

**Penningtons Manches' response to the Law Commission's consultation on
Enforcement of Family Financial Orders published in March 2015**

Penningtons Manches is a leading firm of solicitors. Our family department is one of the largest and most highly rated in the country, with a total of eleven partners, eighteen associates and a consultant providing specialist family law advice in London, Oxford, Reading and Guildford.

The Penningtons Manches family law department has for many years played a significant role in contributing to and informing the development of family law policy. Members of the department currently hold the following positions:

- Chair of Resolution
- Chair of the International Bar Association (IBA) Family Law Committee
- Co-Chair of the IBA Presidential Task Force to combat human trafficking
- President of the International Association of Young Lawyers (AIJA) Private Clients' Commission
- Membership of the Resolution International Committee
- Membership of the Resolution Children Committee
- Membership of the Resolution Cohabitation Committee
- Fellowship of the International Academy of Matrimonial Lawyers (IAML) (six of the partners are Fellows)
- Membership of the Family Justice Council's Financial Needs Working Group

Penningtons Manches provides family law advice to private individuals. Our clients include lawyers, doctors, people in the world of finance, accountants, sportsmen and women, entrepreneurs, writers, farmers, academics and teachers, and their spouses or partners. Often the cases are factually or legally complex or have an international dimension.

Although known for our expertise in 'big money' financial remedy cases and international cases, the department deals with the full range of private family law issues.

Our response to the consultation is based on our experience of representing private individuals seeking to enforce family financial orders, and the difficulties they have experienced. In our response we adopt the same terminology as the consultation document, i.e. 'creditor' to describe the person to whom payment is owed, or to whom the other party has an obligation, under a financial order made in family proceedings and 'debtor' to describe the person who must make a payment or who has an obligation to the other party under a financial order made in family proceedings.

General Comments

We agree with the Family Law Bar Association's assessment that the current landscape of enforcement is, as it stands, "*hopelessly complex and procedurally tortuous*". Those who seek to enforce a financial family order are often the more vulnerable and less financially savvy. Almost invariably (in our experience), they are women. Where a 'creditor' is facing non-payment of an order, often the funds for representation have been exhausted and legal aid, of course, is no longer available. Even with the benefit of specialist legal advice, the process is plagued by delay and uncertainty in outcome. We therefore welcome the Law Commission's review of the law in this area and, broadly, its recommendations for reform of the law and procedure.

There is, of course, a balance to be struck. There are human rights considerations if introducing draconian coercive measures. Similarly, where circumstances have changed and a party genuinely cannot meet a periodical payments obligation, there must be a swift, fair and effective process for variation of family financial orders. However, as we explain below, the current system is weighted in favour of those who wish to frustrate the

enforcement of family financial orders. We have set out in our response below how we believe the balance can be redressed, and how the prospects of those seeking to enforce family financial orders can be improved.

THE IMPACT OF ENFORCEMENT - OUR EXPERIENCE

6.3 *We ask consultees to tell us about their experiences of the impact, financial and otherwise, of:*

- (1) non-payment of sums due under family financial orders;*
- (2) difficulties in obtaining information and advice about the enforcement of family financial orders, including court procedure; and*
- (3) enforcement proceedings on:*
 - a) debtor and creditor;*
 - b) third parties (such as the debtor's other creditors);*
 - c) banks and financial institutions; and*
 - d) the family justice system.*

We have direct experience of the impact of non-payment of sums due under family financial orders and the difficulties often encountered in obtaining accurate information from the non-payer regarding his or her finances. We have seen that non-payment of family financial orders can have a devastating impact on creditors and their dependants.

It is right that sums due under family financial orders should continue to be treated differently from other debts by the courts, particularly when the orders address essential financial needs for housing, education and income for creditors and children of the family.

In our recent experience we have seen first-hand the difficulties experienced by our clients due to non-payment of financial orders including the following:

- a. Non-compliance by a debtor with an undertaking to the court to meet mortgage arrears and mortgage payments leaving the creditor and children facing the repossession of the family home by the mortgagee.

- b. Non-compliance by a debtor with an order to meet an order for payment of legal costs under s22ZA of the Matrimonial Causes Act, thereby effectively preventing the creditor from taking steps necessary to enforce the Order.
- c. In several cases, non-paying debtors have been permitted to pursue patently unmeritorious applications for variation of orders despite having consented to the orders in question (in some cases having paid nothing) whilst creditors have been prevented from pursuing enforcement proceedings pending the outcome of the variation application.

Where enforcement proceedings are required, they very frequently arise in cases which have also been plagued by non-disclosure and non-compliance with disclosure obligations throughout by the debtor. The creditor will have spent many months (if not years) obtaining a family financial order, only to find that the process of enforcement can be just as involved, costly and subject to delay as the original process. In such situations, very substantial sums will have been invested in obtaining orders, only for the creditor to face lengthy and complex steps to enforce those orders, with little certainty of obtaining a satisfactory outcome.

Currently, in our experience, a sophisticated debtor with access to funds is able to delay and frustrate enforcement proceedings by exploiting the shortcomings of the current procedures in numerous ways, including:

- a. failing to pay interim maintenance and legal costs orders;
- b. making vexatious applications for variation of maintenance payments and/or other terms of the original order;
- c. failing to comply with directions to provide information;
- d. seeking adjournments on spurious grounds and failing to attend hearings;
- e. remaining outside the jurisdiction and keeping assets offshore.

Litigation misconduct adds significantly to the costs and delay associated with enforcement.

We have seen that such debtors, who are invariably the more financially powerful party, are able and willing to fund the cost of instructing leading solicitors and counsel to stave off attempts at enforcement, whilst continuing to flout the terms of the original court order (including on occasion ignoring the most basic provisions for maintenance or housing). We have seen new solicitors and leading counsel be appointed by such debtors following the conclusion of proceedings, to plead inability to pay within months of a court determining that the debtor can pay and having made an order accordingly. The examples of delay and frustration to be seen in the recently reported judgment summons decision in *Prest*¹ [2015] are all too familiar to us.

Expert legal advice is essential to enforce an Order against a sophisticated debtor intent on frustrating the Court's orders. However, often the creditor's funds for legal fees are exhausted by the time the financial remedy proceedings are concluded. The creditor is then in the impossible position of needing more legal advice and representation to enforce the Order which it has taken many months and thousands of pounds to obtain, but with no funds left to pursue the debtor. We have found that this problem is particularly acute where a creditor refuses to meet an order under Section 22ZA of the Matrimonial Causes Act 1973 for support for legal costs.

Even if a creditor does have financial resources to pursue enforcement proceedings, it should not have to be so difficult and costly to obtain what the Court has already ordered to be paid.

¹ *Prest v Prest* [2015] EWCA 714

We would support the following measures to mitigate the effect on creditors of family financial orders that are not complied with:

- a. The introduction of a streamlined and simplified Court procedure for enforcement, with clear, centralised guidance available;
- b. The introduction of powers to obtain information from third parties, as recommended by the report;
- c. A wider choice of coercive sanctions for non-compliance; and
- d. A robust judicial approach to case management.

ENFORCEMENT BY THE COURT

6.5 *We invite consultees' views on the enforcement of family financial orders by the court. Could the system be improved or extended?*

It is a step in the right direction (towards a unified approach to enforcement) that the powers that previously existed in the Magistrates Court to for the Court to enforce maintenance orders have now been absorbed by the Family Court. In the rare cases we have seen these powers used, they have been effective. This option could be particularly valuable for vulnerable litigants who cannot effectively enforce the orders themselves.

We suggest the following changes to improve the uptake in use of this method of enforcement:

- a. Publicity to increase awareness of the remedy;
- b. Consolidating the rules and guidance in the Family Procedure Rules; and
- c. Integrating this remedy into the general enforcement application made to the Family Court.

GENERAL ENFORCEMENT APPLICATION

6.6 *Do consultees think that orders to obtain information, and the general enforcement application, work well? How could they be improved?*

The general enforcement application is a welcome simplification of the enforcement procedure. This application should form the basis for further reforms of the enforcement system.

The requirement to cross-refer to the CPR for orders to obtain information is confusing and unnecessary. A single set of rules specific to family financial orders should apply.

As a specific observation, in our experience the notice of hearing issued by the court is inadequate. The notice issued by the Court in response to an application for general enforcement does not clearly set out the procedure (unlike, for example, the Notice of First Appointment, or Judgment Summons). 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.

INFORMATION REQUESTS AND ORDERS

6.7 *We ask for the views of consultees as to:*

- 1) *whether the provisions of the Tribunals, Courts and Enforcement Act 2007 relating to information requests and orders should be brought into force in relation to family financial orders; and*
- 2) *whether the information so obtained should be disclosed to the creditor. [paragraph 2.45]*

We support the introduction of information requests and orders in relation to family financial orders.

The provision of information from independent third parties such as HMRC, financial institutions and credit agencies would be invaluable aids to enforcement. Credit reference agencies can hold a treasure trove of information for a creditor, as they may reveal assets against which direct enforcement measures can be taken, such as bank accounts and properties.

In our experience, if a party has been unreliable with his or her disclosure in court proceedings, he is also likely to be evasive and unhelpful in enforcement proceedings. The provision of third party information would short-circuit this problem. It might also avoid the need for coercive steps to be taken to obtain information from the debtor.

We would also support information obtained from third parties being passed to the creditor in addition to being made available to the Court. Where a party is in default of a family financial order, the balance between preserving the privacy of the debtor and the right of the creditor to receive payment ordered by the court should be determined in favour of the creditor.

INFORMATION FROM THE DEBTOR

6.8 We provisionally propose 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. Do consultees agree? [paragraph 2.54]*

We do not support the automatic requirement for the debtor to provide a full Form E on an application for general enforcement. That would be an onerous and costly requirement. It would introduce additional delay into the process in cases where extensive additional

disclosure is not necessary, for example where the parties have recently been through proceedings and Forms E have been recently exchanged.

We would support a requirement that parties complete a summary statement of means (perhaps more similar to the statement of information for a consent order in Form D81). The court could then make directions for provision of further, more detailed disclosure based on that initial summary if that is necessary in a particular case.

EXECUTION OF DOCUMENTS

6.9 Do consultees believe that any reform is needed to the procedure for the execution of documents by the court, for example the removal of the conditions that the power can only be exercised where the party has refused or neglected to comply with the order to execute the document, or where that party cannot, after reasonable inquiry, be found? [paragraph 3.13]

No. The current process is a necessary safeguard.

THIRD PARTY DEBT ORDERS

6.10 We provisionally propose the streamlining of the procedure for a third party debt order so that there is a final hearing only where a debtor or third party raises an objection following the service of the interim order. Do consultees agree? [paragraph 3.41]

We support the streamlining of the third party debt order procedure, as suggested.

6.11 We ask for consultees' views about the following options for reform:

- 1) the introduction of third party debt orders against joint accounts;*
- 2) the use of the streamlined procedure for third party debt orders against joint accounts; and*
- 3) whether, in any event, there should be provision for disclosure of details of any joint accounts held by the debtor and another person, by the bank, when a third party debt order is made against a bank.*

We support the introduction of third party debt orders against joint accounts and the provision of information about joint accounts.

We also ask for consultees' views about:

- 4) the introduction of periodical third party debt orders;*

- 5) *the introduction of a protected minimum balance when a third party debt order is made against a bank account; and*
- 6) *provision for disclosure of a debtor's bank statements, by the bank, when a third party debt order is made against a bank. [paragraph 3.42]*

We agree with the proposal to introduce 'periodical third party debt orders'. This would make the existing enforcement method of attachment of earnings feasible where parties are self-employed, or receive regular investment income. Unlike other 'retrospective' enforcement methods (which are only of use in recovering arrears of maintenance) it also has the advantage of providing ongoing security for payments. The fact that debtors may be able to manipulate their financial arrangements to avoid the effect of these orders should not prevent the Court from having this power at its disposal.

We also support the requirement for institutions to provide statements in response to service of a third party debt order. As set out above, information from third parties is essential for effective enforcement.

CHARGING ORDERS

- 6.12 *We provisionally propose that the procedure for charging orders should be streamlined so that a final hearing only takes place where a debtor raises an objection following the service of the interim order. Do consultees agree? [paragraph 3.59]*

We agree with this proposal.

PENSIONS

- 6.15 *Consultees are asked to give us their views:*

- 1) *on the court being given the power, at the time of any enforcement proceedings, to exercise its powers to share and attach pensions; and*
- 2) *the restrictions that should apply to the exercise of any such power; should those that currently apply to the exercise of these powers on the making of the original order apply at the time of enforcement and should there be any additional restrictions? [paragraph 3.72]*

We support the court being given power to make orders regarding pensions for the purposes of enforcement. Pensions have the advantage of being a relatively static target that is difficult to dissipate. Recent reforms have made them more flexible and of more benefit to the receiving party.

ATTACHMENT OF EARNINGS ORDERS

6.17 Do consultees think that the provisions for tracking, contained in the Tribunals, Courts and Enforcement Act 2007, should be brought into force for family financial orders? [paragraph 3.105]

We support the introduction of tracking provisions for family financial orders.

6.18 Do consultees think that, in family proceedings, information obtained by the tracking provisions should be disclosed only to the court or should it also be disclosed to the creditor? [paragraph 3.106]

For the reasons given in the reply to question 6.7, we believe that the information should also be disclosed to the creditor.

ARREARS OF MAINTENANCE

6.21 Do consultees think that change is required to the rule that arrears more than 12 months old are recoverable only in special circumstances? If so: (1) should the 12 month period be increased? (2) should the starting point be that all arrears are enforceable, with the debtor having the opportunity to argue otherwise (whether after 12 months or longer)? [paragraph 3.115]

The current provisions, under which only 12 months arrears of maintenance are automatically enforceable, should be reformed. At the very least, a 12 month period is too short. The onus should be on the party who has not met obligations due under a court order to explain why all those arrears should not be repaid.

The decision as to *when* to enforce arrears is, in our experience, one that requires careful consideration. Often it is uneconomic for parties to enforce arrears of maintenance of less than 12 months due to the cost of pursuing enforcement proceedings. It may be that a

debtor who has been resident abroad has returned to the jurisdiction, making enforcement a viable option. Alternatively, there may be a sale of a company in which the debtor had an interest, that makes enforcement proceedings worthwhile.

To give an example, a debtor fled the jurisdiction to avoid a Judgment Summons. He resurfaced five years after the conclusion of proceedings having paid no maintenance for children or school fees due during that period. It is unfair that in those circumstances, the creditor was required to prove that “*special circumstances*” applied before being able to claim arrears where the debtor had defaulted for such a long period.

6.22 We provisionally propose that the court be given the power to remit arrears on a free-standing basis. Do consultees agree? [paragraph 3.117]

We agree that in appropriate circumstances the court should have the power to remit arrears without an application being made for variation.

COSTS

6.23 Do consultees think that any reform of the costs rules, and provisions for the payment of fees, for proceedings for the enforcement of family financial orders would be useful? [paragraph 3.124]

The rules for fixed costs in enforcement proceedings are arcane and outdated. In particular, we would highlight the requirement on judgment summonses to offer payment to the debtor to travel to court. The ‘fixed costs’ regime, in our experience, causes confusion.

The starting point for a successful application for enforcement should be that the debtor pays the creditor’s costs.

JUDGMENT SUMMONS

6.24 We welcome consultees’ views on the use of the judgment summons procedure and whether any reforms could usefully be made to the procedure, bearing in mind the need for it to be human rights compliant. [paragraph 4.23]

In our experience, the Judgment Summons remains an essential tool of last resort in enforcing family financial orders.

Recent caselaw² has demonstrated its continued importance in international cases where assets are retained in complex structures beyond the jurisdiction of the English court.

Mostyn J's attempt to codify the process of judgment summons in *Bhura* has been called into question by the Court of Appeal in *Prest*. We would support the reform of Judgment Summons to provide a clear and unambiguous resolution of how the procedure can be conducted in a manner compliant with the ECHR.

COERCIVE MEASURES

6.25 We provisionally propose that:

- 1) *an order disqualifying a debtor from driving should be introduced;*
- 2) *an order disqualifying the debtor from travelling outside the United Kingdom should be introduced;*
- 3) *an order imposing a curfew on the debtor should be introduced;*
- 4) *that disqualification or curfew orders should be available where the court is satisfied on the balance of probabilities that the debtor has the ability to pay and has not done so;*
- 5) *that disqualification or curfew orders should be imposed where the court believes it to be in the interests of justice, taking account of all the circumstances of the case including:*
 - (a) *the degree of non-compliance;*
 - (b) *the other enforcement methods that are available to the creditor and the likely success of those methods;*
 - (c) *the effect of making the order on the debtor's ability to earn a living; and*
 - (d) *the effect of making the order on any dependants of the debtor*
- (6) *that disqualification orders should take effect, in the first instance, for up to 12 months and curfew orders for up to six months. Do consultees agree? [paragraph 4.61]*

² *Prest v Prest* [2015] EWCA 714

We support the introduction of most, but not all of the additional coercive measures proposed to be available under the general enforcement process.

- 1) In the right cases, we agree that the threat of being disqualified from driving could prompt reluctant payers to comply with their obligations.
- 2) The proposed 'travel bans' could be particularly effective. In our experience, many non-paying debtors lead an international lifestyle and keep assets off-shore to avoid direct enforcement. There would be substantial inconvenience to debtors if they could have their wings clipped by a travel ban, which in our view would be a significant incentive to compliance.
- 3) We are concerned about the introduction of curfew orders, particularly as a civil enforcement measure. These could appear to be punitive rather than coercive in nature. They amount 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.
- 4) We agree that disqualification orders should be available where the court is satisfied on the balance of probabilities that the debtor had or has the ability to pay in compliance with the court's order but has failed to pay.
- 5) We agree with the proposal that disqualification orders should be imposed in the circumstances proposed.
- 6) We agree that disqualification orders should take effect in the first instance for up to 12 months.

BANKRUPTCY

6.26 We ask consultees for their views as to whether arrears of periodical payments should be provable in bankruptcy. [paragraph 4.68]

We agree that arrears of periodical payments should be provable in bankruptcy and so potentially recoverable in the bankruptcy process.

CASE MANAGEMENT POWERS

6.27 Do consultees think that existing case management powers are sufficient and used effectively, whether at the time of the original financial order or at the time of enforcement proceedings? [paragraph 5.17]

Enforcement applications should be allocated to the level of judge who can order all of the remedies which may be appropriate.

One reform of central importance is the introduction of more robust case management of enforcement applications. In particular:

1. As referred to above, an application for variation of a family financial order and remission of all arrears can be used as a delaying tactic by a non-paying creditor. At the same time the non-payer often unilaterally suspends payments of maintenance and, indeed payments for legal costs. We are in favour of a presumption that debtors are not permitted to make or pursue applications for downward variation of periodical payments in circumstances where they are failing to pay to pay at least a proportion of the periodical payments ordered pending the outcome of the variation application.
2. There should be stricter enforcement of orders for payment of ongoing legal costs support and for legal costs orders at the end of a case, to ensure that there is a level playing field. One option that could be considered (in cases where a non-payer instructs solicitors whilst failing to pay a legal services order) are so called pound for pound orders, whereby if a creditor transfers funds to his solicitors, 50% of that sum should be transferred to the debtor's solicitors.

3. In appropriate cases, 'unless' orders and *Hadkinson* orders should be used as a way of compelling debtors to co-operate in enforcement proceedings.

ALTERNATIVE DISPUTE RESOLUTION

6.28 *Do consultees think that 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 alternative dispute resolution methods? [paragraph 5.25]*

No, we do not think that the Family Court should be able to adjourn enforcement proceedings without the parties' consent for the purpose of alternative dispute resolution. It is difficult to conceive of any situation where alternative dispute resolution would be appropriate in enforcement proceedings. Compulsory adjournment to alternative dispute resolution would be a gift to non-payers, offering the opportunity for yet more delay and obfuscation. We have alluded above to our experience that debtors exploit delays in the court process.

GUIDANCE FOR THE PUBLIC AND LITIGANTS IN PERSON

6.29 *We provisionally propose that Government:*

- (1) *consolidate and increase the information and support available to litigants in person and the public in respect of proceedings to enforce family financial orders, with information being published in both electronic and paper formats.*
- (2) *consider the scope for funding lawyers to provide free advice in person to litigants in person that goes beyond information and support but which is not based on a lawyer-client relationship. Do consultees agree? [paragraph 5.41]*

- (1) We support the proposal to increase the provision of information and support available to litigants in person and the public
- (2) We have concerns about the ethical and compliance implications of what is proposed.

INFORMATION AND TRAINING FOR PRACTITIONERS AND THE COURTS

6.30 *We welcome consultees' views on what more, if anything, could be done by practitioners and the courts, in the area of training and professional development, to help improve enforcement. [paragraph 5.46]*

We support the proposal that each court appoints an enforcement liaison judge who has received specific training in relation to enforcement law and practice. Similarly, the development of the skills of support staff should go hand in hand with the reform to the processes recommended.

STATISTICS ON ENFORCEMENT

6.31 We provisionally propose that HMCTS should begin collecting and publishing data on the use of the different enforcement methods in the Family Court. Do consultees agree? [paragraph 5.48]

We support the proposal that HMCTS should begin collating and publishing data about enforcement of family financial orders.

CONSOLIDATION OF LEGISLATION AND RULES

6.32 Do consultees find that the need to refer both to the Family Procedure Rules and the Civil Procedure Rules gives rise to problems?

The current enforcement remedies are scattered across multiple statutes, a situation made worse by the need to refer to multiple sources for the procedure. We support a single reference point for enforcement in the Family Procedure Rules in respect of all methods available for enforcement of family financial orders.

For further information please contact Jane Craig or Edward Floyd on 020 7 457 3000.

Penningtons Manches LLP
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