Report of the Financial Remedies Working Group

Resolution's response

Resolution's 6,500 members are family lawyers, mediators and other family professionals, committed to a non-adversarial approach to family law and the resolution of family disputes.

Our response has been prepared by members of Resolution's National Committee working with our Property, Tax and Pensions (PTP), International and Standards Committees. Our members act on behalf of lay clients in relation to financial remedy negotiations and their financial remedy applications, using the prescribed rules, forms and procedure, on a day to day basis.

Where we make no comments on a part of the Report of the Financial Remedies Working Group (the report), we have noted the content.

General comments

1. Resolution welcomes the opportunity to comment on this initiative. We are supportive of improving court decision-making and making it quicker, less expensive and otherwise easier for users to access the courts, whether represented or not.

2. We agree that the overall structure in Part 9 FPR 2010 should continue. In considering the recommendations in the report, we have had in mind the need, in our view, to design a system which serves the "average" litigant, i.e. those with a lower net worth and/or for those looking to settle. We are concerned that some of the report appears to be strongly focused on procedure for litigants with a high net worth involved in contested proceedings, which does not reflect the typical family court user.

3. We are disappointed that there is no proposal to reintroduce, in some form, without prejudice offers that can be taken into account when the court considers whether a costs order should be made in financial remedy cases. We see this as crucial to providing incentives to settle within an improved procedure, and to the court offering a fair forum for those making use of it. In the meantime we suggest at paragraph 16 of this response that greater encouragement could be given to the making of proposals.

4. We understand the impetus for creating a system that is accessible for the LiP without giving them every indulgence. However, we do press the need for the judiciary, and others in a position to assist litigants, to continue to take appropriate opportunities to provide for people a sensitive and clear explanation of the benefits of good, independent legal advice and the role it plays in setting out their options for resolving their disputes and settling cases. The LiP population is not only made up of those who would previously have been eligible for legal aid. Many people choose to represent themselves for a variety of reasons, but many may benefit from and be able to access some legal advice, even if limited.

5. We suggest that the court has an important role to play in helping users receive guidance and support from legal professionals at an early stage, to help them understand what their process options are and the principles that would apply if agreement cannot be reached. If the benefits of doing so are not outlined, there is a risk of the majority of LiPs, for example, advancing far into the disclosure process before realising that the best outcome they could hope for is already before them.

6. We also believe that the scheme, procedure and documentation should be designed to assist and be reasonably understood by **all litigants**. Presentation of materials for LiPs only suggests special treatment for them.

7. Our members report some courts are prepared to stock Resolution materials and information about local Resolution members, whilst others are not. It would assist all litigants if the courts took a more consistent approach to promoting the local professional family law services available to support litigants and make it easier for them to pass through the court system without feeling disadvantaged. This should include signposting to Resolution, mediators and other services such as Resolution's Family Matters, the Only Dads/Only Mums panel .and parenting information schemes, as well as to websites such as the FMC website.

8. We turn now to respond to some of the specifics in the report. Using its headings:

A. Procedure

Unified Procedure

9. We agree that there should be unified procedures for financial remedies including Schedule 1 Children Act and Part III MFPA 1984 (after an initial permission hearing). We also agree there should be one Form E to avoid confusion, and ideally one Form A with guidance about both procedures (the shortcut procedure and the current procedure).

10. We share the view that the additional jurisdiction under the DPMCA 1978 is an unnecessary complication.

11. We think that the Chapter V procedure should be retained as an alternative for simple variation applications and simple Schedule 1 Children Act applications; many members welcome the shortcut procedure and some would like to see it extended to include the simpler financial remedies cases. It should be clear on the face of the Form A that if a variation application is made in circumstances in which an end to the maintenance order is likely to result (whether with or without a lump sum or a pension sharing order), the full procedures should be followed.

12. In our members' experience, the bulk of the court's work relates to the low net worth case, which needs an affordable process to meet needs at often quite basic levels. In our view, the full financial remedy process with three or four hearings under the report's proposals (albeit with the proposed imposition of FDRs at the First Appointment about which we also have concerns) will not be fit and necessary for the majority of cases many of which may increasingly involve LiPs.

13. The introduction of the shortcut procedure under Chapter V has assisted significantly in avoiding costly processes where relatively small sums are at stake, for example, where there is only a university fees issue to be resolved. Our members have seen cases where the

recipient party would be unable to press their case for fear of disproportionate costs and also cases where – prior to the arrival of the process – the paying party has been held to ransom by a former spouse happy to press the case all the way.

14. Our members have suggested that the existing Rule 9 timetable be amended to bring forward the date for the filing and exchange of Forms E to give time for an earlier exchange of Questionnaires where appropriate, and/or negotiation. In some cases, the parties could by agreement exchange replies to Questionnaire and thus be well placed to use the First Appointment as an FDR. In others, this would assist in the agreement of directions and utilisation of the accelerated First Appointment procedure. (For those rare cases where the level and complexity of assets mean that a longer time for preparation of an accurate and helpful Form E is needed, application could be made to the urgent business judge and for the First Appointment to come before a High Court judge, per existing guidance 1 December 2009/5 June 2014.)

15. We agree with the views expressed in paragraph 10 of the report in relation to international applications. We have no difficulty with paragraph 13 on the assumption that the suggestions regarding the adoption of a unified procedure relate only to recognition matters.

16. Resolution's view is that improvements to procedure for those financial remedy applications coming before the family courts should be considered in tandem with encouragement and incentives to settle early and discouraging the pursuit of unreasonable cases. The exercise of the current costs provisions, together with a lack of Calderbank offers in any form, means that there is no real incentive to settle finance cases that go to court. There are two obvious examples of where this is a problem. First where one party is a LiP and the other is represented. Second, where both are represented but one has far greater financial resources and can therefore use the lack of costs sanctions as a bullying tactic.

17. There are various options to encourage early settlement. Resolution's preference would be a rule allowing without prejudice save as to costs offers to be taken into account. It should not attempt to be too prescriptive or complex, but should allow the judge discretion to consider "Calderbank style" offers in the light of all of the circumstances of the case. We would be happy to assist in formulating such a rule.

18. Consideration might also be given to any indication given by the judge at the FDR being noted and retained in a way that cannot be accessed by any other judge until the end of the final hearing, but which could then be made available as part of the circumstances to be taken into account by the trial judge when considering costs The effectiveness of such a change would of course be dependent upon having properly listed FDRs with judges having the opportunity to form a considered conclusion as to the appropriate outcome at that stage. Another option would be for a record of each party's best offer to be on the court file for use on the subject of costs at final hearing.

19. We also suggest a change to Rule 9.28 to provide that open offers be exchanged not less than two months before trial, and if that is not possible that an explanation must be set out in writing and brought to the court's attention at the final hearing. Open offers should then be made as soon as reasonably practicable and in any event not less than 14/7 days before the final hearing.

One form of financial statement Annex 1

20. We agree there should be one Form E as referred to above.

21. The draft Form E provided with the report requires further amendment as it contains some omissions and typographical errors. More detailed feedback can be provided if required.

22. We support the more accessible narrative at the start of the form. We consider that many boxes should be bigger as not all litigants have access to online programmes. We consider that lists of expenses should vary according to the nature of the application (for example spousal or children application), and that these should be separate schedules with a default pro forma budget available to litigants.

Deemed applications

23. We agree that the requirement to file a Form A for dismissal purposes only at the time of an application for a consent order is unnecessary; it is a practice only required in a very few courts, the majority do not require it.

24. A simplified Form A therefore need not list all potential applications, and could simply have the options of choosing all financial claims (which would include the claims of both parties), or the option of an application to vary an existing order.

25. We consider however that further thought is required on the subject of deemed applications generally, for example in relation to the remarriage of one party before a claim is made. This ties in with the recommendations at paragraph 29 of the report and the objective of de-linking of financial remedies from the divorce process. If financial claims are not initially made in a petition, there is a risk of that party remarrying without having invoked the court's jurisdiction.

26. We suggest that notice could be given to third parties (mortgagees and pension providers) by letter without the requirement to serve a Form A, or by service of the new Form A containing the claims of both parties.

Enhancement of FDRs

27. We generally agree that the FDR is a successful part of the process. We are not however persuaded that the rules should require the parties to attend every First Appointment prepared to treat it as an FDR.

28. Resolution's view is that parties should attempt to settle cases as far as possible whenever there is a court attendance, with encouragement by the court to do so, and the First Appointment should be treated as an FDR in appropriate cases using the current procedure. The rules already provide that where one party is pushing for the First Appointment to be treated as an FDR and the other does not agree, it is in the judge's discretion. It would be welcome if judges did exercise their powers to impose an FDR in those circumstances, and that they had judicial time to conduct an FDR. It is our members' experience that at present judges are not exercising their discretion in this way, instead defaulting to a First Appointment if one party is saying they are not ready for an FDR. However where both parties are saying that the First Appointment should not be treated as an FDR, the starting point should be that it will not be.

29. The proposed approach would potentially increase the represented party's costs (with in practice currently no realistic expectations of costs sanctions). Litigants would have to over-prepare in case the judge elects to treat it as an FDR even if both parties do not think it is appropriate for it to be treated as such. Solicitors who appear as advocates at First Appointments to reduce costs often do not appear as advocates at FDRs and may have to instruct counsel earlier than may be necessary, in case there might be an FDR imposed on them.

30. There is also potential for confusion over whether offers and submissions (including for example case notes) are open or without prejudice and of a judge being inadvertently "knocked out" from dealing with the case in the future, which in courts with only a very limited number of judges could be a particular problem.

31. We also anticipate that there is likely to be a lack of judicial time (including the judicial reading time) for an FDR at the First Appointment stage. We query how First Appointments would be listed if there is to be the judicial power proposed at paragraph 20 of the report. Our members report that listing is already a problem, for example in the CFC, with the impact of the increased volume of LiPs post-LASPO and the implementation of the 26 week rule leading to very many more private law cases floating. If the proposed change led to yet more floating First Appointments, that would not be a welcome development; equally if parties found FDRs shoe-horned into an insufficient amount of court time.

32. The First Appointment provides an opportunity for judicial case management where this is needed, for example, the opportunity to explain to LiPs the purpose of an FDR and to give some guidance as to how to prepare for it as well as appropriate directions.

33. We welcome the Pilot Scheme for dispensing with a First Appointment when both parties agree directions. The timing is however very tight; so much has to be done 14 days before the appointment, and then the Judge's decision is obtained 7 days before, leading to much uncertainty and additional costs (for example inability to stand down counsel). For the accelerated First Appointment procedure to have more take up, the timetable needs to have more room for manoeuvre.

Applications for financial relief after an overseas divorce

34. We agree with paragraphs 24 and 25 of the report.

35. Regarding paragraph 36, Resolution suggests that an application for permission to make an application under Part III should be heard by a Section 9 Judge or a High Court Judge whether the application is made in the High Court or the Family Court. We also suggest that there may be a residue of cases, excluding divorce applications, Schedule 1 applications and Part III applications, where a freestanding application needs to be made. We suggest that such applications also need to be heard by a Section 9 Judge or High Court Judge. Examples of such an application may be an application for spousal maintenance under section 27 where there are overseas divorce proceedings, a forum necessitas application under the maintenance regulation, or enforcement of foreign capital or property orders.

36. We note the decision of Mostyn J in Met v Hat [2013] EWHC 4247.

Efficient Conduct of Final Hearings

37. Whilst there is much to be commended in the 5 June 2014 statement in relation to the hearing of High Court level cases, we do not agree that it should be extended to all cases listed for a final hearing of three days or more.

38. A PTR can be very helpful, but one is simply not needed in every case where directions can be given at the FDR for preparation and the efficient conduct of a final hearing. We believe that this proposal will unnecessarily increase costs and impact on the overall timetable for the hearing of cases in the lower courts

39. We do not agree that there should be a bar on evidence in chief, since that is a counsel of perfection unlikely to be attained in the family courts, where s25 statements may be less comprehensive and there are many LiPs.

40. An agreed schedule of assets at PTR stage is also unrealistic.

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

41. In principle we welcome this as a broad objective but we consider that further detailed work is required before this is achievable. There is a particular problem where there are competing jurisdictions (whether governed by Brussels II or not) if either spouse is disadvantaged by delays in issuing a divorce petition because of a new administrative regime.

42. We consider that it is helpful if financial claims are made in principle in the petition, but that, consistent with paragraph 23 above, this should include potential claims of both parties in order to avoid an advantage to the Petitioner (for example in relation to remarriage and the loss of claims).

43. We note the technical inhibitors identified. We also believe that the suggested change would make no real difference to the parties and should be accompanied by legislative change on the grounds for divorce to provide for divorce without blame. Such law reform is in our view a priority, with the section 1(2)(b) fact petition in particular being a real impediment to good progress in the routine case. Conflict and distress will still not be minimised for those completing and responding to the documentation, and it is not clear who would exercise the discretion on a section 1(2)(b) fact that is currently a judicial task.

44. Further consideration also needs to be given to the practical linking of finalisation of the divorce with free standing financial remedy applications. On a practical level there could be international, insurance, tax and/or pension share consequences of a divorce which concludes before the making of a financial remedy order, for example, where there are pension sharing issues to raise prior to the legal stage of terminating the spouse's status as potential widow/widower; where the spouse would become the ex-spouse immediately for the purposes of death in service benefits before the financial issues are resolved; and a potential knock on impact on claims on death – if the petitioner is non domiciled, the respondent would be in a very difficult position.

45. There would need to be a date fixed for the pronouncement of the divorce with the opportunity to delay that if there were section 10(2) type applications to be made i.e. safeguards to prevent finalisation where there is good financial reason or this would cause severe hardship.

46. In the absence of an accompanying education programme it may in fact be unwise to separate out divorce from financial applications. A large proportion of the general public is still working under a misapprehension that there are common law rights for unmarried partners, and will not always understand that a divorce does not bring an end to financial claims – that assumption has often initially been made by our members' clients before they have the benefit of legal advice. As well as couples leaving issues unresolved, there is the possibility of parties who remarry losing the opportunity to make claims if they remarry and haven't included a claim in the petition. Particular regard would need to be given to helping litigants understand the potential complexities.

47. It is worth noting here the need to ensure consequential changes to all documentation post any change. For example, the acknowledgement of service to the divorce petition still contains a reference to the statement of arrangements for children which must be confusing for litigants and should be amended urgently.

Choice of court location

48. We support the recommendation that the CFC should be a point of entry for financial remedy applications, together with other identified regional centres of excellence. For example, Manchester has a money list involving three judges conducting High Court level work. We suggest that allocation to specialist courts could, as necessary, be handled at a regional level by allocation to regional designated Financial Remedy centres.

49. We agree that parties should be entitled to elect to issue in the CFC (due for example to the greater availability of specialist judges and counsel) or another specialist regional centre of their choice.

B. Litigants in person

Financial Remedy procedure for the LiP

50. We agree that the current procedure is largely effective. The process and procedure, documentation and forms should be designed to be accessible for and reasonably understood by all litigants, including LiPs.

51. Without signposting to at least some legal advice, the emphasis on Dispute Resolution and the effectiveness of the new obligations will be less powerful. Please see our comments at paragraphs 4 and 5.

Guides for LiPs

52. This section contains some helpful references to the type of information which all litigants need to know and be able to access on process and procedure. It would in fact be more generally helpful for both LiPs and represented parties for guides and information to be presented as **'for litigants'**. This might help to address any feelings of being disadvantaged before the court experienced by one or both parties, where one is represented and one is not.

53. Resolution's web site provides information and resources for the public on the legal process, including a series of videos produced by Lucy Reed to help explain how to prepare and what to expect when you have to go to court.

54. Our specific comments on 'Applying for a financial remedy order' at **Annex 4** are as follows:

    a. We suggest that this needs a glossary – will people using it know what a Form A, G, E is?

    b. Some areas are given little attention such as 'complete Form A' with no guidance and which a LiP will probably not know how to do, and other areas are over simplified

    c. What happens at the First Appointment – people also need to be advised to take a diary as the judge will fix a date for the FDR

    d. Information should be provided here about the possibility of the judge directing you and your spouse to get information on and consider the use of an out of court process

    e. What happens between First Appointment and FDR – "write to your spouse setting out what you propose the court should do" would be better worded along the lines of "write to your spouse (or their solicitor if they have one) setting out your proposals as to the financial settlement (as to income, capital, housing and pension) that you consider the court should order"

    f. The FDR – a sentence should be added to say that they should arrive at least an hour in advance to discuss the financial proposals that have been exchanged, encouraging engagement with any solicitor or counsel attending the FDR (Resolution advises members that they may negotiate at court with a LiP on the basis of their client's instructions and if the LiP is willing and comfortable talking to them)

    g. What happens if we cannot agree at the FDR – "set the case down" is legal jargon – change to fix a date for the final hearing

    h. Mention should be made in this section, and that on the Final Hearing, that the final hearing may be 2/3 days or more and that they (and potentially other third parties, including valuers or other experts will almost certainly have to give oral evidence and be cross-examined.) Reference should also be made to the possibility of the decision not being given at the end of the hearing, but rather through a judgment at a later date that the parties are likely to be required to attend

    i. It might be made clearer that you will probably be ordered to prepare a bundle if neither you or your spouse is legally represented

    j. The Final Hearing – again, a sentence should be added to say that they should arrive at least an hour in advance to discuss whether here remain any options for making an agreement, encouraging engagement with any solicitor or counsel involved in the case

    k. Should there be sections about what to do in case of emergency – i.e. applications for LSPOs or maintenance pending suit and so on?

    l. The document appears to assume that both parties will be unrepresented. There should be reference to the fact they may be notified that their spouse has a solicitor with their contact details, and throughout to sending papers and proposals to their spouse or their solicitor if they have one

    m. It would be helpful to include a general section to explain that you may seek independent legal advice at any time during the court proceedings; that this may assist you in understanding your legal position and what would be a fair outcome in your case.

55. The Court Form Finder and its search function would benefit from improvement. Currently you need to know the number of the form you are looking for which must be difficult for LiPs.

Orders

56. It is helpful to encourage judges and practitioners to use language which is readily understood by LiPs and to be open to testing the wording used. The suggestions in the report are likely to be just as useful for represented parties.

57. We note paragraph 60. Regarding the drafting of consent orders, we have already discussed with the Association of District Judges the provision of data on Resolution solicitors who will undertake this work on a fixed fee basis, post orders having been prepared for LiPs by the District Judge.

Case management and LiPs

58. We welcome this part of the report.

59. Judges need to bear in mind the risk of unfair penalisation of represented parties. Financial disadvantage may be incurred by the represented party, for example, by the rules providing that the costs of doing certain tasks, such as preparation of bundles, be shifted solely on to them (which will not be paid from the Legal Aid Fund for those remaining legally aided finance cases); or due to the sometimes unreasonable, wilful conduct of the case by a LIP. 80% of respondents to a Resolution member survey[1] said that the legal or legal aid costs of the represented party increase when one or more LiPs are involved in a case.

60. In our members' experience, scope for negotiations can also be limited in cases involving both a represented party and a LiP. Whilst we advise our members how to deal appropriately with a LiP, the LiP may have reasons for feeling unable or uncomfortable to do so. As discussed earlier, there are no real costs incentives for the LiP to negotiate.

61. More judicial consideration should be given to exercising the discretion to make costs orders against parties where there is consistent non-compliance with the rules, including against LiPs when they are unreasonably adding to the costs of represented parties. The principle in Re W (Children) EWFC 22 about the importance of compliance with directions according to the timetable fixed by the court and keeping the court informed in the event of any non-compliance should apply across all proceedings conducted in the family court.

Judicial Training

62. We believe that, particularly in cases involving at least one LiP, generally the more the blurring of the two different roles of the judge on the one hand as facilitator and helper on process and procedure and on the other, as adjudicator, the more difficulties there can be for the judge and the parties. Anecdotally, our members are beginning to report an apparent reluctance or even a refusal on the part of some judges to determine issues when necessary, due to time pressure or their attitude to their judicial role. Parties are entitled to

[1] Resolution surveyed its members from 24 March to 17 April 2014 about their experience of LASPO on the ground - 125 responded

judicial time and an adjudication where appropriate, for example, where the parties have mediated and done all that they can to crack a case, but need and want a judicial decision.

63. There also needs to be specific thought given to the particular issues which engage where one party is represented and the other is not, including appropriately taking into account the needs and potential costs of represented parties. Judges need to be more aware of the additional cost to a represented party of being against a LiP and make costs orders where appropriate.

64. We suggest that tips and techniques for promoting out of court and at court negotiations with the solicitor for any represented party need to be developed and disseminated. We would be happy to assist in this regard.

65. We recognise that it is important for both judges and those representing parties to have awareness about how LiPs within the family justice system feel, and to think about why a LiP is not instructing a lawyer and how their dealings will differ from those with another lawyer. Resolution provides to members a *Guide to Good Practice on Dealing With Litigants in Person.* Whilst the duty of the solicitor is to represent his/her client as effectively as s/hey can, s/he will be expected to have the Resolution Code of Practice and the ethos behind it at the forefront of their mind in their dealings with LiPs as well as their clients. The judiciary and Judicial College may also find aspects of this of assistance.

66. Judicial training on the adoption of procedural changes is also likely to be necessary. Our members still report to us the rejection of divorce petitions with no statement of arrangements for children attached!

C. Standard form orders in financial remedy proceedings

67. Resolution is committed to supporting the aims of the judiciary in creating a standard approach to order drafting, the implementation of the standard orders, encouraging their widespread adoption and to playing an active role in assisting the profession to successfully and speedily make the transition to use of them.

68. To ensure we can provide the most effective support and publicise the use of the orders through our extensive marketing and member communication channels, it would be helpful to have a timetable detailing when the orders annexed with the report will be confirmed as finalised and the proposed date of their adoption as standard orders by the Family Court. It would also be really helpful for us to know whether the wording used in paragraph 79 of the report will be adopted in the senior judiciary's communications on the orders.

69. Post adoption, we assume that there will be some monitoring of consistency of use, for example, to see where variations in fact become standard. We expect to provide further member feedback on the orders and to suggest any improvements in due course on the basis that our members have extensive experience of the implementation of the orders made and whether they can be enforced.

70. Resolution plans to assist its members by producing a new companion edition to the Financial Remedy Omnibus, accompanied by footnotes and guidance in much the same way as it has done over many years with its publication Precedents for Consent Orders which have been widely used by the profession and district judges to assist in the drafting of financial remedy orders and are now in their ninth edition. This will be promoted to our 6,500 members and others in the family law profession and will be available to edit on line

so that orders can be produced quickly and effectively. We will keep the judiciary updated on its development

D. Arbitration in family proceedings/ Guidance at Annex 12

71. Resolution welcomes this part of the report.

72. We suggest that it would be sensible to have a specific designated judge in each area to deal with arbitration queries generally – this may be helpful since this is still a relatively new scheme.

73. Paragraph 93 of the report proposes to add the "High Court, Family Division" to the list of places where issues relating to a dispute arising out of an arbitration could be dealt with. It would be helpful to clarify how this is going to work i.e. are all arbitration claims/issues going to be dealt with in London (we presume not as we would consider that to be inappropriate) or is this an issue which needs to be addressed?

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Resolution
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