

ENFORCEMENT OF FAMILY FINANCIAL ORDERS

SUMMARY

INTRODUCTION

- 1.1 This Report¹ contains a package of proposals designed to make the enforcement of family financial orders more effective, more accessible and fairer.
- 1.2 Family financial orders are orders made by the court, typically on the ending of a marriage or civil partnership, that require the payment of money, or the transfer of property, between the former spouses or civil partners. Family financial orders may also be made between parents, regardless of whether they are married or in a civil partnership, for the benefit of their children – although the enforcement of child maintenance payments due under the Child Support Act 1991 (which is how most child maintenance is paid) falls outside of this Report.
- 1.3 The enforcement of family financial orders is a practically important yet often overlooked area of law. 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 court order become meaningless unless there is an effective way of enforcing them.
- 1.4 Non-compliance with family financial orders is a significant problem. We estimate that on average there are 4,200 enforcement cases in relation to family financial orders each year. Although data on the total amount of money that goes unpaid each year through non-compliance with family financial orders is not routinely collected, we estimate that it is approximately £15 - 20 million. Further, these figures are likely to be an underestimate as they do not account for the those individuals who are not receiving what they are owed under a family financial order 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.

¹ Unless otherwise stated, all cross references in this summary are to Enforcement of Family Financial Orders (2016) Law Com No 370.

- 1.5 Sometimes a court order is not complied with because the party who owes the money (the debtor) “can’t pay”. The debtor’s resources will have been taken into account when the financial order was made, but the debtor’s circumstances may have changed since the order was made, for example as a result of unemployment. The law already enables a debtor who “can’t pay”, in certain circumstances, to apply to have the order varied (and our Report includes recommendations designed to aid debtors who “can’t pay” to have their arrears cancelled).² Our proposals to make enforcement more effective are directed at those who can pay, but who choose not to do so – debtors who “won’t pay”. Our recommendations will also make it easier to distinguish between “can’t pay” and “won’t pay” debtors.
- 1.6 Where a debtor does not pay, the impact on the person to whom the money or property is owed (the creditor) can be devastating. Resolution, an organisation representing over 6,500 professionals working in family law, described the effect of non-payment as potentially “catastrophic”. Most family financial orders are based on what creditors need to meet their day-to-day expenses and the expenses of dependent children. By definition, if the order is not complied with, then the person to whom the payment is owed will be left in need. Rent or mortgage payments may be missed; basic necessities may become unaffordable; children’s standard of living and care arrangements may be affected; loans or state benefits may become the only means of financial support.
- 1.7 It is important therefore that there is an effective and accessible system for enforcing family financial orders to ensure that debtors comply with their obligations. But the system of enforcement must also be fair to both the creditor and debtor to ensure that neither party, nor any of their dependents, suffers undue hardship. Fairness requires ensuring that debtors who “can’t pay” are not punished for their involuntary non-compliance. Fairness also requires that creditors are equipped with the information and options they need to stand the best chance of recovering what they are owed from debtors who “won’t pay”.
- 1.8 The current law governing the enforcement of family financial orders was described by the Law Society as being “so complicated [that it] may well deter creditors from taking action to obtain payment.” The Family Law Bar Association, when proposing this project, described the law in this area as “hopelessly complex and procedurally tortuous”. The Law Society said “it is conceivable that this [complexity] has an impact on the reputation of the family justice system, and the public’s perception of effectiveness and fairness”. Indeed, the law is so complex that lawyers and even the courts find the enforcement of family financial orders difficult. Inefficiencies 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. The cost of inefficiencies is therefore felt not only by the individuals involved, but by the court service as well.

² See Chapter 13.

- 1.9 The complexities in the law present a particular difficulty as parties seeking to enforce family financial orders are frequently litigants in person who, as one firm of solicitors explained to us, have often, by the time of enforcement proceedings, “exhausted both their emotional and financial resources”. The Court of Appeal recently highlighted the difficulties arising where parties in family proceedings are litigants in person. Lady Justice Black noted that the fact the husband was acting in person meant that he

had approached [the application] on a mistaken basis. The task that would normally have been fulfilled by the parties’ legal representatives, of finding relevant documents amongst the material presented, and researching the law and its application to the facts of the case, had to be done by the judges of the Court of Appeal instead.

As the court noted, the ultimate risk is that the correct result is not reached.

- 1.10 It is inevitable that not all litigants will have legal representation. The most recent statistics show that in 34% of family proceedings neither party is represented (although this does not take account of the percentage of cases in which one party is represented).³ 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.
- 1.11 Where the enforcement of family financial orders is not effective, accessible and fair, the impact of the law will be felt most directly by creditors, debtors and their dependents. But non-compliance with court orders by debtors who “won’t pay” has wider reaching consequences for the State. The state picks up the bill for non-payment through increased claims for benefits and tax credits and the court service suffers the consequences of an inefficient system. Ultimately, non-compliance with family financial orders impacts on society as a whole, as the inability to enforce court orders undermines confidence in the whole family justice system.

Our Report and this Summary

- 1.12 Our Report contains a number of recommendations designed to rectify particular difficulties in the current law. The range of circumstances arising on applications for enforcement of family financial orders is such that not every recommendation is going to help in every case. Collectively, however, our recommendations will improve the current system of enforcement as well as providing additional options for enforcement.
- 1.13 Many of the recommendations that we make do not need Acts of Parliament to be implemented. Instead, they can be implemented by changes to the Family Procedure Rules, including the introduction of an Enforcement Practice Direction, and by the provision of guidance for litigants and the public.

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/556715/family-court-statistics-quarterly-apr-june-2016.pdf

1.14 Although our Report makes a wide-range of recommendations, in this summary we focus on four key problems with the current law and the recommendations we make to solve these problems:

- (1) the complexity of the current rules;
- (2) a lack of information about the debtor available to creditors and the court to enable them to identify the most effective options for enforcement;
- (3) the fact that some of the debtor's assets that could be used to comply with the order may be beyond existing enforcement powers; and
- (4) insufficient means to coerce debtors who "won't pay" to comply with court orders.

1.15 Before we explain how our recommended reforms would address these key problems, there are three practical matters that we believe could improve the process and management of enforcement cases.

IMPROVING THE PROCESS AND MANAGEMENT OF ENFORCEMENT CASES

Thinking ahead to enforcement

1.16 We noted above that there is a tendency for people to think that the process is over once a family financial order has been made. Enforcement of that order is unlikely to be at the forefront of people's minds: there is an expectation that people will comply with court orders. There is a need, therefore, for a wide cultural change, so that legal representatives and judges alike recognise that their role does not necessarily end when the court order is made. Practitioners and judges do not generally encounter enforcement cases as frequently as other family proceedings and there is a need for the courts to think ahead to enforcement at the time a family financial order is made.

1.17 We therefore recommend that judges are directed to consider whether any terms as to enforcement should be included whenever a family financial order is made. Importantly, this direction is not designed to influence the quantum of an order, but will ensure that the court considers how the order that it makes is most likely to be met.

1.18 As we explain below, a lack of information about a debtor can be the biggest barrier to enforcement. To help overcome this difficulty, we recommend that judges should be directed to consider noting for the court file a summary of their main findings in relation to the debtor's assets that may be relevant to future enforcement proceedings.

Enforcement liaison judges

- 1.19 Liaison judges are already a feature of the judicial system and have been used in the family justice system, for example to build expertise in international judicial relations. The Central Family Court has introduced the role of enforcement liaison judge, which we understand to have been very successful. We recommend that an enforcement liaison judge should be appointed in each designated family judge area.⁴ The enforcement liaison judge will help to build expertise in enforcement in his or her area and oversee and improve the management of enforcement proceedings, as well as providing training and information to other judges and being a point of contact for judges with enforcement questions. The enforcement liaison judge may also hear any particularly complex enforcement cases.

The General Enforcement Application

- 1.20 Family creditors who wish to apply for the enforcement of a debt due to them have a choice as to how to proceed. The creditor may apply for a specific form of enforcement. This approach will be most appropriate where the creditor has sufficient information about the debtor to identify an effective means of enforcement. Alternatively, the creditor may apply for a general enforcement application, which is an application for the court to make “an order for such method of enforcement as the court may consider appropriate”. For many creditors, especially those who are litigants in person, the general enforcement application represents the best chance of recovering sums from a debtor who “won’t pay”.
- 1.21 In our Report, we make a number of recommendations in respect of the general enforcement application.⁵ In this Summary we highlight the key changes we suggest to provide a more effective procedure for the general enforcement application and to make that procedure more accessible to the creditor and debtor. Currently, the application is a collection of standalone enforcement remedies brought together under one application. Our recommendations will transform the nature of the application to make it more of an enforcement process with powers and remedies of its own. Our recommendations will both help creditors and save court time. Creditors are less likely to make erroneous applications for specific methods of enforcement if the general enforcement application is an accessible and effective process. Further, our recommendations should enable courts to make substantive progress on enforcement at the first hearing of the application.

⁴ See Chapter 6.

⁵ See Chapter 5.

- 1.22 A commonly cited problem with the current operation of the general enforcement application is the absence of specific rules, with the result that the parties must cross refer between the Family Procedural Rules⁶ (that govern Family Court proceedings) and the Civil Procedure Rules⁷ (the general rules governing all civil proceedings), a problem also encountered generally during enforcement proceedings. There is a concern that there are potential gaps in the rules on a general enforcement application and that the rules are not being applied consistently by the courts. We recommend that there should be a comprehensive set of standalone procedural rules for the general enforcement application contained in the Family Procedural Rules. The rules should be sufficiently detailed so that the parties, courts and legal advisors understand what is required and to ensure uniform application across the country.
- 1.23 We recommend that the rules require the debtor to provide financial disclosure before the first hearing. This disclosure would enable the creditor and court to consider appropriate enforcement action at that hearing, make an enforcement order or make any necessary direction. We recommend that disclosure should be provided in a standard form designed for the purposes of enforcement (an “Enforcement Financial Statement”).⁸
- 1.24 We also recommend that the law should be clarified to ensure that the enforcement methods available on a general enforcement application can be made without the need for the debtor to make a further, specific application for that order. In the Report we also set out what action we propose the court should take where the debtor does not comply with the process.⁹
- 1.25 We consider that the general enforcement application should give the court the widest possible enforcement powers. In light of other proposals we make in our Report, we therefore recommend that in addition to the powers the court already has, the court should be able to make orders disqualifying debtors from driving, prohibiting them from travelling out of the UK¹⁰ and orders against a debtor’s pension,¹¹ on a general enforcement application.
- 1.26 Having outlined recommendations designed to improve the process and management of enforcement, we now consider the recommendations we make to address the four key problems with the current law of enforcement that we identified above.¹²

⁶ The rules of court setting out the procedure in family proceedings in England and Wales.

⁷ The rules of court setting out the procedure in the civil courts in England and Wales.

⁸ See paras 1.33 to 1.35 below.

⁹ See Chapter 5.

¹⁰ See Chapter 12.

¹¹ See Chapter 9.

¹² See para 1.13.

CLEARER RULES

- 1.27 The complexities in the current law are a significant barrier to, effective and fair enforcement of family financial orders. Law that is unnecessarily complex is not good law. But the problems caused by overly complex laws are compounded, as we have noted above,¹³ when the parties to the proceedings are litigants in person. We therefore make a number of recommendations that are designed to simplify the law so that it works better for all of those involved in enforcing family financial orders; creditors and debtors, lawyers and the courts. We also make recommendations specifically designed to make the law more accessible to litigants in person.
- 1.28 First, we recommend the consolidation of the procedural rules so that the rules dealing with enforcement are comprehensively stated in the Family Procedure Rules.¹⁴ The current enforcement regime for family financial orders is found across legislation in a number of Acts of Parliament and in both the Family Procedure Rules and the Civil Procedure Rules. The need to consult different sets of procedure rules in enforcement proceedings has been widely criticised by both judges and practitioners. Further, the relationship between the two sets of rules is not always clear and is especially difficult for a litigant in person to understand.
- 1.29 Secondly, we recommend the creation of a new Enforcement Practice Direction.¹⁵ Practice directions support and supplement procedural rules, such as those set out in the Family Procedure Rules. Generally, practice directions set out the practice that may or must be followed by parties and the courts on different applications. We recommend that the Enforcement Practice Direction should provide a narrative statement of the procedure for bringing an enforcement application so that it provides a “route map” for enforcement proceedings. This approach will be particularly helpful for litigants in person who might otherwise be intimidated by the Family Procedure Rules. Our Report sets out the areas that we consider the practice direction needs to cover.
- 1.30 Thirdly, we recommend that better guidance is provided to litigants in person.¹⁶ Currently, the difficulty of navigating the rules faced by a litigant in person is exacerbated by an absence of authoritative explanatory information and guidance.
- 1.31 We recommend that information on methods of enforcement should be provided at the time the family financial order is made. Providing enforcement information at this stage 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. We envisage a summary on the back of the court order that states the enforcement methods that are available and informs the parties which method could be used to enforce different financial orders. It would also explain the basic criteria for each method of enforcement.

¹³ See paras 1.7 and 1.8 above.

¹⁴ See Chapter 16.

¹⁵ See Chapter 20.

¹⁶ See Chapter 4.

- 1.32 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. 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 online 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.

BETTER INFORMATION

- 1.33 Information about the debtor’s financial circumstances is vital to effective and fair enforcement. Information enables the creditor and the court to determine whether the debtor “won’t pay” (as opposed to “can’t pay”) and, if so, to determine the most appropriate method of enforcement. Resolution identified “insufficient information about the debtor’s circumstances” as being the “biggest barrier to creditors who wish to obtain payment”.
- 1.34 The need for better information about the debtor is particularly important on a general enforcement application, when the court will need to decide which method of enforcement to use.
- 1.35 We recommend the creation of a new Enforcement Financial Statement to ensure disclosure of information about the debtor’s financial circumstances that will aid enforcement.¹⁷ Where the creditor makes a general enforcement application, completion of the Enforcement Financial Statement by the debtor will automatically be required. The obligation to complete the statement will ensure that the creditor and the court have as accurate a view of the debtor’s financial circumstances as possible.
- 1.36 Completion of the Enforcement Financial Statement would not automatically be required where the creditor applies for a specific method of enforcement. It is important, to ensure effective enforcement, that such applications are as streamlined as possible. Requiring the debtor to complete a statement may add unnecessary cost and delay to proceedings. However, the specific method of enforcement could be unsuccessful or run into difficulties and, in those circumstances, it may be appropriate for the court to order the debtor to complete the Enforcement Financial Statement to enable the creditor and the court to appraise the situation and consider the options for further enforcement attempts. Therefore, while completing the Enforcement Financial Statement would not be automatically required where a specific application is made, we recommend that the court should have the power to require its completion. We consider in the Report what information the Enforcement Financial Statement should ask the debtor to give and the supporting documents that he or she should be asked to provide.
- 1.37 If a debtor fails adequately to complete the Enforcement Financial Statement, or provide the required supporting documents, then courts may seek to coerce the debtor into doing so by, for example, holding the debtor in contempt of court. But it may be more effective in bringing about the enforcement of the order to bypass the debtor and obtain the information required directly from other sources.

¹⁷ See Chapter 7.

- 1.38 Systems of obtaining information from third parties to facilitate enforcement already operate in other contexts. For example, the Child Maintenance Service (“CMS”) has very wide information-gathering powers. To facilitate enforcement, the CMS can obtain information from, among other bodies, employers, banks and credit reference agencies. In addition, the CMS benefits from an exchange of information with Her Majesty’s Revenue and Customs (“HMRC”). We understand that these powers are key in taking action to enforce child maintenance.
- 1.39 The Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) provides for the introduction of “information requests and orders” in civil and family enforcement proceedings. An information request enables the court to request information about the debtor from a government department, such as HMRC, while an information order enables the court to obtain information from a private party, such as a bank. The provisions have not, however, been brought into force.
- 1.40 In light of the central role of having information about the debtor in ensuring effective enforcement, we recommend that information requests and information orders are brought into force for the enforcement of family financial orders.¹⁸ We are aware that the reason the 2007 Act has not been implemented is because of the costs of introducing the system. We are of the view, however, that the recommendations we make to integrate information requests and information orders into a reformed procedure for the enforcement of family financial orders would have a significantly lower cost than implementing the procedure envisaged in the 2007 Act.
- 1.41 We recommend that the court should be able to obtain information from the following information providers: the Department for Work and Pensions; HMRC; credit reference agencies; and banks and building societies; Land Registry; and pensions providers. All of these bodies and organisations hold information that may assist the enforcement of a family financial order. The inclusion of pensions providers is necessary given our recommendation that enforcement should be possible against a debtor’s pension assets.¹⁹
- 1.42 The nature of the information provided would differ according to each information provider, but would be limited to the minimum necessary to facilitate the enforcement of a family financial order. We recommend that there be prescribed categories of information that can be sought from each of the information providers.
- 1.43 Our recommendations for information requests and information orders departs from the scheme contained in the 2007 Act in certain respects. In particular, we recommend that information obtained from such an order should be passed to both parties, unless the court is satisfied that there is good reason for it not to be disclosed. This recommendation requires further explanation.

¹⁸ See Chapter 8.

¹⁹ See Chapter 9.

- 1.44 Family financial proceedings (in contrast to most other civil proceedings) demand full financial disclosure from both parties; full and frank disclosure is essential in enabling the court to work out what is a fair distribution of the parties' assets. 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.
- 1.45 In principle, we do not think it is right in the context of enforcement proceedings for family financial orders for information to be before the court and not also be disclosed to the parties. It is a fundamental legal principle that all parties should have the opportunity to consider all information that is before the court. In practice, it is neither efficient nor feasible 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.
- 1.46 To safeguard debtors, however, we recommend that creditors are told by the court how information obtained may and may not be used and that sanctions can automatically follow misuse of information. Misuse of the information by the creditor would be a contempt of court that could result in imprisonment.
- 1.47 We make two further recommendations to ensure that better information is provided to the creditor and the court. First, we recommend that a system of "tracking" contained in the 2007 Act is introduced in respect of family financial orders. Tracking enables the court to request from HMRC whether the debtor has a current employer and, if so, the employer's name and address. Tracking is similar to an information request, but it has a different purpose. Its purpose is to ensure the effectiveness of a particular method of enforcement — an attachment of earnings order, which allows money to be deducted from the debtor's salary and paid directly to the creditor — after the order has been made. Secondly, we recommend that forms used for financial disclosure in family financial proceedings are changed so that, in all cases, parties are asked to provide their National Insurance number. This change, while relatively minor, is practically significant, as the National Insurance number enables accurate identification of an individual for the purposes of HMRC providing information about that person.

BRINGING MORE OF THE DEBTOR'S ASSETS WITHIN THE REACH OF THE COURT

- 1.48 One barrier to the enforcement of family financial orders under the current law is that the debtor may have assets that are beyond the courts' existing enforcement powers. In the Report, we make recommendations designed to make three types of asset more accessible to discharge the debt: the debtor's pension; funds held in joint accounts; and money that will become payable to the debtor in the future (in particular, money that will become payable to self-employed debtors).²⁰

²⁰ See Chapters 9 and 10.

Accessing pension assets

- 1.49 When the Family Court initially makes a family financial order it sometimes has the power to make two types of pension order: first, a pension sharing order, under which one party's pension fund is divided and a proportion of it is moved into a new pension fund belonging to the other party; and secondly a pension attachment order, under which 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. Where a pension attachment order is made the court has a power to require a party to take a lump sum from his or her pension where he or she is entitled to do so under the rules of the pension scheme. We recommend that the court should have the power to make these orders in proceedings for the enforcement of family financial orders that did not originally relate to pensions.
- 1.50 We are mindful of the unique nature of pension assets and of their purpose to provide a means of support to a person in his or her retirement. We are also aware that practical issues and limitations mean that pension orders are unlikely to be the creditor's first choice for the enforcement of a family financial order. In particular, pension orders may not produce an immediate payment to the creditor. Nevertheless, pension orders may provide an effective means of enforcement where there are no other assets available and ensure that the creditor receives what is owed, albeit possibly at a later date. The inability to enforce against a pension is undesirable because a pension may be one of the most significant assets held by a debtor.
- 1.51 To ensure fairness, we recommend that a pension order should only be available on a general enforcement application. Therefore it will not be possible for a creditor to make a standalone application for a pension order. 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 available 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 restricting their use to cases where no other assets are available (which we think would be undesirable).

Foreign pensions

- 1.52 Stakeholders made us aware of specific problems where there has been a divorce overseas, but one (or both) of the parties has a pension in England and Wales. Pension companies in this country will not act on family financial orders made by a foreign court. We suggest amending an existing Act of Parliament which allows the English court to make a financial order after a foreign divorce. Our recommendation would allow the court, in those circumstances, to make a pension order based on the presence of a pension in England and Wales.

Accessing funds in a joint account

- 1.53 Where a debtor has funds in a bank or building society account, a third party debt order can be made in some circumstances to enforce the debt against the funds. A third party debt order requires a third party (the bank or building society) who owes money to the debtor to pay some or all of that money directly to the creditor.
- 1.54 Currently, third party debt orders are not available against joint accounts, unless both (or all) joint account holders are debtors of the creditor in relation to the same debt. The latter situation is very unlikely to apply in respect of a debt arising from a family financial order. This limitation on the availability of third party debt orders means that debtors may “shelter” funds in joint accounts to keep the funds out of the reach of the creditor. As part of a package of measures designed to make third party debt orders a more effective method of enforcement we recommend that they should be available against the funds in any account in the debtor’s name, regardless of whether the debtor is the sole or a joint account holder.
- 1.55 This recommendation does not mean that the debt becomes enforceable against all funds in the account. The third party debt order will be available only in respect of those funds in the account which actually belong to the debtor. If, for example, the debtor has opened a joint account into which he or she and a new partner both pay money, then the third party debt order will be made only in respect of the debtor’s share of the funds.
- 1.56 In order to determine the debtor’s share of the funds in a joint account it is necessary to ascertain how the funds are owned. As a starting point, we recommend a presumption that that the account holders own the funds in equal shares. This presumption means, for example, that where the debtor has a joint account with one other person, a third party debt order can operate against half of the funds. The presumption is most likely to reflect the actual ownership of funds where the debtor has set up an account with his or her new partner, which is being operated as a “common purse”. It will be possible for the other joint account holders, the debtor or the creditor to make representations that the funds are not owned equally.

Accessing money that the debtor will receive in the future

- 1.57 Third party debt orders are not only available in respect of funds in bank accounts. They can be directed at any third party (such as an individual or a company) who owes money to the debtor. Currently, however, third party debt orders are only available in respect of debts that are owing to the debtor at the time the order is made. This limitation applies even in respect of funds in bank accounts, so that the most that can be recovered is the balance of the account at that time. We recommend that third party debt orders should be available to operate on a periodic basis (for example, monthly). This recommendation would have two effects. First, it would enable enforcement against sums that become owing to the debtor after the order is made; such as sums paid into a bank account after that date. Secondly, it would enable the ongoing enforcement of moneys due under a periodical payments order; where, for example, a sum of money becomes payable to the creditor each month. The order would take effect every month to recover what had become due in that particular month.

- 1.58 In making recommendations for third party debt orders to operate periodically, we hope to address a particular difficulty with the current law; namely, that it is difficult to enforce family financial orders against the income of a self-employed debtor. Our recommendations would, for example, enable a third party debt order to operate against a company that regularly pays a self-employed debtor for his or her services.

Protected minimum balance

- 1.59 Third party debt orders are made in two stages; an interim or initial stage, followed by a final order. At the interim stage, the court has the power to freeze the funds in the account up to the value of the debt owed. As a result of our recommendations to expand third party debt orders, we recommend the introduction of a fixed “protected minimum balance” where funds are frozen. The protected minimum balance is a sum of money that the debtor and, in the case of a joint account, the other holders of the account, can withdraw despite the fact the account has been frozen. This safeguard is designed to ensure that debtors (and any other account holders) are not left in need. It will operate in addition to existing provision for a debtor to make an application to the court for a hardship payment order to release funds to meet his or her immediate needs. In the case of a joint account, we recommend that joint account holders should also be able to make an application for a hardship payment order.

MORE EFFECTIVE COERCIVE ORDERS

- 1.60 By coercive orders we mean orders that 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 “won’t pay”, then a coercive order may be the only route to enforcement.

- 1.61 The current law provides two coercive orders, but both have difficulties. First, a debtor can be committed to prison on a judgment summons for up to six weeks, subject to being released earlier on payment of the money owed. However, the judgment summons requires proof to the criminal standard (the court must be completely sure) that the debtor has the means to pay, which is a high hurdle for the creditor to reach, especially if the creditor is a litigant in person. In our Report we discuss some recent case law in respect of the evidence the creditor is required to provide to meet this threshold.²¹ Further, imprisonment of the debtor is often not a desirable outcome because of its impact on the debtor's family life and ability to earn an income. Notwithstanding these concerns, as we explain in our Report, the judgment summons is still considered to have a role to play in enforcement proceedings.²² Secondly, a writ or warrant of sequestration enables the debtor's goods to be taken possession of, held and dealt with in accordance with directions of the court. Although the court may give directions for the property to be dealt with in order to recover funds for the creditor, the procedure is mainly aimed at applying pressure on the creditor. Sequestration is a complex and expensive order, which is rarely used.
- 1.62 We recommend the introduction of two new coercive orders, to enable the courts to disqualify debtors from driving or prohibit them travelling out of the United Kingdom.²³ Disqualification from driving is already used as a means of enforcement under the Child Support Act 1991 ("CSA 1991"). Further, the law already provides orders that can be used to prevent a debtor from leaving the jurisdiction, but the current orders are not free-standing methods of enforcement; they can only be applied for in existing proceedings. 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.
- 1.63 In making recommendations for these new coercive orders we have taken care to ensure that the orders are genuinely coercive and not punitive. A punitive order would be an order that punished the debtor for non-payment. That is not the intention. The coercive orders we recommend are designed to put pressure on a debtor who can pay but "won't pay" to pay the money owed to the creditor. Importantly in this respect, payment by the debtor immediately brings the order to an end.
- 1.64 We propose that the court should be able to make a coercive order either on a general enforcement application or on a specific application for a coercive order. The ability for a creditor to make a specific application for a coercive order will be useful in those cases, albeit rare, where a creditor has evidence of the debtor's ability to pay from resources that obviously lie beyond the reach of the court; for example because they are held outside of England and Wales. 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.

²¹ See Chapter 15.

²² See Chapter 15.

²³ See Chapter 12.

- 1.65 Under the scheme we recommend, a coercive order will only be imposed if the court is satisfied that the debtor has the ability to pay what is due and that it is in the interests of justice to make the order. By “has the ability to pay” we mean that the debtor has the ability at the time the coercive order is made. We consider this timing is important as it ensures that the orders are not punitive. We recommend that the court should be satisfied that the debtor has the ability to pay on the balance of probabilities.
- 1.66 In considering the interests of justice, we recommend that the court should take into account all the circumstances of the case including: the extent of the debtor’s failure to pay what is owed; the other enforcement methods that are available to the creditor and the likely success of those methods; the likely effectiveness of a coercive order in achieving payment of the debt; 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.
- 1.67 The requirement for the court to take into account the likely effectiveness of the coercive order in achieving payment of the debt is one of the ways in which the orders are characterised as coercive. To impose an order where it is clear that the debtor will not pay would be punitive.
- 1.68 We recommend that where a coercive order is imposed, it may last for up to 12 months. The order would be discharged upon full payment of the arrears due to the creditor. The debtor would be able to ask the court to vary or discharge the coercive order on partial payment of the debt. The court should be able to postpone the start of an order and temporarily suspend an order on an application by the debtor. This safeguard will, for example, enable a debtor prohibited from travelling out of the United Kingdom to apply to have the prohibition suspended (even where no payment has been made) where the debtor has an urgent need to travel – perhaps due to a family emergency.
- 1.69 Debtors who are disqualified from driving would be prohibited from holding or obtaining a licence. Any licence held will be surrendered to the court. Sanctions will follow automatically under the existing criminal law if a debtor drives whilst the disqualification order is in place. When the disqualification order comes to an end, the debtor will need to apply to the DVLA for a new licence (but will not be required to re-take a driving test).
- 1.70 Debtors who are prohibited from travelling out of the United Kingdom will be required to surrender their passport to the court. The passport will not be cancelled, but the debtor will be placed on Her Majesty’s Passport Office’s “stop file” to ensure that no new passport is issued. A debtor who travels outside of the United Kingdom in breach of the order will be in contempt of court.

- 1.71 Our recommendations for coercive orders are carefully framed to ensure that the orders will only be available to coerce the debtor to pay the money due, not as a form of punishment. On this basis, we consider that the proceedings will be civil, not criminal in nature. The distinction is an important one. Article 6 of the European Convention on Human Rights, which provides for the right to a fair trial, provides additional rights, for example a higher standard of proof, where proceedings are criminal. We set out our full analysis in the Report.²⁴

CONCLUSION

- 1.72 It is essential that the law provides effective and accessible ways of enforcing family financial orders that ensure fairness to the debtor and the creditor. A failure to do so impacts most directly on the debtor and his or her dependents, but also affects the State, courts, the family justice system and society as a whole. Our recommendations will achieve these aims, whilst providing a procedure for enforcement that is much more accessible by the increasing numbers of litigants in person who bring, or are involved in, enforcement actions. By doing so, our recommendations will ensure a more efficient use of court time.
- 1.73 Not all of our proposals will help in each individual case. The most effective means of enforcement will always depend on the facts, which inevitably vary considerably from case to case. But taken as a whole, our recommendations provide courts and creditors with better information, a more effective range of enforcement methods and a more effective process. Collectively our recommendations will help improve the enforcement of family financial orders.

²⁴ See paras 12.84 to 12.103.