whether the proceedings were criminal or civil, which would impact on the standard of proof, could be argued either way. The Family Law Bare Association, Pennington Manches and Janet Bazley QC all considered that the civil standard of proof was appropriate.

[23] A national organisation representing justices' clerks and legal advisers.

12.50 The standard of proof that should apply on proceedings for a coercive order is bound up with the question of the nature of the proceedings – whether they are civil or criminal proceedings for the purposes of Article 6 of the ECHR. Both of these issues need to be considered in light of the details of our recommendations for coercive orders. Therefore, we explore the issues of the nature of the proceedings and the standard of proof later in this chapter after having set out the circumstances in which we think coercive orders should be able to be made and the terms on which they should operate.

Unavailability of a conventional enforcement method

12.51 The Family Law Bar Association, in its consultation response, suggested that coercive orders should not be available unless the creditor has already attempted to obtain payment by way of "a conventional enforcement order", or it appears to the court that "a conventional enforcement order would not be effective as a means of obtaining payment". We think that the court should consider whether other "conventional" methods of enforcement could be effective but as part of determining whether to exercise its discretion to make a coercive order rather than it be part of the initial threshold test.

12.52 Although we do not see coercive orders as a first option for enforcement we do not consider that they should be restricted to being a method of last resort. For example, a creditor may wish to apply for a coercive order where there is evidence that a debtor has available funds overseas that cannot be reached by conventional enforcement methods but could be used by the debtor to immediately pay what he or she owes, and a house in this jurisdiction that could be charged but doing so would not result in immediate payment to the creditor. In those circumstances, we think the availability of a charging order would be better weighed in the interests of justice test rather than forming part of the initial threshold test. For that reason, we do not adopt the suggestion of the Family Law Bar Association on this point.

12.53 **We recommend that the court should have the power to make a coercive order where the court is satisfied at the time of considering the application that the debtor has the ability to pay what is owed (the "threshold test").**

Interests of justice test

12.54 In the Consultation Paper, we proposed that once the threshold test has been met, the court should exercise its discretion to make a coercive order if satisfied that it would be in the interests of justice to do so. We proposed that in considering the interests of justice the court should take account of all the circumstances of the case including:

(1) the degree of non-compliance;

(2) the other enforcement methods that are available to the creditor and the likely success of those methods;

(3) the effect of making the order on the debtor's ability to earn a living; and

(4) the effect of making the order on any dependants of the debtor.

Consultation responses

12.55 In general, consultees who supported the introduction of coercive orders in principle agreed with our proposal for the inclusion of an interests of justice test and agreed with the proposed formulation of that test. The Justices' Clerks' Society thought that the introduction of the test and our criteria would "require the court to take a proportional view in considering whether the sanction is appropriate in any particular case". The Judges of the Family Division of the High Court similarly agreed with our criteria and suggested it was important for the court to focus in particular on the effect of making the order on the debtor's ability to earn a living and the effect of making the order on any dependants of the debtor.

12.56 The Family Law Bar Association agreed that the court should consider "a checklist of factors" before making any coercive order and agreed with the four factors we proposed. In addition, the Association suggested adding the following consideration: "the effect of making the order on a debtor's family life". It considered that the children of a debtor should not indirectly suffer the consequences of a coercive order. For example, it said debtors should not be disqualified from driving or prohibited from travelling out of the UK if the effect is that they are unable to have contact with their children.

Discussion and recommendation

12.57 Consultees agreed that the court should have a discretion whether or not to make a coercive order once the threshold test has been met. A coercive order is of serious consequence to the debtor and the circumstances of each case must be carefully considered by the court in determining whether it is appropriate to make such an order. We are of the view that the court should be guided in the exercise of its discretion by a statutory test and the proposal of "the interests of justice" found favour with consultees. It is important to stress, however, that we intend the interests of justice to be served by the court being satisfied that the order is necessary and will be coercive in nature; we do not intend for the orders to be made as a punishment. Generally, consultees echoed that intention.

12.58 To ensure that the object of coercion and not punishment is clear, we consider that two changes are required to the list of specific factors that the court should consider from set out in the Consultation Paper. First, we think it is important for the court to consider the likely effectiveness of a coercive order in achieving the debtor's compliance with the family financial order. Secondly, we are concerned that the requirement for the court to consider the debtor's "degree of non-compliance" is not interpreted to mean that the worse the debtor's behaviour the more likely a coercive order will be made. That is not what we intend. The court must consider the debtor's ability to pay at the time of considering the application. The intention behind including that factor was to alert the court to applications where the imposition of a coercive order would be disproportionate, for example, after one missed periodical payment. In those circumstances, it is unlikely to be proportionate for the court to make a coercive order. To make our intention clearer, we think the specific factor the court should consider is "the extent of the debtor's failure to pay what is owed".

12.59 Considering the suggestion from the Family Law Bar Association, we do not agree that "the effect of making the order on a debtor's family life" should be added as a specific consideration. The court, in considering all the circumstances, will need to balance considerations of both the debtor's and the creditor's family life in considering whether or not to make a coercive order and on what terms. We do not think it would be appropriate to highlight the impact on the debtor's family life and not that on the creditor's. Although it is the debtor who will suffer the impact of any order being made, it is the creditor who is suffering the effects of the debtor's non-compliance. We acknowledge that the court must take account of the impact on third parties, and that is why we have highlighted the effect on any dependants of the debtor. We consider that the debtor's dependants are those most likely to suffer undue hardship and their position must specifically be taken into account.

12.60 **We recommend that where the threshold test is met the court should exercise its discretion to make a coercive order if it would be in the interests of justice to do so. In determining whether the interests of justice would be met by making a coercive order the court should take account of all the circumstances of the case including:**

(1) the extent of the debtor's failure to pay what is owed;

(2) the other enforcement methods that are available to the creditor and the likely success of those methods;

(3) the likely effectiveness of a coercive order in achieving compliance;

(4) the effect of making the order on the debtor's ability to earn a living; and

(5) the effect of making the order on any dependants of the debtor.

Application for a coercive order

12.61 We consider that a coercive order should be available, both:

(1) on a specific application for a coercive order; and

(2) on a general enforcement application.

12.62 We gave consideration to whether coercive orders should be available only on a general enforcement application once a court has had the opportunity within that application of considering the debtor's financial circumstances and the availability of other enforcement methods. However, we concluded that the orders should not be so limited as there may be cases, albeit rare, where a creditor has evidence of the debtor's ability to pay from resources that obviously lie beyond the courts' conventional enforcement powers. In those circumstances the creditor may wish to make a specific application for a coercive order. Of course, the court will need to be satisfied that the debtor has the ability to pay and that a coercive order is appropriate. If the court is satisfied that the debtor has the ability to pay, the onus will be on the debtor if he or she wishes to suggest that a different enforcement application should have been made. The court may be able to make a different enforcement order at that time if the necessary information is before the court.[24]

12.63 **We recommend that coercive orders be available on a general enforcement application and on a specific application for a coercive order.**

Terms and operation of the coercive orders

Duration of the orders, renewal and option to postpone the operation of the order

12.64 No consultees objected to the proposals made in the Consultation Paper in respect of the duration of the orders, the ability of the creditor to apply for a renewal and the option for the court to postpone the operation of coercive orders in the first instance.

12.65 As a result, we make the following recommendations.

(1) We recommend that the court should be able to impose coercive orders for up to 12 months.

(2) We recommend that the coercive orders should be discharged upon full payment of the debt owing at the time the application was made (and on which the application was founded), and we recommend that the debtor should have the option of asking the court to consider varying the terms of or discharging the coercive order upon part payment of what is owed.

(3) We recommend that the creditor be entitled to make a new application for a further coercive order to take effect in respect of the same debt once the first (or subsequent) order has expired. However, on every application the court must consider the matter afresh and be satisfied that the threshold test is met and that it is in the interests of justice to make a further coercive order.

[24] In such circumstances the court could require the creditor to undertake to issue the relevant application within a certain period of time.

(4) **We recommend that the court have power to postpone the start of the orders to give the debtor a further period of time to pay what is due.**

12.66 We note that postponing the start date of the order would not be appropriate in respect of an order prohibiting the debtor from travelling out of the UK if the court had concerns that the debtor may leave the jurisdiction before the postponed start of the order.

12.67 Further, although we did not pose the question in the Consultation Paper, we are of the view that the court should be able to impose both coercive orders at the same time. We think this would be appropriate in only a very few cases but that the option should be available.

12.68 **We recommend that the court should be able to make orders both disqualifying the debtor from driving and prohibiting the debtor from travelling out of the United Kingdom simultaneously for the purposes of enforcing the same debt.**

Operation of the orders

12.69 A number of consultees queried how the coercive orders would take effect in practice. Having considered the operation of similar enforcement schemes and consulted with stakeholders on this point, we set out here how we recommend that they work.

DISQUALIFICATION FROM DRIVING

12.70 We have concluded that the Family Court should have the power to make an order that disqualifies the debtor from holding or obtaining a driving licence. This is the same power as is available to the court to enforce unpaid child maintenance under the CSA 1991. Upon a disqualification order being made, we recommend that the debtor be required to surrender his or her driving licence to the court.[25] The court will notify the Driver and Vehicle Licensing Agency ("DVLA") of the debtor's disqualification, and the debtor's licence will be cancelled.[26] Disqualifying a debtor from holding or obtaining a driving licence effectively disqualifies the debtor from driving. Framing the order in this way means it fits within an existing regime already operating for the purposes of enforcing child maintenance. We understand from the DVLA that if notifications and the return of licences from the Family Court can operate through the existing channels this will limit the cost to DVLA of dealing with disqualifications arising from the enforcement of family financial orders. Further, the orders will fit into an existing regime of criminal law, meaning that there will be automatic sanctions for any debtor who breaches the order.

[25] Surrendered licences will then need to be forwarded to DVLA for destruction.

[26] This is the same process as applies following a disqualification order under the Child Support Act 1991.

12.71 When the period of disqualification comes to an end, either because the order expires or the debtor pays what is due, the debtor will need to apply to the DVLA for a new licence. We understand that DVLA will notify such debtors as the time approaches for them to apply (under the original duration of the order).

12.72 **We recommend that the court's power to disqualify a debtor from driving should be in the terms of disqualifying a debtor from holding or obtaining a driving licence.**

12.73 **We recommend that the court has the power to require the surrender of the debtor's driving licence.**

PROHIBITING THE DEBTOR FROM TRAVELLING OUT OF THE UNITED KINGDOM

12.74 The power that we recommend would be a power to prohibit debtors from travelling out of the UK. A debtor who breaches such an order, by leaving the UK, will be in contempt of court. In order to bolster the effect of the order in some cases, we consider that the court should have the power to seize a debtor's UK passport.

12.75 Debtors subject to a travel prohibition order would be required to surrender their UK passport to the court, and the court would hold that passport for the duration of the prohibition (subject to any temporary relief granted). Her Majesty's Passport Office ("HMPO") would be notified that the order prohibiting travel out of the UK had been made and that the debtor's passport had been seized, so that no new passport would be issued to the debtor if he or she were to apply to HMPO. We have spoken with officials at HMPO and they confirmed that an individual can be added to a "stop file", which means that the issue of a new passport (both a first passport or a renewal) would be prevented. HMPO had no objection to the introduction of coercive orders in principle.[27]

[27] Its only opposition in principle would be to any suggestion that it should hold surrendered passports, which would be strongly resisted.

12.76 We are of the view that different considerations apply to the seizing of foreign passports. There is precedent for orders providing for a foreign passport held by a party to English family proceedings to be seized by the court.[28] However, the passport orders in these cases were made in response to the threat of international child abduction. We take the view that, in the less immediately serious context of the enforcement of a financial order, it is inappropriate for the court to seize a foreign passport. We have reached this conclusion for a number of reasons. First, a passport belongs to the issuing state rather than the individual to whom it is issued.[29] This makes it potentially controversial for one state to seize a foreign passport as it would be seizing the property of another state. Secondly, beyond that point of principle, an English court will not be able to prohibit a foreign authority from issuing the debtor with a new passport and so seizing a passport in those circumstances will not necessarily achieve the desired effect. Thirdly, it is also likely that a debtor with a foreign passport will have more reason to travel outside of the jurisdiction and so is more likely to be successful in applying to the court for his or her passport to be released for temporary travel.

12.77 The provisions in the CSA 1991 that seek to prevent overseas travel as a means of enforcing unpaid child maintenance, require the debtor to surrender any UK passport[30] or ID card that records the person to whom it has been issued as being a British Citizen.[31] There is no precedent in that context, therefore, for the seizure of foreign passports. For these reasons, therefore, we do not recommend that the court should have the power to seize a foreign passport, though we note that it is a matter that Parliament may wish to re-consider

[28] *SC v BH* [2014] EWHC 1584 (Fam), [2014] Fam Law 1115. In some circumstances the order is for the passport to be retained by the party's solicitors, to be released only by an order of the court or with the other party's consent: *Re K (Minors) (Foreign Passport: Jurisdiction)* [1997] 2 FLR 569.

[29] *Atapattu, R (On the Application of) v The Secretary of State for the Home Department* [2011] EWHC 1388 (Admin).

[30] As defined in the Immigration Act 1971.

[31] Child Support Act 1991, s 39B.

12.78 We recognise that there are limitations to the operation of this coercive order. First, a debtor may refuse to surrender his or her UK passport and it may not be possible to locate the debtor to enforce the surrender before he or she leaves the jurisdiction. In circumstances where the debtor has refused to surrender his or her UK passport it may then be appropriate for the court to order that the passport be cancelled.[32] However, there are no exit controls on leaving the UK, so even a cancelled passport may not prevent a debtor from leaving the country. The issue could (but will not necessarily) be picked up on the debtor's re-entry. We do not, as explained above, recommend that the court has the power to seize a foreign passport. Secondly, some areas outside of United Kingdom do not require a passport to travel there from the United Kingdom, such as Jersey.[33] While these limitations may affect the impact of a travel prohibition order in an individual case, we do not think that they undermine the general utility of such orders; a debtor who travels in breach of the order will be in contempt of court. Further, the orders are not targeted at debtors who present a risk of leaving and not returning to the jurisdiction– they are targeted at debtor's who are choosing not to pay what they owe and aim to apply some pressure to ensure that they pay.

12.79 We recommend that the court, on making an order prohibiting a debtor from travelling out of the United Kingdom, has the power to confiscate the debtor's United Kingdom passport and notify Her Majesty's Passport Office of the prohibition. In circumstances where the debtor will not surrender his or her passport, we recommend the court have power to request Her Majesty's Passport Office to cancel the debtor's passport.

12.80 HMPO asked us to consider that there may be urgent and compassionate reasons that people need to travel. HMPO already has procedures in place for such circumstances and can act quickly. We agree that this needs to be a possibility. However, we consider that, if a debtor needs to travel, he or she must make an application to court for permission for the passport to be temporarily returned. We do not think it would be appropriate for HMPO to have to take the decision whether to return the debtor's passport to enable travel. Applications for temporary relief from the prohibition and for a temporary return of the debtor's passport may need to be considered urgently and we consider that a procedure should be in place to enable urgent consideration where required.

12.81 **We recommend that the debtors should be able to apply to the court for the prohibition order to be lifted if they have an urgent need to travel.**

[32] We do not recommend that the debtor's passport should be cancelled on the making of every order prohibiting a debtor from travelling out of the UK as seems unnecessary if cancellation can be avoided and the passport held by the court. The court holding the passport rather than cancelling it means that the debtor can more easily travel if he or she is granted temporary relief from the order, see paras 12.80 and 12.81 below.

[33] All of the British Isles (including the Republic of Ireland) are part of the Common Travel Area. The internal borders of the Common Travel Area are subject to minimal or non-existent border control and can generally be crossed with minimal identity documents.

Consequences of breaching a coercive order

12.82 For coercive orders to “have teeth”, there must be consequences of breach of an order. Breach of a driving disqualification order would amount to an offence under the Road Traffic Act 1988.[34]

12.83 The position is different for breach of an order disqualifying a debtor from travelling outside the United Kingdom - there is no existing offence of travelling without a valid passport. However, if the debtor were to travel in breach of an order prohibiting him or her from doing so that would amount to a contempt of court, and the debtor would be punished accordingly.

THE NATURE OF THE PROCEEDINGS AND THE STANDARD OF PROOF THAT SHOULD APPLY

The nature of the proceedings

Discussion

12.84 In the Consultation Paper we discussed the nature of the proposed coercive orders and whether they amounted to civil or criminal sanctions for the purposes of the European Convention on Human Rights (“ECHR”).[35] The question is an important one. Article 6 of the ECHR, which provides for the right to a fair trial, draws a distinction between civil and criminal proceedings and provides additional rights where proceedings are criminal.[36] If the proceedings are criminal then the individual facing the criminal charge is entitled, for example, to legal aid for representation, to benefit from the stricter rules of evidence that apply in criminal proceedings and to benefit from the higher standard of proof that applies.[37]

12.85 The European Court of Human Rights has held repeatedly that it is not simply a question for national law to determine whether a particular “charge” is criminal or not.[38] There is an autonomous meaning of a criminal charge for the purposes of the ECHR. To determine whether any particular proceedings amount to a criminal charge, the court considers three criteria:

(1) the classification under national law;

[34] Driving while disqualified, Road Traffic Act 1988, s 103(1).

[35] Convention for the Protection of Human Rights and Fundamental Freedoms

[36] For a discussion of the blurring of the boundaries between criminal and civil law in domestic law see A Ashworth, “Is the criminal law a lost cause?” (2000) Law Quarterly Review 225.

[37] The ECHR permits contracting states to make their own rules of evidence, but does require that an individual must be proved guilty “according to law”, and that requirement will not be met unless an individual is proved to be guilty in accordance with national law. English law draws a distinction between the rules of evidence that apply and the standard of proof required in civil and criminal proceedings: *R v Briggs-Price* [2009] UKHL 19, [2009] 1 AC 1026.

[38] Articles 6(2) and (3) which provide the additional safeguards apply where a person is “charged with a criminal offence”.

(2) the nature of the offence; and

(3) the nature and severity of the penalty.[39]

12.86 A finding that the proceedings are of a criminal nature by any of the three criteria is sufficient to make it criminal for the purposes of the ECHR.

12.87 Breach of a family financial order is classified as a civil not criminal wrong under our national law. That is the starting point, but either the nature of the "offence" or the nature and severity of the penalty may alter that classification under the ECHR. We do not think that the nature of the "offence" of non-payment of a family financial order would be considered criminal: the requirement to comply with a family financial order is not a general requirement applying to all citizens (the requirement applies only to the individual debtor) and proceedings for enforcement of the order are not brought by a public authority (they are brought by a private individual).[40]

12.88 It is the third criterion, "the nature and severity of the penalty", where a disqualification order has the potential to tip the proceedings into the criminal sphere, depending on the terms of the sanctions that judges have at their disposal. The House of Lords in determining whether an application for an anti-social behaviour order resulted in criminal or civil proceedings considered that the key question was whether "the making of such an order amounts to the imposition of a penalty." This was the preliminary question to be asked before considering "the nature" of the penalty. [41]

12.89 There is no case law (either domestic or of the European Court of Human Rights) that is directly on point in assessing whether the coercive orders that we recommend amount to a penalty. The European Court has found certain sanctions that disqualify an individual from driving or that could lead to the invalidation of a driving licence to be criminal penalties[42], but the decisions turn on the facts of each case and none are analogous to the orders that we recommend. For example, we are not aware of any decision that considers the nature of a driving disqualification order where that order has not been a consequence of a criminal conviction for a driving offence. The court often states that the fact the sanction is imposed following a conviction is the starting point for determining whether the sanction is a criminal penalty.[43]

[39] *Engel v Netherlands* (1976) 1 EHRR 647 (App No 5100/71).

[40] The relevant liability being of general application to all citizens and proceedings for breach being brought by a public authority are factors that to lean towards a classification of the proceedings as criminal: *Benham v The United Kingdom* (1996) 22 EHRR 293 (App No 19380/92), where the proceedings were brought for non-payment of a community charge.

[41] *R (Mc Cann v Others) v Crown Court at Manchester and another* [2002] UKHL 39, [2003] 1 AC 787.

[42] *Malige v France* 68/1997/852/1059; *Nilsson v Sweden* 73661/01; *Maszni v Romania* 59892/00.

[43] See for example, *Malige v France* 68/1997/852/1059 at [35].

12.90 In the case of *Nilsson v Sweden*[44] where the applicant's licence had been withdrawn as a result of convictions for aggravated drunk driving and unlawful driving, the European Court stated that the severity of the measure, which was a suspension of the applicant's driving licence for 18 months, was so significant that it could be viewed as a criminal sanction regardless of the context of his criminal conviction. Although, at first sight, this may seem to have a bearing on the orders that we recommend, we are of the view that the facts of *Nilsson* make it quite different. The coercive orders that we recommend may be made for a maximum of 12 months, but importantly they would be lifted upon payment of what is due and the debtor would have the right to apply for the order to be re-considered upon part payment – it is within the gift of the debtor, therefore, to be released from the order. That was not the case in *Nilsson* where there was no opportunity for the applicant to take steps to have the suspension lifted.

12.91 Further, the period of suspension in *Nilsson* was calculated on a standardised basis in proportion to the seriousness of the offence; there was no individual assessment on the likelihood of repeat conduct. In contrast, the orders that we recommend would only be made after a consideration of all the circumstances of the individual case, including the impact of making a coercive order on the debtor and any of his or her dependants and the likelihood of the coercive order achieving compliance with the family financial order. A coercive order would only be made if proportionate and in the interests of justice. We are of the view that the individual assessment in every case of the appropriateness of making a coercive order and the fact that the order would be lifted upon payment and re-considered on part-payment make the orders we recommend of a different nature and considerably less severe than the period of suspension in *Nilsson*.

12.92 What constitutes "a penalty" was considered by the European Court of Human Rights in *Welch v United Kingdom*.[45] The court was asked to determine whether a confiscation order made under the Drug Trafficking Offences Act 1986, following a conviction under the same Act, amounted to a criminal penalty. A confiscation order requires the defendant to hand over the proceeds of his or her drug trafficking following a conviction for a drug trafficking offence.

12.93 The court found that a confiscation order is a criminal penalty. The starting point for the court was that a confiscation order is imposed following conviction for a criminal offence. That consideration does not apply in the case of the coercive orders that we recommend, and so it is important to take account of the other factors that the court highlighted as relevant in reaching its decision. There were several aspects of confiscation orders which the court considered "in keeping with the idea of a penalty as it is commonly understood", which when taken together provided a strong indication of "a regime of punishment." Those aspects were:

[44] 73661/01.

[45] 20 EHRR 247.

(1) the sweeping statutory assumptions that apply to calculate the proceeds of drug trafficking;[46]

(2) the fact that the confiscation order is aimed at the proceeds of drug trafficking and not limited to actual enrichment or profit – it is more far-reaching than just ensuring that the defendant has not profited from drug trafficking;

(3) the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused; and

(4) the possibility of imprisonment in default of payment.

12.94 We have concluded that, considering the factors emphasised by the court in *Welch* and the aspects of confiscation orders highlighted in that case as indicating a punitive regime, our recommended disqualification orders would not be considered a criminal penalty.

12.95 The objective of the coercive orders is not to create a regime of punishment, but rather to seek to effect compliance with a court order.[47] Unlike confiscation orders where the court may take account of the degree of culpability of the defendant, the Family Court in considering making a disqualification order must be satisfied that the debtor has the ability to pay what is due at the time the court is considering making the order. If the court were to find that the debtor had the ability to pay one month prior but no longer had the means, the court could not impose a coercive order as a punishment. Further, the fact that the coercive order will be lifted upon payment and can be re-considered on part payment characterises the order as a lever to encourage payment of what is due; the order is not intended to prejudice the debtor once that payment has been made, and does not go beyond ensuring that the debtor is not wrongfully benefiting from his or her non-compliance. In addition, the powers we recommend will include the power to make a coercive order with a postponed start date so that the order would take effect if the debtor does not pay what is owed within a certain period of time. We envisage orders with a postponed start date being the order that a court would often make to encourage compliance.

[46] In summary, the effect of the assumptions are that all property that has passed through the defendant's hands in the period of six years before proceedings were instituted against him or her are deemed proceeds of drug trafficking.

[47] For a discussion on the different nature of orders made in various criminal and civil proceedings see A Ashworth, *Sentencing and Criminal Justice* (6th ed 2015) Ch 11.

12.96 We consider that the analysis that the recommended coercive orders would not amount to criminal penalties is supported by the domestic decisions of the House of Lords in *R (Mc Cann v Others) v Crown Court at Manchester and another*[48] and a recent decision of the High Court in *Chief Constable of Lancashire v Wilson*.[49]

12.97 In *McCann* the House of Lords found that an anti-social behaviour order was not a penalty, and that the proceedings giving rise to such an order were civil rather than criminal. The prohibitions that were imposed by the anti-social behaviour order were imposed "for preventive reasons, not as punishment." The House of Lords considered that a court, when considering making an anti-social behaviour order, "is not being required, nor indeed is it permitted, to consider what an appropriate sanction would be for [the defendant's[50]] past conduct." Further, the court noted that "while the court may restrict the defendant's liberty where this is shown to be necessary to protect persons in the area from further anti-social acts by him, it may not deprive him of it nor may it impose a fine on him".

12.98 In the case of *Wilson*,[51] reported in July 2015 (after the publication of our Consultation Paper) the High Court considered whether gang-related injunctions[52] give rise to civil or criminal proceedings for the purposes of Article 6 ECHR. The court held that as the injunctions can only be preventive or protective in nature,[53] and cannot be lawfully punitive, the proceedings were civil and not criminal.

12.99 A coercive order cannot lawfully be used to punish past behaviour; . to impose a disqualification order, the Family Court would have to be satisfied that the debtor has the means to pay at the time the application is considered. Nor can coercive orders have the effect of depriving the debtor of his or her liberty. For those two reasons, we are of the view that the analysis applied in *McCann* and *Wilson* supports the argument that disqualification orders give rise to civil not criminal proceedings.

[48] [2002] UKHL 39; [2003] 1 AC 787.

[49] [2015] EWHC 2763 (QB). We note that Clarke LJ granted permission to appeal the judgment of the High Court on 21 July 2015 ([2015] EWCA Civ 907). Permission to appeal was, however, granted on grounds unrelated to our discussion. Clarke LJ considered it arguable the court had failed to take account of the possibility that individuals belonging to a gang have different levels of involvement and that the restrictions imposed on the defendant were disproportionate.

[50] The House of Lords used the term "defendant" throughout the judgment.

[51] [2015] EWHC 2763 (QB).

[52] Injunctions made under the Policing and Crime Act 2009.

[53] A court must be satisfied that an injunction is necessary to prevent the respondent from engaging in gang-related activity or to protect the respondent from the same

12.100 Further, it is worth noting that the sanctions that could be imposed under the regime being considered in *Wilson* could be very far-reaching. The injunctions could be positive as well as negative in nature, with there being no limit in the statute to the positive requirements that could be imposed.[54] The decision perhaps highlights the point made by the European Court of Human Rights in *Welch* that the severity of a measure is not determinative in considering whether or not it amounts to a penalty. In contrast to the regime under consideration in *Wilson*, the coercive orders that we recommend are far more limited.

Consultation responses

12.101 Two consultees discussed the issue of the nature of the proceedings. Both were of the view that coercive orders should give rise to civil proceedings. The two responses on this point came from the Family Law Bar Association and Janet Bazley QC. They thought that care must be taken in framing the powers as they considered there was a risk they could be considered criminal sanctions. Both referred to the need to distinguish the coercive powers from the disqualification from driving order under the CSA 1991, which requires proof of means to the criminal standard.[55]

12.102 The Family Law Bar Association suggested that in order:

> "that any future analysis under the three criteria located in the decision of *Engel v Netherlands*[56] will not lead to a determination by the court that the proceedings amount to a criminal charge because they are punitive in nature … the statutory framework which creates the new powers must:
>
> (a) Designate them as civil sanctions (though we recognise this is not determinative);
>
> (b) Provide for a threshold consideration which will include a finding that:
>
> (i) The debtor has the means to pay but has not;
>
> (ii) The creditor has already attempted to obtain payment by way of a conventional enforcement order; or
>
> (iii) it appears to the court that a conventional enforcement order would not be effective as means of obtaining payment.

[54] In his judgment Mr Justice Kerr noted that counsel acting for some of the respondents gave the example "not entirely frivolously, of a person being made to break stones on Dartmoor".

[55] We address this point at paras 12.120 to 12.122 below.

[56] (1976) EHRR 647 (App No 5100/71).

(c) Once the threshold consideration has been met, provide for a general checklist of factors the court must take into account before making a coercive order;

(d) Specify the standard of proof required in relation to the threshold is that of the balance of probabilities;

(e) Provide limitations which reduce the severity of these penalties. These limitations will include;

(i) Specified maximum durations for any coercive order;

(ii) Provision for the debtor, during the currency of a coercive order, to make an application for an order to be discharged and/or suspended."

12.103 Taking account of the case law set out above, the two responses on the issue and the way in which we suggest the power should be framed, we consider that based on the details of our recommendations proceedings for a disqualification order are civil proceedings for the purposes of article 6 of the ECHR.

The standard of proof that should apply

12.104 As we consider the proceedings to be civil in nature, the starting point is that the civil standard of proof should apply. The civil standard of proof requires the court to find facts to be proven on "the balance of probabilities". However, it is not the case that the civil standard of proof applies in all civil proceedings. For example, the House of Lords in *McCann*, although finding that the proceedings for an anti-social behaviour order under the Crime and Disorder Act 1988[57] were civil and not criminal, held that a heightened civil standard of proof, which is indistinguishable from the criminal standard of proof, should apply to the question of whether the defendant had acted in an anti-social manner. The House of Lords considered that a court should be "sure" that the defendant had so acted. It is therefore possible, on this analysis, that disqualification orders could be civil proceedings but that the standard of proof should be higher than the balance of probabilities. Subsequently to *McCann*, however, the concept of a heightened standard of civil proof has been rejected by the House of Lords, meaning that in any proceedings either the normal civil standard of proof or the criminal standard of proof must apply.[58]

[57] No longer in force.

[58] *Re B (Children) (Care Proceedings: Standard of Proof*) [2008] UKHL 35, [2009] 1 AC 11.

12.105 The issue of which standard of proof should apply to coercive orders is not straightforward. There are strong policy arguments for the application of the standard civil standard of proof. In particular, as we explain below, it is the debtor who holds all the information about his or her financial circumstances and therefore about his or her ability to pay the sums due. Despite the strength of the policy argument, we acknowledge that the determination of the standard of proof is a matter on which different conclusions may be drawn. In this section we explain the arguments that could be made for the application of different standards of proof. We conclude, however, that it is appropriate to apply the civil standard of the balance of probabilities and we recommend accordingly.

12.106 In *McCann*, the court held that the criminal standard should apply given the "seriousness of the matters involved". Lord Hope of Craighead said:

> I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which if proved, would have serious consequences for the person against whom they are made.[59]

12.107 It could be argued that the "seriousness of the matters involved" in the making of coercive orders mean that, following the court's reasoning in *McCann*, the higher standard of proof should be applied. An order disqualifying a debtor from driving or prohibiting a debtor from travelling outside the UK is a serious matter and will have serious consequences for the debtor. That has to be the case since otherwise the orders will not act as encouragement to pay what is owed.

12.108 However, the terms of the orders that could be made under the legislation that was being considered in *McCann* were arguably much more serious. The legislation did not limit the prohibitions that could be imposed by way of an anti-social behaviour order beyond them being "necessary for the purpose of protecting from further anti-social acts by the defendant." An anti-social behaviour order could therefore involve a far more – or far less – severe intrusion on a person's liberty than disqualification from driving or a prohibition from travelling out of the UK. Further, an anti-social behaviour order could not be imposed for less than a term of two years and could not be discharged without the consent of both parties. Breach of any anti-social behaviour order was a criminal offence that carried a maximum sentence on indictment of five years imprisonment. In contrast, the coercive orders that we recommend would be limited and defined by statute, and would contain a number of important safeguards:

(1) the orders would be for a maximum duration of twelve months in the first instance;

(2) the orders would be lifted on full-payment of the debt; and

(3) the orders could be re-considered on part payment.

[59] [2002] UKHL 39; [2003] 1 AC 787 at [82].

12.109 Further, the court would have regard to all the circumstances of the case before concluding that the imposition of a coercive order was in the interests of justice and was therefore a proportionate means of ensuring payment of the debt. As already stated, the court would consider the impact of making a coercive order on the individual debtor as well as on his or her dependants along with the likely effectiveness of the coercive order in achieving compliance with the financial order. It has been noted that the normal civil standard of proof is appropriate in family proceedings where the court adopts a "partly inquisitorial approach".[60] Although the comment was made in the course of children proceedings, we consider that a similar "partly inquisitorial approach" would be adopted by courts considering making a coercive order. On our recommendations, breach of a disqualification from driving order would be a criminal offence as a result of legislation already in place. However, we do not consider that that feature alone requires a higher standard of proof to apply in the proceedings for making a coercive order.

12.110 The Crime and Disorder Act 1998 has now been repealed, and injunctions to tackle anti-social behaviour are currently made under the Anti-social Behaviour, Crime and Policing Act 2014. Unlike the 1998 Act, the 2014 Act specifies that the civil standard of proof applies to the question of whether the respondent has engaged (or threatens to engage) in anti-social behaviour. Many of the features highlighted above, that made anti-social behaviour orders of such serious consequence, do not feature in the new legislation. Although the legislation is still very flexible as to the injunctions that may be imposed, there is no longer a minimum term of two years, the injunction may be varied on the application of either party without the other party's consent, and breach of such an injunction is not a criminal offence.

12.111 In *Wilson* the court was asked to consider whether the Policing and Crime Act 2009 was right to specify that the civil standard of proof should apply for the making of gang-related injunctions or whether the seriousness of the matters involved meant that a higher standard should apply The applicants argued that the civil standard of proof was incompatible with their rights to a fair trial under article 6 ECHR.[61]

[60] *RE U (A Child)* [2004] EWCA Civ 567, [2005] Fam 134; approved by the Supreme Court in *J (Children) (Care Proceedings: threshold Criteria)* [2013] UKSC 9, [2013] 1 AC 680, where the court held that the simple balance of probabilities was the test for the identification of a perpetrator in children proceedings.

[61] Mr Justice Kerr noted that as the legislation explicitly provided for the standard of proof to be applied, it was not open to the court to substitute a different standard of proof. If the court determined that standard of proof to be wrong then the court would have to issue a declaration that the legislation was incompatible with the Human Rights Act 1998.

12.112 The court noted that the procedural protection must be "commensurate with the gravity of the potential consequences".[62] The court found that the consequences of an injunction in this context "may be grave and may include, for example, curfews, a ban from specific locations and other substantial interferences with [the respondents'] lives including a positive requirement to undertake particular activities". However, the court was satisfied that there were "safeguards" within the legislation (for example, a two-year time limit on any order, an eight-hour time limit on any curfew order, the need to minimise interference with religious beliefs, and an express requirement for the trial judge to consider the impact of article 8 of the ECHR), and that there was a real need for the powers. The court determined that the broader legislative purpose could not be achieved without measures that will "have a major impact on the life of persons against whom injunctions are granted". These factors combined meant that the use of the civil standard of proof was not a violation of article 6(1).

12.113 We think that many of the factors highlighted in *Wilson* that point to the civil standard of proof being appropriate and fair are present in the coercive orders that we recommend. We note that *Wilson* is a High Court decision, but currently no higher court has been asked to consider this point in respect of the 2009 Act.

The purpose of the legislation

12.114 As noted by the court in *Wilson*, when considering the standard of proof that should apply it is important to look at (among other things) the purpose of the legislation. The purpose of introducing coercive orders is to ensure that there can be effective enforcement against "won't pay" debtors who owe money under a family financial order. In such cases the debtor is refusing to comply with a court order which the debtor has the ability to comply with. Through non-compliance the debtor is, in most cases, depriving the creditor of money that he or she needs for everyday living. It is essential that effective enforcement action can be taken. However, coercive orders are not to be made against "can't pay" debtors; our recommendation is not to punish those debtors who really cannot pay what is due. The standard of proof that applies must, therefore, strike the right balance between ensuring that "won't pay" debtors may be coerced and that "can't pay" debtors are not wrongly punished.

[62] Citing *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, per Lord Bingham.

12.115 The issues (to which the standard of proof would apply) are whether the debt is owed and whether the debtor has the ability to pay what is due.[63] It is unlikely to be difficult to establish whether or not the debt is owed; the difficult issue is likely to be whether the debtor has the ability to pay. In respect of this issue, we are of the view that the debtor is in a far stronger position to prove his or her case than the creditor. Debtors have all the information about their finances; those who cannot pay should be able to prove that to the court by making full disclosure. Creditors, on the other hand, will only have access to such information as the debtor provides or that can be obtained from third parties. We make recommendations to increase the information that can be obtained from third parties[64] but the creditor can never be in the same fully informed position as the debtor.

12.116 We consider that the imbalance in the parties' positions means that it may be very difficult for a creditor to prove to the criminal standard that the debtor has the ability to pay. Taking account of the need for effective enforcement against "won't pay" debtors, the difficulties that a creditor may face in proving that the debtor has the ability to pay, and the relative ease with which a debtor may prove that he or she does not have the ability to pay, we think that the civil standard of proof strikes the right balance.

12.117 As noted above, the injunctions that may be granted under the Anti-Social Behaviour, Crime and Policing Act 2014 and under the Policing and Crime Act 2009 may be granted on the civil standard of proof. That is not the only legislation where the court has the power to restrict a person's activity or deprive them of property on the balance of probabilities. For example, the court may, on the balance of probabilities, make a non-molestation order or an occupation order under the Family Law Act 1996. A non-molestation order can, for example, prohibit an individual from entering a particular town, and an occupation order may require an individual to leave his or her home. Under the Proceeds of Crime Act 2002, civil recovery orders can be made to recover any property that the court is satisfied, to the civil standard of proof, derives from unlawful conduct.[65] Although there were differences of opinion expressed as the Bill passed through the House of Commons as to whether a heightened civil standard would apply, the legislation states that the court must decide the issues "on the balance of probabilities".[66] It is not the case therefore that serious consequences necessarily dictate that a criminal standard of proof should apply. These powers, like the coercive orders that we recommend, are aimed at striking a balance between competing interests.

12.118 Taking account of the safeguards limiting the effect of the consequences for the debtor and the purpose of introducing the legislation, we are of the view that no higher standard of proof than the ordinary civil standard need be applied in proceedings for a disqualification order.

[63] For a discussion on the meaning of "ability to pay", see paras 12.40 to 12.46 above.

[64] See Chapter 8 above.

[65] Proceeds of Crime Act 2002, part 5.

[66] Proceeds of Crime Act 2002, s 241.

12.119 **We recommend that for a court to impose a coercive order, the creditor should have to establish to the civil standard of proof that the debtor has the ability to pay.**

Disqualification under the Child Support Act 1991

12.120 Under the CSA 1991, a child maintenance debtor may be committed to prison or disqualified from driving.[67] The court must be satisfied that there has been "wilful refusal or culpable neglect [to pay what is due]" on the part of the debtor. The statute is silent as to the standard of proof but the operation of the legislation was considered by the Court of Appeal in *Karoonian v CMEC*.[68] The court noted that "an application for committal is to be treated as a criminal charge", and said that:

> The Commission accepts the onus of proof lies on them and that the standard of proof is the criminal standard beyond reasonable doubt, not the civil standard of the balance of probability.

12.121 Given that a disqualification order is an alternative sanction on the same application, it follows that the same standard of proof applies (though there was no discussion on this point before the court).[69] Our recommendations would, therefore, result in a difference between the standard of proof required for a debtor to be disqualified from driving for the non-payment of a child support assessment under the CSA 1991, and the standard of proof required to disqualify a debtor from driving or from travelling outside of the United Kingdom for the non-payment of a family financial order.

12.122 We consider that difference to be justified. Disqualification under the CSA 1991 is available to the court as an alternative to committal on the same application, and an order for committal necessarily involves findings of culpability to be made to the criminal standard. Secondly, an order for disqualification under the CSA 1991 may be made where the court finds "wilful refusal or culpable neglect" by virtue of the debtor having had the means to pay at a prior time regardless of whether he or she has the means at the time of the application.[70] In that respect a disqualification order may be made to punish the debtor under the CSA 1991, in a way that the coercive orders that we recommend may not. While the two schemes may appear similar, they are essentially different in the way that they respond to non-payment.

OTHER HUMAN RIGHTS AND INTERNATIONAL OBLIGATIONS

12.123 It is not only article 6 of the ECHR that needs considering when thinking about introducing powers to disqualify a debtor from driving or from travelling outside the jurisdiction. Other human rights and international obligations are engaged.

[67] Child Support Act 1991, s 39A.

[68] [2012] EWCA Civ 1379, [2013] 1 FLR 1121.

[69] There must be a possibility that if a disqualification order was available on a separate application then a different standard of proof could apply but the court did not explore this.

[70] *Karoonian v CMEC* [2012] EWCA Civ 1379, [2013] 1 FLR 1121 at [24].

Right to respect for private and family life

12.124 The coercive orders which we recommend may engage the debtor's right to respect for a private and family life under article 8 ECHR. The orders may also impact on the debtor's family, and other dependants. We consider, however, that any interference with these rights is justified in pursuance of the legitimate aim of protecting the creditor's rights to obtain what he or she is due. The court in each case will ensure that any interference is proportionate. We propose that the court must take account of all the circumstances in determining whether to make a disqualification order and, if so, on what terms. We suggest drawing the court's attention to a list of factors[71] that we consider will ensure that a disqualification order would not be made where it would have a disproportionate impact on the debtor or his or her family or dependents. One factor in that list is "the effect of making the order on any dependants of the debtor", which we conclude will ensure that the rights of any dependants are fully considered.

Right to the peaceful enjoyment of possessions

12.125 Our recommendations for coercive orders involve the court having the power to confiscate a debtor's UK passport or driving licence. At first sight, the debtor's right to peaceful enjoyment of possessions under article 1 of protocol 1 ECHR (A1P1) may seem to be engaged. However, a passport is the property of the issuing state and not the individual and so the debtor has no A1P1 right in respect of his or her passport,[72] and the confiscation of a driving licence has been held not to engage this right.[73]

Right to liberty

12.126 Article 5 ECHR protects individuals' right to liberty. The relationship between orders that disqualify an individual from leaving the British Isles and article 5 were considered in *Young v Young*.[74] Mr Justice Mostyn determined that confinement of an individual to the British Isles was not a confinement to "such a limited place" that article 5 was engaged.

Right to leave any country

12.127 This is only relevant to the orders prohibiting debtors from travelling out of the UK.

[71] See para 12.60 above.

[72] *Atapattu, R (On the Application of) v The Secretary of State for the Home Department* [2011] EWHC 1388 (Admin).

[73] *Toma v Romania* [2012] ECHR 1051/06.

[74] [2012] EWHC 138 (Fam), [2012] Fam 198.

12.128 Every individual's right "to leave any country" is enshrined in article 12.2 of the International Covenant on Civil and Political Rights ("ICCPR").[75] Further, the Citizens Rights Directive 2004/38/EC (also sometimes called the "Free Movement Directive") defines the right of free movement for citizens of the European Economic Area (EEA), which includes the member states of the European Union ("EU"). That right includes the right to leave the territory of an EU member state to travel to another member state. A debtor who is prohibited from travelling out of the UK is suffering an interference with his or her right to leave this country. However, neither the right under the ICCPR nor the right under the Free Movement Directive are absolute. We consider that the interference with the debtor's right to leave the UK (on the terms that we recommend) for the purposes of enforcing a family financial order is, in principle, justified and proportionate.

12.129 The ICCPR allows for restrictions to the right to leave any country where those restrictions are:

(1) provided by law;

(2) necessary to protect security, public order, public health or morals or the rights and freedoms of others;

(3) consistent with the other rights of the Convention;[76]

(4) precise, rather than discretionary, criteria; and

(5) respect the principle of proportionality.[77]

12.130 The recommended coercive orders would, if implemented be provided for by statute and would therefore be "provided by law" for the purpose of article 12.3.

[75] The UK ratified the ICCPR on 20 May 1976. A similar right is found in the ECHR at Protocol No. 4 of Article 2.2, which provides that: "Everyone shall be free to leave any country, including his own." However, the UK has not yet ratified Protocol No 4.

[76] The conditions at (1) to (3) are found in Article 12.3 of the ICCPR. It seems that states are afforded a wide margin of appreciation in the application of the qualifications prescribed in Article 12.3. Harvey and Barnidge suggest that Article 12.3 is interpreted in a way "that defers to states' concerns if at least arguably justified and sufficient": R P Barnidge and C Harvey, *The right to leave one's own country under international law*, Global Commission on International Migration, September 2005.

[77] The conditions at (4) and (5) are found in General Comment No 27.

12.131 The recommended coercive orders are necessary to protect the rights and freedoms of the creditor. The order is rooted in the creditor's welfare, designed to secure for him or her the satisfaction of a judgment debt following the breakdown of marriage or the dissolution of a civil partnership. The right to a fair trial in article 6(1) of the ECHR includes a right to effective enforcement of judgments. [78] Further, securing satisfaction of the judgment debt for the creditor engages his or her right to the peaceful enjoyment of his or her possessions (article 1, protocol 1), the right to an effective remedy (article 13) and, in circumstances where the welfare of the creditor's family is involved, the right to private and family life (article 8). Orders would only be made if "necessary". Under our recommendation the court must be satisfied that the debtor can pay and then must only make an order if it is in the interests of justice to do so, taking account of the availability and likely success of other enforcement methods.

12.132 The orders would be consistent with the other rights under the Convention. Article 2.1 provides that all states parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. As it is recommended that the disqualification order should apply to all debtors without distinction (for example, to both national and non-national debtors) it is non-discriminatory and therefore compatible with the other rights of the Convention.

12.133 Limitations of the right should operate on precise criteria and not confer unfettered discretion on the state. Although we recommend that the exercise of the power be at the court's discretion, that discretion is only available once the threshold criteria have been met. The court cannot impose a coercive order unless satisfied that the debtor has the ability to pay the order. We consider that this provides sufficiently certain criteria for the operation of the order.

12.134 Finally, the infringement of the debtor's right to leave the UK must be proportionate to the legitimate aim of improving the efficiency of enforcement in this context. As the judge will have a broad discretion to weigh all the circumstances in the case against each other, this requirement will be met in every case.

12.135 The Court of Justice of the European Union ("CJEU") has considered the compatibility of travel bans on EU citizens and their consistency with the EU right of freedom of movement on a number of occasions. Restrictions on the freedom of movement of EU citizens are permitted if:

(1) such orders are made on grounds of public policy, public security or public health; and

(2) are not invoked to serve economic ends.[79]

[78] *Hornsby v Greece*, 19 March 1997, Reports of Judgments and Decisions 1997-II.

[79] Citizens' Rights Directive 2004/38/EC, Official Journal L 158 of 2004 p 77, Article 27(1).

12.136 In addition, if made on grounds of public policy or public security, the restriction must:

(1) comply with the principle of proportionality;

(2) be based exclusively on the personal conduct of the individual concerned; and

(3) the personal conduct in question must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[80]

12.137 States are afforded a wide, albeit not unlimited, margin of appreciation in determining what amounts to "public policy" in this context. In *Jipa*, for example, the court referred to states' "freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one member state to another".[81] We recommend coercive orders to ensure that the creditor receives what he or she is due, but also to ensure compliance with a court order. Such compliance is essential to ensuring the proper administration of justice and maintaining confidence in the justice system, both of which represent fundamental interests of society. That is the public policy that the orders pursue.

12.138 We note the decision of the CJEU in *Byankov*,[82] but only to distinguish it from the disqualification orders that we recommend. In *Byankov*, the court held that the travel ban imposed by the Bulgarian state on one of its citizens for non-payment of a private law debt owed to a company was inconsistent with EU law. The travel ban in question was an administrative measure that was applied without any consideration of the personal conduct or circumstances of the debtor, beyond the fact that a debt existed and the debtor could not provide security for the debt. The court criticised the measure, noting that: "there is no mention of public policy, public safety or public health." By contrast, the order that we recommend to prohibit debtors from travelling out of the UK would be based exclusively on the personal conduct of each debtor (the debtor's decision not to comply with the court order) and would be imposed not by an administrative measure but by a judge after a consideration of all the circumstances. The CJEU further criticised the measure in *Byankov* for being imposed to serve "economic ends", which is not a legitimate objective for restricting freedom of movement. The objective of the coercive orders goes far beyond the satisfaction of private law debts. As noted above they are about ensuring compliance with court orders.

12.139 Although both *Jipa* and *Byankov* involved prohibitions on travel made against citizens of the respondent state, the CJEU did not distinguish between nationals and non-nationals, referring to citizens of the Union generally. In contrast, the European Court of Human Rights has held that when restricting the right a non-

[80] Citizens' Rights Directive 2004/38/EC, Official Journal L 158 of 2004 p 77, Article 27(2).

[81] C-33/07 *Jipa* [2008] I-5157 at [44] and [45].

[82] C-249/11 *Byankov* [2012] ECR I-0000.

national has under Article 2, Protocol No 4 to leave a country a higher standard applies. In such a case, the restriction on free movement could be justified only if there were clear indications of a genuine public interest which outweigh the individual's right to freedom of movement.[83] The UK has not ratified Article 2, protocol No 4 and the point does not appear to have been raised before the CJEU. However, we think it is important to note the approach that the European Court of Human Rights has taken in respect of non-nationals and the rights under article 2, protocol No 4. Further, other decisions of the court illustrate that restrictions on leaving a country engage other convention rights (as considered above) that the UK has ratified.[84]

12.140 We consider that the application of a higher standard does not require a different statutory test to apply to non-nationals in respect of an order prohibiting travel out of the UK as the court will have the discretion to consider the facts of each case. As we set out above, the court will have to consider different factors when determining whether to make an order prohibiting travel in respect of a non-British national. Further, partly as a result of the different considerations that apply we do not recommend that the court should have the power to seize a foreign passport.

[83] *Miazdzyk v Poland* application number 23592/07.

[84] *Nada v Switzerland* application number 10593/08.

PART 4
A FAIRER SYSTEM: BALANCING THE INTERESTS OF THE PARTIES

CHAPTER 13
PERMISSION TO ENFORCE AND POWER TO REMIT ARREARS

INTRODUCTION

13.1 In family proceedings, arrears due under any financial provision order[1] which are more than 12 months old at the time enforcement proceedings are started may only be enforced with the court's permission.[2]

13.2 The requirement for permission to enforce arrears in the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 applies in respect of arrears from orders arising under those Acts. There is no equivalent requirement in the Children Act 1989. The recommendations made in this chapter, therefore, apply only to family financial orders made under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004.

13.3 We discussed the purpose of this rule in our Consultation Paper.[3] We concluded that the rule exists to enable the parties to move on, to put an end to stale claims and to prevent the debtor from accruing unaffordable liabilities. Such a rule is necessary in family financial proceedings as financial orders are made to achieve a fair distribution of the parties' assets at particular moments in time. In particular, orders for periodical payments, which are the orders that most often engage the requirement for permission to enforce arrears, are: a) about meeting needs; and b) usually met by the debtor from his or her income. So, if the creditor does not enforce a periodical payments order in a timely manner, then that raises the question of whether the creditor in fact needs that income.[4] In addition, a debtor may not have the means to meet a large sum of accrued arrears and the court may remit some of the arrears, either on the creditor's application for permission or if the debtor applies to vary the ongoing order.

13.4 At present, there is no statutory test for the courts to apply when considering whether to grant permission to enforce arrears more than 12 months old. There is no guidance in the statute as to how the rule should be operated or even what it is trying to achieve. That said, it has come to be understood, perhaps erroneously, that the court will decline to grant permission unless there are

[1] The statutory provision refers to orders for "financial provision", which are defined by Matrimonial Causes Act 1973, s 21 to include periodical payments (including maintenance pending suit and interim maintenance) and lump sum orders. Typically, however, the arrears will be of periodical payments. Some commentary appears to suggest that lump sum orders are not included.

[2] Matrimonial Causes Act 1973, s 32 (1); Civil Partnership Act 2004 sch 5, para 63.

[3] The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219, para 3.113.

[4] Of course, they might need the income and may, for example, be getting into debt to meet their needs. The court would consider all of the circumstances when deciding an application for permission.

"special circumstances".[5] However, there is no agreement in the most recent case law on whether "special circumstances" is the appropriate test.[6] In practice, the courts seem to consider the circumstances of the case as a whole, looking particularly at:

(1) the culpability of the debtor and his or her explanations for non-payment;

(2) the steps that the creditor has taken to enforce the debt;

(3) the parties' ability to pay legal fees for representation and whether the original unpaid order included provision for legal fees, for example where the original order is an order for maintenance pending suit and a legal services order; and

(4) the parties' respective means or at least the debtor's ability to pay the debt.

13.5 We asked in the Consultation Paper whether a change is required to the rule that arrears more than 12 months old are recoverable only in special circumstances. If so, then we invited views on whether the 12 month period should be increased or if the starting point should be that all arrears are enforceable with the debtor having the opportunity to argue otherwise (whether after 12 months or longer).

Responses to the Consultation Paper

13.6 Consultees highlighted several problems with the current rule on arrears of maintenance and suggested a number of options for reform.

Problems with the current rule

LEGITIMATE REASONS FOR THE CREDITOR'S DELAY

13.7 Several consultees[7] noted that there are often legitimate reasons for the creditor delaying his or her enforcement action beyond the 12 month period. The Family Justice Council and Penningtons Manches echoed the difficulty that we had noted in the Consultation Paper that creditors will often have to wait until sufficient arrears have built up to make an enforcement application cost-effective. Penningtons Manches further said that the creditor may wish to wait for a certain event before enforcement proceedings are worthwhile, such as the sale of a company. The Family Justice Council referred to the creditor's fear that the

[5] The test of "special circumstances" seems to first appear in the High Court decision of *B v C (Enforcement: Arrears)* [1995] 1 FLR 467. The test may have come from the Court of Appeal decision of *Russell v Russell* [1986] 1 FLR 465, which was cited in *B v C* and referred to the fact that "stale arrears … required special consideration". In the Court of Appeal decision in *Lumsden v Lumsden* (unreported) 11 November 1998, Lady Justice Butler-Sloss queried whether "special circumstances" was the right test, explaining that she had "some difficulty" in understanding where the phrase had come from as it is not found in the statute.

[6] In *Arif v Anwar* [2014] EWHC 4669 (Fam), [2014] All ER (D) 313 (Mar), the court made its decision on the basis that the power to grant permission is "a general provision unencumbered by the need to establish any special circumstances". However, in *N v N* [2015] EWHC 514 (Fam), [2015] Family Law 512, the court considered that it was "trite law" that arrears becoming due more than one year before the commencement of the enforcement proceedings were not enforceable "unless there were special circumstances".

[7] The Family Justice Council, the Family Law Bar Association, Justices' Clerks' Society and Penningtons Manches.

debtor will cease payment altogether if enforcement proceedings are started. The Family Law Bar Association focused on the fact that the creditor will likely to seek to avoid litigation which can be "expensive, time consuming and stressful". The Justices' Clerks' Society noted that creditors may have relied on promises that the money would be paid and that creditors will often be unfamiliar with the enforcement process.

UNDERMINES THE NEED FOR COMPLIANCE

13.8 Some consultees[8] made the point that the final order is there to be obeyed and the debtor should not be permitted to escape his or her obligations by virtue of the 12 month period. The rule sends the wrong message.

13.9 Further, a few consultees[9] noted that the current 12 month period acts as a disincentive for debtors to pay. Debtors know that if they wait until the period has elapsed, creditors may have their application for permission to enforce the arrears rejected or the court may remit the arrears and the slate will be "wiped clean."[10]

Suggestions for reform

RETAIN THE 12 MONTH RULE BUT REVISE THE TEST

13.10 District Judge Robinson thought that the "12 month rule for arrears is reasonable in itself". However, he was critical of the special circumstances test as he felt that it did not account for where the creditor has been seeking to negotiate or has some other good reason for the delay in bringing enforcement proceedings. Ultimately, he felt that the present case law is "unduly restrictive".

INCREASE THE TIME PERIOD

13.11 Some consultees suggested that the time period should be increased. The Family Justice Council recommended that, after balancing the interests of the creditor and the debtor, the 12 month period should be extended to five years. The Money Advice Trust also recommended a longer period but did not specify what that should be.

13.12 The Law Society proposed that the period of time should take account of (and discount) any time taken to make use of alternative dispute resolution methods to resolve the matter before bringing an application before the court.

INCREASE THE TIME PERIOD AND IMPOSE AN AUTOMATIC BAR

13.13 Whilst some members of the Family Law Bar Association thought that the current system works well in practice, some of its members recommended that the 12 month period should be increased to either 24 or 36 months. However, they also proposed that arrears older than that period should not be enforceable under any circumstances.

[8] The Family Law Bar Association, International Family Law Group and Resolution.

[9] International Family Law Group, Justices' Clerks' Society and the Money Advice Trust.

[10] International Family Law Group.

MAKE ALL ARREARS ENFORCEABLE

13.14 Several consultees proposed a starting point that all arrears are enforceable but the debtor has the opportunity to argue otherwise.

Discussion and recommendations

13.15 We agree with the objectives of the current 12 month rule. As noted above, in the context of family financial orders, it is an important rule to ensure that unaffordable liabilities do not accrue and it should act as an incentive to the creditor to take timely enforcement action. However, consultees' responses confirm that there are problems with the existing law and that some change is needed. We propose maintaining the current mechanism of making historic arrears enforceable only with the court's permission as we consider this approach provides the best way to balance the creditor's and debtor's interests and allow the facts of each case to be accounted for. However, we consider that there should be a change to the length of the period and clarification of the test for permission.

Length of the period of arrears that may be enforced without the permission of the court

13.16 We think that the 12 month period is insufficient to account for the legitimate reasons the creditor may have for delaying enforcement proceedings. Further, we see the force of the argument that the current period does not take sufficient account of the fact that the order is there to be obeyed. We consider that a longer period will help demonstrate the seriousness of the debtor's obligations under the final order. It may provide more of an incentive for compliance with the order as the debtor will know that arrears will remain enforceable for a longer period without the need for permission.

13.17 In the Consultation Paper we discussed whether it would be appropriate to extend the period of time to two or five years. On reflection and following discussion with stakeholders, we are of the view that the period of time should be extended to two years. We consider that two years strikes the appropriate balance between recognising that there are legitimate reasons why a creditor may delay in taking enforcement action and the potential unfairness to the debtor and the evidential difficulties caused by any longer period. We acknowledge that the length of any limitation period is somewhat arbitrary. However, we think that the concerns discussed above are most effectively balanced by a period of two years.

Test for permission

13.18 We envisage that most applications for enforcement would be brought within the recommended period of two years. However, we recognise that there may still be cases where, for some good reason, enforcement proceedings have been delayed and so we do not recommend a total bar on enforcing arrears that have accrued outside of that period. We think the test for permission should be clear but not overly prescriptive. A very prescriptive test would run the risk of missing some deserving creditors as it is difficult to envisage all the circumstances that could reasonably cause a creditor to bring enforcement proceedings beyond the two year period.

13.19 We are of the view that the court should grant permission to enforce arrears only if it is satisfied that there exists a good reason for doing so. In deciding whether a good reason exists, the court should have regard to all the circumstances of the case. A good reason may be made out by the creditor having taken steps with a view to enforce the arrears or to reach an agreement with the debtor regarding payment but those steps proving unsuccessful. Or, the creditor may not have taken any steps to enforce the arrears but there may have been a good reason for the creditor's inaction. For example, the following two scenarios would, in our view, amount to a good reason for inaction by the creditor:

(1) A is due £500 a month under a periodical payments order. A's former spouse B has refused to pay for the past three years. A has not pursued enforcement action because B has had no assets against which enforcement could readily have been taken. B lives in rented accommodation and is self-employed, running a business through a private company and paying funds into a joint account held with a new partner.[11] A learns that B is about to sell B's company. Following the sale of B's company, A seeks permission to enforce all of the arrears. The lack of assets to enforce against prior to B selling the company is a good reason for A not taking earlier enforcement action.

(2) C is due £10,000 under a lump sum order. D's former civil partner moved to South America immediately following the final financial order and lived there for two and a half years. C waited until D moved back before taking enforcement action. D's absence from the jurisdiction would constitute a good reason for C not taking earlier enforcement action.

13.20 We do not think that arguments about the parties' means have a place in an application for permission to enforce arrears. The application for permission is not about reconsidering the original order in light of the parties' existing means. If the debtor is unable to pay because of a change in circumstances, then his or her remedy lies in instituting variation proceedings (or an application for the remission of specific arrears under the new provision that we recommend below). Further, we consider that the creditor's means are not pertinent to the application. Although they may be relevant on a variation application, we see an application for permission to enforce as distinct proceedings. The caveat to this rejection of the parties' means as a relevant factor is where the parties' means are relevant to the creditor's explanation for not having brought earlier enforcement proceedings, for example if the creditor did not have the means to fund enforcement proceedings or the debtor did not have the assets to enforce against.

13.21 **We recommend the amendment of section 32(1) of the Matrimonial Causes Act 1973 and paragraph 63 of schedule 5 of the Civil Partnership Act 2004 so that:**

(1) the period of time for enforcing arrears without the court's permission is extended from 12 to 24 months;

[11] We recommend enabling enforcement against funds in a joint account by way of a third party debt order, see paras 10.92 to 10.97 above.

(2) the court be directed to grant leave to enforce arrears beyond that period where it is satisfied that there is good reason to do so; and

(3) in deciding whether a good reason exists the court be directed to have regard to all the circumstances of the case.

POWER TO REMIT ARREARS

13.22 Currently, the court has the power to remit arrears on an application for variation of a financial order[12] and where there has been an application for permission to enforce arrears beyond the 12 month limit.[13] As discussed in the Consultation Paper,[14] it is not clear whether a debtor can apply to the court for arrears to be remitted in other circumstances.

13.23 In some circumstances it may be fair for arrears to be remitted but there is no need to vary the ongoing order. This could arise, for example, if a debtor has been out of work for a period and unable to pay the maintenance due for that time, but then returns to work and is able to pay the maintenance going forward although not the arrears. Currently the debtor would have to apply for a variation to have the relevant arrears remitted. An application to vary requires both parties to provide comprehensive financial disclosure similar to that as is required on an application for a financial remedy and engages a similar procedure, which can mean the application takes a considerable time to be resolved. We consider it undesirable for the debtor to have to make an application to vary in circumstances where the debtor seeks only to remit arrears and we asked in the Consultation Paper whether there should be a free-standing power to remit arrears.

13.24 Consultees[15] supported the idea of a free-standing power to remit arrears. The Judges of the Family Division of the High Court agreed that a debtor "should be able to apply for arrears to be remitted without the need to apply separately to vary the order". Clarions said they had acted in a number of cases where the debtor had failed to make the necessary application for variation and remission of arrears "in the mistaken belief that an informal agreement between the parties [would] suffice". Clarions thought "a straightforward, cost-effective, discrete application for remission … would [lead to matters being] "tidied up" more frequently, leading to clarity and certainty for both parties". District Judge Robinson said there was a "clear need" for such a power, noting that the "present situation is a mess". A number of consultees noted that court can "in effect remit arrears by refusing to enforce" but agreed that an express power to remit would be helpful.

[12] Matrimonial Causes Act 1973, s 31(2A); Civil Partnership Act 2004, sch 5, para 52.

[13] Matrimonial Causes Act 1973, s 32(2); Civil Partnership Act 2004, sch 5, para 63.

[14] The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219, para 3.116.

[15] Clarion Solicitors, District Judge Robinson, the Family Justice Council, the Family Law Bar Association, International Family Law Group, Janet Bazley QC, the Judges of the Family Division of the High Court, Justices' Clerks' Society, Law Society, the Money Advice Trust, Penningtons Manches, Resolution, Tony Roe and one member of the public.

13.25 Following the overwhelming support for the proposal, we think a free-standing power to remit arrears should be introduced. We now go on to consider what the scope of that power should be.

13.26 We do not consider that there should be a free-standing power to remit arrears that have accrued under all family financial orders. Where an order is capable of being varied, the court has power to remit arrears that have accrued under that order. The problem we identified in the Consultation Paper, and the focus of the consultation responses, was that debtors should not have to make a variation application just to be able to ask the court to remit arrears in circumstances where the debtor is not seeking a variation of the order on an ongoing basis. That is the issue our recommended reform seeks to remedy. We have therefore formed the view that debtors should be able to ask the court to remit arrears without having to make an application to vary only where the underlying order is capable of being varied. Where the order is not capable of being varied, we do not consider it appropriate for the debtor effectively to achieve a retrospective variation by a free-standing application to remit arrears. [16]

13.27 **We recommend that there be a free-standing power to remit arrears, only where the underlying order is capable of variation under section 31 of the Matrimonial Causes Act 1973.**

13.28 As to the test that should apply on such an application, both the Law Society and Resolution suggested that the court should be able to remit arrears where it would be "fair to both parties". We consider that fairness does not provide sufficient guidance to the court, though we agree that the court should strive to achieve fairness to both parties in exercising its discretion. We think the power should be focussed on remedying the problem that has been identified and should not provide wider scope for debtors to seek a remission of arrears. The problem identified is debtors having to apply for a variation to ask the court to remit arrears. A debtor would make such an application where a change of circumstances has meant that he or she has been unable to comply with the family financial order and we consider this should form the basis of the test. However, we are of the view that the court should also be directed to consider the impact on the creditor on remitting the relevant arrears. In some circumstances, if the impact is significant, then it may be appropriate for the debt to remain to be enforced at a later date.

13.29 **We recommend that the court should have the power to remit arrears, on an application by a debtor, where it is satisfied that, due to a change in the debtor's financial circumstances, the debtor was unable to make the payments as they fell due. We also recommend that the court, in making its decision, should be directed to consider the impact on the creditor of remitting the arrears.**

13.30 We consider it important to avoid an application for remission of arrears replicating an application for variation of maintenance. We envisage that an application to remit arrears under this new power would focus on a change in the

[16] The court may, of course, remit arrears under such an order if the debtor requires permission to enforce: Matrimonial Causes Act 1973, s32(2); Civil Partnership Act 2004, sch 5, para 63.

debtor's circumstances, but that the procedure should be simple and the necessary disclosure less onerous than that which would be required on an application to vary. We envisage an application for remission of arrears to be a more streamlined application. On an application to remit, the court will be concerned only with a defined period of time and the reasons for and impact (on both parties) of the debtor's non-payment will be known. It is not like a variation application where the court must look forward to an unknown future. As a result, we encourage HMCTS and the Family Procedure Rules Committee to consider whether such an application could be resolved by no more than narrative statements and a short hearing (if necessary).

POWER TO REMIT ARREARS ON APPLICATION FOR PERMISSION TO ENFORCE

13.31 Currently, on an application for leave to enforce arrears beyond the 12 month limit, the court has the power to remit those arrears. Remitting the arrears brings an end to the matter that just refusing permission to enforce does not. If the arrears are remitted, then there is no longer a debt to be paid. If permission is refused but the arrears are not remitted, then the debt remains payable and the creditor may apply again for permission to enforce the debt at a later date. We recommend below the introduction of a free-standing power to remit arrears, but we consider that the court's existing power to remit arrears on an application for permission to enforce should remain. There are two reasons for this.

(1) Our recommendation of a free-standing power to remit arrears is limited to the remission of arrears that have accrued under orders that are capable of being varied and so, for example, not arrears that are due under a one-off lump sum order which cannot be varied. The power to remit arrears on an application for permission to enforce applies to arrears in respect of "any financial provision order". If the creditor seeks permission to enforce arrears due under a one-off lump sum order, the court may remit those arrears.

(2) The remission of arrears on an application for permission to enforce will likely be because there is no good reason why permission should be granted. The new power that we recommend below is not aimed at remitting stale arrears, it is intended to solve a different problem – namely change of circumstances.

13.32 For these reasons, we consider that the court's power to remit arrears on an application for permission to enforce is performing a different function to the new power that we recommend and should be retained.

CHAPTER 14
STREAMLINING – THIRD PARTY DEBT ORDERS AND CHARGING ORDERS

INTRODUCTION

14.1 The idea of streamlining applications for third party debt orders and charging orders was proposed by the Government in its 2011 Consultation.[1] The details of the proposed streamlined procedure were slightly different for the two orders, but the general approach and objective were the same. Both third party debt orders and charging orders are made in a two stage process: an interim order followed by a final order. At present, the interim order is usually made without a hearing, and then a hearing is listed to consider whether to make the order final. Streamlining the procedure would mean that a hearing would only take place if the debtor or a third party raised an objection following the service of the interim order. If no objections were raised, a final order would be made without a hearing.

14.2 In the 2012 Government Response to the 2011 Consultation, the Government said that it would seek to implement a streamlined procedure for both charging orders and third party debt orders. It is maintained that streamlining could reduce delays leading to the faster payment of the debt, simplify the process for the parties and save court time.[2] Members of the judiciary took the view that judicial consideration was only necessary at the interim stage of the orders and that most final hearings were administrative in nature.[3] When we published our Consultation Paper the streamlined procedure had not been implemented for either application. We provisionally proposed that it should be implemented for both applications in the enforcement of family financial orders.

14.3 Since we published our Consultation Paper there have been changes to the application procedure for charging orders in civil, but not in family, proceedings. Applications in civil proceedings have been centralised and must be made to the County Court Money Claims Centre in Salford.[4] A court officer, rather than a judge, has the power to make the interim order provided that certain criteria are

[1] Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales (2011) Cm 8045.

[2] Ministry of Justice, *Impact assessment: Proposed reforms to third party debt orders* (2011) p 10, available at https://consult.justice.gov.uk/digital-communications/county_court_disputes/supporting_documents/Enf_IA_third_party_debt_orders.pdf (last visited 02 December 2016).

[3] Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales: The Government Response (2012) Cm 8274, p 53.

[4] Civil Procedure Rules, r 73.3 – centralisation does not apply where the application is for a charging order over an interest in a fund in court.

met.[5] If no objections are received from the debtor, a district judge at the Centre can make the final charging order without a hearing being required.[6] The procedure for civil charging orders has, therefore, been streamlined.

14.4 Charging orders in family proceedings used to be governed by the rules governing charging orders in other civil proceedings at Part 73 of the Civil Procedure Rules. However, at the same time as amendments were made to Part 73 of the Civil Procedure Rules, a new Part 40 was introduced into the Family Procedure Rules to govern applications for charging orders in family proceedings. The procedure under Part 40 of the Family Procedure Rules is materially the same as the old procedure under Part 73 of the Civil Procedure Rules. The procedure for a charging order in family proceedings is, therefore, currently unchanged.

14.5 Applications for third party debt orders in family proceedings continue to be governed by Part 72 of the Civil Procedure Rules[7] and the procedure in family and civil proceedings is the same. Unlike for charging orders, applications for third party debt orders have been neither centralised nor streamlined. Although the proposals for streamlining the applications for the two orders are very similar, we consider that they raise different issues. Therefore we discuss the two applications separately below.

THIRD PARTY DEBT ORDERS

Introduction

14.6 We noted in the Consultation Paper that the benefits of streamlining the application procedure needed to be considered against the potential risks. We said that a third party debt order directed against funds in a debtor's bank or building society account may give rise to bank charges, lapsed direct debits, unpaid bills, and hardship for the debtor. Omitting the final hearing in some cases would remove an important safeguard for those in debt, particularly for vulnerable groups who may find it especially hard to deal with the court process.[8] However, we also recognised that the Government, in its 2011 Consultation, explained that notices sent to judgment debtors would be revised to provide more information on the nature and consequences of a third party debt order and explain that the order would automatically be made final unless a hearing is requested.[9] We also noted that a streamlined procedure may raise different issues if the third party

[5] Civil Procedure Rules, r 73.4.

[6] Civil Procedure Rules, r 73.10(6) and (7).

[7] As applied by Family Procedure Rules, r 33.24.

[8] Money Advice Trust, *Ministry of Justice Solving Disputes in the County Courts Consultation Paper: Response by the Money Advice Trust* (June 2011) p 24.

[9] Ministry of Justice, *Impact assessment: Proposed reforms to third party debt orders* (2011) pp 9 and 10, available at https://consult.justice.gov.uk/digital-communications/county_court_disputes/supporting_documents/Enf_IA_third_party_debt_orders.pdf (last visited 02 December 2016).

debt order was made against a bank account that the debtor holds with another person. That is not possible under the current rules, but we recommend reform so that third party debt orders may be made against joint accounts.[10]

14.7 In our Consultation Paper we provisionally proposed the introduction of a streamlined procedure and we asked for consultees' views as to whether a streamlined procedure should apply on the making of a third party debt order against a joint account. However, having considered the responses received, we are no longer minded to recommend the introduction of a streamlined procedure on applications for any third party debt order. The concerns raised by consultees suggested that the potential harm that could be caused by the procedure outweighs the potential benefits.

Consultation responses

14.8 The responses on the issue of whether the procedure for third party debt orders should be streamlined were split, with a small majority not supporting the proposal or, without explicitly objecting, raising concerns within their responses.

14.9 The consultees who supported the proposal[11] were mainly in support due to the cost and time saving that it may achieve.

14.10 Some consultees who objected to the proposal were of the opinion that the current procedure of an interim order followed by a hearing on notice strikes the correct balance between the competing claims of the debtor, the creditor and any third parties who may claim an interest.[12] There was concern that debtors who are, for example, abroad or ill, or otherwise do not receive notice of the hearing, would be assumed to consent to the making of the order. The Family Law Bar Association raised a concern that some creditors may make an application specifically knowing that the debtor will not receive notice of the interim order.

14.11 Another consultee[13] outlined a number of scenarios in which it would be inappropriate to make an order. For example, if the funds that had been lent by the debtor to the third party were set aside to meet specific liabilities such as a tax obligation or would be needed for day to day living during a period of unemployment. Whilst a debtor would, within a streamlined process, still have the opportunity to raise any such arguments by objecting to the making of a final order, this response highlights the need to give the debtor and the third party a full opportunity to present his or her case to the court. There will be debtors for whom an automatic final hearing provides a necessary safeguard. The Family Justice Council and the Law Society both stressed the need to protect vulnerable people who may be struggling with debt.

[10] See Chapter 10.

[11] Clarion Solicitors, International Family Law Group, the Judges of the Family Division of the High Court, Penningtons Manches, Resolution and Tony Roe.

[12] The Family Law Bar Association and Janet Bazley QC.

14.12 Beyond concerns about potential injustice to the debtor, other consultees noted that a streamlined procedure may cause further delay to the creditor. First, there would need to be sufficient time built in to the procedure to enable the debtor or third party to raise an objection. Secondly, final orders made without a hearing seem inherently more vulnerable to appeals and applications to set aside. It was also noted by District Judge Robinson that final hearings provide an opportunity to rectify any mistakes made when the interim order is made on paper.

Discussion

14.13 On balance, we are not minded to recommend the introduction of a streamlined procedure for third party debt orders. The various concerns raised by consultees have led us to think there is a real risk of injustice to the debtor or third party and that the gains to the creditor are vulnerable to the possibility of more appeals or applications to set aside. As a result, we do not think the benefits are sufficient to outweigh the risks of prejudice to the debtor.

14.14 Moreover, we are concerned that a streamlined procedure has the potential to cause greater hardship in cases where an application is made for a third party debt order against a joint account or for a periodic third party debt order.[14] We consider that there is a greater risk of unfairness if an order is made against a joint account without hearing from the parties involved; funds could be taken that do not belong to the debtor. Although the joint account holder would be given the opportunity to make representations, the account holder is unlikely to have been a party to the original proceedings, may be unaware of the original order and may be unaware of any issues of non-compliance. In those circumstances he or she may lack the context to fully understand the impact of the third party debt order and his or her right to be heard by the court. Also, importantly, the interests of the debtor and the joint account holder may not be aligned and it is important that the court hears from both of them. The effects of a periodic third party debt order may be far-reaching and could last for a significant period of time. In those circumstances we think it is right that a final order is only made after a hearing. Further, the court is unlikely to be able to determine the terms of a periodic order without hearing from the debtor and possibly the relevant third party. Neither application is currently possible, but enabling these options are reforms that we recommend. We think it would be confusing to have different procedures for different types of third party debt orders.

CHARGING ORDERS

Introduction

14.15 We noted in the Consultation Paper that a charging order has a less immediate effect on the debtor than a third party debt order. A final charging order secures rather than recovers a debt; a creditor with the benefit of a charging order needs

[13] A member of the public.

[14] For our recommendations in respect of third party debt orders, see Chapter 10 above.

to make a further application for an order for sale before recovering any funds from the debtor. The risk to the debtor posed by a final charging order erroneously being made is, therefore, a lesser risk than that posed by a final third party debt order erroneously made. We think this distinction is important when considering streamlining the application process for the two orders.

Consultation responses

14.16 The majority of consultees supported the introduction of streamlined applications for charging orders, mostly due to the cost and time savings that would result.[15] The Family Law Bar Association agreed with our proposal on the basis that the making of a final charging order is not the final step in the process as the creditor would still need to obtain an order for sale. The Family Law Bar Association felt that any difficulties caused by the accelerated process could be resolved at the stage of an order for sale including, where appropriate, the variation or discharge of the final order. It also considered, as we proposed, that the final charging order should be made by a judge.

14.17 International Family Law Group also supported the streamlining of charging orders, noting that charging orders are “less likely to have an immediate damaging effect on the debtor than a third party debt order”. For streamlining to work, it said that the debtor must have a reasonable time to respond, be clearly informed of the consequences of the order and be given sufficient information as to how to issue a notice of objection. It also thought that the cost and saving to the creditor (and the court) outweighed the potential hardship to the debtor provided these conditions were satisfied.

14.18 The Law Society also agreed with the proposal and noted that “interim charging orders are less likely to have a damaging effect on the debtor than an interim third party debt order”. It thought that “if the debtor was mistaken in not raising objections, issues can be rectified before any serious impact happens”.

14.19 Arguing against reform, the Family Justice Council said that the final hearing is “usually short and administrative in nature” but that it “provides safeguards that the procedure has been properly complied with and for a vulnerable creditor in debt”. District Judge Robinson agreed, saying that the current two stage system was satisfactory; the final order is often unopposed but the return date provides a “valuable check”.

14.20 The Money Advice Trust thought charging orders should be a “last resort” and so would not support the removal of checks and balances that are currently in place. It thought that our process would allow too little time for those affected to make an application to the court raising objections to the order. The presumption that the order will become final means that anyone who does not receive the

[15] The Family Law Bar Association, International Family Law Group, Janet Bazley QC, the Judges of the Family Division of the High Court, Law Society, Penningtons Manches, Resolution and Tony Roe.

paperwork (whether they are ill, in hospital or away) will have no knowledge of the proceedings until it is too late. The Trust argued that a charging order can mean a threat to an individual's home which means it is important to ensure that protections stay in place so that the process is fair to all parties.

14.21 The Family Justice Council also thought that if a final hearing were only listed if the debtor (or third party) raised objections, there would be delay for the creditor, as the debtor would need to be given more time to respond and if administrative errors were made, that would lead to an application to set aside the final order.

14.22 One member of the public thought that the court needs to be aware of the debtor's other creditors and financial obligations and that a hearing serves this purpose. He also thought that it was very expensive to apply to the court once an interim order had been served. In his view, most people could not apply to the court because of cost, time and expertise.

Discussion and recommendations

14.23 A streamlined procedure has the benefits of saving time and costs for the creditor and the court. Unlike for third party debt orders, we are of the view that the benefits of streamlining the process for a charging order are not outweighed by the risk to the debtor of a final order being erroneously made. The consequences of a wrongly made charging order are far less serious than those of a wrongly made third party debt order and can be more easily remedied. It is important to note that a charging order may be made over a debtor's home (or a property that is the home of a third party), but that also the property could not be sold without a further application being made for an order for sale, and an order for sale would not be made without a hearing.

14.24 We note the concern of the Family Justice Council that the introduction of streamlining would cause delay for creditors, presumably because the court would not make the listing of a hearing (if required) until the expiry of the period within which objections may be raised. We accept that may be a concern in some cases, but we have been told by Her Majesty's Courts and Tribunals Service that most civil hearings in respect of charging orders are not attended and we have no reason to think the situation different in family proceedings. So, in most cases, we would not expect an objection to be made and the creditor will therefore receive his or her order more quickly under the streamlined procedure. It may also be possible, although this is a matter for those with operational responsibility in the courts, for the court always to list a final hearing, which would be vacated should no objections be received. This approach would avoid the delay inherent in waiting to list the hearing until after an objection has been received.

14.25 **We recommend the introduction of a streamlined procedure for applications for charging orders to enforce family financial orders.**

14.26 We explore below the details of the recommendation.

The streamlined procedure

14.27 With regard to the process to be followed, the scheme set out in the updated Part 73 of the Civil Procedure Rules provides a good model. We are not recommending that applications to enforce a family financial order by way of a

charging order should be centralised in the same way as has been done in the civil courts. Centralisation is not a point on which we have consulted and, furthermore, we see this as an operational matter for Her Majesty's Courts and Tribunals Service.

14.28 Under Part 73 an interim charging order may be made by a court officer only where it relates to land (so not, for example, to securities) and where none of the listed exceptions apply. These are where:[16]

(1) an application is made for a charging order against an interest held by a person as trustee of a trust and the order being enforced by the charging order was made against that person as trustee of the trust;

(2) an application is made for a charging order against the interest of a partner in partnership property under section 23 of the Partnership Act 1890;[17]

(3) an instalment order has been made before 1 October 2012;[18] and

(4) the court officer otherwise considers that the application should be dealt with by a judge.

14.29 We consider that this approach should be adopted within the Family Court, allowing some interim orders to be made without taking up judicial time. Where the order sought is more complex, because it relates to assets other than land, or one of the exceptions (listed above) applies, the interim order must be made by a judge and a hearing date allocated.

14.30 If the interim order is made by the court officer then, under Part 73, the creditor has 21 days from the date of the order to serve the order and 28 days in which to file a certificate of service, together with a statement of the amount due with any costs and interest.[19] If, following the making of the interim order, a person files written evidence of an objection within 28 days of the service of the order on him or her, then the court must transfer the application for a hearing in the local court.[20] If no objections are received within 28 days of service, the district judge can make a final charging order without the need for a hearing.[21] Were the

[16] Civil Procedure Rules, r 73.4(4).

[17] Section 23 allows a partner's interest in the partnership property and profits to be charged for a partner's separate judgment debt.

[18] This is because, before that date, it was not possible to make a charging order to enforce the payment of a sum payable by instalments where there had been no default in payment of the instalments. The position was changed by the insertion of ss 1(6) to 1(8) in the Charging Orders Act 1979 by section 93(2) of the Tribunals, Courts and Enforcement Act 2007.

[19] Civil Procedure Rules, r 73.7(1) and (2).

[20] Civil Procedure Rules, r 73.10(2) and (3).

[21] Civil Procedure Rules, r 73.10(6) and (7)(a).

procedure to be adopted in the Family Court, then an objection within 28 days would simply mean that a final order could only be made after a hearing (assuming streamlining of the procedure in the Family Court did not involve any centralisation).[22]

14.31 **We recommend that the streamlined procedure be modelled on the procedure in Part 73 of the Civil Procedure Rules for the making of charging orders in civil proceedings, with necessary modifications.**

Safeguards

14.32 The Family Justice Council, District Judge Robinson and a member of the public highlighted that the current procedure, requiring a hearing on every application before a final order is made, provides safeguards for the debtor. In the context of charging orders, we consider that the debtor's ability to raise an objection and request a hearing is sufficient to safeguard the debtor. However, it is essential that debtors and interested third parties[23] are made aware of their rights to object to a final order being made. Debtors, and interested third parties, must be told in very clear terms of their rights and how to exercise them when they are served with the interim order.

14.33 **We recommend that steps are taken to ensure that on a streamlined application, debtors and interested third parties are clearly informed of their rights to object to the making of a final charging order and to request a hearing, and how to exercise those rights.**

Charging orders and financial products

14.34 The Law Society responded to our question in the Consultation Paper on whether consultees were aware of any problems with the application of charging orders to financial products by stating that it thought that this was an "unwieldy process" which is "not often used". It commented that "the application process is too complicated for most litigants in person to navigate" and that the "costs involved in instructing a lawyer might be uneconomic".[24] However, a number of consultees

[22] Land Registry responded to our provisional proposal in the Consultation Paper by querying whether we meant that an interim charging order could become final through lapse of time, which would have implications for its procedures (and which it thought would be less straightforward), or whether a judge would still be required to take the active step of making the final order. As set out in the main text, we think that, as in the procedure under Part 73 of the Civil Procedure Rules, a final order should be made by a judge rather than an interim order automatically becoming a final order or being deemed to be so.

[23] By "interested third parties" we mean those who are to be served with the interim charging order: Civil Procedure Rules, r 73.7.

[24] This may be because, in respect of securities, it is possible to apply to the court for a stop order or stop notice, as well as a charging order. These steps provide the creditor with protection by aiming to prevent or give notice of dealings with securities against which they are seeking, or have obtained, a charging order. See Family Procedure Rules, Part 40, chapters 3 and 4. Any final charging order against securities must also include a stop notice, see Family Procedure Rules, r 40.8(3).

also responded to say that they were unaware of any problems.[25] On that basis, and bearing in mind the proposals that we make for improving access to and understanding of enforcement procedures, we are not minded to recommend any changes to the procedure for applying for a charging order against securities held by a debtor (which would include financial products).

[25] District Judge Richard Robinson, the Family Law Bar Association, Janet Bazley QC, Money Advice Trust, Resolution and Tony Roe. It is possible that the other consultees who did not respond to this question were also unaware of any problems.

CHAPTER 15
JUDGMENT SUMMONS

INTRODUCTION

15.1 Debtors who have not paid what they owe under a family financial order may be committed to prison for up to six weeks on a judgment summons application. To commit a debtor to prison, the court must be satisfied beyond reasonable doubt that the debtor has or has had at some time since the date the financial order was made the means to pay what is owed and "has refused or neglected, or refuses or neglects, to pay the same". [1] Even if the court is so satisfied, it does not have to commit the debtor to prison. The court may instead make a suspended committal order (giving the debtor a final chance to pay what is owed), set new terms for the payment that is due, make an attachment of earnings order, or order that the debt is paid in a certain way, for example by standing order.[2] Imprisonment is not generally available as a sanction for the non-payment of debt. It is confined to the non-payment of debts arising under "maintenance orders", which has a wide meaning and covers all family financial orders, and certain taxes and social security contributions.[3]

15.2 The Court of Appeal decision in *Mubarak v Mubarak (No. 1)*[4] in 2001 determined that the proceedings on a judgment summons application are criminal proceedings for the purposes of the ECHR (because of the risk of imprisonment for the debtor) and the extra safeguards required by article 6 ECHR for criminal proceedings therefore apply. The court held that the procedure that was then in place, which required the debtor to give evidence on oath as to his or her means, was in breach of the requirements of article 6 as it denied the debtor protection against self-incrimination. The court determined that the criminal standard of proof must apply, that the debtor is entitled to know the case he or she must answer in full and in sufficient time to prepare a defence and that the debtor cannot be required to give evidence or to incriminate him or herself.[5]

15.3 Following *Mubarak*, there were a number of developments to ensure that the judgment summons procedure protected the debtor's human rights. The Civil Procedure (Modification of Enactments) Order 2002 removed the possibility of proof of a debtor's means being obtained by summoning him or her for questioning under oath.[6] In addition, the Practice Direction (Family Proceedings: Committal Applications)[7] made it clear that the Practice Direction on committal applications in civil proceedings, which provided certain procedural safeguards, also applied in family cases. Detailed provisions in the Family Procedure Rules

[1] Debtors Act 1869, s 5.

[2] Family Procedure Rules, r 33.16.

[3] Administration of Justice Act 1970, s 11.

[4] [2001] 1 FLR 698, [2001] Fam Law 178.

[5] To incriminate him or herself means for the debtor to make him or herself appear guilty of a crime.

[6] SI 2002 No 439, art 3.

[7] [2001] 2 All ER 704.

on both judgment summonses and committals provide further clarification.[8] It is now widely accepted that the procedure in place for judgment summons applications is compliant with the debtor's human rights. However, some practitioners and judges take the view that these changes make it very difficult for the creditor to meet the required standard of proof to obtain the debtor's committal, removing much of the attraction of the procedure as a method of enforcement.[9]

15.4 In our Consultation Paper we noted that it is not possible to reform the procedure by relaxing any of the safeguards necessary to make the application human rights compliant. However, bearing that necessity for compliance in mind, we asked whether any reforms could usefully be made and we asked for views generally on the judgment summons procedure. We noted that one issue that may benefit from clarification was the obligation of the creditor to offer the debtor payment of his or her travel expenses to attend court, which we considered was a procedural burden on the creditor and not brought sufficiently to the creditor's attention on the application form.[10] We also noted that one possibility for reform would be to increase the length of time for which a debtor could be committed to prison, but our initial view was that given the general prohibition on imprisonment for debt, such a move would be a retrograde step.

15.5 Some consultees did not comment on the length of the maximum sentence on a judgment summons application and the views of those who commented were mixed. The Judges of the Family Division were of the view that the current maximum period of six weeks is "quite inadequate". The Family Justice Council thought the same. The judges of the Family Division noted that the debtor will, in practice, only serve three weeks[11] and that a significant number of debtors will consider this "a small price to pay". They advocated increasing the period to two years to bring it in line with the maximum sentence for contempt of court. On the other hand, the Family Law Bar Association and Janet Bazley QC considered that the current maximum term of six weeks was "sufficient to ensure compliance." Stone King commented that imprisonment was "never the answer where there are children." We make no recommendations on the issue of the maximum sentence as we consider it is a matter of policy for Parliament, but we suggest it is an issue that should be further considered.

[8] These also consolidate provisions that were previously criticised for being scattered over several sources; see *Constantinides v Constantinides* [2013] EWHC 3688 (Fam), [2014] 1 WLR 1934 at [37].

[9] G Howell and J Montgomery (eds), *Butterworths Family Law Service* (Issue 192, December 2014) Vol 4(I), para 3255.

[10] Form N67.

[11] Section 258 of the Criminal Justice Act 2003 governs release for contemnors (those imprisoned for contempt of court or "any kindred offence") and provides for automatic unconditional release after half the sentence has been served. We consider that an offence leading to imprisonment on a judgment summons is a "kindred offence"; judgment summonses under section 5 of the Debtors Act are contempt proceedings: *Mubarak v Mubarak (No. 1)* [2001] 1 FLR 698.

15.6 There have been developments since the publication of our Consultation Paper. There have been reforms to the procedures governing the service of the application for a judgment summons and the consequences of the debtor's non-attendance, and a number of cases on the important issue of what evidence the creditor must adduce on a judgment summons application. On the latter point, in the Consultation Paper we noted the 2012 decision of Mr Justice Mostyn in *Bhura v Bhura*[12] where a judgment summons application led to the debtor's committal for non-payment under a family financial order. In his decision, Mr Justice Mostyn took the opportunity to set out a number of principles that applied on a judgment summons application and explained that although the creditor must establish a case to answer "this need not be an elaborate exercise". It was thought by some commentators that this formulation of the principles may lead to a revival of judgment summons applications. However, in *Prest v Prest*[13] the Court of Appeal has recently cast doubt on some of Mr Justice Mostyn's observations, leading to confusion as to the principles to be applied. This issue was picked up by a number of consultees.

15.7 In this section we consider the issues arising from consultation responses and the recent developments that have occurred. We do not make any recommendations for reform. We are of the view that the recent reforms have removed the need for any procedural changes and we do not think legislative reform is needed to resolve the "*Bhura*" debate. We include a discussion of the debate as a means of clarifying the position.

CONSULTATION RESPONSES

General comments

15.8 The Family Justice Council and Janet Bazley QC said that the judgment summons application is a "useful tool". International Family Law Group considered it to be a "forceful incentive to debtors to pay", the Family Law Bar Association called it "an important weapon", and the Judges of the Family Division of the High Court said it is a "vital part of the armoury of the court".

15.9 The Law Society took a different view and considered the judgment summons not to be an effective enforcement method in family proceedings "because the proceedings have to be conducted under the criminal [standard] of proof". The Society also questioned whether it is "reasonable" to imprison someone for the non-payment of a family financial order, citing

> recent guidance and judgments [that] show that neither the government nor the judiciary believes that imprisoning debtors is a good way to retrieve a debt, or a proportionate punishment.

[12] [2012] EWHC 3633 (Fam), [2013] 2 FLR 44.

[13] [2015] EWCA Civ 714, [2016] 1 FLR 773.

Stone King[14] said that prison "can never be the answer where there are children". Resolution said that judgment summons "probably only has a very limited role to play in family cases" and that the focus should be on the proposals for the introduction of civil coercive measures.[15]

Procedural requirements

15.10 The discussion in our Consultation Paper of the creditor being required to meet the debtor's travel expenses was picked up by some consultees. However, opinion was split as to whether the issue was the principle of the payment, with some consultees suggesting the requirement should be removed,[16] or whether the issue was the creditor not being made sufficiently aware of the requirement, with some consultees suggesting an amendment to the application form to make it more explicit.[17]

15.11 The Justices' Clerks' Society[18] considered the evidential requirements upon the creditor "too high". District Judge Robinson said similarly that the possibility of a litigant in person complying with the requirements "is not realistic." The Judges of the Family Division, however, considered that the procedural requirements "have not prevented the court making orders in appropriate cases."

15.12 The Justices' Clerks' Society also thought that the restrictions on using evidence obtained in previous proceedings are too high. The Family Justice Council agreed, commenting that it seems to be unfair to creditors that information obtained on a general enforcement application cannot subsequently be used on a judgment summons application. The Council acknowledged that the judgment summons procedure needs to be human rights compliant but said that a "balance needs to be struck" as "the creditor's and children's family life is affected by wilful non-payment."

15.13 As noted above, the observations of Mr Justice Mostyn in *Bhura* as to how the creditor may prove his or her case have been doubted by the Court of Appeal in *Prest v Prest,*[19] resulting in a feeling of uncertainty as to what evidence a creditor must produce on a judgment summons application. This was picked up by the Family Law Bar Association and Pennington Manches: the latter said that it would support reform to "provide a clear and unambiguous resolution of how the procedure can be conducted in a manner compliant with the ECHR."

DISCUSSION

Should the judgment summons application be retained for the enforcement of family financial orders?

15.14 We did not pose this question directly in the Consultation Paper but, given the

[14] A law firm with a specialist family law team.

[15] For our recommendations for the introduction of orders to disqualify debtors from driving and prohibiting debtors from travelling out of the United Kingdom, see Chapter 12 above.

[16] The Family Law Bar Association, Janet Bazley QC and the Justices' Clerks' Society.

[17] The Family Justice Council and International Family Law Group.

[18] A national organisation representing justices' clerks and legal advisers.

[19] [2015] EWCA Civ 714, [2016] 1 FLR 773.

very limited availability of imprisonment as a method of enforcement of debt outside of the context of family financial orders, it is a natural question to consider. Although some consultees queried the utility of the judgment summons application, given the difficulties for the creditor in making a successful application, and the Law Society questioned generally whether imprisonment was effective, the majority of consultees who commented generally on the desirability of the application considered that it did have a role to play.

15.15 We explained in Chapter 12, in recommending the introduction of coercive orders, why the enforcement of family orders warrants different methods of enforcement to civil debts generally. We are of the view that those same reasons apply for imprisonment being available as an ultimate sanction. We acknowledge that committal will not be appropriate in the vast majority of cases, but we consider that it is an important sanction to have available and should be retained.

Evidence from other enforcement proceedings

15.16 Two consultees suggested a change to the rule that certain evidence obtained on a general enforcement application is not admissible on a subsequent judgment summons application. However, we are of the view that, like the standard of proof that must apply, this rule is a procedural safeguard that cannot be relaxed.

15.17 It is not permissible to make use of any statements that a debtor has provided on a general enforcement application, though use can be made of documents that have been disclosed.[20] Statements are not admissible as the debtor will have been compelled to provide them and so to make use of that evidence would infringe the debtor's right to remain silent on a judgment summons application. That right exists because judgment summons applications are considered criminal proceedings for the purposes of the debtor's right to a fair trial under Article 6 ECHR. It would, however, be permissible to make use of such statements for the purposes of the disqualification orders that we recommend. We consider that introducing alternative civil options for indirect enforcement would strike a fair balance.

Travel expenses

15.18 Since the publication of the Consultation Paper, the rules governing service of a judgment summons application have changed.[21] The amendments allow a creditor to choose whether to serve the application personally or by post (previously personal service was obligatory), and the creditor is no longer under an obligation to pay, or offer to pay, the debtor's travel expenses to court. However, there are consequences for the choices that the creditor makes in the event of the debtor's non-compliance. If the creditor chooses not to offer the debtor his or her travel expenses then there is no possibility of the debtor being committed for a failure to attend court.[22]

15.19 We are of the view that giving creditors this option strikes a fair balance between

[20] *Mohan v Mohan* [2013] EWCA Civ 586, [2014] 1 FLR 717.

[21] Amended by the Family Procedure (Amendment No. 2) Rules SI 2015/1420.

not imposing the requirement on creditors and ensuring that a "can't pay" debtor is not punished in circumstances where he or she is unable to attend court. Following the recent amendments, we are of the view that no further reform is necessary in this area. We note, however, the importance of ensuring that creditors are fully informed of the consequences of their choice.

The evidence that the creditor must adduce

15.20 As noted in the consultation paper and above, we are of the view that it is not possible, nor would it be desirable, to relax the procedural requirements on a judgment summons application; they are necessary to safeguard the rights of the debtor. However, since the publication of the consultation paper, an issue has arisen as to how the creditor can prove what he or she is required to prove on a judgment summons.

Establishing a case to answer

15.21 On a judgment summons application, it is for the creditor to prove his or her case, not for the debtor to disprove it. Just as in a criminal case it is for the prosecution to prove the defendant's guilt and not for the defendant to prove that he or she is not guilty. The burden of proof is on the creditor. The debtor does not have to say anything, but there comes a point where the creditor has put enough evidence before the court that if the debtor were to say nothing then the court could be satisfied that the case was proved. At that point a case to answer has been established. Once the creditor has established a case to answer, the burden is then on the debtor to provide some evidence to the contrary. The question, on which different views have been expressed, is what must the creditor do to establish a case to answer on a judgment summons application so that the evidential burden shifts to the debtor?

15.22 There have been a series of cases (*Zuk v Zuk*,[23] *Bhura v Bhura*[24] and *Mohan v Mohan*[25]), that have suggested that all the creditor needs to do to establish a case to answer on a judgment summons application is to prove the existence of the original financial order and prove that the debtor has not paid. The reasoning is explained by Lord Justice Thorpe in *Zuk:*

> …where the order which the creditor seeks to enforce is a lump sum order, the judgment creditor starts from the strong position that the order itself establishes, either expressly or implicitly, that the payer had the means to pay at the date the order was made.[26]

Lord Justice Thorpe went on to say that:

[22] Family Procedure Rules 2010, r 33.14A. If the debtor has been personally served then the debtor may be committed in his or her absence if the creditor can prove the substantive case against the debtor.

[23] [2012] EWCA Civ 1871, [2013] 2 FLR 1466.

[24] [2012] EWHC 3633 (Fam), [2013] 2 FLR 44.

[25] [2013] EWCA Civ 586, [2014] 1 FLR 717.

[26] [2012] EWCA Civ 1871, [2013] 2 FLR 1466 at [19].

> Plainly in a case where there has been some major and unforeseen financial development which removes from the payer the ability to pay which he had at the date of order, the ordinary expectation is that he would be the applicant to the court seeking the variation of the order either under the limited powers of the court to revisit in the light of some volcanic development or perhaps simply to seek some relief by way of deferment of the date of payment or perhaps future payment by instalments. So although of course the rule is and must remain that the burden of proof rests on the applicant, I think in a case such as this that burden is lightly discharged and an evidential burden may switch to the debtor.[27]

15.23 In *Bhura,* Mr Justice Mostyn said:

> It is essential that the applicant adduces sufficient evidence to establish at least a case to answer. Generally speaking, this need not be an elaborate exercise. Proof of the order and of non-payment will likely give rise to an inference which establishes the case to answer.
>
> …
>
> If the applicant establishes a case to answer an evidential burden shifts to the respondent to answer it. If he fails to discharge that evidential burden then the terms of [section 5 of the Debtors Act 1869] will be found proved against him or her to the requisite standard.[28]

15.24 In *Mohan*, Lord Justice Thorpe noted that had the wife pursued a judgment summons application "very little evidence" would have been necessary from her. He said of the husband:

> If he failed to attend the hearing then he would be liable to sentence under r 33.14(1)(a). If he attended but declined to give evidence he would be little better off. The reality is that if he attended, although not compellable, he would have been obliged to proffer explanation and excuse.[29]

15.25 The Court of Appeal in the case of *Prest v Prest*[30] has said (albeit in a comment not necessary to decide the issues in the case) that this line of authority must be treated with "a substantial degree of caution". Lord Justice McFarlane challenged the view that:

> it is simply sufficient to rely upon findings as to wealth made on the civil standard of proof in the original proceedings and that those findings, coupled with proof of non-payment, is sufficient to establish a 'burden' on the respondent which can only be discharged if he or she enters the witness box and proffers a credible explanation.

[27] [2012] EWCA Civ 1871, [2013] 2 FLR 1466 at [19].

[28] [2012] EWHC 3633 (Fam), [2013] 2 FLR 44 at [13].

[29] [2013] EWCA Civ 586, [2014] 1 FLR 717 at [45].

15.26 Lord Justice McFarlane reasoned that findings as to the debtor's means made to the civil standard of proof in the original financial proceedings cannot be relied upon (without more) to establish to the criminal standard of proof that the debtor has the necessary means on a judgment summons application. Lord Justice McFarlane summarised the position as follows:

> The facts of each case will differ, and the aim of Thorpe LJ and Mostyn J in envisaging a process which is straightforward and not onerous to the applicant is laudable, but at the end of the day this is a process which may result in the respondent serving a term of imprisonment and the court must be clear as to the following requirements, namely that:
>
> a) The fact that the respondent has or has had, since the date of the order or judgment, the means to pay the sum due must be proved to the criminal standard of proof;
>
> b) The fact that the respondent has refused or neglected, or refuses or neglects, to pay the sum due must also be proved to the criminal standard;
>
> c) The burden of proof is at all times on the applicant; and
>
> d) The respondent cannot be compelled to give evidence.[31]

15.27 The decision in *Prest* has led to a feeling of uncertainty as to the approach that should be taken and has been interpreted by some as imposing a very high burden on creditors, which it is feared they will not be able to discharge. In *Migliaccio v Migliaccio*,[32] in response to the decision in *Prest,* Mr Justice Mostyn said:

> Intelligence has reached me that these remarks … have caused considerable difficulty in routine enforcement proceedings, particularly under the Child Support Act,[33] in as much as they suggest that everything must be proved de novo.[34]

A need for reform?

15.28 There is uncertainty as to whether Mr Justice Mostyn's proposition in *Bhura* that proof of the original order and the debtor's non-payment will likely establish a case to answer is right. The proposition was quite clearly doubted by Lord Justice McFarlane in the Court of Appeal in *Prest*, but Mr Justice Mostyn in *Migliaccio* said the proposition was consistent with the decision of Lord Justice Richards in

30 [2015] EWCA Civ 714, [2015] Fam Law 1047.

31 [2015] EWCA Civ 714, [2015] Fam Law 1047 at [55].

32 [2016] EWHC 1055 (Fam), [2016] 4 WLR 90

33 Committal to prison for non-payment of child maintenance is available under the Child Support Act 1991.

34 At paragraph 26 of the judgment. A requirement to prove everything “de novo” means that there can be no reliance on the original order and everything must be proved again.

the Court of Appeal in *Gibbons CMEC; Karoonian v CMEC,*[35] which, Mr Justice Mostyn suggested was binding on Lord Justice McFarlane. Although not referred to by Mr Justice Mostyn in *Migliaccio*, the decision in *Zuk,* which is part of the same line of authority, was also a decision of the Court of Appeal. One commentator has suggested that:

> …the most that can be said is that there exists powerful non-binding judicial opinion on both sides of the divide as to the degree of evidence required to provide, at least, a case to answer for committal upon a judgment summons against an alleged non-paying party.[36]

15.29 In its consultation response, Pennington Manches requested a "clear and unambiguous resolution". We have given consideration as to whether any reform could assist and, in particular, whether statute could set out the evidence that the creditor needs to provide to establish a case to answer. Such a statutory test could take the form of a presumption. It would operate so that if certain conditions were met, for example if the original order were made by consent, then it would be presumed that the debtor had the means to pay unless the debtor provided evidence to the contrary. The idea of a presumption was raised by Clarions in its response to another issue in the consultation paper. Clarions said:

> We would therefore like the Law Commission to consider whether it would be more appropriate to start from a presumption that the debtor can pay, with an opportunity for the debtor to rebut that presumption by providing financial disclosure.

15.30 However, we do not recommend such reform for two reasons. First, we think it is very difficult to frame the suggested presumption so that it would operate satisfactorily. If too wide, a presumption risks offending against the debtor's right to a fair trial under article 6 ECHR. If too narrow, a presumption risks suggesting that in cases that fall outside the presumption, the creditor must do more than is currently necessary to establish a case to answer. Secondly, on a close analysis of the cases we do not think that it is a problem with the current law, but a difference in application in different cases, that is causing the uncertainty.

15.31 We agree with the reasoning of Lord Justice McFarlane that proof of the existence of the original order does not necessarily prove that the debtor has the means to pay what is owed on a judgment summons application. The judge hearing the financial proceedings only had to be satisfied as to the debtor's means on the balance of probabilities. In contrast, the judge on the judgment summons application must be satisfied beyond reasonable doubt. However, we do not consider that to mean that in every case the creditor has to start all over again.

15.32 The circumstances that were prevailing at the time the original order was made, and the evidence that was adduced in the original proceedings, will fall

[35] [2012] EWCA Civ 1379, [2013] 1 FLR 1121. The case was about imprisonment for the non-payment of child maintenance under the Child Support Act 1991 but the same principles apply.

[36] Ashley Murray, "The evidential burden in judgment summons hearings" (2016) 46 *Family Law* 1017.

somewhere on a spectrum from unequivocally establishing a case to answer to not greatly assisting doing so. In cases where the debtor has admitted to having certain assets or consented to certain orders, we are of the view that those facts, in addition to establishing that the debtor has not paid what is owed, may, without any more, establish a case to answer. For example, if the order is for a lump sum and was made with consent three months prior to the judgment summons application, then we suggest it is very likely that would establish a case to answer. However if, for example, the order had been made two years ago and was based on the judge making findings that the debtor had assets that the debtor denied, then we suggest that order would not, without more, establish a case to answer.

15.33 It is a matter for the judge in each case to determine what evidence is necessary to establish a case to answer. We do not think there is any debate that the burden of proof rests on the creditor on every judgment summons application, but that does not prohibit the creditor relying on the original order or evidence from the original proceedings to discharge that burden in certain circumstances. We are of the view that given the nature of the proceedings that strikes the right balance in protecting the rights of both parties and do not recommend any reform.

CHAPTER 16
COSTS

INTRODUCTION

16.1 The rules governing costs in family enforcement proceedings are contained in both the Family Procedure Rules and Civil Procedure Rules.[1] Unlike other family proceedings, there is no general rule[2] as to costs in enforcement proceedings.[3] The court retains a general discretion to make any order about costs that it thinks just[4] and the party seeking a costs order must persuade the court that an order for costs is appropriate. For some enforcement methods,[5] the rules specifically apply fixed costs.[6] In civil proceedings, the court is specifically empowered to disapply fixed costs.[7] The Family Court relies on a general discretion to disapply fixed costs rather than an express power to do so.[8]

16.2 In the Consultation Paper, we asked consultees whether any reform of the costs rules would be useful.

16.3 Consultees were generally in favour of some reform. The following three main issues emerged.

(1) A need for consolidation of the procedural rules.

(2) Consideration of the general rule as to costs on enforcement.

(3) The application of fixed costs.

[1] Part 28 of the Family Procedure Rules applies the costs provisions in Parts 44, 46 and 47 and r 45.8 of the Civil Procedure Rules, with modifications.

[2] In this section we use the term "general rule" to mean what the rules denote as the default position for costs orders; that position can, of course, be departed from by the court in its discretion.

[3] In family financial remedy proceedings, the general rule is that the court will make no order as to the costs: Family Procedure Rules, r 28.3(5).

[4] Family Procedure Rules, r 28(1).

[5] Applications for writs and warrants of control, attachment of earnings orders, charging orders, orders to obtain information, and third party debt orders.

[6] Rule 45.8 of the Civil Procedure Rules sets out, in a table, the fixed costs to be allowed in respect of legal representatives' costs on enforcement proceedings. These are applied in family proceedings by the Family Procedure Rules, r 28.2(1).

[7] The Civil Procedure Rules, r 45.1 provides that only fixed costs will be allowed in respect of legal representatives' charges for specific proceedings "unless the court orders otherwise".

[8] Family Procedure Rules, r 28(1).

16.4 Some consultees referred to the current rules by which the creditor has to pay the debtor's travel costs on certain applications. We address those rules in the sections on the enforcement methods where the issue arises.[9]

16.5 For each of the main issues, we will outline the current law, consider the consultation responses and then set out our recommendations.

CONSOLIDATION OF THE RULES

16.6 Currently, both the Family Procedure Rules and Civil Procedure Rules govern costs in family proceedings. The need to cross refer between these rules can be confusing for lawyers and litigants in person.

16.7 It was suggested to varying degrees by consultees[10] that the costs rules could be clearer, that it was "unhelpful" and "unwieldy" to have to cross-refer between the two sets of procedural rules and that greater clarity of the costs rules may help creditors decide whether to take enforcement action.

16.8 We agree that the rules are confusing and the need to refer to both the Family Procedure Rules and the Civil Procedure Rules makes matters worse. For example, the rule[11] in the Family Procedure Rules applying the costs rules in the Civil Procedure Rules to proceedings other than "financial remedy proceedings", which include enforcement proceedings, is as follows:

> Subject to rule 28.3,[12] Parts 44 (except rules 44.2(2) and (3) and 44.10(2) and (3)), 46 and 47 and rule 45.8 of the Civil Procedure Rules apply to costs in proceedings, with the following modifications –
>
> (a) in the definition of "authorised court officer" in rule 44.1(1), for the words in sub-paragraph (i) substitute "the Family Court";
>
> (b) (revoked)
>
> (c) in accordance with any provisions in Practice Direction 28A; and
>
> (d) any other necessary modifications.

16.9 For a litigant in person, we suggest that this rule would be very difficult to follow.

16.10 **We recommend that the costs rules that apply on the enforcement of family financial orders should be consolidated, so that there is a stand-alone set of costs rules in the Family Procedure Rules 2010.**

[9] See paras 5.30 to 5.33 and 15.18 and 15.19 above.

[10] District Judge Richard Robinson, the Family Justice Council, the Family Law Bar Association and Janet Bazley QC.

[11] Family Procedure Rules 2010, r 28.2.

[12] Rule 28.3 makes special provision for "financial remedy proceedings".

16.11 A consolidation of the costs rules in family proceedings could of course extend beyond the costs rules that apply on applications for the enforcement of family financial orders. Such reform is beyond the scope of the project, but we note the possibility of inserting discrete costs rules for all family proceedings in the Family Procedure Rules.

A GENERAL RULE

Introduction

16.12 In civil enforcement, and civil proceedings generally, there is a general rule that "costs follow the event". That means that the court will order that the successful party recovers his or her costs from the unsuccessful party.[13] This general rule does not apply in family proceedings. In family financial remedy proceedings, the general rule is that the court will make "no order as to the costs".[14] That means that the parties will have to pay their own costs. However, the court may depart from this general rule based on arguments about how each party has conducted the litigation.[15]

16.13 Enforcement proceedings are not financial remedy proceedings for the purposes of the costs rules[16] and so the general rule of "no order as to costs" does not apply. It is often said that the court has a "clean sheet" in enforcement proceedings. It has been held that the starting point is that costs follow the event, but that starting point may be more easily displaced than in other civil proceedings.[17]

16.14 Any general rule that operates in enforcement proceedings must take account of both where the creditor is successful in his or her application and where the creditor is unsuccessful. By "successful", we mean the court has either

(1) made the enforcement order applied for, for example an attachment of earnings order or a charging order; or

(2) on a general enforcement application or an application for judgment summons, has made any enforcement order.[18]

[13] Civil Procedure Rules, r 44.2.

[14] Family Procedure Rules, r 28.3(5).

[15] Family Procedure Rules, r 28.3(6).

[16] Family Procedure Rules, r 28.3(4)(b).

[17] Per Butler-Sloss LJ in in *Gojkovic v Gojkovic (No. 2)* [1991] 3 WLR 621, recently adopted in *Solomon v Solomon* [2013] EWCA Civ 1095, [2013] All ER (D) 233.

[18] On a general enforcement application the court may make any number of enforcement orders it considers appropriate. On a judgment summons application the court may, based on the same findings, make an order for attachment of earnings rather than an order for committal.

Consultation responses

16.15 International Family Law Group thought that the current position of a "clean sheet" was appropriate. They considered that the very fact that a creditor is having to issue enforcement proceedings means that the debtor may have defaulted on a financial order and therefore the "no costs order" principle would be unjust. However, they also noted that it is often the case of the debtor being unable to pay rather than unwilling to pay and so a general rule in favour of the creditor would be unfair. Ultimately, International Family Law Group concluded that the combination of the factors the court already has to take into account when determining whether to make a costs order as well as our proposed obligation to file a financial statement[19] would "assist the court in making appropriate costs orders when the debtor has unreasonably defaulted on a financial order". The Law Society were of the view that there should be no major reforms in this area and that the current position provides the court with the flexibility to award costs as it thinks fit.

16.16 However, other consultees[20] advocated the introduction of a general rule that the debtor should pay the creditor's costs on a successful enforcement application. Janet Bazley QC thought such a general rule would be "helpful and likely to encourage payment of family finance orders". The Justices' Clerks' Society noted that "confidence that [the creditor] will receive recompense for the action is likely to encourage pursuance of the debt". It added that "it would also mean that a debtor who is unwilling to pay may be encouraged to do so if faced with potential court costs on top of the debt".

16.17 The Family Law Bar Association and Janet Bazley QC proposed that where the creditor's enforcement application is unsuccessful the general rule should be no order as to costs unless the creditor has behaved unreasonably in the commencement of or conduct of the enforcement proceedings. No other respondents specifically addressed this point.

Discussion and recommendations

16.18 We favour the introduction of a general rule that successful creditors will receive their costs on an enforcement application. We are aware that this approach is currently adopted in practice. Making it a general rule is desirable to ensure consistency in approach and provide assurance to creditors that the costs of successful enforcement action will be met by debtors. The court may of course depart from the general rule and exercise its discretion to make any order as to costs as it thinks just and, as now, would take all the circumstances into account.

16.19 Perhaps the more difficult issue is the position if the creditor's application for enforcement is not successful. There is a range of reasons why a creditor may be

[19] See Chapter 7.

[20] Clarion Solicitors, the Family Law Bar Association, the Judges of the Family Division of the High Court, the Justices' Clerks' Society, Penningtons Manches and Resolution.

unsuccessful. Such reasons could range from, at one end of the spectrum, a creditor acting unreasonably in bringing an enforcement application for money that is not owed to, at the other end, a debtor evading enforcement by moving money from a bank account just before an application for a third party debt order is made. The range of reasons why a creditor may be unsuccessful makes it difficult to apply a general rule.

16.20 In light of further discussion with our advisory group, we are of the view that when the creditor is unsuccessful, there should be no general rule - the "clean sheet" approach should remain. This approach will allow the court the greatest discretion in taking account of the circumstances of the case. We note that our proposals will mean, unlike in other family or civil proceedings, that the costs rule is different depending on which party is successful. However, we consider that the context of enforcement proceedings justifies this approach. First, the debtor is in breach of a court order: the creditor would not have to bring enforcement proceedings but for the debtor's breach. Secondly, the debtor has more information about his or her ability to meet the original order than the creditor: the creditor might not have had to bring enforcement proceedings if the debtor had provided the creditor with information about his or her financial circumstances. It is this asymmetry of information between the two parties in family enforcement that, we think, justifies a different approach when the creditor is unsuccessful.[21]

16.21 We acknowledge that our recommendations will create a disparity between the costs rules that apply in enforcement proceedings brought under the Civil Procedure Rules and those brought under the Family Procedure Rules. We consider that the approach recommended is the right approach in the enforcement of family financial orders. Consideration may be given to whether there is merit to a similar approach in civil enforcement proceedings, but that is beyond the scope of our project.

16.22 **We recommend that:**

(1) where the creditor is successful in his or her enforcement application, there should be a general rule that the costs of the application will be met by the debtor; and

(2) where the creditor is unsuccessful, no general rule should apply and the court will exercise its general discretion in awarding costs.

[21] We note that in the context of personal injury cases where the parties are often in an asymmetric relationship (because the defendant will often be an insurance company and far better resourced that the claimant), there are costs rules that favour the "weaker" party. In personal injury cases qualified one way costs shifting applies so that the claimant will never have to pay costs for the defendant that amount to more than he or she has received from the claim: Civil Procedure Rules, r 44.14(1).

FIXED COSTS

Introduction

16.23 For certain enforcement proceedings, fixed costs are applied in respect of the amounts to be allowed for legal representation.[22] The objective of fixed costs has been described as follows:

> Fixed costs provide a means of ensuring certainty over how much litigation will cost a losing party under a party-and-party costs order, and a method by which the government can limit costs as a matter of policy.[23]

16.24 The amounts provided for in respect of enforcement proceedings are small; they range from £2.25 for filing a request for a warrant of control (that is, enforcement by taking control of goods) to £110 on the making of a final charging order. It has been said that "the costs [that apply on enforcement proceedings] could do with some rationalisation as they are inconsistent by incomprehensibly small amounts".[24]

16.25 The Civil Procedure Rules at r 45.1, provide that only fixed costs will be allowed in respect of legal representatives' charges for specific proceedings "*unless the court orders otherwise*".[25] Rule 45.1 is not applied to family proceedings. However, the Family Court does have a general discretion to make "such order to costs as it thinks just",[26] and is generally considered in legal commentary to have the same power to "disapply" the fixed costs as other civil courts.[27] We understand, however, that there is confusion in practice as to the Family Court's power to make orders for costs other than fixed costs.

16.26 Further, there is very little authority on when the court should make an order otherwise than for fixed costs. Some of the (non-enforcement) situations in which fixed costs apply have additional rules as to when the court may make an order for costs other than fixed costs. For example, the costs recoverable in small claims in civil proceedings will only be the fixed costs unless one party has

[22] The fixed costs are set out in the Civil Procedure Rules at rule 45.8 and applied to family proceedings by rule 28.2(1) of the Family Procedure Rules.

[23] Sir M Kay, S Sime and D French, *Blackstone's Civil Practice 2015 The Commentary*, (4th ed 2015) p 1187.

[24] D di Mambro, "Developments since the August Supplement to the Civil Court Practice" (1 October 2013) 3 (10) *Civil Court News* 69.

[25] Emphasis added.

[26] Family Procedure Rules, r 28.1.

[27] Though in *Amber Construction Services Ltd v London Interspace HG Ltd* [2007] EWHC 3042 (TCC), Mr Justice Akenhead notes that the discretion to "order otherwise" under rule 45.1 of the Civil Procedure Rules means that "in appropriate cases, the court retains its discretion to order such costs as are appropriate", which could suggest that but for the specific discretion to "order otherwise" he would consider the general discretion as to costs under the Civil Procedure Rules to be superseded by the fixed costs rules.

"behaved unreasonably".[28] Such rules are considered to impose a higher bar[29] than operates on the court's discretion under rule 45.1 or the Family Court's general discretion – there are no such additional rules as to fixed costs on enforcement.

16.27 The issue as to making orders otherwise than for fixed costs under rule 45.1 has received little judicial attention. District Judge Robinson noted that the distinction between fixed costs and general costs was not clear, even to some judges. He thought that reform was needed to ensure that "the position is made clear so that a litigant in person can understand". Penningtons Manches were more critical and commented that "the rules for fixed costs in enforcement proceedings are arcane and outdated". For this reason, they thought the regime caused confusion.

16.28 The amounts provided for fixed costs are very low and will often represent a nominal portion of the party's real costs. Fixed costs in enforcement proceedings were introduced in 2001[30] and the amounts have not been changed since that time. Whilst we realise that fixed costs aim to strike a balance between ensuring parties are adequately recompensed and preventing parties from incurring high costs we think the current level should be reviewed, but we acknowledge that is a matter for HMCTS.

16.29 We are not minded to recommend the abolition of fixed costs in enforcement proceedings as we recognise that fixed costs form part of a wider policy aimed at ensuring that costs are proportionate to any given application. However, we consider an amendment to the Family Procedure Rules 2010 to include the same explicit power to depart from fixed costs as is in the Civil Procedure Rules 1998 should be made. An explicit power would provide clarity and may focus the court's attention on whether a costs order other than for fixed costs is appropriate.

16.30 **We recommend the introduction of an explicit power in the Family Procedure Rules for judges to depart from fixed costs in family enforcement proceedings.**

[28] Civil Procedure Rules, r 27.14(2)(g).

[29] P D Berry, "Shortchanged or overcharged" (18 November 2008) 152/44 *Solicitors' Journal*, 19.

[30] Civil Procedure (Amendment No. 5) Rules 2001, SI 2001 No 4015.

CHAPTER 17
BANKRUPTCY

INTRODUCTION

17.1 In the Consultation Paper we noted that bankruptcy proceedings might be used by a creditor as a method of enforcement. This is because certain debts arising from a family financial order can be "proved" in the bankruptcy: a creditor who has a provable debt will be eligible to obtain a share of the bankrupt's property when it is distributed by the trustee in bankruptcy. A creditor in respect of a family financial order can serve a statutory demand in respect of the debt. In the case of a debt payable immediately, this demand requires the debtor to pay, compound for or secure the debt within 21 days.[1] A failure by the debtor to do so provides the necessary proof of the debtor's inability to pay, providing the grounds for the creditor to present a petition for the debtor's bankruptcy.[2]

17.2 However, a creditor in respect of a family financial order will rank behind secured and preferential creditors.[3] Enforcement by way of bankruptcy is therefore something of a blunt instrument; the bankrupt will not have the funds to pay all creditors in full and the family creditor is very unlikely to recover anything like the full amount of the debt owed to him or her where the debtor has other significant debts. The creditor might, however, choose to serve a statutory demand on the debtor in the hope of forcing the debtor to pay up to avoid a petition for his or her bankruptcy being filed.[4]

THE TREATMENT IN BANKRUPTCY OF DEBTS ARISING UNDER FAMILY FINANCIAL ORDERS

17.3 Not all debts arising under family financial orders ("family debts") are, however, provable in bankruptcy. The Consultation Paper set out the current position that, while unpaid orders for lump sums and costs can be proved in the bankruptcy, arrears of periodical payments cannot.[5] We asked whether this position should

[1] Insolvency Act 1986, s 268.

[2] Insolvency Act 1986, s 267. There are other criteria that must be satisfied, notably the amount of the debt, or the aggregate amount of the debts, must be equal to or exceed the bankruptcy level. At the time of the Consultation Paper the bankruptcy level was set at £750, but it was raised to £5,000 in October 2015. We also note that the Insolvency Rules 2016, replacing the current rules, are due to come into force in April 2017. The changes made by these Rules do not affect the position regarding family debts.

[3] Preferential debts are set out at schedule 6 of the Insolvency Act 1986 and include remuneration to employees and employer's contributions to occupational pension schemes. Secured creditors are those who have a debt that has been secured, typically by taking a charge over property owned by the debtor. A creditor in respect of a family financial order will usually not be a secured creditor unless he or she has the benefit of secured periodical payments; in that case the creditor would seek to realise the security without resorting to a bankruptcy petition.

[4] This possibility was raised by an attendee at the Cardiff consultation event. In his experience this is an effective way of securing compliance.

[5] Insolvency Rules 1986, r 12.3(2)(a). While arrears which arise under an order for periodical payments made by the court are not provable, arrears of maintenance that arise from an agreement between the parties, such as a separation deed or agreement, are provable as a debt. See *Victor v Victor* [1912] 1 KB 247 and *McQuiban v McQuiban* [1913] P 208.

change so that arrears of periodical payments can also be proved in the bankruptcy.

17.4 Arrears of maintenance payments have never been provable in bankruptcy. The exclusion appears to date back to before 1900, with the reasons given that maintenance was payable from earnings, rather than as a capital sum, and therefore was not available to the creditors. Further, maintenance payments could not be valued because the arrears might be remitted.[6]

17.5 By contrast, the position with regard to other family financial orders has changed over time. Prior to 1986, as now, lump sums and costs orders resulting from a family financial order were provable in bankruptcy. With the entry into force of the Insolvency Act 1986 and the associated Rules, such sums were no longer provable, but the change was subjected to judicial criticism.[7] In 2005, by an amendment of the Insolvency Rules, orders for lump sums and costs once again became provable.[8] The amendment was recommended by the Insolvency Service following a consultation in May 2004. The consultation did not contemplate making arrears of periodical payments provable in bankruptcy. The Insolvency Service's Consultation Paper noted that prior to 1986 such arrears were not capable of being provable as they were not capable of being "fairly estimated", due to the Family Court's power to vary periodical payments orders and remit arrears.

17.6 After the bankruptcy, family debts are placed by the legislation in a more advantageous position than nearly all other debts. Usually, a year after the making of a bankruptcy order, the bankrupt is discharged from bankruptcy and released from his or her debts.[9] However, debts arising under any order made in family proceedings will survive the bankruptcy and will not be extinguished unless the court orders otherwise. This provision places family debts into a very limited class of debts that "survive" the bankruptcy; the others are, broadly, debts arising from a maintenance calculation under the Child Support Act 1991, fraud or fraudulent breach of trust to which the bankrupt was a party, a fine for an offence and damages for personal injury.[10]

17.7 During a bankruptcy, provable debts can only be enforced with the leave of the court.[11] As arrears accrued, and accruing,[12] under a periodical payments order are not provable, they may be enforced without the court's permission. However, the court has a general power to stay[13] any action against the property or person

6 *Kerr v Kerr* [1897] 2 QB 439.

7 For example, in *Woodley v Woodley (No. 2)* [1993] 2 FLR 477.

8 Insolvency (Amendment) Rules 2005, SI 2005 No 527, r 44.

9 Insolvency Act 1986, ss 279 and 281.

10 Insolvency Act 1986, s 281(5). As to debts that are both provable in and survive the bankruptcy, beyond those arising under lump sum orders and costs orders made in family proceedings, only debts arising from damages for personal injury and an account of profits for fraudulent breach of trust are within that category.

11 Insolvency Act 1986, s 285(3).

12 The obligation to make periodical payments does not cease on the debtor's bankruptcy.

13 To "stay" an action means to suspend it or temporarily stop the action.

of a bankrupt.[14] Further, the creditor's prospects of being able successfully to enforce may be hampered in two ways. First, the bankrupt may apply to the Family Court to vary downwards, perhaps to a nominal amount, any periodical payments that he or she is making on the basis that these cannot be afforded. Additionally, the bankrupt may apply to remit the outstanding arrears. Secondly, the trustee in bankruptcy is able to apply for an income payments order; this is an order claiming for the bankrupt's estate as much of the bankrupt's income as the order specifies. Income that is "claimed" for the bankrupt's estate is then available to be paid to the bankrupt's creditors. The order can last up to three years.[15]

SHOULD ARREARS OF PERIODICAL PAYMENTS BE PROVABLE?

Consultation responses

17.8 In the Consultation Paper we asked whether arrears of periodical payments should be provable in bankruptcy. The majority of consultees favoured periodical payments being provable in bankruptcy,[16] whilst only a few consultees opposed the idea.[17]

17.9 Responding in favour of arrears being provable in bankruptcy, the Family Law Bar Association and Janet Bazley QC could not see a reasoned basis for the current distinction between lump sums and arrears of periodical payments. They also thought it was important to retain the protection that debts due by reason of an order made within family proceedings survive the bankruptcy.

17.10 The Judges of the Family Division of the High Court agreed that arrears of periodical payments should be both provable and survive the discharge of the bankruptcy. They thought this position should be subject to the usual powers to remit arrears. Resolution also responded positively. It commented that "arrears are a debt and the debtor may have deliberately allowed arrears to accrue with a view to seeking bankruptcy."

17.11 However, Resolution noted the minimum debt requirement applying from 1 October 2015, which would require substantial arrears to arise before a bankruptcy petition could be issued, especially if debt arrears must arise within a 12 month period.[18]

17.12 The Family Justice Council was not in favour of arrears being provable. Their view was predicated on the basis that "bankruptcy can be used as a tactic by the debtor to avoid meeting his obligations". It felt, therefore, that "the former spouse is in a better position if the order in the family proceedings survives the

[14] Insolvency Act 1986, s 285(1).

[15] Insolvency Act 1986, s 310.

[16] District Judge Robinson, the Family Law Bar Association, International Family Law Group, Janet Bazley QC, the Judges of the Family Division of the High Court, Penningtons Manches, Resolution and Tony Roe.

[17] The Family Justice Council, Law Society and one member of the public.

[18] However, we note that this consideration is only relevant if the sole basis for the bankruptcy petition is the arrears of maintenance. It does not therefore concern the question of whether arrears of maintenance should generally be provable in bankruptcy.

bankruptcy". The Council did not comment on the desirability of arrears of periodical payments both surviving and being provable in bankruptcy.

17.13 The Law Society thought the current position struck "the right balance between family and other creditors".

Discussion

17.14 The arguments for and against arrears of maintenance being provable seem to us to be finely balanced. We note that the majority of consultees supported a reform making arrears provable, but that the consultees who answered the question all came specifically (with the exception of the member of the public and the Law Society)[19] from a family law background. We think that is important as consultees will (understandably) have been considering the issue from the perspective of the parties involved in family enforcement proceedings and not, perhaps, any other creditors of the debtor.

Arguments for arrears being provable

17.15 To make arrears provable would benefit both the debtor and the creditor. The creditor might receive some of the arrears during the bankruptcy from the bankrupt's estate (and the remaining debt would still survive) and the debtor, if payment was made towards arrears during the bankruptcy, would be faced with a smaller amount of arrears remaining payable after the bankruptcy is discharged. We also think that there is force in the argument advanced by the Family Law Bar Association and Janet Bazley QC, querying why arrears of maintenance should, logically, be treated any differently from an unpaid lump sum.

Arguments that reform is undesirable

17.16 Making arrears of periodical payments provable would cause the bankrupt's other creditors who are due to receive a dividend from the bankruptcy to lose out; the monies gathered in by the trustee would be available towards the payment of the maintenance arrears as well as the other debts. We are mindful, therefore, that any change would impact on some of a bankrupt's other creditors. It would be un-secured and non-preferential creditors who were affected. Those with secured or preferential debts would be paid out of the estate before a family creditor.

17.17 We are wary of unintended consequences flowing from a decision to change the law in this respect. For example, we would not want the result of arrears being provable to be that trustees in bankruptcy routinely apply to remit such arrears to increase the funds available for other creditors. The Insolvency Act 1986 sets out payments to a third party which the trustee can challenge. The trustee can challenge, for example, transactions at an under-value, preferences and excessive pension contributions[20] in order to recover money for creditors. Our research has not uncovered any instances where the trustee in bankruptcy has

[19] Both of whom, together with the Family Justice Council, thought that the current position should be maintained.

[20] Insolvency Act 1986, ss 339, 340 and 342A. A preference is defined in s 340(3) as where "the individual [the bankrupt] does anything or suffers anything to be done which (in either case) has the effect of putting that person [for example, one of the individual's creditors] into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done".

sought to challenge, through litigation, maintenance paid by the debtor. Theoretically, however, it might be possible for the trustee to make an application for variation of the periodical payments made by the bankrupt, asking for the arrears to be remitted, by using the power to "bring, institute or defend any legal actions".[21]

17.18 If arrears were to be provable, a decision would need to be taken about the interrelationship of any such provision with the rule that arrears that became due more than 12 months before the commencement of proceedings to enforce them can only be enforced with the leave of the court.[22] This was discussed by the Insolvency Service in their 2004 consultation. It may be that only arrears which accrued within the specified period before the date of the bankruptcy order should be provable, potentially subject to the family creditor arguing otherwise, but this clearly adds another layer of complexity.

Conclusion

17.19 While we acknowledge that the majority of our consultees supported the reform, on balance, we do not recommend that arrears should be provable in bankruptcy. In reaching that view we place particular emphasis on our concern over unintended consequences, the lack of clear evidence that making arrears provable would result in a substantial benefit for family creditors and the fact that the position in law regarding arrears has been unchanged for more than 100 years, while the position regarding debts arising under other family orders has recently changed.

17.20 The debtor's duty to make payment under a periodical payments order continues throughout the bankruptcy. To make arrears of periodical payments provable in bankruptcy would, therefore, put creditors with the benefit of a periodical payments order in a uniquely privileged position. The arrears owed to the creditor would be provable in the bankruptcy, the obligation to make payments would continue throughout the bankruptcy and the debt would survive the bankruptcy.[23]

17.21 We are also conscious that the debt which is perhaps most analogous to one arising under an order for periodical payments ─ a child maintenance calculation under the Child Support Act 1991 ─ is not provable in bankruptcy. Making arrears of periodical payments provable would therefore create a discrepancy between an order for spousal or child maintenance and child maintenance under the 1991 Act.

[21] Insolvency Act 1986, s 314. Such action must be approved by the creditors and the court - query whether it would be likely that such approval would be forthcoming.

[22] We recommend elsewhere in the Report that this period be extended to two years; see Chapter 13.

[23] Periodical payments as part of an award of damages for personal injury do prove in, continue throughout, and survive a bankruptcy. However, the nature of such a periodical payments order is very different from a family periodical payments order, in the personal injury context the court can only make such an order if satisfied that the continuity of payment is reasonably secure, usually for the payment's lifetime, and often the payments will be made by an insurer: Damages Act 1996, s 2.

INCOME PAYMENT ORDERS AND MAINTENANCE PAYMENTS

17.22 James Pirrie[24] told us that, in his view, reform was needed to ensure that on applications for income payment orders the court should be required to take account of maintenance payments being made by the debtor to his or her children (living apart from him or her) or former spouse/partner.

17.23 Currently, the court is prevented from making an income payments order where the effect would be to reduce the bankrupt's income below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family.[25] However, "family" is defined for the purposes of that section as meaning those living with the bankrupt,[26] which is unlikely to be the case for the creditor with the benefit of a periodical payments order. The current position, effectively, privileges the needs of the "second" family over those of the "first" family.[27] This position is arguably unfair and does not give proper recognition to the debtor's obligation to continue to make periodical payments notwithstanding the bankruptcy.

17.24 This same issue was referred to in the Insolvency Service's 2004 consultation. The Insolvency Service considered that in practice the court does take account of a debtor's obligation under a periodical payments order, but it would be better for the statute to make provision for the court to do so. However, they noted that there was no suitable legislative vehicle to make the necessary change.

17.25 The problem could be remedied by inserting a reference in the appropriate section for consideration to be given to the debtor's obligations under any extant periodical payments order, or perhaps to the reasonable domestic needs of those for whom the periodical payments are being made (reasonable domestic needs are not defined in the statute).[28]

17.26 We think this idea has merit, but are conscious that it goes beyond issues of the enforcement of family financial orders. It could also mean that less of the bankrupt's income is potentially available to the bankrupt's creditors by way of an income payments order. Accordingly we do not make any recommendations on this point, but we draw Government's attention to the issue as one that may merit further consideration.

[24] A family law solicitor.

[25] Insolvency Act 1986, s 310(2).

[26] See definition of "family" in Insolvency Act 1986, s 385 ("Miscellaneous definitions").

[27] By "second" family we mean those currently living with the debtor, and by "first" we mean those benefiting from the periodical payments order and not living with the debtor.

[28] It might, perhaps, be unfair to allow the full amount of maintenance payments if these would exceed the reasonable domestic needs of the former spouse/partner and any children of that relationship and therefore result in payments to the bankrupt's "first" family being made on a more generous basis than to the "second" family. We do not necessarily think that it would be a good idea for the issue to be addressed by changing the definition of "family" to encompass the "first" family given that the definition is not specific to the section of the Insolvency Act dealing with income payments orders.

PART 5
PRACTICAL STEPS TO ACHIEVING ENFORCEMENT

CHAPTER 18
THINKING AHEAD TO ENFORCEMENT

INTRODUCTION

18.1 We noted in the Consultation Paper that our preliminary work had highlighted that practitioners and judges do not generally encounter enforcement cases as often as other types of family proceedings and that a "cultural change" might be required to maximise the potential of any enforcement system. By "cultural change" we mean a greater recognition that the role of legal representatives and the court does not necessarily end at the final financial order. In particular, a theme that emerged from a survey conducted by Resolution in June 2014 to support our project was that its members advocated a more proactive approach to enforcement by those involved in making or obtaining the original family financial order.

18.2 In the Consultation Paper we therefore asked a general question about the use of case management powers at the time of the original order and at the time of enforcement proceedings. Consultees made various suggestions in their responses, including some which went beyond what could strictly be considered case management powers. In this Chapter we discuss some of the suggestions we received about how family financial orders could be made in a way that minimises the risk of non-compliance and to pave the way for any future enforcement proceedings that are needed.

DIRECTION TO CONSIDER ENFORCEMENT

18.3 The Family Law Bar Association referred in its response to the idea of a statutory direction for judges to consider enforcement and thought that this idea had "much merit". Such a direction would require the court, at the time of making an order, to consider the terms of the order and any further directions that are necessary either to ensure compliance or facilitate enforcement. We agree that a direction would be a positive step in improving the enforcement of family financial orders. Whilst many judges and practitioners already take potential problems into account, a specific direction would encourage more careful consideration at the time when priority is understandably being given to reaching an effective settlement of the family dispute. It would also be a reminder to consider the terms of agreements, negotiated by litigants in person, not only as to the fairness of the agreement but also as to enforceability.

18.4 In light of the responses received and feedback from our advisory group and following discussions with judges who deal with family enforcement, we agree that a direction to consider enforcement is a good idea. However, we propose that the direction is contained within the Family Procedure Rules, perhaps included in the proposed enforcement practice direction,[1] rather than in statute.

18.5 The purpose of the recommended direction would be to progress the cultural shift being called for in the area of enforcement, which could be achieved by a statutory direction. There is precedent for such a statutory direction in section

[1] See Chapter 3.

25A(1) of the Matrimonial Causes Act 1973,[2] which imposes a duty on the court on every financial remedy application to consider the possibility of achieving a "clean break" (that is, the absence of any ongoing financial obligations between the parties).

18.6 However, we are concerned that any direction to consider enforcement, unlike the direction to consider a "clean break", should not influence the court to the extent that it would affect the quantum of an order. The direction to consider enforcement would be relevant only to choices regarding how the parties' obligations might be met. For example, whether the order should be secured, whether provision should be made for the court to execute documents in the event of a party's non-compliance or whether a suspended attachment of earnings order might be appropriate. The direction would be about practice rather than principle and for that reason we are of the view that the direction should be in the Family Procedure Rules 2010, rather than in statute, though the issue of when the direction is most appropriately provided is a finely balanced one. We set out below our view of how such a system could work.

18.7 The duty to consider enforcement should apply at the time of settling, that is determining, the precise terms of all family financial orders. The duty would apply at the time of concluding the financial proceedings but should also apply at the time of making interim financial orders, namely legal services orders and those for maintenance pending suit. Interim financial orders are always needs based and so, although the failure to pay can be taken into account in any final order, in the short term non-compliance is likely to cause serious disadvantage to the creditor.

18.8 **We recommend the introduction of a specific direction within the Family Procedure Rules for the court to consider whether to include any terms as to enforcement when making any family financial order.**

18.9 We are also attracted to the proposal of the Family Law Bar Association that a notice should be included on final orders that payment under a family financial order should continue unless and until that order is varied, or the parties agree in writing that it should be varied; the debtor should not unilaterally just stop paying.

18.10 **We recommend that a notice should be included on family financial orders that payment under a family financial order should continue until the order is varied or until the parties reach agreement in writing to vary the order.**

RECORD OF FINDINGS

18.11 We have been told that in many, although by no means all, enforcement cases it would have been possible to anticipate future problems during the course of the original proceedings. If a party has been reluctant to engage in and comply with his or her obligations during those proceedings, then there is a risk that he or she will take the same approach to compliance with the final family financial order.

[2] Equivalent provision is found in the Civil Partnership Act 2004, sch 5, para 23.

18.12 We propose greater judicial continuity between the original enforcement proceedings,[3] to help anticipate and address enforcement issues. However, as we have explored above, judicial continuity may not be possible in all cases. The inability to provide for continuity may not only be a result of allocation decisions, but also practical considerations such as judges having moved between courts or retired before the enforcement application arises. It has been suggested to us that there is a form of thinking ahead that could bridge the gap in such cases. A judge at a final hearing could make a note for the court file of findings as to the existence, value and ownership of assets that he or she considers important if the case returns to court in the context of an enforcement application.[4] The information will then be on the court file to inform the judge who hears any enforcement proceedings. It may also be helpful in cases where judicial continuity is possible if the enforcement proceedings are brought months or years after the family financial order is made.

18.13 We are conscious that if a party wishes to rely on a finding in the initial proceedings, he or she is entitled to apply for a transcript of the judgment. However, this recommendation may avoid the time and expense of having to do so, particularly where a previous finding may not be determinative but would be helpful in providing general background information on the case. We do not envisage a record of findings on the court file becoming compulsory. We suggest that a direction to the judge to consider providing a record of findings could be noted in the new enforcement practice direction,[5] as an example of good practice whenever it may be helpful or appropriate to do so. Where such a note is placed on the file then the parties should be given a copy and the opportunity to comment.

18.14 **We recommend that the enforcement practice direction directs the judge to consider noting for the court file a summary of his or her main findings that may be relevant to future enforcement proceedings**.

MENTION HEARINGS

18.15 A mention hearing is a short hearing listed to mention a case and update the court about its progress. The Family Law Bar Association suggested that the listing of such a hearing to "anticipate enforcement issues" could be made as part of case management directions to facilitate enforcement at the time of the original order. We think that this idea has merit and that in cases where there appears to be a risk of non-compliance the listing of a follow up mention hearing could deter non-compliance with the order altogether, or assist in dealing with any enforcement issues quickly and effectively.

18.16 We understand that it is the practice of some district judges to list short hearings to monitor compliance with their orders in any event. We propose a specific reference in the EPD to this power as an encouragement to list a mention hearing in appropriate cases. We envisage the hearings being short,[6] which means that

[3] See Chapter 6.

[4] This would not be required if the court gives a written judgment or the case is reported.

[5] For our proposal for a new enforcement practice direction see Chapter 3.

[6] We understand that currently in other contexts mention hearings are listed for five or ten minutes.

an enforcement order would not be likely to be made at that hearing. However, if the parties feel that compliance is subject to the scrutiny of the court there will be an incentive to comply (in a timely fashion) and enforcement options will come under review from an early stage.

18.17 We understand that there would be implications for court lists and that, particularly where both parties are unrepresented, there may be a risk that these mention hearings would not be vacated even where they are not needed. Based on the suggestion by the Family Law Bar Association, we therefore consider that it would be sensible to provide guidance in the practice direction as to when these hearings may be listed. We suggest that the court should consider listing a mention hearing for these purposes if the court believes that a party will not comply, or will have difficulty in complying, with all or part of the order.

Mention hearing by FDR judge

18.18 The current rules prohibit applications for enforcement being heard by the judge who conducted the FDR in the original financial proceedings and we do not recommend any change to this rule.[7] As a result we consider that it would be more efficient for any mention hearing listed in anticipation of enforcement issues to be listed before a judge who did not conduct the FDR. For example, if the order provided for a judge to execute documents in the event of the debtor's non-compliance, then it would be best for the mention hearing to be before a different judge so there would be no barrier to the court executing the documents at the mention hearing, if it is appropriate for the court to do so. Such listing will also allow for judicial continuity throughout any enforcement proceedings from the time of the mention hearing.

18.19 **We recommend that the enforcement practice direction refers to the court's power to list a mention hearing on the making of a family financial order and notes that such a listing may be beneficial where the court believes that a party will not comply, or will have difficulty in complying, with all or part of the order. The mention hearing should not be listed before a judge who has heard an FDR in the case.**

NATIONAL INSURANCE NUMBERS

18.20 Another issue that has come to our attention is that the parties' national insurance numbers may not be known in all family financial cases. National insurance numbers may assist with effective enforcement and we think it would be beneficial to ensure they are known.

18.21 Currently, on Form E (which is the financial statement used in financial proceedings that follow a divorce or the dissolution of a civil partnership), a party's national insurance number is requested only in the pensions section. It is foreseeable that a party who does not have a pension would not complete any of that section and so his or her national insurance number would not be captured. In applications under Schedule 1 of the Children Act 1989, Form E1 does not require parties to provide their national insurance numbers at all.[8] Further, family

[7] We explain our reasoning for not recommending any change at paras 6.30 to 6.33 above.

[8] This is consistent since there is no pension section of that form.

financial cases can be resolved by a consent order where the parties have not completed any of the comprehensive financial disclosure forms, but instead fill out a summary of financial information, and in those circumstances, it is unlikely that their national insurance numbers will be known to the court.

18.22 If our proposals in relation to tracking debtors' employment via Her Majesty's Revenue and Customs and information requests and information orders are implemented, national insurance numbers will become particularly important. National insurance numbers are one of the unique identifiers that enable Her Majesty's Revenue and Customs to provide accurate information about an individual.[9] Although there are cases where the creditor will know the debtor's national insurance number, systematic collection of the data within documents that are held on the court file would be more efficient and accurate. We think that changes to the standard disclosure forms to require every party to provide his or her national insurance number would be a small change that may bring significant improvements to the chances of enforcing a family financial order.

18.23 **We recommend that Form E, Form E1 (disclosure form in proceedings under Schedule 1 of the Children Act 1989) and Form D81 (summary of financial information when submitting a consent order) are updated to ask for the national insurance number of each party.**

[9] See para 8.30 above.

CHAPTER 19
ALTERNATIVE DISPUTE RESOLUTION

INTRODUCTION

19.1 There is increasing support for family disputes to be resolved in a forum other than court proceedings.[1] The three main types of alternative dispute resolution ("ADR"), in the context of family disputes, are:

(1) Mediation – a third party (the mediator) facilitates an agreement being reached between the two parties in a series of face-to-face meetings;

(2) Collaborative law – the parties each instruct their own lawyer but the aim is to reach agreement through four-way face-to-face meetings between the parties and their lawyers, who all sign a participation agreement providing for the parties to instruct new legal representatives should the process fail; and

(3) Arbitration – the parties, who will usually be represented by lawyers (although this is not mandatory), agree that the dispute will be heard by an arbitrator, who undertakes the role otherwise played by the judge. The parties decide on the identity of the arbitrator and agree to be bound by his or her decision. The parties will agree with the arbitrator how the process should be conducted; this may be face-to-face, by telephone or in writing.

ADR GENERALLY IN FAMILY PROCEEDINGS

19.2 The Family Court has a duty to further the overriding objective of dealing with cases justly[2] by actively managing cases. That includes a duty to encourage the parties to use ADR (referred to in the rules as non-court dispute resolution) if the court considers it appropriate, and a duty to facilitate the use of such procedures.[3]

19.3 In addition the general duty to further the overriding objective, Part 3 of the Family Procedure Rules provides explicit powers for the Family Court in relation to ADR.[4] Under rule 3.3 of the Family Procedure Rules the court has a duty to consider ADR at every stage in the proceedings. Under rule 3.4, the court has the

[1] Demonstrated by the inclusion of references to alternative dispute resolution in the Family Procedure Rules, comments by the judiciary and initiatives such as the launch of the Institute of Family Law Arbitrators in February 2012. An example of recent judicial commentary on the point is that of the President in *S v S* [2014] EWHC 7 (Fam), [2014] 2 FCR 484: "… mediation and subsequently other forms of alternative dispute resolution have become well established as a means of resolving financial disputes on divorce. As Lord Justice Thorpe observed in *Al Khatib v Masry* [2005] 1 FLR 381, para 17: "there is no case, however conflicted, which is not potentially open to successful mediation".

[2] Family Procedure Rules, r 1.1(1) gives the Family Procedure Rules the overriding objective of "enabling the court to deal with cases justly having regard to any welfare issues involved".

[3] Family Procedure Rules, r 1.4(f).

[4] Rule 3.2 states that "this Chapter contains the court's duty and powers to encourage and facilitate the use of non-court dispute resolution".

power to adjourn proceedings in order to facilitate ADR. The court can exercise its power to adjourn proceedings to enable parties to "obtain information and advice about, and consider using, non-dispute resolution" whenever the court considers it appropriate.[5] However, an adjournment to "enable non-court dispute resolution to take place" can only happen *if both parties agree*. [6]

19.4 It is considered that this rule, requiring the parties' agreement, qualifies the general power to stay proceedings found in the court's case management powers and therefore, the Family Court can only order a stay for the purposes of enabling ADR to take place where the parties agree.

19.5 The position is different in proceedings governed by the Civil Procedure Rules; in such proceedings the general power to order a stay is not qualified by any equivalent rule. The court may, therefore, order a stay of proceedings to enable ADR, making use of the general power without the need for the parties' consent. In addition, the court has a specific power during the preliminary stage of proceedings to stay proceedings without the parties' consent for the settlement of the case.[7] No equivalent power exists in the Family Procedure Rules.

19.6 Under the Family Procedure Rules, there is a specific requirement for an applicant for financial remedies to show that he or she has attended a mediation and information assessment meeting ("MIAM"). At the MIAM an authorised family mediator will provide information about mediation and other forms of ADR, and assess the suitability of mediation in that particular case. Enforcement proceedings are exempted from the requirement to attend a MIAM. There is, therefore, nothing in the current Family Procedure Rules that obliges the parties to consider whether ADR may be appropriate before issuing an enforcement application.

19.7 A related point was made by Mr Justice Mostyn in the case of *Mann v Mann*.[8] He recognised that the judge-led financial dispute resolution hearing ("FDR"), imposed on financial remedy proceedings by Part 9 of the Family Procedure Rules without any need for the parties' explicit consent, does not apply on enforcement proceedings.[9] He considered that the FDR in financial remedy proceedings makes the need for parties to engage actively in ADR in other ways less pressing; where the FDR does not apply there is a need for more judicial powers to encourage ADR in appropriate cases. Mr Justice Mostyn went so far as to say that:

> Specifically, the court ought to be able to order participation in ADR in enforcement proceedings.[10]

[5] Family Procedure Rules, r 3.4.

[6] Emphasis added.

[7] Civil Procdure Rules, r 26.4.

[8] [2014] EWHC 537 (Fam), [2014] 1 WLR 2807.

[9] Where a FDR is ordered attendance by the parties is compulsory unless the court directs otherwise: Family Procedure Rules, r 9.17.

[10] *Mann v Mann* [2014] EWHC 537 (Fam), [2014] 1 WLR 2807 at [24].

19.8 In *Mann v Mann*, the parties had previously entered into a written agreement to engage in mediation to resolve outstanding matters between them. Mr Justice Mostyn considered that this was sufficient "agreement"[11] to adjourn the proceedings to enable ADR to take place, even though by the time of the hearing the creditor no longer agreed to mediate.[12] He adjourned the enforcement application for eight weeks to provide a "final opportunity to engage in ADR". He noted that he could not compel the parties to engage in mediation but that he could "robustly encourage them" by means of an Ungley order,[13] the terms of which are as follows.

(1) If either party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the enforcement proceedings, should the judge consider that such means of resolution were appropriate, when he or she is considering the appropriate costs order to make.

(2) The party considering the case unsuitable for ADR shall, not less than seven days before the commencement of the adjourned enforcement hearing, file with the court a witness statement without prejudice save as to costs, giving reasons on which they rely for saying that the case was unsuitable.

19.9 In the Consultation Paper we asked whether the Family Court should be able to adjourn enforcement proceedings without the parties' consent for the purpose of the parties attempting to reach agreement using ADR.[14] Such an amendment would enable an adjournment, as ordered in *Mann v Mann*, in circumstances where there was no present agreement between the parties to adjourn, and no prior agreement to make use of mediation. We did not go so far as to suggest that the Family Court should have the power to order participation in ADR in enforcement proceedings (or otherwise).

CONSULTATION RESPONSES

19.10 Consultees' responses to our question were mixed. Even those that were in support of ADR were cautious about its use in enforcement proceedings. There were three recurring reasons present in the responses of those who did not think that the requirement for the parties' consent should be removed.

[11] As required by Family Procedure Rules, r 3.4, see para 19.3 above.

[12] The creditor claimed that it was an implied term of the agreement that the debtor would pay the rent on a property and that in circumstances where the debtor had breached the implied term the debtor could not rely on the agreement to mediate. Further, the creditor said the court could not force or coerce her to mediate, whatever might have been agreed.

[13] This is a form of order devised by Master Ungley, which sets out costs consequences of a party failing to act in the way that a court may later decide would have been reasonable.

[14] The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219, 5.25.

Responses opposed to extending the court's ADR powers

ADR is not generally appropriate at the stage of enforcement

19.11 The Birmingham Law Society[15] noted that whilst ADR is "generally welcomed", it is not appropriate in cases where the debtor will not pay; further, for debtors who cannot pay, a determination by a judge is likely to be more useful. This was echoed by Clarion Solicitors who felt it was unlikely that "dispute resolution models [would] be appropriate in an enforcement situation". The Family Justice Council considered that the nature of enforcement proceedings meant ADR was inappropriate: "the court has made an order or approved a consent order and it should be complied with". Penningtons Manches and Resolution agreed and stated that they found it difficult to conceive of any situation in which ADR would be appropriate in enforcement proceedings. The Law Society considered that enforcement did not lend itself as well to ADR as other parts of the family law process.[16]

Successful ADR requires both parties to be willing to engage in the process

19.12 Clarion Solicitors recognised that, for ADR to be successful, "a certain level of co-operation is required"; they thought that this would be lacking in enforcement proceedings. Whilst the Family Law Bar Association could see scope for the parties to use mediation where there was a live variation application or, in any event, a significant change of circumstances since the making of the final order, it did not think that the court should have the power to adjourn for the purpose of ADR "unless both parties agree".

Risk of ADR being used as a delaying tactic

19.13 District Judge Robinson insisted that ADR should never "be allowed to become an additional tool for the time waster". The Family Law Bar Association considered that "the creditor may see little value in ADR and the debtor may attempt to use this as a way of delaying enforcement". Further, the Law Society thought that both parties should have to agree to the adjournment; otherwise, there is the risk that one party may request an adjournment as a delaying tactic. Penningtons Manches argued that "compulsory adjournment to ADR would be a gift to non-payers, offering the opportunity for yet more delay and obfuscation".

Responses in favour of extending the court's ADR powers

19.14 The Judges of the Family Division of the High Court supported the introduction of the power but thought that it will only be in rare enforcement cases that there is scope for ADR and that in general, for it to be successful, it is necessary for both parties to be prepared to engage. The Justices' Clerks' Society thought the power would be "helpful". It suggested that once the creditor "appreciates the difficulties

[15] An association representing legal practitioners from Birmingham and the surrounding area.

faced by a debtor, they may be willing to agree terms for payment". Ultimately, the Society felt that it would create "greater understanding and cooperation between parties" and be "less stressful and expensive". One member of the public described the proposal as a "great idea".

19.15 Two of the positive responses were notably more cautious than the others. International Family Law Group explained that they "hugely [supported] ADR in its various manifestations". However, they noted that there were risks to encouraging ADR in enforcement proceedings; namely, creditors would have to wait for a period before they could "get their enforcement proceedings off the ground". They also noted that ADR was only effective "if both parties enter into it freely and willingly". Janet Bazley QC "cautiously [supported]" the power but thought it should only be used exceptionally where "there is real evidence that ADR is likely to be effective and, probably, only where both parties agree. Otherwise, this is likely to lead to delay and greater difficulty enforcing the order."

DISCUSSION

19.16 At present, a judge hearing any case in family proceedings who considers that the case may be suitable for ADR, cannot adjourn the proceedings to enable ADR to take place unless the parties agree. There may be many good reasons why one or both parties may not agree to such an adjournment, but sometimes parties reach entrenched positions and may not see the potential benefit of attempting to resolve the dispute by ADR. Arguably, in such a case, it would be of benefit for the court to have the power to adjourn without the parties' consent.

19.17 Although we acknowledge that the issue is, in one sense, more pressing in enforcement proceedings as there is no requirement to attend a MIAM before issuing court proceedings and no FDR hearing to encourage ADR, we do not consider that it is a problem confined to enforcement proceedings. Other proceedings may similarly benefit from the court being in a position to order an adjournment to enable ADR without the parties' consent; for example, following an FDR hearing where agreement has not been reached but the parties have significantly narrowed the issues between them.

19.18 We also note that the power already exists to adjourn, without the parties' consent, to allow the parties to consider using ADR. While there is a difference between adjourning to facilitate consideration of ADR and adjourning to allow ADR to take place (perhaps because, in the latter case, the judge, but not the parties, considers that ADR would be beneficial) it is not a big difference. A judge

[16] Some consultees did not address the specific issue of the need for the parties' consent to adjourn proceedings for that purpose but generally supported the use of ADR. National Family Mediation, a national family mediation provider, thought that the underlying assumption that mediation is inappropriate at the stage of enforcement was flawed. It thought that ADR should be considered by the court at all stages of proceedings and that this would reduce the need for enforcement proceedings as more would have been agreed and carried out by consent. Stone King commented that ADR, and in particular mediation, should be considered "as an entry point for enforcement of family financial orders".

can also make an Ungley order[17] to encourage the use of ADR, as Mr Justice Mostyn did in the case of *Mann v Mann* discussed above.

19.19 We can readily understand the concerns raised by consultees as to any reform that promotes ADR in the context of enforcement. Enforcement is predicated on the notion that creditors have a court order in their favour and so are seeking only to recover assets that the court has already decided are due to them. Viewed from this perspective, ADR, with its focus on compromise, has little place in enforcement proceedings. However, the outcome of ADR might relate to a change in the method or timing of payments, rather than being confined to a reduction in what the debtor owes. It is also possible that ADR may bring benefits in cases where the order which the creditor seeks to enforce is an order that the debtor can apply to vary. Discussion in mediation may help the parties to understand each other's position, and may provide a quicker and cheaper resolution than court proceedings.

19.20 Overall, the arguments are finely balanced. However, for the reasons given by consultees, we consider that caution is necessary with regard to the use of ADR in enforcement proceedings. Further, our project's remit, being limited to the enforcement of family financial orders, means that we cannot make recommendations for reform that would go beyond the court's powers on enforcement proceedings. Any recommendation we make could, therefore, lead to the Family Court having stronger powers to direct the use of ADR in enforcement proceedings than in other family proceedings; which we do not consider to be a satisfactory outcome. As a result, we are not minded to recommend any change to the court's ADR powers in the context of enforcing family financial orders.

[17] See para 19.8 above.

CHAPTER 20
THE ENFORCEMENT PRACTICE DIRECTION

INTRODUCTION

20.1 In Chapter 3, we recommended that a narrative practice direction dedicated to enforcement should be included in the Family Procedure Rules. In this chapter we consider what such a practice direction should contain. For the purposes of this discussion we will call this practice direction the Enforcement Practice Direction ("EPD").

THE ENFORCEMENT PRACTICE DIRECTION

Scope

20.2 The EPD should provide direction to the court and parties on all enforcement applications, and provide "enforcement focussed" direction at the earlier stage of when the original financial order is made. It should be an authoritative point of reference for all those involved in family enforcement and should, therefore, also have the benefit of providing a firm basis for guidance and information for litigants and the public in a format outside of the Family Procedure Rules.

20.3 There will be some overlap in content between the EPD and the separate guide on enforcement that we recommend be produced,[1] but we do not consider that problematic. The practice direction would be serving a number of purposes, namely directing the practice of the court, directing the parties, and guiding all concerned through the enforcement process. The benefit of including "guidance" within the practice direction is that it places it in close proximity to the rules. As a result, it is more likely to be seen by practitioners and judges who may not think to make use of guidance drafted for litigants.

Direction for parties

The options for enforcement

20.4 Both creditors and debtors need to understand the options available to enforce a family financial order. The EPD should set out a comprehensive "menu" of the available enforcement orders, including the option of making a general enforcement application or, in some circumstances, asking a court officer to take enforcement action on behalf of the creditor.[2] It should explain, briefly, for each method of enforcement:

(1) its operation;

(2) which orders it might be used to enforce; and

(3) where relevant, which of the debtor's assets it might be used against.[3]

20.5 The EPD should set out the rules and other practice directions that apply on each application and provide hyperlinks to relevant application. We recommend that

[1] See paras 4.16 to 4.19 above.

[2] See Chapter 4 above for a discussion on "enforcement by the court".

[3] A coercive order will not operate against a debtor's assets.

these parts and practice directions should all be available within the Family Procedure Rules.[4]

20.6 The EPD should explain that a debtor may, in certain circumstances, ask the court to remit arrears. If our recommendation to create a free-standing application for remission is implemented[5] then the EPD should direct debtors to the relevant rules governing such an application.

Applications to court

20.7 The EPD should direct creditors to which court and on which form they should make their enforcement application.[6] It should set out the differences between making a general enforcement application and an application for a specific enforcement order, and the circumstances in which creditors might prefer to make the different applications. Direction should be given as to what information the creditor ought to provide (if available) at the time of making a general enforcement application.

20.8 The EPD should set out when applications may be made without notice to the other party and on an urgent basis. For example, applications on a without notice basis are standard for an application for a third party debt order or charging order.

20.9 Where a particular method of enforcement does not already have a specific practice direction, we recommend that the EPD fulfil the role of directing the parties through any difficult elements of the application and procedure. For example, we have been told by consultees that it would be helpful for a practice direction to set out how an application for a judgment summons should be made to ensure that it respects the rights of the debtor to a fair trial under article 6 of the European Convention on Human Rights ("ECHR"). The EPD could explain, for example, that the creditor should set out his or her case clearly in advance of the hearing and that the debtor cannot be compelled to give evidence.

Procedure following an application

20.10 It would be helpful for the EPD to explain what the parties can expect to happen after the application for enforcement has been made; for example, on how many occasions parties will be expected to attend court before the court makes an order for enforcement or what happens when part or all of the debt owed by the debtor is paid. To avoid overloading the EPD with the detail of each enforcement method, it will be necessary to cross-refer to other practice directions consolidated in the Family Procedure Rules. However, we take the view that it would be helpful to set out in summary form the path that different enforcement applications take. For the general enforcement application, we recommend that more detail about the procedure is provided, including what is expected from each party at different stages of the application.

[4] See Chapter 3.

[5] For our recommendation, see paras 13.27 and 13.29 above.

[6] The explanation might be by reference to the relevant part or practice direction, given that the appropriate court will vary depending on the method of enforcement for which an application is being made. Generally, and with exceptions, the application will be made either to the court that made the order for which enforcement is sought or to the designated family court for the designated family judge area within which the judgment or order was made (unless proceedings having been transferred).

Key principles and considerations

20.11 The EPD should explain that the court has discretion when considering an enforcement application and should contain an explanation of the key principles that the court will apply. In particular whether it is the case that the debtor cannot pay the sum owed or whether the debtor can pay but is refusing or neglecting to do so.

20.12 The EPD should explain the importance of correct information being provided by the debtor and the creditor, both to enable the court to understand whether the debtor is capable of payment and, if that is the case, to increase the likelihood of an order for enforcement being successful. There should be an explanation of when the court has the power to remit arrears, when the creditor will have to seek the court's permission to enforce arrears and of the factors that the court will take into account when making these decisions.[7] The EPD should also explain the connection between enforcement and variation, namely that, in some cases, an application for enforcement by the creditor will be met with an application for variation of the existing financial order (for example, for periodical payments) by the debtor.

After an order is made

20.13 The EPD should set out any steps that need to be taken after the making of an enforcement order for it to be effective, for example, the need to protect a charging order over registered land by making an application to Land Registry to enter a notice on the register.

Costs

20.14 The EPD should set out the costs rules that apply to enforcement proceedings and it should explain that these differ from the rules that apply at the stage of the financial remedy proceedings. Parties should be directed as to what steps they need to take if they wish to ask the court to make an order for costs. The EPD should provide guidance on when the court may depart from any fixed costs that apply.

Allocation

20.15 The EPD should explain how cases will be allocated. We discuss our recommendations for the allocation of enforcement proceedings elsewhere in this Report. The proposals that we make are designed to ensure that enforcement applications should be listed before the same judge who determined the original proceedings where those proceedings were concluded at a final hearing and where that would not result in unreasonable delay.[8]

Explanation of terms

20.16 The EPD should contain a glossary of legal terms that might be encountered in the area of the enforcement of family financial orders. This should include general legal terms that will be encountered by those making and responding to court applications, as well as those specific to enforcement proceedings, such as "security", "Land Registry", "arrears" and "remittance".

[7] See Chapter 13.

[8] See paras 6.28 to 6.34 above.

Signposting and funding

20.17 The EPD should signpost readers both to services that are generally useful to families seeking advice in the context of separation and divorce[9] and, in particular, those that may be useful in the specific context of non-compliance with a family financial order. It could signpost to organisations providing debt advice and counselling services to assist debtors (and creditors) in sorting out their finances.[10] The EPD could provide a brief explanation of bankruptcy and how that might be used to enforce a debt, recognising that the creditor is unlikely to recover fully what is owed by participating as a creditor but that such debts are not extinguished on discharge from bankruptcy (subject to the court's discretion). Information about other legal methods of dealing with debt, such as individual voluntary arrangements, could also be included.

20.18 This section of the EPD could also suggest sources of information which creditors might find useful or necessary, particularly for those seeking to enforce orders without legal advice. For example, the creditor could be directed to the information available from Land Registry[11] or Companies House.[12] An online version of the EPD should contain hyperlinks to relevant websites. Importantly, there should be a link to the electronic version of the detailed guidance for litigants in person that we recommend be produced.[13]

Direction to the court

THROUGHOUT FAMILY FINANCIAL PROCEEDINGS

20.19 The EPD should explain that judges are to bear in mind enforcement throughout family financial proceedings. It should direct the court to consider the issue of enforcement at the time that a final order is made within financial remedy proceedings.[14] It should also explain that there are standard orders for use in both financial remedy and enforcement proceedings,[15] and provide a link to where these orders can be found on the internet. The EPD should direct judges to consider exercising their case management powers to list a mention hearing at the conclusion of the financial proceedings, in any case where the judge has doubts that the payer will readily comply with the order.[16] The EPD should also encourage judges to consider whether to set out key findings from the case, in order to assist with any future enforcement application.[17]

[9] For example, information about funding and dispute resolution options and links to the websites where members of the public can find legal information or search for a lawyer (such as those of the Law Society and Resolution).

[10] Two such organisations are the Money Advice Trust (http://www.moneyadvicetrust.org/Pages/default.aspx) (last visited 02 December 2016) and StepChange (http://www.stepchange.org/) (last visited 02 December 2016).

[11] A creditor may wish to apply for a charging order and can use the Land Registry website to obtain a copy of the debtor's title to the property.

[12] To obtain information about the finances of a company of which the debtor is a director or shareholder.

[13] See paras 4.16 to 4.20 above.

[14] See paras 18.3 to 18.8 above.

[15] Produced by the Financial Remedies Working Group.

[16] See paras 18.15 to 18.19 above.

[17] See paras 18.11 to 18.14 above.

ON ENFORCEMENT APPLICATIONS

20.20 On a general enforcement application, the court should be directed to consider exercising its powers to make information requests or orders, and its power to issue a warrant for arrest, if necessary. On applications for specific methods of enforcement, the court should be directed to consider exercising its power to direct a debtor to complete an enforcement financial statement (that we recommend be introduced).[18]

20.21 As noted above, we recommend that the EPD set out the costs rules that apply on an enforcement application. Further, we suggest that direction be given to the court on when fixed costs should be departed from.[19]

20.22 The court should be reminded to give careful consideration to any application for the adjournment of enforcement proceedings on the basis that a variation application has been issued, as it is not in every case that a variation application requires enforcement proceedings to be adjourned. If an adjournment is granted, then the court should identify the issues that need to be resolved before the enforcement application can continue.

A timetable?

20.23 The CAP provides a timetable for the court to follow, and the steps it must take, on receipt of an application concerning the living arrangements of a child. We are of the view that enforcement applications should be dealt with as quickly as possible; by their nature, and subject to an order being varied or remitted, the applicant creditor is waiting to be paid money, or to receive property, that should already have been paid or received. That said, we are also mindful that the resources of HMCTS are finite and that any requirement for a court to deal with one type of application within a specified period may well mean that the court deals with another type of application more slowly. We also take the view that a timetable for the resolution of a particular application can only be set by those who deal with the daily operations of the court. For these reasons, we leave it to HMCTS and the judiciary, should our recommendation for the EPD be adopted, to decide whether it can or should contain a timetable for enforcement proceedings, and, if so, what that should be.

[18] For our recommendations for the introduction of an enforcement financial statement, see Chapter 7.

[19] See the discussion on fixed costs in paras 16.23 to 16.30 above.

PART 6
LIST OF RECOMMENDATIONS

CHAPTER 21
LIST OF RECOMMENDATIONS

CHAPTER 3

21.1 We recommend that the Parts dealing with enforcement in the Family Procedure Rules should be made comprehensive so that there is no need to refer to the Civil Procedure Rules for the enforcement of a family financial order.

21.2 We recommend that a narrative practice direction dedicated to the enforcement of family financial orders should be included in the Family Procedure Rules.

CHAPTER 4

21.3 We recommend that to expand and improve the information and guidance available to parties:

(1) a summary of enforcement information be provided on the back of family financial orders; and

(2) a comprehensive "step by step" guide to the enforcement of family financial orders be produced.

21.4 We recommend that steps are taken to increase awareness of enforcement by the court, namely:

(1) including a reference to enforcement by the court on the information that we recommend be provided at the time of the order;

(2) identifying enforcement by the court as an option in the comprehensive enforcement guidance that we recommend be produced; and

(3) directing parties how to make an application for enforcement by the court in the recommended enforcement practice direction.

21.5 We recommend that, subject to IT capability and resource implications, Her Majesty's Courts and Tribunals Service should begin collecting and publishing data on the applications for the different enforcement methods in the Family Court.

21.6 We recommend that Her Majesty's Courts and Tribunals Service consider the need to collect such data when making decisions about the IT systems used to process family applications.

CHAPTER 5

21.7 We make the following recommendations for reform of the general enforcement application:

(1) The introduction of a new part of the Family Procedure Rules to govern the procedure.

(2) Clarification that on the general enforcement application the court is empowered to make any of the available enforcement orders without the need for any further application.

(3) A new application form and notice of hearing that will provide guidance to the parties as to the nature of the application, the orders that may be made and what is required of each of them, including:

(i) setting out the standard information and disclosure that the debtor must provide in advance of the hearing; and

(ii) providing the opportunity for the creditor to ask for further specific information or documents.

(4) A choice for the creditor as to the method of service of the application (by personal service or by post).

(5) An obligation on the debtor to provide disclosure in advance of the hearing.

(6) Providing for committal in the event of the debtor's non-compliance, using a modified version of the rules contained in Part 71 of the Civil Procedure Rules, to be set out in full in the Family Procedure Rules.

(7) An express provision in the rules to highlight the already existing possibility of making use of an arrest warrant to secure the debtor's attendance.

(8) Empowering the court to proceed in the absence of the debtor.

(9) Enabling the court to make information requests and information orders on a general enforcement application.

(10) Enabling the court to make orders against pensions and coercive orders on a general enforcement application.

CHAPTER 6

21.8 We recommend:

(1) The appointment of an enforcement liaison judge in each designated family judge area.

(2) An amendment to the rules so that applications for enforcement are allocated to the same judge who determined the original financial case where the case was concluded at a final hearing, unless such an allocation would cause unreasonable delay.

(3) An extension of the enforcement powers of lay justices to enable lay justices to make the following orders for the enforcement of family financial orders:

(a) charging orders;

(b) third party debt orders;

(c) warrants of control;

(d) warrants of delivery;

(e) driving disqualification; and

(f) prohibition on travelling out of the United Kingdom

(4) An amendment to the rules so that an application for enforcement may be listed before a lower level of judge than the judge who made the order that the application seeks to enforce, but that a judge of at least the level of district judge must authorise an application to be listed before lay justices.

CHAPTER 7

21.9 We recommend:

(1) A new form of financial statement - an "enforcement financial statement" - should be created, specifically designed for the purposes of enforcement. The enforcement financial statement should require the debtor to provide the information and documentation set out in Appendix B, Figure 4.

(2) The creditor should retain the right to ask the debtor to provide additional information or documentation and the financial statement should provide for this.

(3) The financial statement should warn the debtor of the consequences of being deliberately untruthful and should inform the debtor that the information provided may be checked by way of information requests or orders.

(4) Debtors should be required to complete the financial statement on every general enforcement application.

(5) There should be no automatic requirement for the debtor to complete the financial statement on specific enforcement applications but the court should have the power to order the debtor to complete the financial statement if appropriate in all the circumstances.

CHAPTER 8

21.10 We recommend:

(1) Information requests and information orders, as provided for in the Tribunal Courts and Enforcement Act 2007, be brought into force for the enforcement of family financial orders.

(2) The Family Court should have the power to make an information request or information order on a general enforcement application.

(3) The Family Court should be able to direct information requests and information orders to the following bodies:

(a) Department for Work and Pensions;

(b) Her Majesty's Revenue and Customs;

(c) Land Registry;

(d) credit reference agencies;

(e) banks and building societies; and

(f) pension providers.

(4) The categories of information that the Family Court may order or request should be prescribed in regulations.

(5) An information provider should be able to decline to comply with an information order in circumstances where:

(a) the body in question does not hold the relevant information;

(b) the body in question is unable to ascertain whether it holds the information because of the way the order identifies the debtor; or

(c) where disclosure of the information would involve unreasonable effort or expense.

(6) The court may disclose the information obtained to the parties in the proceedings, and in addition may use the information in the following ways:

(a) to make another request or order;

(b) to provide the creditor with information about what enforcement action it would be appropriate to take to recover the debt;

(c) to carry out functions in relation to any action taken by the creditor to recover the debt; and

(d) to disclose the information to another court where the creditor is taking action in that court.

(7) The offences in the Tribunal Courts and Enforcement Act 2007 be retained for the unauthorised use by officials of information obtained under an information request or information order.

(8) The court have the power to order that creditors may only use the information obtained under an information request or information order for certain authorised purposes; a penal notice should be attached to the order warning creditors that they may face imprisonment if they use the information for any other purpose.

(9) That parties be authorised to use information obtained under an information request or information order:

(a) for the purposes of furthering the proceedings in which the information request or information order was made;

(b) for the purposes of initiating or furthering other proceedings to enforce the same debt or debts that were the subject of the proceedings in which the information request or information order was made; and

(c) for any other purpose, with the permission of the court.

21.11 We recommend that section 92 of the Tribunals, Courts and Enforcement Act 2007 be brought into force for the purposes of enforcing family financial orders.

21.12 We recommend that the court be authorised to disclose any information obtained by way of "tracking" to the creditor.

21.13 We recommend that the court must redirect an attachment of earnings order to a debtor's new employer where it has the information to do so, unless the court is satisfied upon an application by the debtor that such a redirection is not necessary or appropriate.

CHAPTER 9

21.14 We recommend that pension sharing orders and pension attachment orders be made available for the purposes of enforcing family financial orders.

21.15 We make the following recommendations as to the restrictions that should apply on the making of a pension order for the purposes of enforcing a family financial order:

(1) Pension sharing and pension attachment orders should be made available for the purposes of enforcing a family financial order regardless of whether the court's powers to make such orders were dismissed as part of the final order concluding the financial remedy proceedings.

(2) There should be only one restriction applying to the making of pension orders for the purpose of enforcing a family financial order, as a result of previous pension orders having been made. The restriction should be that no pension sharing order may be made if a third party (that is, someone other than the two parties to the enforcement litigation) has the benefit of a pension attachment order against the same pension fund.

(3) In determining whether to make a pension sharing or pension attachment order the court should consider:

a) whether the debtor has other assets against which enforcement could be taken; and

b) whether the costs of making the order are proportionate to the debt that is owed.

21.16 We recommend that the scope of the new enforcement powers against pensions should extend to the enforcement of orders under Schedule 1 of the Children Act 1989.

21.17 We recommend that pension orders on enforcement are available only on a general enforcement application.

21.18 We recommend that in determining whether to make an order against a debtor's pension for the purpose of enforcing a family financial order, the court should take account of the tax consequences that would arise as a result of the order.

21.19 We recommend that the decision as to which party should bear the cost of any tax due as a result of orders made against the debtor's pension for the purposes of enforcing a family financial order be left to the discretion of the judge making the order.

21.20 We recommend that pension compensation sharing orders and pension compensation attachment orders be available for the purposes of enforcing a family financial order, regardless of whether the court's powers to make such orders were dismissed as part of the final order concluding the financial remedy proceedings.

21.21 We recommend that there should be only one restriction to apply to the making of such orders for the purpose of enforcing a family financial order, as a result of previous pension orders, or pension compensation orders, being made. The restriction would be that no pension compensation sharing order could be made if a third party (that is, someone other than the two parties to the enforcement litigation) has the benefit of a pension compensation attachment order or a pension attachment order against the same PPF compensation or the pension fund from which the PPF compensation derives.

21.22 We recommend the introduction of a new ground of jurisdiction under section 15 of the Matrimonial and Family Proceedings Act 1984, namely that one of the parties has an interest in a pension arrangement situated in the jurisdiction. In such circumstances the court's powers under the Act would be limited to making an order against that party's pension.

CHAPTER 10

21.23 We recommend the introduction of a protected minimum balance to apply between the making of an interim and final third party debt order, with the amount to be fixed in legislation.

21.24 We recommend expanding the scope of third party debt orders in two ways:

(1) to enforce future debts owed by the debtor to the creditor as and when they fall due (for example, payments under a periodical payments order); and

(2) to allow enforcement against future debts owed by a third party to the debtor.

21.25 We recommend that a periodic third party debt order may:

(1) operate against funds in a debtor's bank account by requiring payment to a creditor of a fixed amount at set regular intervals; and

(2) operate against other debts by requiring payment to a creditor of a fixed or proportionate amount of any sum that the third party pays to the debtor in payment of a debt, as and when payment to the debtor is made.

21.26 We recommend the following powers be available to the court on making a periodic third party debt order.

(1) Where the order is made against funds in a bank account, the power to freeze funds beyond the making of the final order.

(2) Where the order is directed to a third party who is not a bank, the power to direct that the third party must notify the creditor three days in advance of making any payment to the debtor.

(3) Where the order is directed to a third party who is not a bank, the court may set a level of funds that must be paid to the debtor by the third party before the third party makes any payment to the creditor (a final protected balance).

21.27 We recommend that the duration of a third party debt order be at the discretion of the court, but that in determining the duration the court should have regard to:

(1) the degree of the debtor's non-compliance;

(2) the impact on the creditor of the debtor's non-compliance and the potential impact of any future non-compliance;

(3) the impact on the debtor of the imposition of the order; and

(4) the impact on the third party of the imposition of the order.

21.28 We recommend that a periodic third party debt order may only be made to enforce a debt arising under a family financial order following default by the debtor in respect of that debt.

21.29 We recommend that it should be possible to apply for a third party debt order against the funds in any account in the debtor's name, regardless of whether the debtor is the sole or a joint account holder. The court should have the power to make a third party debt order in respect of any funds that:

(1) are a debt owed to the debtor; and

(2) are funds to which the debtor is beneficially entitled.

21.30 We recommend a presumption, in the context of an application for a third party debt order to enforce a family financial order against an account on which the debtor is not the only account holder, that the account holders own the funds in the account in equal shares, but with an opportunity for the creditor, debtor and the other account holders to make representations as to the ownership of the funds.

21.31 We recommend that all account holders should be able to apply for a hardship payment order in circumstances where an interim third party debt order is made against a joint account.

21.32 We recommend the introduction of a specific power for the court to order disclosure of bank statements when considering making a periodic third party debt order after allowing the parties to make representations as to whether disclosure should be ordered.

CHAPTER 11

21.33 We recommend that section 24A of the Matrimonial Causes Act 1973, and paragraph 10 of Schedule 5 to the Civil Partnership Act 2004, be extended so that an order for sale can be made at the same time as, or subsequent to, any order for the payment of money within financial remedy proceedings.

CHAPTER 12

21.34 We recommend the introduction of orders disqualifying debtors from driving and prohibiting debtors from travelling out of the United Kingdom for the enforcement of family financial orders ("coercive orders").

21.35 We recommend that the court should have the power to make a coercive order where the court is satisfied at the time of considering the application that the debtor has the ability to pay what is owed (the "threshold test").

21.36 We recommend that where the threshold test is met the court should exercise its discretion to make a coercive order if it would be in the interests of justice to do so. In determining whether the interests of justice would be met by making a coercive order the court should take account of all the circumstances of the case including:

(1) the extent of the debtor's failure to pay what is owed;

(2) the other enforcement methods that are available to the creditor and the likely success of those methods;

(3) the likely effectiveness of a coercive order in achieving compliance;

(4) the effect of making the order on the debtor's ability to earn a living; and

(5) the effect of making the order on any dependants of the debtor.

21.37 We recommend that coercive orders be available on a general enforcement application and on a specific application for a coercive order.

21.38 We recommend that the court should be able to impose coercive orders for up to 12 months.

21.39 We recommend that coercive orders should be discharged upon full payment of the debt owing at the time the application was made (and on which the application was founded), and we recommend that the debtor should have the option of asking the court to consider varying the terms of or discharging the coercive order upon part payment of what is owed.

21.40 We recommend that the creditor be entitled to make a new application for a further coercive order to take effect in respect of the same debt once the first (or subsequent) order has expired. However, on every application the court must consider the matter afresh and be satisfied that the threshold test is met and that it is in the interests of justice to make a further coercive order.

21.41 We recommend that the court have power to postpone the start of the orders to give the debtor a further period of time to pay what is due.

21.42 We recommend that the court should be able to make orders both disqualifying the debtor from driving and prohibiting the debtor from travelling out of the United Kingdom simultaneously for the purposes of enforcing the same debt.

21.43 We recommend that the court's power to disqualify a debtor from driving should be in the terms of disqualifying a debtor from holding or obtaining a driving licence.

21.44 We recommend that the court has the power to require the surrender of the debtor's driving licence.

21.45 We recommend that the court, on making an order prohibiting a debtor from travelling out of the United Kingdom, has the power to confiscate the debtor's United Kingdom passport and notify Her Majesty's Passport Office of the prohibition. In circumstances where the debtor will not surrender his or her passport, we recommend the court have power to request Her Majesty's Passport Office to cancel the debtor's passport.

21.46 We recommend that the debtors should be able to apply to the court for the prohibition order to be lifted if they have an urgent need to travel.

21.47 We recommend that for a court to impose a coercive order, the creditor should have to establish to the civil standard of proof that the debtor has the ability to pay.

CHAPTER 13

21.48 We recommend the amendment of section 32(1) of the Matrimonial Causes Act 1973 and paragraph 63 of schedule 5 of the Civil Partnership Act 2004 so that:

(1) the period of time for enforcing arrears without the court's permission is extended from 12 to 24 months;

(2) the court be directed to grant leave to enforce arrears beyond that period where it is satisfied that there are good reasons for doing so; and

(3) in deciding whether a good reason exists the court be directed to have regard to all the circumstances of the case.

21.49 We recommend that there be a free-standing power to remit arrears, only where the underlying order is capable of variation under section 31 of the Matrimonial Causes Act 1973.

21.50 We recommend that the court should have the power to remit arrears, on an application by a debtor, where it is satisfied that, due to a change in the debtor's financial circumstances, the debtor was unable to make the payments as they fell due. We also recommend that the court, in making its decision, should be directed to consider the impact on the creditor of remitting the arrears.

CHAPTER 14

21.51 We recommend the introduction of a streamlined procedure for applications for charging orders to enforce family financial orders.

21.52 We recommend that the streamlined procedure be modelled on the procedure in Part 73 of the Civil Procedure Rules for the making of charging orders in civil proceedings, with necessary modifications.

21.53 We recommend that steps are taken to ensure that on a streamlined application, debtors and interested third parties are clearly informed of their rights to object to the making of a final charging order and to request a hearing, and how to exercise those rights.

CHAPTER 16

21.54 We recommend that the costs rules that apply on the enforcement of family financial orders should be consolidated, so that there is a stand-alone set of costs rules in the Family Procedure Rules 2010.

21.55 We recommend that:

(1) where the creditor is successful in his or her enforcement application, there should be a general rule that the costs of the application will be met by the debtor; and

(2) where the creditor is unsuccessful, no general rule should apply and the court will exercise its general discretion in awarding costs.

21.56 We recommend the introduction of an explicit power in the Family Procedure Rules for judges to depart from fixed costs in family enforcement proceedings.

CHAPTER 18

21.57 We recommend the introduction of a specific direction within the Family Procedure Rules for the court to consider whether to include any terms as to enforcement when making a family financial order.

21.58 We recommend that a notice should be included on family financial orders that payment under a family financial order should continue until the order is varied or until the parties reach agreement in writing to vary the order.

21.59 We recommend that the enforcement practice direction directs the judge to consider noting for the court file a summary of his or her main findings that may be relevant to future enforcement proceedings.

21.60 We recommend that the enforcement practice direction refers to the court's power to list a mention hearing on the making of a family financial order and notes that such a listing may be beneficial where the court believes that a party will not comply, or will have difficulty in complying, with all or part of the order. The mention hearing should not be listed before a judge who has heard an FDR in the case.

21.61 We recommend that Form E, Form E1 (disclosure form in proceedings under Schedule 1 of the Children Act 1989) and Form D81 (summary of financial information when submitting a consent order) are updated to ask for the national insurance number of each party.

(Signed) DAVID BEAN, *Chairman*
NICK HOPKINS
STEPHEN LEWIS
DAVID ORMEROD
NICHOLAS PAINES

PHIL GOLDING, *Chief Executive*
22 November 2016

APPENDIX A

APPENDIX A
LIST OF CONSULTEES

Association of Pension Lawyers

A national association representing pension lawyers throughout the UK.

Birmingham Law Society

An association representing legal practitioners from Birmingham and the surrounding area.

Charles Russell Speechlys LLP

A law firm with a specialist family law team.

Clarion Solicitors

A law firm with a specialist family law team.

District Judge Robinson

A district judge sitting at the Central Family Court.

Malcolm Dodds

Clerk to the Justices for Kent.

Family Justice Council

An advisory non-departmental public body; the Council's role is to promote an inter-disciplinary approach to family justice and to monitor the court system.

Family Law Bar Association

A representative body for barristers who practise in family law.

Gavin Smith

A family law barrister.

Gwyn Evans

A family law barrister.

International Family Law Group

A specialist family law firm.

James Pirrie

A family law solicitor.

Janet Bazley QC (response approved by the Bar Council)

A barrister practising in family law.

The Bar Council is a body that represents barristers in England and Wales.

Judges of the Family Division of the High Court

High Court judges who hear family cases.

Justices' Clerks' Society

The professional society for justices' clerks, who are lawyers who advise lay justices.

Wendy Kennett

An academic at Cardiff University.

Land Registry

A Government department (non-Ministerial) responsible for the registration of the ownership of land in England and Wales.

Law for Life/Advicenow

A national charity that aims to increase access to justice by providing information on civil rights. Advicenow is an independent, not-for-profit website, run by the charity Law for Life.

Law Society

The representative body for solicitors in England and Wales.

Magistrates Association

A national charity supporting and representing Magistrates, who we refer to as lay justices in this Report.

Money Advice Trust

A UK charity that helps people to tackle debt and manage money.

National Family Mediation

A national mediation provider.

Penningtons Manches

A law firm with a specialist family law team.

Resolution

An organisation representing over 6,500 family lawyers and other professionals working in family law.

Rhys Taylor

A family law barrister.

Stone King
A law firm with a specialist family law team.

Tony Roe
A family law solicitor.

We are grateful to a number of members of the public who also responded to the consultation

ADVISORY GROUP MEMBERS

John Baker, Justices' Clerk (London Family)

Janet Bazley QC, 1 Garden Court

David Burles, 1 Garden Court

District Judge Darbyshire

District Judge Hickman

David Hodson OBE, International Family Law Group

His Honour Judge Oliver

James Pirrie, Family Law in Practice

Naomi Rainey, then at Slater and Gordon Lawyers, now at Vardags

District Judge Robinson

David Salter, Mills and Reeve

Gavin Smith, 1 Hare Court

Rhys Taylor, 30 Park Place

Meg Van Rooyen, Money Advice Trust

APPENDIX B

APPENDIX B

FIGURE 1

ESTIMATED NUMBER OF APPLICATIONS TO ENFORCE FAMILY FINANCIAL ORDERS

1.1 Enforcement cases may arise from the need to enforce any of the different types of family financial orders, namely:

(1) Orders for a financial remedy made under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004, and orders for interim maintenance made under those same Acts ("financial remedy orders");

(2) Orders made under Schedule 1 to the Children Act 1989; and

(3) Orders for costs made on petitions for divorce and applications for the dissolution of a civil partnership.

1.2 Data that we have obtained from the Central Family Court ("CFC") suggests that about 9% of financial remedy cases may lead to enforcement action.[1] We have assumed that the same rate can be applied to orders for interim maintenance and Schedule 1 orders. [2]

1.3 Taking an average of the number of family financial orders made in the years from 2013 to 2015[3] and applying 9% as the rate of orders that require enforcement, gives the following number of cases requiring enforcement action every year:

(1) around 3,650 financial remedy orders; and

(2) around 40 Schedule 1 orders.[4]

[1] It may be that the nature of the cases heard at the Central Family Court, which tend to be complex in nature, means that the percentage may not be truly representative of the number of enforcement applications brought in different family court hearing centres. There are many variables that are difficult to account for, so we use the figure of 9% illustratively.

[2] There is no reason to assume that a different rate of enforcement applies to orders for maintenance pending suit or Schedule 1 orders.

[3] Family Court statistics quarterly: January to March 2016 tables, Table 11. See https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2016 (last visited 28th October 2016).

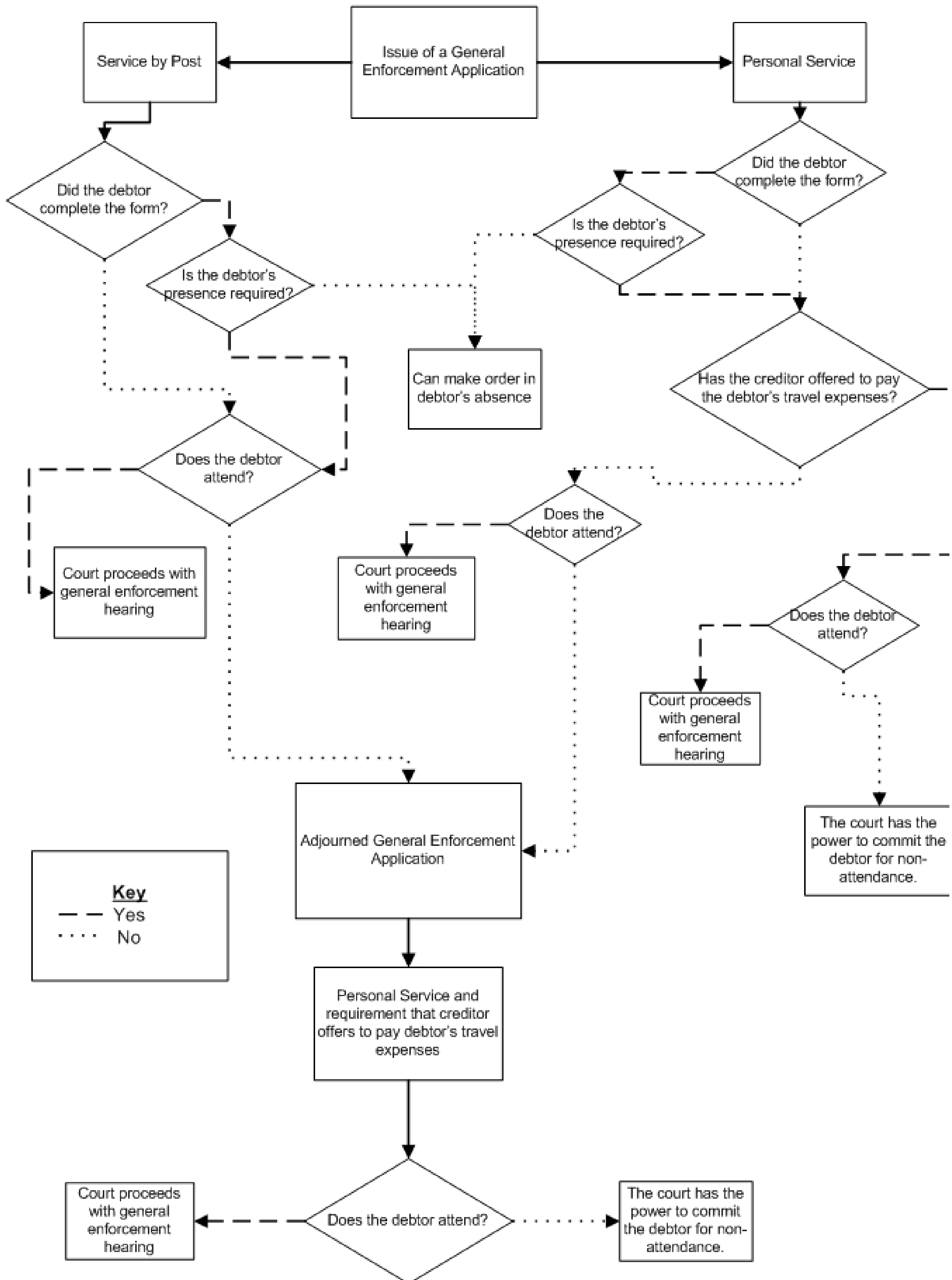
[4] Data on number of Schedule 1 orders was provided to us by Family Court statistics quarterly.

1.4 We do not assume that the same enforcement percentage can be applied to costs orders made on petitions for divorce and applications for the dissolution of civil partnerships as we understand that they give rise to fewer issues of non-compliance. For illustrative purposes, if 50% of the number of decree absolutes (that is the order which ends a marriage) made in 2015[5] include an order for costs, and 1% of those costs orders require enforcement action, that would result in about 500 additional enforcement cases.

1.5 In total, therefore, we assume that family financial orders give rise to, on average, about 4,200 enforcement cases per year.

[5] 102,827 decree absolutes were made in 2015: Family Court statistics quarterly: January to March 2016 tables, Table 7. See https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2016 (last visited 28th October 2016).

Appendix B - Figure 2: Proposed general enforcement application procedure



APPENDIX B

FIGURE 3

DISCLOSURE REQUIRED BY DEBTOR ON VARIOUS ENFORCEMENT APPLICATIONS

Enforcement application	**Form of disclosure**
Attachment of earnings	Form N56 Form N56 requires the debtor to provide information regarding his or her dependants, employment details, bank account and savings, income, expenses and main debts.
Third party debt order	Written evidence of objection (if applicable) Banks and building societies served with an order must provide information regarding all sole accounts held by the debtor
Charging order	Written evidence of objection (if applicable)
General enforcement application	Response to creditor’s questions
Judgment summons	N/A – protection against self-incrimination
Writs and warrants	N/A
Sequestration	N/A
Order to obtain information	EX140 (response to oral questions recorded on this form)

APPENDIX B

FIGURE 4

INFORMATION AND DOCUMENTATION THAT THE ENFORCEMENT FINANCIAL STATEMENT SHOULD CAPTURE

Information

(1) Name

(2) Age

(3) Address and the nature of the debtor's residence (for example, owner-occupied, renting, lodging, other)

(4) NI number

(5) Marital status

(6) Telephone number

(7) Information about income from any/all employment undertaken by the debtor, including (for each employment):

  (a) Occupation

  (b) How many hours worked p/w

  (c) Whether the position is permanent or temporary

  (d) Name and address of employer

  (e) How the debtor is paid, for example an annual salary, or on an hourly rate and whether the debtor is entitled to any additional payments such as commission or bonuses

  (f) Gross income for the last year

  (g) Average net income for the last three months

  (h) Method of payment to the debtor, and if directly to his or her bank account, details of that account

(8) Information about any/all income from self-employment (either operating as a sole trader or by taking an income as a shareholder in a company) or partnership, including:

(a) Occupation

(b) Nature of self-employment (sole trader, shareholder in company, or partnership) If the debtor is a shareholder in a company, the extent of the debtor's shareholding and how many other shareholders there are If the debtor is a partner in a partnership, the debtor's share of the partnership and how many other partners there are

(c) Name of business

(d) Any office held by the debtor in the business (for example, a directorship)

(e) Number of employees employed by the business

(f) The business' last annual turnover

(g) Profit made by the business over the last year, and the debtor's share of the profit

(h) The funds received by the debtor over the last twelve months and (if relevant) how those funds have been taken

(i) Any money owed by the business to the debtor

(j) Details of the business' accountant (if relevant)

(k) Details of any live contracts

(9) Information about any/all state benefits (including tax credit and pension credit) received by the debtor, including:

(a) Type of benefit

(b) Amount received and frequency of the payment

(10) Information about any income received from a pension fund, including:

(a) Name and address of pension provider

(b) Type of pension fund

(c) When payments commenced

(d) Amount received and frequency of the payments

(11) Information about any other income – for example, from investments, rental income, student grants or from an interest in a trust fund

(12) Information about any real property in which the debtor has an interest (in England and Wales or abroad), including:

(a) The address of the property

(b) Land registry title number

(c) Details of who owns the property and the extent of debtor's legal and beneficial interest in the property

(d) An estimate of the current value of the property

(e) The details of any mortgages secured against the property and the outstanding balances, and if the property is jointly owned, the share of the mortgage payments that the debtor is paying

(f) Who occupies the property/what use is currently made of the property

(13) Information about any bank or building society accounts in which the debtor has an interest, including:

(a) The name and address of the relevant bank or building society

(b) The account number

(c) The type of the account

(d) The balance of the account

(e) If the account is a joint account, the names of the other account holders

(14) Information about any pension rights held by the debtor, including:

(a) Name and address of pension provider

(b) Type of pension fund

(c) Value provided by last pension statement

(d) Whether the fund is in payment

(15) Information about any shareholding/investment or insurance policies held by the debtor, including:

(a) For any shareholding/investment, the name, the type of investment, the size of the holding, the current value, and if any other person has an interest in the shareholding, his or her details and the value of his or her interest

(b) For any insurance policy, the company the policy is held with, the type of policy, the policy number, the maturity date, and, if applicable, the current surrender value

(16) Information about any other asset owned by the debtor (either owned outright, or in which the debtor has an interest, for example under hire purchase or conditional sale etc) worth £500 or more, and any cash sums held by the debtor of £500 or more

(17) Information about any money owed to the debtor, but not money owed by his or her business nor money owed to the business and accounted for in the value of his or her business assets

(18) Information about any CGT that would be payable on the disposal of any property or asset, including an estimate of the liability

(19) Information about the debtor's regular and essential outgoings, to include mortgage payments/rent (not including payments made by way of housing benefit), council tax, utility bills, food, clothing, loan repayments, telephone payments etc

(20) Information about debts owed by the debtor, for example to HMRC, or on a credit card

Documentation

To verify the information provided in the statement, we recommend that the debtor be required to provide, as a minimum, the documentation set out below, so far as the documentation is relevant to the individual debtor

(1) The debtor's payslips for the last three months and last P60

(2) The debtor's last two tax returns and last two years' of personal accounts

(3) For every business in which the debtor has an interest either as a partner, a shareholder in a private company[1] or a business that the debtor runs as a sole trader, the last two years' balance sheets and profit and loss accounts, a set of current management accounts, and any bills or invoices owed to the judgment debtor

(4) The debtor's last pension statement, showing the value of the debtor's pension rights and the income received if the pension is in payment

(5) Official Copy Land Registry entries for each property in which the debtor has an interest

(6) Latest mortgage statement for each mortgage secured against property in which the debtor has an interest

(7) Any share certificates or documents verifying the extent and value of the debtor's interest in any investments or insurance policies

[1] We have recommended limiting this to private companies as it should be relatively easy to value the debtor's shareholding in a publicly traded company

(8) If the debtor lives in rented accommodation, a copy of the relevant tenancy agreement

(9) If the debtor has an interest in a property that is let, a copy of the tenancy agreement

(10) Electricity, gas, water and council tax bills for the last year

(11) Copies of bank statements for each account in which the debtor has an interest showing the current balance and the last three months' of transactions We recommend that this obligation does not extend to business bank accounts except where the debtor is running his or her business as a sole trader

(12) Any court orders under which the debtor continues to owe money

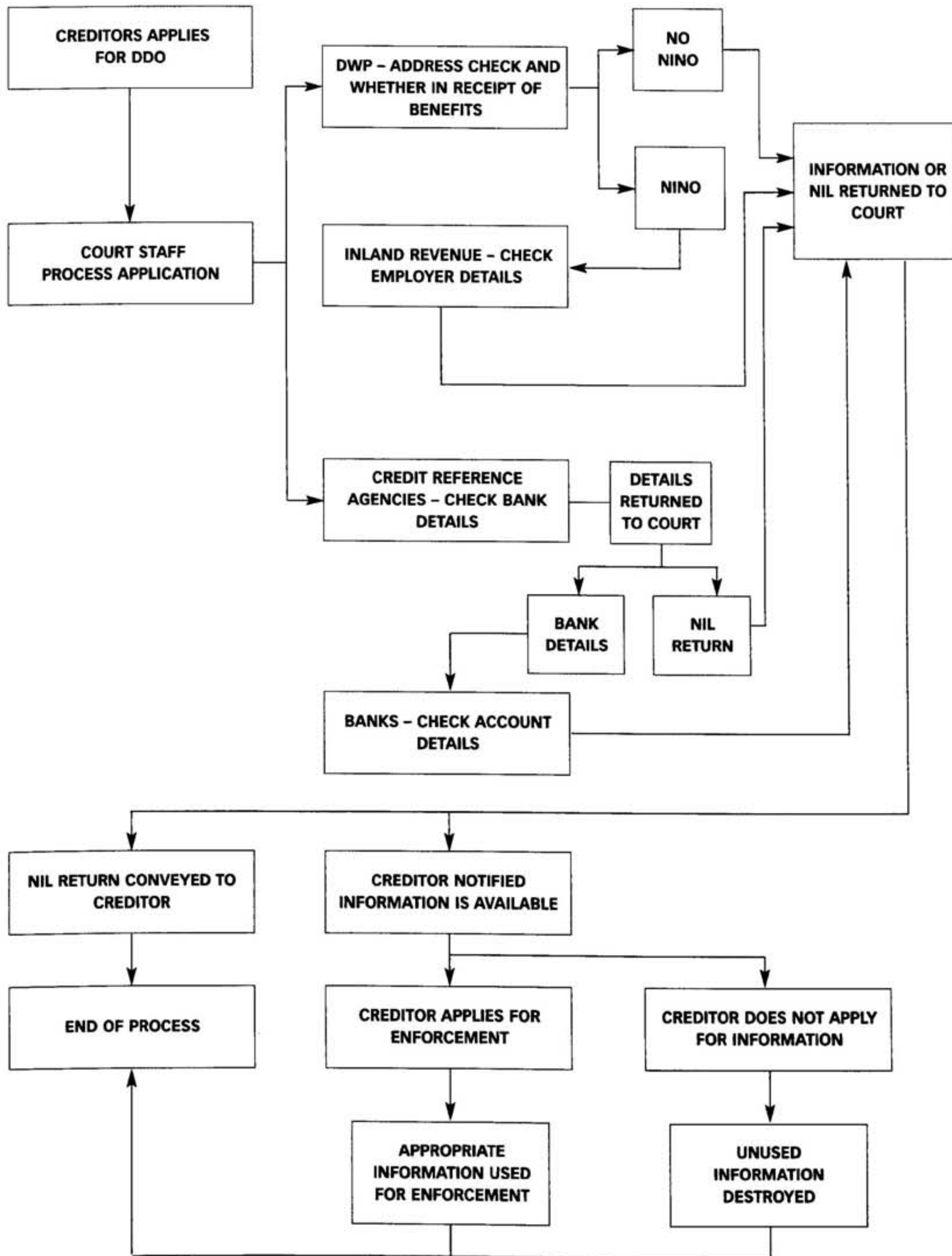
(13) Any hire-purchase or similar agreements under which the debtor continues to owe money

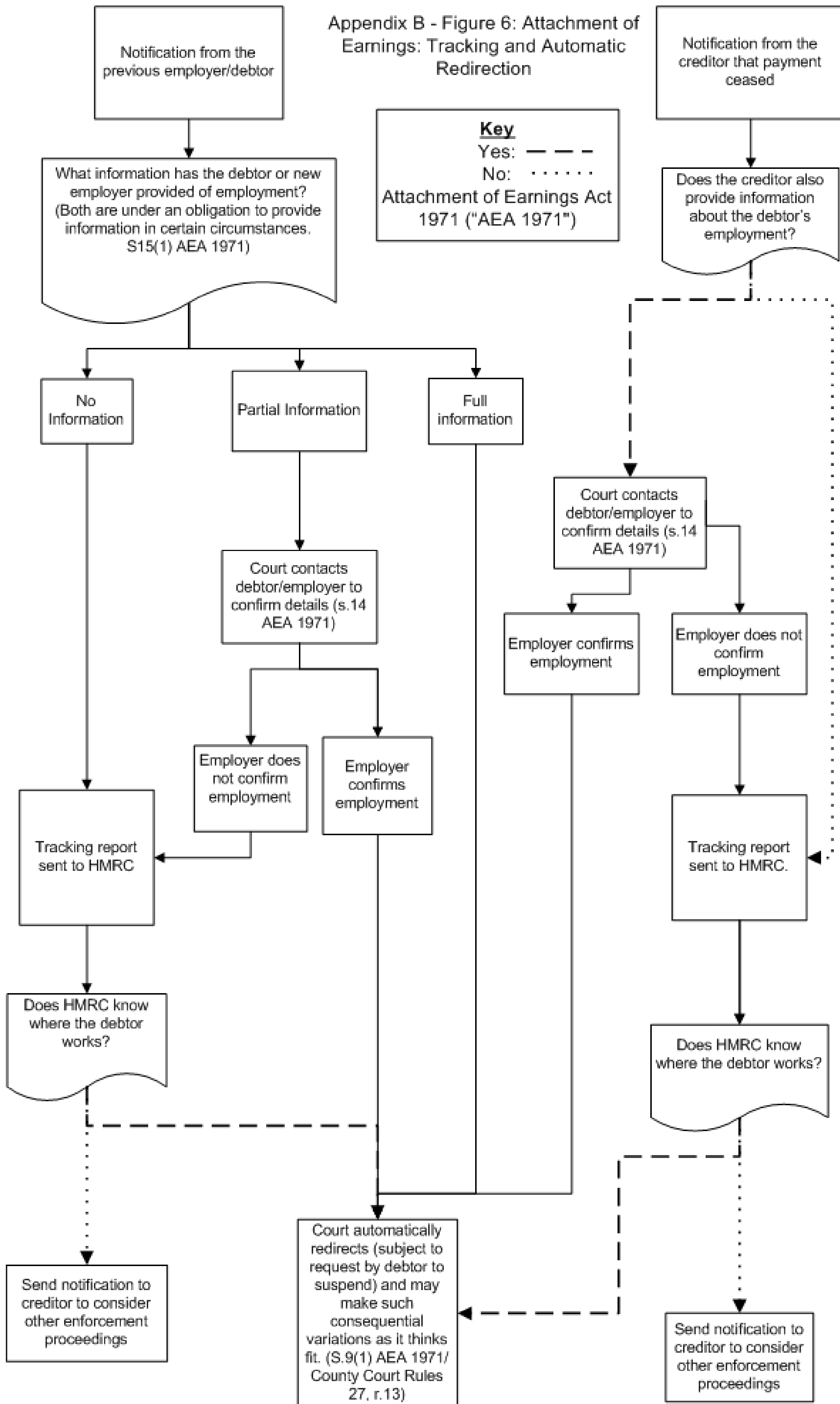
(14) Any other outstanding bills

(15) Any other documents that the debtor considers verifies the information provided in the financial statement

Flow Chart C

3





Appendix B - Figure 6: Attachment of Earnings: Tracking and Automatic Redirection
Key
Yes:
No:
Attachment of Earnings Act 1971 ("AEA 1971")
Notification from the previous employer/debtor
What information has the debtor or new employer provided of employment? (Both are under an obligation to provide information in certain circumstances. S15(1) AEA 1971)
No Information
Partial Information
Full information
Court contacts debtor/employer to confirm details (s.14 AEA 1971)
Employer does not confirm employment
Employer confirms employment
Tracking report sent to HMRC
Does HMRC know where the debtor works?
Send notification to creditor to consider other enforcement proceedings
Court automatically redirects (subject to request by debtor to suspend) and may make such consequential variations as it thinks fit. (S.9(1) AEA 1971/ County Court Rules 27, r.13)
Notification from the creditor that payment ceased
Does the creditor also provide information about the debtor's employment?
Court contacts debtor/employer to confirm details (s.14 AEA 1971)
Employer confirms employment
Employer does not confirm employment
Tracking report sent to HMRC.
Does HMRC know where the debtor works?
Send notification to creditor to consider other enforcement proceedings

APPENDIX B

FIGURE 7

WORKED EXAMPLE OF PERIODIC THIRD PARTY DEBT ORDERS

1.1 Our recommendations to expand the scope of third party debt orders mean they could be used in new ways to enforce family financial orders.

1.2 We recommend that third party debt orders should be able to operate periodically. The result is that a periodic third party debt order may be used to enforce an ongoing periodical payments order against income that the debtor receives from third parties who do not employ the debtor.[1]

1.3 When enforcing against the debtor's income it is important to take account of the minimum amount that the debtor needs every month to meet his or her essential outgoings. We recommend that a "final protected balance" is set to ensure that the debtor can receive what he or she needs.

1.4 On the next page is an example of a situation where a periodic third party debt order could be used to enforce a periodical payments order against the income of a self-employed debtor, and then on the following page, a table showing how the order would operate in practice.

[1] If the debtor were employed then enforcement could be by way of an attachment of earnings order under the Attachment of Earnings Act 1971.

Facts

A owes B £500 p/m under a periodical payments order. A has not paid B for the last three months as A believes B is in a new relationship and does not want to continue making periodical payments. A is a self-employed florist.

A's biggest client is Hotel X, a hotel chain. A completes a regular weekly order of floral arrangements for Hotel X, for which Hotel X pays A, on average, £625 p/w. A sometimes undertakes work for other clients but it is irregular and does not generate a lot of income.

B recovers the arrears that A owes by way of a third party debt order against funds in A's account. B thinks that A will continue not to pay what is owed and asks the court to make a periodic third party debt order. The court agrees with B and decides a periodic third party debt order should be made.

What would be the terms of the order and how would it operate in practice?

Terms of the order

A's income from Hotel X is, on average, £2,500 p/m. A has business expenses of £500 p/m, meaning that A's profit is £2,000 p/m. As A is self-employed, A must make provision to pay tax and national insurance contributions out of that profit. In addition to that provision, A has other essential outgoings such as rent.

The court makes a periodic third party debt order directed at Hotel X. The court sets the final protected balance at £1,300 and the order requires Hotel X, in each period of 28 days from the date the order begins:

1. to pay to B, 50% of every payment that Hotel X is due to make to A for A's services; but

2. not to make any payment to B until payments to A in that period have totalled £1,300; and

3. not to make any payment to B that takes the total amount paid by Hotel X to B above £500 in that period.

Week	Payment from Hotel X to A (debtor)	Payment from Hotel X to B (creditor)
Week 1	£625	£0 *No payment to B as final protected balance not reached*.
Week 2	£625	£0 *No payment to B as final protected balance not reached.*
Week 3	£337.50 *Payment of £50 to A to reach final protected balance of £1,300.* *50% of remaining payment of £575, paid to B and 50% to A (£50 + £287.50)*	£287.50
Week 4	£412.50 *As final protected balance reached, 50% of total payment of £625 (so £312.50) is available to be paid to B. However, that would take payments to B over the £500 limit, so only £212.50 is paid to B (so as to reach the £500 limit) and remainder paid to A.*	£212.50
Total	£2,000	£500

APPENDIX C

Record of examination

(Individual)

In the	
Claim No.	
Appn. No.	

Judgment Creditor:

Judgment Debtor:

1 Personal Information

Full Name

Your age?

Present address

National insurance no.

Are you
- ☐ married?
- ☐ single?
- ☐ separated?
- ☐ divorced?
- ☐ living with partner?

Phone numbers:

home

work

mobile

other

Do you intend moving to another address? ☐ Yes ☐ No

If Yes, what will your new address be and when are you moving?

Date

Do you have any dependant children? ☐ Yes ☐ No

If Yes, what are their names and ages?

Name	Age

Do you have other dependants living with you, *eg. elderly relatives*? ☐ Yes ☐ No

If Yes, what are their names and ages and to what extent are they dependant?

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2 Employment Status

Are you

- ☐ employed? Go to section 3 below
- ☐ self employed? Go to section 4 page 3
- ☐ unemployed? Go to section 5 page 5
- ☐ retired? Go to section 6 page 5

3 Employment Details

What is your occupation?

Where is your place of work if different?

What is the name and address of your employer and your employee number?

employee number

What is your gross pay *ie. before tax, national insurance deductions?* £ per

What is your average take home pay including overtime and commission? £ per

Do you receive Working Tax Credit? ☐ Yes ☐ No

If Yes, how much? £ per

How often are you paid? ☐ weekly ☐ monthly ☐ other ____________

On which day are you paid?

Is your pay paid ☐ in cash ☐ by cheque ☐ direct to bank or building society account?

If direct to bank or building society account what is the name and address of the branch and account number?

account number

Do you have any jobs other than your main job? ☐ Yes ☐ No

If Yes, ask for all the above details in relation to all other jobs and set out information below.

Go to Section 7 page 5

4 Self Employed

How long have you been self employed? [ ]

What work do you do? [ ]

What is the name of your business? [ ]

Do you have business premises? eg. shop, yard, lockup

☐ Yes

☐ No

If Yes, what is their address? [ ]

What is your annual turnover? £

What amount of profit did the business make over the last year? £

How much do you draw from the business? £ per

What were your total drawings in last 12 months? £

Are you a ☐ sole trader? ☐ partner?

If a partner,

(a) How many partners are there? [ ]

(b) What is your share of the partnership ? %

How many employees do you have? [ ]

Do you complete Inland Revenue self assessment? ☐ Yes ☐ No

Do you have accounts? ☐ Yes ☐ No

Do you employ an accountant?

☐ Yes

☐ No

If Yes, what is the accountantís name and address? [ ]

If you donít have an accountant are accounts audited by a third party?

☐ Yes

☐ No

If Yes,give name and address and say when audit takes place? [ ]

Date of audit

Will you allow the creditor to approach your accountant or auditor or Inland Revenue to verify the information you have given in this section?

☐ Yes

☐ No

Are you working on any contracts at the moment?

☐ Yes

☐ No

If Yes, give details below

Name and address of customer	Nature of work	Contract price £	Amount outstanding £	Date payment expected

Is any money still due to you for work already done?

- [ ] Yes
- [ ] No

If Yes, give details below

Name and address of customer	Nature of work	Contract price £	Amount outstanding £	Date payment expected

If money (see above) is overdue what steps are you taking to recover it?

Do you have contracts for work in the future?

- [ ] Yes
- [ ] No

If Yes, give details below

Name and address of customer	Nature of work	Expected price £

Go to Section 7 page 5

5 Unemployed

How long have you been unemployed?

What is your trade / training /profession?

What steps are you taking to obtain employment?

Do you have any outstanding job interviews?

☐ Yes

☐ No

If Yes, when?

What state benefits do you receive? *(Housing benefit, if any should be included section 8b on page 7)*

Type of benefit	Amount	Frequency of payment	DSS/BA ref.

Go to Section 7 below

6 Retired

When did you retire?

By whom are your pension(s) paid, how much is paid and when? *(include both state and private pensions)*

Pension from	Amount	Frequency of payment

Go to Section 7 below

7 Other Income

Is there anyone else in your household who is employed? *(Do not include tenants/lodgers. See section 8 on page 6)*

☐ Yes

☐ No

If Yes, how much do they contribute to the running of the home?

£ per

What other state benefits do you receive? *(Housing benefit, if any should be included section 8b on page 7)*

Type of benefit	Amount	Frequency of payment	DSS/BA ref.

Go to Section 8 page 6

8 Residence

Is your home

☐ your own property?
Go to 8a below

☐ lodgings?
Go to 8b page 7

☐ rented from a council or housing association?
Go to 8b page 7

☐ rented unfurnished from a private landlord?
Go to 8b page 7

☐ rented furnished from a private landlord?
Go to 8b page 7

☐ other ____________________
(e.g. mobile home) Go to 8b page 7

8a Your own property

Are you the sole owner? ☐ Yes ☐ No

If No, name joint owner(s) [ ]

Do you own the ☐ freehold? ☐ leasehold?

When did you buy the property? [ ]

Is your home a ☐ house? ☐ bungalow? ☐ flat?

Is it ☐ detached? ☐ semi-detached? ☐ terraced?

How many of the following rooms does it have? [ ] living rooms? [ ] kitchens? [ ] bedrooms? [ ] bath/shower rooms?

How much Council Tax do you pay per year? £

What was the purchase price of property? £

What is its value now? £

Is your home mortgaged? ☐ Yes ☐ No

If Yes, what is the name and address of your mortgage lender? [ ]

How much are your mortgage payments per month? £

What type of mortgage do you have? *eg. repayment, endowment etc.* [ ]

How long is the mortgage for? years

When did you take out the mortgage? [ ]

How much is currently owed under the mortgage? £

Is some or all of the interest paid by the Benefits Agency? ☐ Yes ☐ No

If Yes, how much is paid each month? £

Do you let any part of your home?

☐ Yes
☐ No

If Yes, give names of the tenants/lodgers and details of rent received

Do you have any loans secured on your home? (e.g. further mortgage)

☐ Yes
☐ No

If Yes, give the same details as for the first mortgage

[Go to Section 9 page 8]

8b Rented property

Do you rent ☐ on your own? ☐ jointly?

What is the name and address of your landlord?

How long have you lived at the property? ____months ____years

Do you share parts of your home with someone unconnected with you?

☐ Yes
☐ No

Do you pay any additional service charges in connection with the premises?

☐ Yes
☐ No

If Yes, give details £ per

How much rent do you pay? £ per none ☐

How much Council Tax do you pay a year? £ none ☐

Do you sub-let any part of your home?

☐ Yes
☐ No

If Yes, give names of tenants/lodgers and details of rent received.

Do you receive housing benefit?

☐ Yes
☐ No

If Yes, give details £ per paid to

[Go to Section 9 page 8]

9 Savings, Investments and other Assets

Do you own any property other than your home? ☐ Yes ☐ No

If Yes, give the address and value and details of any mortgages and lettings

Do you have any bank, building society or other accounts? ☐ Yes ☐ No

If Yes, give details below

Name & Address of Bank Building Society	Account No.	Type of Account	Balance	Sole or joint A/c	Name(s) of joint account holder(s)

Do you have any shares, investments (eg. ISAs, Tessas etc.), insurance/assurance policies or premium bonds? ☐ Yes ☐ No

If Yes, give details below

Are you making contributions to a pension scheme? ☐ Yes ☐ No

If Yes, give details

Do you have any of the following items and how long have you had them?

	Age (years)	Is it owned by you, on hire purchase credit sale or rented?	If not owned by you, give; Name of Creditor	Amount still owed	Payments
☐ Microwave					
☐ Hi-fi / surround sound					
☐ Television (No.______)					
☐ Video					
☐ Camcorder					
☐ Computer					
☐ Dishwasher					
☐ Camera					
☐ Dining Room suite					
☐ Caravan					
☐ Mobile telephone					
☐ Musical instruments..					
☐ Other itemsÖ .					

Do you own a motor vehicle?	☐ Yes ☐ No	If Yes, give age, make, model value and registration number. State whether it is owned by you, or subject to a hire purchase/ rental agreement.
Do you have any assets not previously mentioned?	☐ Yes ☐ No	If Yes, give details

Assets	Value

Does anyone owe you money, which is not a business debt or for work you have done?	☐ Yes ☐ No	If Yes, who owes you money and how much do they owe?

	Value

10 Other Debts or regular payments and court orders

Expenses

Do not include payments made by other members of your household out of their own income or priority debts listed opposite

Mortgage	£	per
Rent	£	per
Council tax	£	per
Gas	£	per
Electricity	£	per
Water charges	£	per
Housekeeping, food, school meals	£	per
Travelling expenses	£	per
Childrenís clothing	£	per
Maintenance/child support payments	£	per
Student loan repayments	£	per
Mail order payments	£	per
HP repayments	£	per
Digital/satellite TV subscriptions	£	per
Telephone	£	per
Mobile phone	£	per
Other expenses (*not court orders, priority* debts or credit debts listed left)	£	per
	£	per
	£	per
Total Expenses	**£**	**per**

Priority Debts

This section is for arrears only. DO NOT include regular expenses listed left

			Total arrears outstanding
Rent arrears	£	per	£
Mortgage arrears	£	per	£
Council tax/Community charge arrears	£	per	£
Water charge arrears	£	per	£
Fuel arrears: Gas	£	per	£
Electricity	£	per	£
Other	£	per	£
Maintenance arrears	£	per	£
Income tax	£	per	£
VAT	£	per	£
National Insurance	£	per	£
Others *(give details below)*	£	per	£
	£	per	£
	£	per	£
	£	per	£
Total Priority Debts	**£**	**per**	**£**

Have any court orders been made against you?

☐ Yes

☐ No

If Yes, give details below

Name of court and case number	Date of Judgment or order	Amount of Judgment or order	Instalments payable per month	Name of creditor	Total still owed	Are payments up to date? (yes/no)	If no, how much in arrears?
TOTALS							

Do you owe money on credit cards or any other loans (not mortage or business)?

☐ Yes

☐ No

If Yes, give details below

Name of Creditor	Total amount owing	Instalments payable per month	Are payments up to date? (yes/no)	If no, how much in arrears?
TOTALS				

Have any bankruptcy proceedings been issued against you?

☐ Yes

☐ No

If Yes, what is the court name and case no.

Is the petition

☐ still pending?

☐ order made but discharged?

☐ order has been made but not discharged?

☐ other outcome? *(give details below)*

Has an Individual Voluntary Arrangement been made?

☐ Yes

☐ No

If Yes, give the date

If No, is there a current proposal for one?

☐ Yes ☐ No

Give details of Trustee/ Insolvency Practitioner/ Administrator, supervisor

11 Offer of Payment

Can you make an offer of payment? ☐ Yes ☐ No

If No, please explain why

What is your offer of payment?

Pay in full by ______ day of ______

Instalments of £ ______ per ______ to start on ______

Method of payment ☐ postal order ☐ cheque ☐ direct debit ☐ standing order ☐ payment book ☐ cash

I certify that this is a correct record of the answers I gave to the questions in this document.

Signed ______ Judgment Debtor

Print name ______

Date ______

The judgment debtor refused to sign this record of evidence.

Signed ______ Court Officer

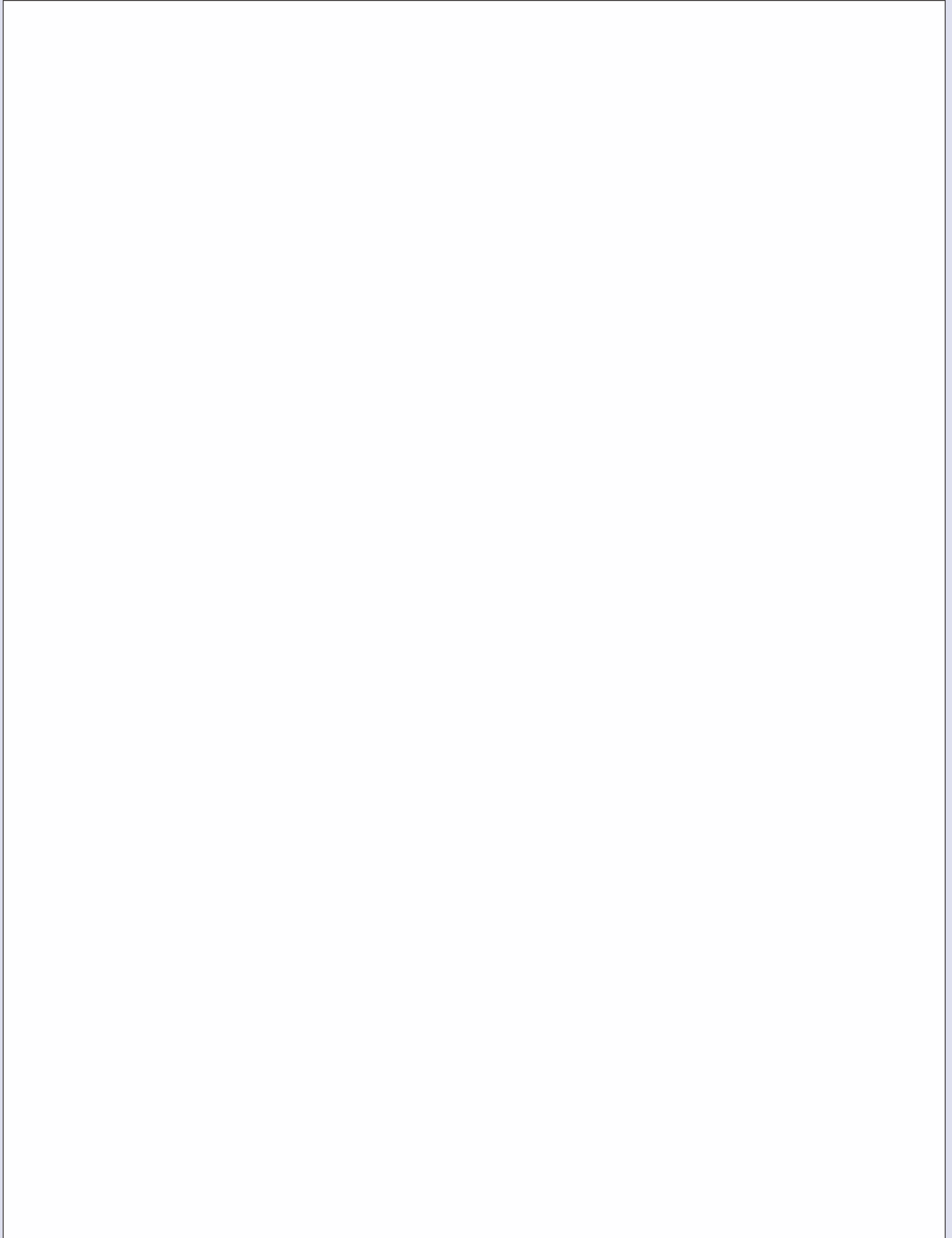
Print name ______

Date ______

The following costs of the examination have been allowed and added to the judgment debt £ ______

12 Documents produced

The judgment debtor produced the following documents:



APPENDIX D

Comments on the use of the EX140 as a financial statement for enforcement of family financial orders

Here are some detailed comments on the proposals to use a modified form of the EX140 as a financial statement for enforcement of family financial orders. We have some concerns over the suitability of the form as it does not seem fit for purpose in its current format.

The form is in general need of an update and the layout is confusing. Some of the ways in which the relevant financial information about a person's financial situation is to be found is scattered across the form instead of being kept in a central place in one format so that you can gain a full picture of someone's circumstances. Income in particular needs putting together in a summary.

There are some major gaps in the form as far as we can see, especially in section 10. This is not an adequate financial statement as it stands. Unless all the debts someone has are included, then a full picture of their income, outgoings and liabilities will not be obtained.

Again we would refer you to the Common Financial Statement (CFS)[1] which sets out how a debt adviser would approach completing a comprehensive financial statement. This is the tool in use at the moment across industry and some Government depts. such as Insolvency Service for DROs and IVAs, AIB, FCA CONC rules and so on. For an easy-to-use format financial statement which uses CFS methodology, have a look at the National Debtline budgeting tool. https://www.nationaldebtline.org/EW/steps/step2/Pages/Step_2_11.aspx

The Money Advice Service is developing the Standard Financial Statement (SFS) which builds on the CFS and is due for launch later in the year.[2] This will then be used in the relevant departments. We hope that the Money Advice Service is talking to the Ministry of Justice about adopting the SFS into court forms more generally. The CFS is already in the draft pre-action protocol for debt.

We have not repeated any of the additional changes you wish to see on the EX140 as these have already been identified in the paper.

Documents to accompany the statement

Clearly the documentation required to comply with an enforcement order, is always going to be more onerous than what would be required for a debt advice financial statement.

We would suggest that the section (14) "any other outstanding bills" be clarified. Does this mean all the debts that someone might have including credit agreements, or household bills only?

[1] http://www.cfs.moneyadvicetrust.org/

[2] https://www.moneyadviceservice.org.uk/en/corporate/industry-support-for-single-tool-to-help-indebted-people

Comments on EX140 form

We have attempted to match this with the CFS wherever possible.

Number	Section	Comments
1	**Personal information**	
	The marital status questions	The options need expanding to include: • Widowed • Civil Partnership
2	**Employment status**	
		The options for employment status are too limited as there are only 4 possible options. We have identified these additional common types of employment. • Sick • Disability • Carer • Student
3	**Employment details**	
		There is no option to say how many hours are worked or whether employment is full- time or part-time. You also cannot select whether it is temporary work or a zero hours contract.
		There is no mention of pension contributions which may be automatically deducted from salary e.g. under work pension auto-enrolment.
	Do you receive working tax credit?	This question should not form part of the employment details. Both working tax credit and child tax credit are paid by HMRC usually directly into a recipient's bank account. Questions about tax credits should form part of the picture in "other income".
4	**Self employed**	
	References to Inland Revenue	Needs updating to HMRC
5	**Unemployed**	
	Unemployed section	This is a very limited description. As we said above, the options need to be expanded. Either "unemployed" should be renamed to incorporate other options such as: • Sick • Disability • Carer • Student (There may be other appropriate employment status types to add.) Alternatively, there should be new sections to reflect these types of employment status. Each comes with its own income and benefits and would help to build a more comprehensive picture of circumstances.
	Table asking what	"DSS/BA ref" This needs updating as neither DSS or

	state benefits do you receive?	BA are current part of DWP.
6	**Retired**	
		Retired seems a rather old fashioned reference . Usually refer to pension age as people do not always formally “retire”.
		No reference to pension credit in the box about pensions
7	**Other income**	
		This is currently the section to use to include all the other income that is received. It is not set out in a helpful way and is unlikely to capture the type of benefit income for the employment statuses we have identified above. There is nowhere to include maintenance received, nor is there anywhere to include student income such as student grants/loans.
	Table asking what other state benefits do you receive?	“DSS/BA ref” This needs updating as neither DSS or BA are current part of DWP.
8	**Residence**	
		Limited housing status options. Could include: • Homeless • Shared ownership Would suggest updating the word “lodgings” to “boarding or living with parents/family”
8a	**Your own property**	
	Is some or all of the interest paid by the Benefits Agency	Need updating to DWP (I would think).
	Council tax	Not sure why the form asks for council tax per year as it also asks about council tax in section 10.
8b	**Rented property**	
	Council tax	Not sure why the form asks for council tax per year as it also asks about council tax in section 10.
	Shared ownership	There is nowhere to put this information in either 8a or 8b
	Do you receive housing benefit?	There is always an issue with housing benefit on financial statements. If you include it in the rented property section, then it makes sense to include instructions in section 10 to either include rent you pay in full or after housing benefit has been taken into account.
9	**Savings, investments and other assets**	
	Do you have any shares, investments e.g. ISAs, TESSAs etc	Suggest remove TESSA as defunct in 2004!
	The pension section	This needs rethinking. The employment section has no references to pension payments under work pension or auto-enrolment.

		The section under assets only asks if making contributions to a pension scheme. It does not ask about pension assets.
		Agree that the list of assets should be removed and replaced with the wording suggested in the paper.
	Do you own a motor vehicle?	The wording of the section asks you to "state whether it is owned by you, or subject to a hire purchase/rental agreement". Would suggest this wording is updated to reflect the different forms in which you can buy a car these days. such as hire purchase, conditional sale, lease purchase, personal contract purchase and hire agreement.
10	**Other debts or regular payments and court orders**	
		There are substantial changes we would suggest to the expenses and priority debt section.
	Expenses	Suggest including the following essential outgoings • Second mortgage or secured loan • Ground rent/service charges • Mortgage endowment and mortgage PPI • Building and contents insurance • Pension and life insurance • Other utilities (coal, oil, calor gas) • TV licence • Magistrates' court fines (unless covered in court order section) • Childcare costs • Adult care costs • Healthcare costs We would also suggest: • "HP repayments" would be clearer if changed to "Hire purchase or conditional sale" • "Mail order payments" is not normally an essential outgoing but some schools of thought think that people should be able to list a catalogue used to buy clothing as an essential outgoing. • "children's clothing". We would expect "clothing and footwear" for the whole family should be included, not just for children.
	Priority debts	The following are missing from the list of priority debts: • Second mortgage or secured loan arrears • Magistrates' court fine arrears (see comment

		above) • Hire-purchase or conditional-sale arrears • Phone arrears • Benefit and tax credit overpayments Water is not really a priority debt (as cannot disconnect) although confusingly is an essential outgoing so should be included in the "expenses" column.
	Have any court orders been made against you?	It would be helpful to differentiate between county court and high court judgments as opposed to a magistrates' court fine here as people get them very confused. A magistrates' court fine is a priority debt and should be differentiated.
	Do you owe money on credit cards or any other loans (not mortages or business)	Typo on mortgage This section could helpfully add other types of debt in such as home-collected credit, payday loans, catalogues, bills of sale, rent to own, bank building society loans, family or personal debts (and water if removed from priority debts section)
		Where do you set out parking penalties?
		Where would you set out hire purchase/conditional sale agreements? We would include in priority debts.
		Where would you set out benefit and tax credit overpayments? We would include in priority debts.
	The form asks if bankruptcy or an IVA has been put in place.	This section should also ask about debt relief orders[3] which is another formal insolvency option that was not available when the form was designed. For the sake of completeness should probably ask if an administration order or debt management plan is in place.

[3] https://www.gov.uk/options-for-paying-off-your-debts/debt-relief-orders

APPENDIX E

APPENDIX E
THE RELATIONSHIP BETWEEN THE 1984 ACT AND THE MAINTENANCE REGULATION

E.1 In Chapter 9 of the Report we briefly discussed the impact of the EU Maintenance Regulation (the "Regulation")[1] on our proposals to add a further ground of jurisdiction for obtaining financial relief in England and Wales after a foreign divorce to those already set out in Part III of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act"). The intention behind our recommendation is to allow an order to be made in this jurisdiction, against a pension in England and Wales in which one of the parties has an interest, in order either to reflect or complete a package of financial orders made between those parties in another jurisdiction. At present, there can be difficulties in obtaining an English order to give effect to a foreign order or agreement as the necessary jurisdiction for the English court to make a pension order following an overseas divorce cannot always be found.

E.2 The relationship between the 1984 Act and the Regulation is a technical area and the need to consider their interaction only arises where the pension order sought amounts to a maintenance obligation, therefore engaging the Regulation. Where the order against a pension is to reflect a sharing of assets there is no need to consider the relationship between the 1984 Act and the Regulation because the Regulation is not engaged. We therefore set out this more detailed consideration of the Regulation in this appendix, rather than in the main Report. Of course, it is not always easy to decide whether a pension order (or indeed any order) should be characterised as an order for maintenance or an order to share assets.

E.3 When is the Regulation engaged? It appears to be in every case in which a maintenance obligation is under consideration. There is some uncertainty in the case law as to whether the Regulation is engaged in cases where the other relevant country is not an EU member state as well as cases where the other relevant country is a member state.[2] However, there are good arguments that the Regulation is engaged even where the other country is not a member state.[3]

Interaction between the Maintenance Regulation and 1984 Act

Jurisdiction

JURISDICTION UNDER THE 1984 ACT

E.4 Part III of the 1984 Act provides a number of grounds of jurisdiction to enable an English court to make financial orders following an overseas divorce, namely:

[1] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[2] For example, in *MA v SK* [2015] EWHC 887 (Fam), [2016] 1 FLR 310 a decision was based on needs but the analysis of jurisdiction made no reference to the Maintenance Regulation.

[3] See for example recital 15 and article 7 of the Maintenance Regulation and *M v M* [2014] EWHC 925 (Fam), [2015] 1 FLR 465.

(1) either of the parties to the marriage was domiciled in England and Wales on the date of the application for [permission to make an application under Part III] or was so domiciled on the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or

(2) either of the parties to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or

(3) either or both of the parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling-house situated in England or Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.

We recommend adding a fourth ground to this list, namely that one of the parties has a pension fund situated in this jurisdiction.

E.5 However, on an application under Part III of the 1984 Act that seeks an order which amounts to a maintenance obligation, the court's jurisdiction to make the order which is sought is determined not by the grounds listed at (1) to (3) above but by the Maintenance Regulation.[4]

JURISIDCTION UNDER THE MAINTENANCE REGULATION

E.6 The Regulation provides a number of grounds of jurisdiction for proceedings relating to maintenance obligations in Member States. The first four grounds provided, the "general provisions", are:

(4) the habitual residence of the creditor;

(5) the habitual residence of the debtor;

(6) where jurisdiction exists under national law to entertain proceedings concerning the status of a person if the matter in relation to maintenance is ancillary to those proceedings, unless that jurisdiction is based on the sole nationality or domicile of one of the parties; and

(7) where jurisdiction exists under national law to entertain proceedings concerning parental responsibility if the matter in relation to maintenance is ancillary to those proceedings, unless that jurisdiction is based on the sole nationality or domicile of one of the parties.[5]

[4] Matrimonial and Family Proceedings Act 1984, s.15(1A).

[5] Council Regulation (EC) No 4/2009, article 3.

E.7 Jurisdiction may be based on the parties' agreement,[6] but there must still be a connecting factor, namely that the relevant member state must: be one or both of the parties' habitual residence; be one of which one or both of the parties has the nationality; or in the case of maintenance obligations between spouses, have jurisdiction to settle their matrimonial dispute; or be the spouses' last common habitual residence for a period of at least one year.[7]

E.8 Beyond the general provisions for jurisdiction, and jurisdiction based on the parties' agreement, jurisdiction may be founded on the defendant entering an appearance before a court (otherwise than just to contest jurisdiction).[8]

E.9 In addition article 7 of the Regulation may provide jurisdiction where this cannot be established in the ways outlined above. Article 7 provides that where no court of an EU member state has jurisdiction under any other article of the Regulation, the court of an EU member state may have jurisdiction "on an exceptional basis" if the member state has "a sufficient connection" with the dispute and

> …if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected.

Jurisdiction to make a pension order after an overseas divorce

E.10 The Regulation provides wider grounds of jurisdiction than Part III of the 1984 Act. If the pension order which is sought amounts to a maintenance obligation and jurisdiction can be found under the Regulation then there will be no need to rely on the additional ground of jurisdiction that we recommend be added to section 15(1) of the 1984 Act.

E.11 Further, where jurisdiction under the Regulation cannot be founded on any of the general provisions for jurisdiction, the parties' agreement or the defendant entering an appearance then article 7 may provide jurisdiction. The inability of the other jurisdiction in question to make a pension order effective against a pension in England and Wales, or the fact that it has not done so, might be said to found an acceptable ground for the exercise of the article 7 jurisdiction. If so, the English court might make a pension sharing order in these circumstances.

E.12 However, there are two scenarios where the additional ground of jurisdiction that we recommend under the 1984 Act may assist.

(1) In circumstances where the pension order sought cannot be characterised as a maintenance obligation (so is a sharing of assets), so that the Regulation is not engaged.

[6] Council Regulation (EC) No 4/2009, article 4.

[7] These conditions must be satisfied at the time that the agreement is concluded or at the time that the court is seised. The jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise. Jurisdiction cannot be founded by agreement in respect of a dispute concerning child maintenance.

[8] Council Regulation (EC) No 4/2009, article 5.

(2) In circumstances where a pension order has been made in another member state and the English court has no jurisdiction under the Regulation. In that case, if jurisdiction could be founded on the new ground that we propose for the 1984 Act then it might be possible to avoid the requirement for jurisdiction to be founded under the Regulation. This is because it is conceivable that making a "mirror" pension order in England and Wales to allow the implementation of the pension order made by the other member state could be characterised as enforcement of that first order under the Regulation. One of the aims of the Regulation is to ensure that a maintenance decision obtained in one member state is easily enforceable in another.[9]

E.13 There is also the question of the effect on the recommendation of the UK's projected exit from the European Union following the referendum of 26 June 2016. If the effect of the exit from the EU is that the Regulation ceases to have effect (and is not replicated in our national law) then the grounds of jurisdiction discussed above would no longer be available. This would make more pressing the need for reform to the 1984 Act to add the additional ground of jurisdiction that we recommend.

Prior Maintenance Decision

E.14 There is one further point to note about the relationship between the Regulation and the 1984 Act. That is that the effect of the Regulation may be that an English court is unable to, or should not, make any maintenance orders where there is a previous decision by another member state regarding maintenance obligations. In summary, the argument is that once maintenance obligations have been determined by one member state, that member state is given exclusive jurisdiction over maintenance, or that member state's decision is at least entitled to recognition. [10] If adopted, this could severely restrict the use of Part III of the 1984 Act, whether for a pension order or any other type of order. It is possible, therefore, that where another member state had made a prior maintenance decision, Part III claims would only be available in cases where the wealth of the parties is being divided on a sharing, rather than needs, basis. On the other hand, if the approach that we set out above at paragraph A.12(2) were to be accepted then this problem would, in the context of making a "mirror" pension order, fall away. The outcome may turn on whether the pension order made in England and Wales is characterised as enforcement of the foreign pension order or a new maintenance decision.

[9] See, for example, recital 9 of the Regulation.

[10] For a discussion of this issue, see: See A Heenan, "Scuppering Schofield? The impact of the EU Maintenance Regulation on claims for pension sharing" [2012] *Family Law* 191, and C Hale and H Clayton, "Part III and the Maintenance Regulation: Clash of the Titans (25 January 2016) *Family Law Week*, available at http://www.familylawweek.co.uk/site.aspx?i=ed158523 (last visited 2 November 2016)

E.15 In addition, the High Court has held that jurisdiction in respect of maintenance obligations can exist sequentially in different states.[11] This would mean that a state could still exercise jurisdiction over a maintenance decision previously decided in another state, where the proceedings in that first state had been concluded. The Court of Appeal, in hearing the appeal from the High Court case, declined to address this conclusion or arguments on it, which were not necessary to decide the case before it.[12] The Supreme Court, in hearing a case on Part III of the 1984 Act, did not need to decide the question, but did acknowledge that this area "involves difficult questions".[13]

E.16 In summary, the utility of our proposal to introduce a new ground of jurisdiction under section 15 of the 1984 Act will be affected by any continuing developments regarding the precise scope and effect of the Regulation.

[11] *AA v BB* [2014] EWHC 4210 (Fam), [2015] 2 FLR 1251.

[12] *Ramadani v Ramadani* [2015] EWCA Civ 1138, [2016] 1 FCR 1.

[13] *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628 at para [57].

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