Public Policy

There is a public policy in all litigation, but especially in family law litigation, about finality, conclusion and certainty. Judges constantly testify to the importance of parties knowing that there is an end to the dispute and to the litigation.

Lord Wilberforce in Ampthill Peerage Case [1976] 2 WLR 77, HL:

“It is vitally necessary that the law should provide a means for any doubts which may be raised to be resolved, and resolved at a time when witnesses and records are available. It is vitally necessary that any such doubts once disposed of should be resolved once for all and that they should not be capable of being reopened whenever, allegedly, some new material is brought to light which might have borne upon the question. How otherwise could a man's life be planned?

This policy has been in statutory form for over a century; ... This principle of finality of determination is, of course, but one strand in a more general fabric. English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book.

The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended.

But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.”

In addition, the whole direction of the conduct of family law dispute resolution over the past 25 years has been to encourage settlements, agreements and a conciliatory approach. This was the SFLA (now Resolution) Code of Conduct in the early 1970s which still applies today and with even greater force. It is now embodied in the Law Society Family Law Protocol.

It is only rare and exceptional cases that require a final hearing. Cases might be exceptional because of the facts, conflicts of evidence or the disputed area of law; it is only exceptional cases like these that should reach that final stage. Too many cases go to a final hearing or close to a final hearing when they should be settled.
Family law directly encourages settlement by allowing for/providing for the making of consent orders. The vast majority of financial disputes on marriage breakdown are settled by consent orders. Therefore practitioners have a much greater need for knowledge about making consent orders than preparing for final hearings. Yet just as the parties are reaching some consensus and want their case to be concluded quickly, so a number of procedural and practical obstacles can arise. These notes set out the law, practice and procedure on making a consent order.

**Making a Consent Order**

*What is a consent order?*

“an order in the terms applied for to which the respondent agrees” (s33A (3) MCA).

Both parties agree comprehensively and conclusively the specific terms of an order which can be final or interim in nature.

A consent order can be substantive e.g. final financial order or interim maintenance pending suit, or can be procedural e.g. directions. Generally these notes refer to substantive financial orders.

A consent order can be without contested evidence or argument, but very exceptionally can be after some part of a contested hearing. However in the latter, particular provisions would apply.

A consent order is not the product of a rubber stamp (Pounds [1994] 1 FLR 775). The court has an independent duty to check that the intended consent order is fair and just according to law. Practice varies as to how much in reality a court will object to a consent order and anecdotally it only tends to be in exceptional circumstances where parties are both represented by specialist lawyers.

When making a financial order, the court has a duty to consider whether it has:

- power e.g. ss 22 – 24 MCA; and
- jurisdiction e.g. after decree nisi for final orders; and
- it is fair and reasonable e.g. within the section 25 criteria.

Note that the court has no additional powers simply because there is an agreement.

The court has power only to make financial remedy orders. It cannot make any other orders, which must therefore be contained within recitals and undertakings as appropriate. This leads to complicated issues regarding enforcement. Always anticipate enforcement difficulties before finalising the precise terms of the settlement.

For example, the court cannot:

- order the transfer of property to a third party.
- order the transfer of a property in the sole name of a third party.
- order the transfer of a property in the name of one party and a third party.
- order the transfer of a property in which a third party has a beneficial interest.
- make directions regarding a property held by a trustee in bankruptcy or a mortgagee in possession.
order the transfer of a property in one court order and then subsequently order the transfer of another property in another court order, save for narrow circumstances of capitalisation on a variation of maintenance. 

order one party to pay a lump sum to a third party. 

order one party to pay debts. 

order one party to pay regular payments to a third party, and see special provisions in respect of school fees.

The original and leading authority is Jenkins v Livesey [1985] AC 424, HOL. This stated that the family courts’ jurisdiction came from statute e.g. the Matrimonial Causes Act (MCA). The court’s function is the same as when making a contested order. There are a list of matters to consider such as section 25. The order must be just and fair.

The amount of scrutiny of financial consent orders varies from court to court and district judge to district judge. Know your court. Know your district judge. Know their foibles, weaknesses, inconsistencies, pet and petty hatreds and what extra documents they require for a consent order to be made.

**Caution for consent orders**

Lawyers and clients have a difficult balancing act in deciding when to settle. Strictly, a settlement should arise when there has been full and complete disclosure, suitably corroborated. 

However, obtaining complete disclosure can be very difficult, time-consuming, costly and give rise to major disputes with impacts on the wider family. It is often necessary to take a commercial judgement on what more information can be ascertained, and at what cost and over what period of time and at what benefit to an improved settlement. This is frankly a horrendous task and responsibility. Much judgement, experience and wisdom is needed. Hindsight can too easily show in a few cases that one party should have gone on to seek more disclosure etc. before settling.

If a lawyer believes that disclosure is inadequate, misleading or wrong, then written advice must be given to this effect. Moreover, a lawyer cannot give proper professional advice on terms of settlement without reliable disclosure. A lawyer must make it clear that he cannot accept responsibility for advising on any financial settlement when there is unreliable disclosure.

Nevertheless, clients understandably want to settle. Often, but certainly not always, they have a reasonably good understanding of whether their spouse has made reasonably good disclosure. Sometimes in any event, clients want to settle on particular terms without pursuing complete disclosure. Sometimes the solicitor may have a good suspicion that particular terms are as good as can be obtained even with more extensive and expensive investigation.

In such circumstances, before settling (including probably making any offer), the lawyer must obtain a letter of authority in writing with instructions to settle notwithstanding incomplete or unreliable disclosure. Prepare a precedent letter in advance to be used by all practitioners in a department. It will be used often! It must be good, reliable and as watertight as possible. It is good practice to send a copy of the proposed letter of offer with the proposed letter of authority so that the client can see what proposal is being made. It is good practice to remind the client that if an offer is made, which is then accepted, it will probably be open and may give rise to costs implications and other difficulties if the client should subsequently resile from it.
See Dickinson v Jones Alexander & Co [1993] 2 FLR 521, a solicitor was liable in damages for £330,000 for negligence including failure to investigate.

But see also comments by Lincoln J in two cases, Dutfield v Gilbert H Stephens and Sons [1988] Fam Law 473 and P v P [1989] 2 FLR 241 about the undesirability of squandering costs on valuations which proved little or of no importance. There are many other similar comments by judges.

Many solicitors feel not so much that it is a balancing act but too often a game of Russian roulette. Hindsight is a wonderful view. It can in practice sometimes be immensely difficult to know when to stop investigating and settle, when to recommend a client to settle and when to give way graciously when a client wants to settle with some disclosure still outstanding.

**What is needed for a consent order?**

In order to undertake its section 25 exercise, and without the information available at a contested hearing, the court requires certain information. This is set out initially in the authority section in the primary statute, s33A (1) MCA: “notwithstanding anything in the preceding provisions of this Part of this Act, on an application for a consent order for financial relief the court may, unless it has reason to think there are other circumstances into which it ought to enquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application”. This enables the court to make a consent order without full investigation and oral evidence.

This information is now prescribed in Rule 9.26 of the Family Procedure Rules 2010.

**Information on application for consent order for financial relief R9.26**

(1) Subject to paragraphs (5) and to rule 35.2 in relation to an application for a consent order (a) the applicant was filed two copies of a draft of the order in the terms sought, one of which must be endorsed with a statement signed by the respondent to the application signifying agreement, and (b) each party must file with the court and serve on the other party a statement of information in the form referred to in PD 5A.

(2) Where each party’s statement of information is contained in one form, it must be signed by both the applicant and the respondent to certify that they have read the contents of the other party’s statement.

(3) Where each party’s statement of information is in a separate form, the form of each party must be signed by the other party to certify that they have read the contents of the statement contained in that form.

(4) Unless the court directs otherwise, the applicant and the respondent need not attend the hearing for an application for a consent order.

(5) Where all or any of the parties attend the hearing of an application for financial remedy the court may (a) dispense with the filing of a statement of information; and (b) give directions for the information which would otherwise be required to be given in such a statement to be given in such a manner as it thinks fit.
(6) In relation to an application for a consent order under Part 3 of the 1984 Act or Schedule 7 to the 2004 Act, the application for permission to make the application may be heard at the same time as the application for a financial remedy is evidence of the respondent's consent to the order is filed with the application.

As set out in (1), an application for a financial consent order requires 2 copies of the draft order. One must be signed by the respondent to the application signifying agreement. Check local practice. Some courts e.g. the Central Family Court, like to have two copies of the consent order as signed by the parties and one clean unsigned copy which is then used as the consent order itself.

Note that if the consent order is only to vary periodical payments or for interim periodical payments, it is only information about net income which has previously been required. However in practice, whilst this may be satisfactory for many district judges in respect of interim maintenance, some district judges will want information about capital at the time of variation of periodical payments because of the more recent change in the law allowing capitalisation on variation. Do not be surprised therefore if a district judge requests this. They will almost certainly be alert to this already! It may therefore be good practice, on a variation of periodical payments, to set out the capital position in summary. The practitioner will in any event have considered this at the time of settling the variation.

Note that if the parties attend the hearing for financial remedy, the court may dispense with the statement of information and give directions for what information may be required. How does this work? In practice it does not work as simply as the subparagraph sets out.

If there is a final financial hearing with bundles lodged, and the parties settle before the case starts, it can (should?) be presumed that the skeleton arguments already lodged contain sufficient information and which would have been read by the judge even as the parties are settling outside the door of the court. Therefore the judge should not need any more information and/or alternatively could be easily and quickly directed to what additional information is needed.

The same would apply if the final hearing was part-heard, when again presumably the judge would have been given the basic information, as required above, in the opening.

The same should apply if the case settles at an FDR. In order to have conducted the necessary FDR exercise, the judge would have needed at least the information prescribed above. He should not therefore need any additional information before being able to make a consent order.

The same might apply if the case is settled at a First Appointment if the parties have sufficient financial disclosure in order to be able to settle.

Accordingly in all of these circumstances, it is quite likely that a separate statement of financial circumstances would not be needed, alternatively just a small amount of additional specific information need be provided.

However, know your court, know your district judge, and specifically know how different district judges within a court may have different requirements.

Note the changes in April 2011 as a result of the new Rules, especially with the requirement that either there is one form signed by both or each have signed the other's form. Previous invariable practice
was that each completed their form however it was sometimes submitted without the other side seeing it. This is overcome by this change.

The new statement of information is much more substantial than the previous Form M1 and see PD 5A. Where it is on one form, it must be signed by both parties to certify that they have read the contents of each other’s statement (R 9.26.2). Where it is on separate forms, as often occurs, the form of each party must be signed by the other party to certify they have read the contents of the statement of the other, (R 9.26.3). This is to make sure that each have seen the statement of information being submitted by the other.

Special rules apply when a consent order is being made at the hearing of an application for a financial remedy and see R 9.26.5

The court has no jurisdiction to make a financial order unless there is a financial application. If there are ongoing financial proceedings, there will be a Form A. Subject to the following, no further Form A is needed with the application for the consent order. If there are no ongoing financial proceedings, a Form A must accompany the application for the consent order. In these circumstances, it is conventional to include the words “for dismissal purposes only” on the form. The fee is much less!

What about a Form A on behalf of the respondent to a consent application? Practice varies. In some courts, including the Central Family Court, there is a requirement that the respondent also files a form A, marked as above “for dismissal purposes only”. The rationale is that the court has no jurisdiction to dismiss financial provision claims or to make financial provision orders unless those claims are before the court. They can only be before the court in Form A, hence the requirement. This is the reason why a number of consent applications are sent back, to the chagrin of many practitioners especially those out of London. However a number of county courts do not have this requirement and are content for claims to be deemed to have been made, including reference to such claims being deemed to have been made in the consent order. It is suggested that the Central Family Court practice is the better one and technically correct. If in doubt, lodge Form A on behalf of the respondent to the consent order application and marked “for dismissal purposes”.

Do not ask the judge, on making a consent order, to read the forms E.

Do not ask the judge, on making a consent order, to read letters of disclosure.

Do not ask the judge, on making a consent order, to read a myriad of attachments to Form D81.

When lodging a consent order months, or weeks, or perhaps even days, after an FDR, do not necessarily presume that the judge will remember the disclosure given at the FDR. In any event, in bigger courts the consent order may be seen by a different judge. Agree at the end of the FDR with the judge whether a Form D81 will be needed over the anticipated timeframe for the consent order. In any event, if any time has elapsed since the FDR and in any event in the bigger courts, it is wise to lodge a Form D81.

**The Consent Order itself**

As above, two copies must be lodged. Some courts including the Central Family Court require three copies signed by the parties, one being the original plus an additional clean, unmarked copy. The last
is sometimes used as the sealed order itself, to save typing. Perhaps soon we will be able to send e-mail copies!

It is good practice for clients to sign the consent order instead of, or preferably in addition to, the lawyers. They cannot then say that they did not see it, did not have an opportunity to read it and, perhaps, did not understand it!

An order only takes effect on decree absolute.

There is no jurisdiction to make an order before decree nisi. However on the authority of Pounds, (above), it is now possible to lodge an application for a consent order before decree nisi on the basis that the order will be made on the pronouncement of the decree nisi. Note that the order will not be made before the decree nisi and is conditional upon the decree nisi. The practice is to approve the order with a recommendation that it is made on the pronouncement. This is unlikely if there is not a decree nisi date or unless a special procedure application has been made and a special procedure certificate granted.

Sometimes, and perhaps anecdotally, asking for a final financial order to be approved and made on the decree nisi at the same time as making the special procedure application gives rise to fears that it may delay the special procedure application. If this is an anxiety, either lodge after the special procedure application has been successful and a decree nisi date given or alternatively lodge immediately after the decree nisi. Know your court.

Once the consent order has been received from the court, send a copy to the client. On client's instructions, send copies to third parties affected by the order. Send copies to pension providers, mortgage companies and similar.

Unless the court has simply used a clean copy of the lawyers consent order, check the typing very carefully!

Making a Consent Order

Take care on drafting consent orders. It is a complex subject requiring much experience, wisdom and often discussion with colleagues.

Take particular care and note/consider the following:

- the difference between recitals and orders.
- the difference between recitals and undertakings.
- what is an undertaking and how can it be enforced?
- there can be no orders against third parties.
- orders can only be under sections 22 to 24.
- dismissal of claims: when, on what event, is it clear and relatively imminent?
- differentiate between term orders and section 28 orders.
- differentiate between future events and past events, especially if any delay in lodging the consent order.
- take particular care of clean breaks.
• take care with orders regarding children, for instance the CSA, capitalisation, capital orders.
• be specific on costs.
• use good precedents.
• be aware of local court practice.

When is a settlement not a settlement?

There have been many problems concerning the status of the outcome of the FDR when there is no final order made.

The court cannot simply adjourn the case generally unless very exceptional. Therefore if the parties reach an agreement at court at a First Appointment or an FDR but without a consent order, the case cannot simply be adjourned. Good practice is to put it over to a mention in about six or eight weeks' time with the proviso that nobody need attend provided a consent order has then been lodged at the court. The court has a duty of fixing timetables or otherwise controlling the progress of the case, R1.4 (2) (g).

See Law Society Family Law Protocol, 3rd edition, for good practice although this may vary locally.

Quite often at an FDR, general agreement will be reached on the major terms, however solicitors know that converting heads of agreement into a final financial order often throws up a lot of questions of detail. Some may be significant. Do the parties and their lawyers want the heads of agreement to be open or remain privileged?

If the judge at the FDR indicates that the agreement is reasonable and within the boundaries of section 25 on what a court might order, the parties must know whether this is intended as an order. The judge should be clear expressly on the terms of the order made on the day. The judge should ask whether the parties want a final order that day or simply an indication. Although the parties may be keen to have an order on the day, it may not be possible or even desirable.

Use of the word “approved” in the context of the outcome of the FDR is ambiguous and could be misleading. Preferably it should not be used or endorsed. It is for the court to make clear what the parties are doing and whether or not to make a substantive order and indeed whether the FDR has now become open.

If there is intended to be a final order, there must be a first decree. The terms must be sufficiently clear and certain and complete to be made into a perfected order.

In many courts, if the FDR judge accepts the terms as an agreed order, then the draft terms should go back to that judge alone.

The heads of agreement reached at the FDR would in any event often be an Edgar agreement if it is agreed that it is open and no longer confidential. See the case law above in respect of FDR's.

If the judge intends only to give an indication, then it must be explained that:

• a final substantive order is not being made,
the indication is confidential i.e. not open,
the agreement seems reasonable and,
if and when a final consent order is lodged, the court will then consider whether to give its
approval as if a normal application on paper.

In other words, everything remains behind the curtain of privilege. This gives protections yet it does
not give the parties finality and certainty on the day.

If the agreed terms are open, after legal advice, but the judge only gives a confidential indication, then
it would be appropriate to list the matter for a mention. The order may refer to the parties having
agreed written heads of agreement but no more.

An alternative is the un-perfected binding order. This is a final order subject to perfection. The judge
should explain that he was making a binding order that day in the terms of the agreement but
adjourning the application so that detailed terms could be perfected into a final order. If then the
parties disagreed about those detailed final terms, the court could decide what those terms would be:
see Xydhias [1999] 1 FLR 683.

The district judge's name and date for the perfected final order is then the same as that of the
unperfected order. This is because the final order is made when the heads of agreement are made
into an order of the court even if those terms are unperfected at that time. This could cause problems if
there was for example any partial implementation between the heads of agreement and the perfected
terms being drawn up. Care is needed in the terms drawn up as it must be technically backdated. It is
similar in certain ways to a judgment after a contested hearing when the order must follow the terms of
the judgment notwithstanding subsequent developments.

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