FAMILY LAW SEMINAR**:**

ENFORCEMENT OF ORDERS: THE JUDICIAL PERSPECTIVE
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INTRODUCTION:

In recent years I have come to the conclusion that some young Family Law Practitioners believe that the only or perhaps best method to enforce a judgment or order is to pursue Contempt proceedings and my fellow panellists and I are here to enlighten you on the other forms of enforcement that are more available.

I understand that the popularity of the seminar has attracted young lawyers practising in the wider civil arena as well so I have tailored my presentation to include references to the CPR as well.

This leads me nicely into the first idea I want to share with you which is that the same general rules of enforcement that are available in Civil Procedure are the very ones that are available in Family Law. Many of the Rules for other procedures as well are substantially the same. References to enforcement procedures in the CPR and the schedules thereto have reproduced the old 1975 Rules of Supreme Court. Some of the names have been updated but the rules are the same. Perhaps the short-sightedness surrounding enforcement in the family arena stems from the fact that compared to the CPR and the Rules of Supreme Court where enforcement procedures are covered by approximately 12 Parts or Rules, in the FPR

enforcement is dealt with in Part 38 consisting of three very brief rules. But Rule 38.3[1] for all its brevity opens up all the enforcement procedures available in the 1975 RSC from Order 45 to 55 to the family law practitioner as they were available to the pre-CPR practitioner and are now available in their updated version to the current CPR litigator. Additionally, enforcement remedies are **scattered throughout** various pieces of **legislation**, two of which I will mention briefly later.

There is some doubt as to whether the CPR enforcement procedures are available to the family lawyer and that is because under the FPR's predecessor the Matrimonial Causes Rules, contained, what I describe as an all-encompassing rule[2] that where the MCR were silent the RSC would apply. An equivalent rule was not carried over into the FPR because of the timing of those Rules, which were implemented before the introduction of the CPR which should and technically are the umbrella rules governing both family and civil procedure. Indeed, that gap ought to have been bridged some time ago but has remained a chasm, which although not fatal to the task at hand today, does cause some irritation in other areas of procedure. Anyway for now it is enough to know that the family law practitioner is as well-equipped under the RSC as the civil practitioner is under the CPR to enforce any judgment or order.

Family Law is a specialised area of civil law, which presupposes that you have a comfortable, working knowledge of civil law because the general principles of civil law apply to family law.

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[1] R 38.3 – Any sum shown to be due under an affidavit filed under rule 38.2 may be enforced in the same way as any judgment or order for a sum of money under the Rules of the Supreme Court 1975 or under the Debtors Act Chap. 8:07

[2] Matrimonial Causes Rules – R 3

3 (1) Subject to the provisions of these and of any written law, the Rules of the Supreme Court, shall apply with the necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Court.

(2) For the purpose of subrule (1) any provision of these Rules authorizing or requiring anything to be done in matrimonial proceedings shall be treated as if it were a provision of the Rules of the Supreme Court.

Many of the Rules and procedures in both areas are largely the same. I always recommend to young civil law practitioners that they expose themselves or explore as many facets of civil law as practicable, before specialising, so as to grasp the foundations and common principles that traverse across the wide spectrum of civil law which would enhance your skill as you branch off into your preferred area of speciality.

On a point of judicial assistance: Note that there are some judges who are anxious to assist young attorneys - and for the purpose of this point only, I am referring to attorneys who have been called to the bar less than three years. The CPR and FPR have eliminated a major source of learning – the courtroom where many a young lawyer had the freedom to sit in what were then known as 'chamber courts' (civil and matrimonial) and just observe the daily occurrences in courtroom. It was an eye-opening sometimes "ah-ha moment" when obscure procedure you read in the RSC seen played out in court provided much needed clarity. One appreciated the deference paid to the court by senior practitioners and much more importantly to each other and generally to observe more experienced litigators practise their craft. It was a privilege at least for me to have had the benefit of that experience in my "young" days. Today the CMCs and DHs have eliminated this wonderful source of learning so you must avail yourselves of other sources on information – and "Uncle Google" can only get you so far. The onus is on you to seek out every form of classroom and learn as much as you can.

One of those sources can be the Judge or Master. Recognise when a court is trying to guide you, even if it comes in the form of a buff (hopefully those instances are in the minority). It does not happen often, but grasp the opportunity when it does. We can't tell you outright what to do but we do sometimes give a gentle (or in some cases a stern) judicial nudge in the

right direction, depending on the circumstances. These nudges are not intended to insult or criticise but merely to guide. Don't argue with the Judge even if you don't agree with him or her. Retire to your chambers, research the issue and satisfy yourself that either, you were on the right track and the court is wrong after all, OR that you need to adjust your approach.

A FEW TIPS AND GUIDELINES ON ENFORCEMENT:

Before going into details on the various forms I have been asked to deal with, I would like to make some suggestions when choosing the form of enforcement on behalf of your client.

The Purpose of Enforcement

It is important to bear in mind that the purpose of all forms of enforcement in family proceedings is to ensure that the family is protected, or in both civil and family cases that the mandatory orders of the court are complied with. Enforcement proceedings are not to be viewed as a means of punishing a defaulting party, rather they are meant to get the defaulter to comply. It has been said that there is no general principle that imprisonment should not be imposed except as a last resort[3], but in reality a court is not likely to impose a custodial sentence if there are other forms of enforcement available. Think about it for a moment. How many of you having filed contempt/committal proceedings have had the Judge make an order for imprisonment? I am certain that these orders are in the minority and have been made in exceptional circumstances. One must exercise care in selecting the form of enforcement suitable to the circumstances of the case.

[3] Jones v Jones [1993] 2 F.L.R. 377

Choose the most effective way of getting the order enforced. Carting the defaulter off to jail as the first line of attack, is not going to get the maintenance order or lump sum paid. The initial gloating satisfaction the creditor may feel, when the order is made for six, seven or ten days simple imprisonment is short-lived, especially when the reality of the disobedience of the order continues on the debtor's release and more alarmingly when the debtor loses his job because of his incarceration. So whilst this is an available form of enforcement and in some instances might be suitable to get the debtor to obey it is not the most appropriate in many circumstances.

Tell the court what you want

The court cannot give you what you do not ask for. Your application must state what form of enforcement you are pursuing on behalf of your client. It is pointless to file an application simply stating that a party is "in arrears of maintenance" or "has failed to pay the judgment amount of "$X". Is it that you are awaiting the court to choose the form of enforcement for you or it is that you believe that merely stating that the defaulter has not paid is a form of enforcement? Either way you will not succeed in getting your client's order enforced.

Two important pieces of legislation

Familiarise yourselves with the Remedies of Creditors Act Ch 8:09 that outlines the different remedies available for enforcement and the Debtors Act Ch 8:07 that gives all the steps necessary for obtaining relief from a Judgment Debtor. Pay particular attention to s. 7 of the

Remedies of Creditors Act that provides the prerequisites to be satisfied before an applicant can proceed with an enforcement application for example[4]:

(i) The registration of a judgment and particulars of the judgment debtor with the Registrar General before a judgment affecting land can be enforced – s.7;

(ii) The re-registration of the judgment after three years if necessary – s.9;

(iii) ss 18 – 27 which provide for the execution of personal chattels;

(iv) Orders for Sale are contained in ss 28 et al – extremely important.

The Affidavit in support:

In most cases (civil and family) the applicant will be required to file an affidavit in support of the application to enforce. Rule 38.2 of the FPR provides (except for Attachment of Earnings applications when the order for financial relief is made) that an affidavit must be sworn verifying the amount due under the order and showing how the amount is arrived at; depending on the particular type of enforcement to be used, the affidavit may be required to contain other particulars.

Arrears of Maintenance more than one year:

Section 32(1) of the Matrimonial Proceedings and Property Act bars collection of arrears of maintenance over twelve months old without leave of the court in certain circumstances[5]. Leave must be obtained[6] before enforcement proceedings are brought, except where a

[4] Please note that the above list is not exhaustive by any means. It is important to read the Acts in their entirety.

[5] Includes: (i) maintenance pending suit – s.23; (ii) financial provision for a party to a marriage – s 24(1); (iii) financial provision for a child of the family – s.25(2); (iv) neglect to maintain party or child – s.28(5) & (6)

[6] C v S (Maintenance Order: Enforcement) [1977] 1 F.L.R. 298

Judgment Summons or Attachment of Earnings Application is used, where the application for leave may be contained in the main application.

Personal Service

When enforcing mandatory orders and undertakings (other than for the payment of money) the order must have been served personally on the person, endorsed with the penal clause. There are certain exceptions. Undertakings need not have been served personally and not later than the expiration of the period within which the act is ordered to be done.

The Penal Clause

A word on the penal notice and service: To enforce a mandatory order the penal clause ***must*** be endorsed on the copy of the order that is being served. The endorsement of this notice is the responsibility of the Attorney acting on behalf of the party wishing to enforce the order.

> *Form of Penal Notice*: NOTICE: If you fail to comply with the terms of this order by the time limited therein you will be in contempt of court and may be liable to be imprisoned or to have your assets confiscated [*or in the case of a prohibitory order*: if you disobey this Order] you will be in contempt of court, and you may be liable to be imprisoned.
>
> [*or where the defendant/respondent is a corporate body*]
>
> TAKE NOTICE that, if you fail to comply with the terms of this order by the time therein limited [*or in the case of a prohibitory or*der: if you fail to comply with this Order] you will be in contempt of court and may be liable to have your assets confiscated. (CPR R 53.3(b); CPR [UK] R 81.9.

Limitation Period

There is a limitation period for the enforceability of an order or judgment. Execution may issue at any time within six years of the date of the order: if the six years have elapsed or if there has been any change by death or otherwise in the parties (either those entitled to or liable to execution) leave to issue execution must be obtained[7]. Leave cannot be given after twelve years from the date of the order[8], unless there has been some acknowledgment or part payment within the previous 12 years.

The Rules of Supreme Court 1975; The Family Proceedings Rules & the Civil Proceedings Rules

References in this presentation are made to all three of the above rules. The 1975 Rules of Enforcement are applicable to the Family Court and are a replica of the modern-day CPR. So for the civil lawyers in the audience I have referred to the RSC rules as contained in the CPR with the UK equivalent. For the family law practitioner, the 1973/4/5/6 editions of the White Book may be referred to in reference to the RSC.

I have referred to the CPR UK Rules for one purpose and one purpose only, and that is to impress upon you the treasure trove of information that the White Book (as it is commonly called) is. I urge you to make The White Book part of your daily repertoire if you are to master the rules. The learning provided in the White Book is filled with comprehensive explanations of all things litigious, from the very mundane to more specific areas of civil litigation. While the local rules contain the bare rules, the White Book gives detailed step-by-step guidelines on how, why and when to use each rule. Read the explanations given in the pages of the White

[7] RSC O. 46, r. 2; CPR R. 47.2

[8] The Limitation of Certain Actions Act Ch 7:09, s. 3

Book – and literally 'read the fine print'. The editorial notes and footnotes give invaluable guidance and explanations that provide clarity and detailed examples that you can use to ensure that all the criteria required for each step are met. And this applies generally throughout as it relates to the Rules of Court.

SOME ENFORCEMENT PROCEEDINGS:

My presentation deals with the following forms of enforcement:

(1) Oral Examination

(2) Garnishee Proceedings

(3) Charging Order, Stop Notices and Stop Orders;

(4) Writs of Execution (Writs of Fieri Facias; Writs of Possession; Writs of Delivery; Writs of Sequestration)

Oral Examination – RSC O.48; CPR [TT] Part 25; CPR [UK] Part 71).

General:

Where a person has obtained a judgment or an order for the payment of money by the judgment debtor the judgment creditor may apply for an order that the judgment debtor or, if the judgment debtor is a body corporate, an officer of the body, be orally examined. He may be examined as to whether any and if so what debts are owing to him and whether he has any and if so what other property or means of satisfying the judgment or order.

The judgment debtor may be examined at any stage of the enforcement proceedings to establish his means and assets and this is the most appropriate method to enforce the judgment or order.

Request for oral examination of judgment debtors is made ex-parte to a Master or Judge. It must be supported by an affidavit, which must show that the Applicant is entitled to enforce the judgment or order. The court may order the judgment debtor or officer to produce any books or documents in his possession relevant to the examination at the time of the examination.

O 48 1(1) of RSC; R 45.3 of CPR [TT] provides for an order for oral examination to be made on an ex parte application. In all family enforcement see FPR r 38.2.

Procedure:

1. The following should be filed:
    a. The FPR r 38.2 affidavit;
    b. Draft order;
    c. Where permission is required to enforce the judgment a copy of the permission must be attached to the application;
    d. Where the application for the order is against an officer of a body corporate the application must be supported by evidence showing that the person to be orally examined is such an officer;
    e. Where the person to be examined is to be ordered to produce any books or documents the application must identify the books and documents to be produced.
2. The order for the oral examination must state the date, time and place of the examination and specify the books or documents, if any which the person to be examined must produce.

3. The order must be served personally on the debtor at least seven days before the date fixed for the examination.

Garnishee Proceedings – O 49 RSC; Part 51 CPR [TT]

General:

Garnishee proceedings may be used to enforce maintenance orders, lump sum orders, undertakings to pay school fees. There is no limit on the amount, which may be enforced by these proceedings. They enable the judgment creditor to attach money due to the judgment debtor from a third person (the garnishee). The court may order the garnishee to pay the judgment creditor the amount of a debt due or accruing to the judgment debtor from the garnishee or so much of the debt as is sufficient to satisfy the judgment or order and the costs of the garnishee proceedings. The debt must be actually due that is in existence but not necessarily immediately payable.

Procedure:

1. The application is made ex-parte and is an application for an order to show cause supported by an affidavit giving particulars of the judgment debtor, his known address, identifying the judgment or order to be enforced and stating the amount of such judgment or order and the amount remaining unpaid under it at the time of the application.
2. If satisfied the court will in the first instance make an order to show cause, which will specify a return day (at least seven days before) on which further consideration will be given to the matter. This requires the garnishee to appear before the court to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor – nisi or provisional order.

3. The order will be drawn up by the court.
4. The order to show cause will be served on the garnishee.
5. If the garnishee does not attend upon the further consideration of the matter or does not dispute the debt due or claimed to be due from him to the judgment debtor the court may make an order absolute against the garnishee.
6. An order absolute may be enforced in the same manner as any other order for the payment of money.

Charging orders; Stop notices and Stop orders – RSC O 50; CPR [TT] Parts 49 & 50

General:

Charging orders can be used to enforce orders for maintenance, lump sum and costs provided that the amount is ascertainable. A charging order can be made on the judgment debtor's land, securities, funds in court or beneficial interests under trusts and on certain other interests in the hands of trustees.

Once made a charging order is enforceable according to the nature of the property charged as if it were an equitable charge created in writing under the debtor's hand. The court may make a stop order preventing dealings with funds in court without notice to the applicant and may make an order prohibiting any dealings in securities.

Writs of Execution

These writs are available to enforce a judgment or order and are directed against the property of the person bound by the judgment or order and include Writs of Fieri Facias, Writs of Delivery, Writs of Possession and Writs of Sequestration. The Writs of Fieri Facias and

Delivery are available against personalty; the Writ of Possession is available against land; and the Writ of Sequestration is available against both personalty and land.

Procedure Generally:

(i) Leave to issue writ of execution:

In some cases, the applicant must seek leave to issue a writ of execution. An application for leave to issue a writ of execution (other than a writ of sequestration) is made ex-parte, unless otherwise directed. The application is supported by an affidavit identifying the judgment or order to which it relates. If the application is for the payment of money, it must state the amount originally due and the amount due at the date of the application. The affidavit must give such other information as is necessary to satisfy the court that the applicant is entitled to proceed to execution on the judgment or order in question and that the person against whom it is sought to issue execution is liable to execution on it.

(ii) Issuing the Writ:

The writ is issued when it is sealed by the filing clerk. The following documents should be filed:

(1) Praecipe;

(2) The affidavit verifying the amount due and how it is arrived at;

(3) Three copies of writ;

(4) Office copy of the original order;

(5) Order for leave, if appropriate.

The writ should be indorsed with the direction to the bailiff to levy the sum due and payable and sought to be recovered and this amount must be stated together with any interest.

The court will seal the writ and return a copy to the applicant's Attorney and forward one to the Marshal's department for execution.

(iii) Execution and return:

The bailiff having conduct of the execution then binds the property in the goods of the debtor from the time of delivery of the writ to him (the bailiff) for execution and upon receipt of the writ the bailiff must endorse on the back of the writ the hour, day month and year when he received it.

(1) Writs of Fieri Facias: Orders and Judgments for maintenance, lump sums or for other payments of money which are not judgments or orders for payment of money into court may be enforced by a writ of fieri facias (as well as by garnishee proceedings, a charging order or the appointment of a receiver).

(2) Writs of Possession: Orders for Possession are far more common in civil proceedings (trespass, adverse possession, mortgage claims) but can also occur in matrimonial proceedings. If your client is the Borrower and has fallen into arrears with the mortgage the lender is entitled to seek redress by way of an Order for Possession

A judgment or order for the giving of possession of land may be enforced by writ of possession. See RSC O13.4, O 45.3; O 85.4; CPR R 46.4

Leave of the court is required before a writ of possession can be issued.[9] Leave will not be granted unless it is shown that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the court sufficient to enable him to apply to the court for any relief to which he may be entitled.

The application for leave to issue may be made ex-parte unless the court directs it to be made by notice, but should be supported by affidavit stating inter alia whether the property is solely occupied by the person ordered to give possession. If the property or part thereof is sub-let, details of the notice given to the tenants must be set out. The application is made by lodging the affidavit.

If the Defendant/Respondent or any other person is in actual possession the affidavit must also state:

i. Whether the premises or any other part of them is a dwelling-house;
ii. If so, what is the rateable value of the dwelling-house and whether it is let furnished (and if so what is the amount of furniture in it) or unfurnished;
iii. Any other matters which will assist the Judge/Master in determining whether any occupier is protected by the Rent Act? Landlord and Tenants Act?

[9] CPR R 47.8

On being granted leave, the applicant may then issue a Writ. The description of the premises in the writ must correspond with that contained in the judgment or order. The Writ should be issued out of the court in which the matter is proceeding.

The following should be filed at court:

1. A praecipe: The wording should be to the following effect: Seal in pursuance of the Order dated _____ a Writ of Possession directed to the Registrar to give possession of _____ to _____. Order dated _____
2. Two Writs;
3. Evidence of the granting of leave;
4. An office copy of the original order
5. Fee

The court will seal one writ and return it to the applicant's Attorney who should send it to the appropriate bailiff. The Claimant/Petitioner/Respondent or his representative must attend with the bailiff to point out the premises and to receive possession, otherwise the bailiff may return that no one came to point out the land or receive possession thereof. The bailiff is required to evict any person on the premises regardless of whether they were parties to the possession proceedings or not.

(3) Writs of Delivery: A judgment or order for the delivery of any goods without the alternative of paying the assessed value of the goods may be enforced by a writ of specific delivery; a judgment or order for the delivery of any goods or their assessed value may be enforced by a writ of delivery to recover the goods or their assessed value or, with leave of the court, by a writ of specific delivery.

Writs of delivery are also more common in the civil jurisdiction and even there it is infrequently used as a means of enforcement. Specific delivery allows for the recovery of goods only and does not allow the judgment debtor the alternative of paying their assessed value. In such cases the Writ may be issued without leave and without a previous assessment of the value of the goods and the value of the goods need not be stated in the Writ.

If the judgment or order is for the delivery of goods or payment of their assessed value it may be enforced by a writ of delivery to recover the goods or their assessed value. In this case the writ MUST state the value of the goods on the writ.

See RSC O 45; CPR [TT] 47.9; CPR [UK] 83.14

(4) Writs of Sequestration: Where a person required by a judgment or order to do a specified act within a specified time refuses or neglects to do it within that time or any extended or abridged time or where a person disobeys a judgment or order requiring him to abstain from doing an act, the judgment or order may be enforced, with the court's leave, by a writ of sequestration against that person's property.

This is another method of enforcing obedience of an order and is a form of execution. It is not commonly used in Trinidad and Tobago. A Writ of Sequestration gives the sequester power to enter upon all the disobeyer's real estate and to collect, receive and sequester into their hands not only all the rents and profits of his lands etc. but also his goods, chattels and personal estate whatsoever and ordering them to detain the rents, etc. and goods etc. under sequestration until the order be complied with.

Receivers – RSC O 51; CPR [TT] R 52; CPR [UK] Part 69

Enforcing a judgment or order by the appointment of a receiver is also not commonly used and in fact the court will generally not appoint a receiver unless it can be shown that the more usual forms of execution have been proven or are likely to prove ineffectual. The procedure is similar to that of garnishee proceedings.

The application may be made ex-parte in the first instance, but the order should not be granted ex-parte unless in cases or emergency. It is supported by an affidavit setting out the particulars of the order and the fact that it remains unsatisfied and the details of the outstanding amounts, giving the method of calculating any arrears and interest. The affidavit must also state other methods that have been attempted to recover the debt that they have failed or not wholly satisfied the debt and/or why they are likely to fail. Details of the proposed receiver and his fitness to be a receiver are detailed in the affidavit and his consent to act as receiver. If there is need for an injunction, that too should be outlined in the affidavit.

Child Abduction & Reciprocal Enforcement of Maintenance

This may have to be the subject of another seminar but for now I will simply say that the Convention of the Civil Aspects of International Child Abduction was ratified by Trinidad and Tobago by the International Child Abduction Act of 2008. This Act provides for the safe return of a child to its country of habitual residence.

Two other reciprocal conventions that ensure the obedience of cross-border orders are the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973[10] and the Convention on the International Recovery of Child Support and other forms of Family Maintenance 2007[11]. From their very names one could appreciate the vital roles these conventions, once ratified, could play in enforcing orders internationally. Regrettably, Trinidad and Tobago is yet to ratify these critically important conventions.[12]

[10] At the time of making this presentation the Republic of Trinidad and Tobago was not a contracting party to this Convention.

[11] At the time of making this presentation the Republic of Trinidad and Tobago was not a contracting party to this Convention.

[12] The ratification process begins with the Attorney General who must lay a Bill before Parliament to pass the Act/Acts that would integrate these and other Conventions into our statute books. Most AGs the world over (and ours is no exception) are bombarded with requests to address the ever increasing problem of crime and matters associated therewith with the result that far less attention is placed on family matters.