

TALAK (OR TALAQ) DIVORCES - ENSURING THAT THEY ARE 'EFFECTIVE'

In a recent case, I had a client who believed that she was divorced by way of talaq in Bangladesh. Her husband, then living in Bangladesh, had pronounced the word 'Talak' three times, and had then sent her notice regarding the divorce by registered post, and had informed her by telephone the aforementioned divorce letter or notice.

As a result, the wife believed that she was divorced, and sought leave to make an Application for an Order for Financial Relief under Part III of the Matrimonial and Family Proceedings Act 1984 in the High Court in England. She and her two children lived in this country.

She and her husband had originally married in Bangladesh, and, at the time, the husband had both U.K. and Bangladeshi nationality. After the marriage, the wife (who at that time was a Bangladeshi national) joined her husband in the U.K., initially under a 'Visitor' Visa, and later as the spouse of a person present and settled in the U.K. They had two children, both of whom are British citizens, and the wife too has now acquired British citizenship. Both parents have retained their dual nationality.

The parties separated in 2006, when the husband returned to Bangladesh. Thereafter, he sought to divorce his wife by way of talaq divorce.

However, the relevant law with regard to divorce in respect of a marriage between two Muslim citizens of Bangladesh is contained in the Muslim Family Laws Ordinance 1961 ("MFLO"), as well as the Muslim Marriages and Divorces (Registration) Act 1974 ("MMDR") and the relevant Rules framed under each of these statutes, read together with the Muslim Personal Law (Shariat) Application Act 1937, and the Family Courts Ordinance 1985 ("FCO") and the Family Court Rules 1985.

In Bangladesh, the issues of marriage and divorce are governed by the laws of personal status, which vary depending upon the community to which the parties are considered to belong. Muslim personal law applies in respect of all matters relating to marriage and divorce where the parties are Muslims (c.f. Section 3 of the Muslim Personal Law (Shariat) Application Act 1937.

As both these parties were Bangladeshi nationals and Muslims by birth, the general principles of Muslim Personal Law would apply, as modified by statute, in particular the MFLO and the MMDR and the relevant Rules thereunder. Section 1(2) of the MFLO provides that "The Ordinance extends to the whole of Bangladesh, and applies to all Muslim citizens of Bangladesh, wherever they may be."

With regard to a divorce under Muslim Law - i.e. a talaq - Section 7 of the MFLO provides as follows:-

- "7. (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife. (N.B. 'The Chairman' refers to the Chairman of the Union Parishad (if in a rural area) or the Chairman of the Paurashava (Municipality) or Mayor or Administrator of the City Corporation (in an urban area) (c.f. Section 2(b) of the MFLO)).
- (3) Save as provided in sub-section (5), a talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.
- (4) Within thirty days of the receipt of notice under sub-section(1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation....."
- (N.B. 'Arbitration Council' means 'a body consisting of the Chairman and a representative of each of the parties to a matter dealt with in this Ordinance (c.f. Section 2(a) of the MFLO).

It would appear that the consistent view of the superior Court in Bangladesh is that non-compliance with the provisions of Section 7 of the MFLO will render the divorce ineffective (c.f. Nur Nabi v. Salima Akhter Doly (2008) 13 BLC, 328 (per Md. Abdul Matin J.). The Pakistan Supreme Court has also held that Section 7 of the Ordinance is mandatory to make talaq effective.

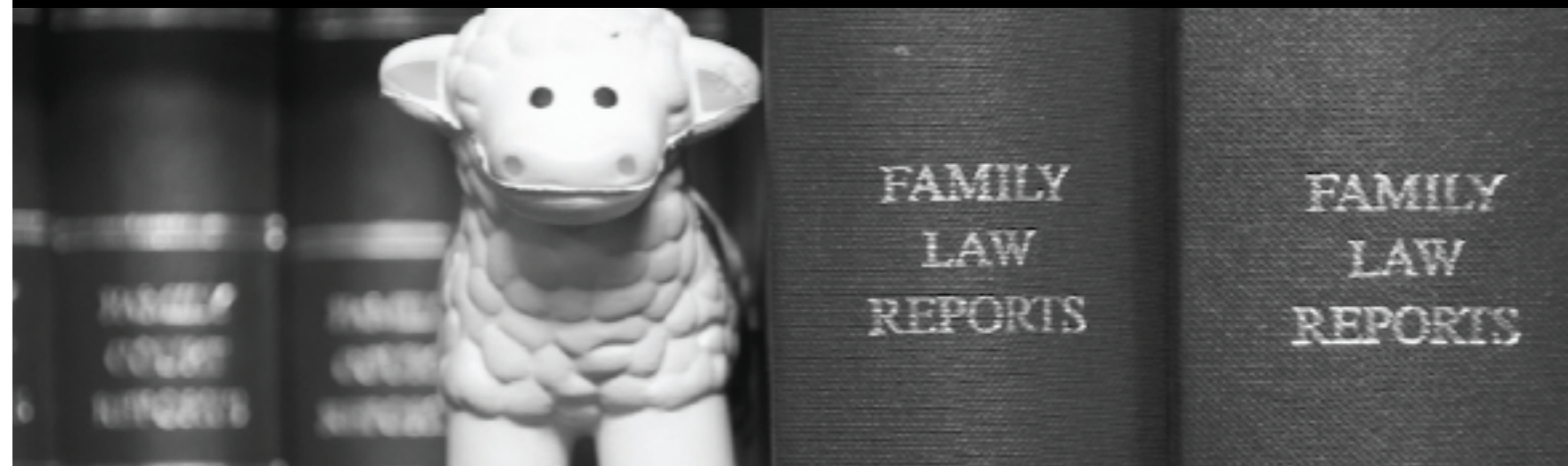
Consequently, in order to ensure that a talaq divorce can be regarded as effective under Bangladeshi and Pakistani law, lawyers dealing with such cases in England should ensure that:-

- (i) Notice of the talaq has been served on the wife;
- (ii) Notice has been served on 'the Chairman' in accordance with Section 7(1) and Section 2(b) of the MFLO;
- (iii) There has been a Meeting between 'the Chairman' and a representative of each of the parties (known as an Arbitration Council) in order to ascertain whether there can be any reconciliation between the parties; and
- (iv) Ninety days have passed since the Notice was served on the Chairman.

It is only if all those steps have been complied with that a talaq divorce becomes effective. In my case, it transpired that the Chairman had not been given Notice of the pronouncement of talaq by the husband, and so the divorce was not considered to be effective.

PHILIP CONRATH

TANFIELD CHAMBERS



FAMILY GROUP NEWSLETTER

TANFIELD CHAMBERS



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Welcome to the latest edition of the Tanfield Family Newsletter and a warm welcome to our new family clerk, Zoe Bluck. With the recent Implementation of the new Family Procedure Rules, we hope that Gerald Wilson's article is of assistance to you. We remain, as ever, committed to continuing to provide an efficient, effective, enthusiastic and committed service to both solicitors and their clients. The team continues to develop, with a large number of members currently training to provide mediation. We will be having the usual Crammer Days in the Autumn and look forward to seeing many of you there.

DICK PEARS

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THE FAMILY PROCEDURE RULES 2010

The FPR 2010 came into effect on 6 April 2011. It had a rushed birth, as the new Forms were only made available on a temporary website about 3 weeks before, hardly time to get familiar with all the changes. Not surprisingly, many solicitors preferred to issue early rather than struggle to get it right on the hoof.

Even then, the Rules still apply in existing proceedings to any new "step" taken after 6.4.11. The transitional provisions in PD36A do not define this term, but it includes an application or hearing, though not the response to any "step". So the new Rules apply as far as practical - if there is uncertainty, the court can direct which rules will apply to existing proceedings. In any case, the court should be forbearing where it is unclear which rules apply.

SO HOW ARE THE NEW RULES SET OUT?

They are a single set of rules for family proceedings in all courts, including Magistrates' Courts, but they do not cover civil proceedings: i.e. TOLATA, Inheritance Act, enforcement of English orders in the Magistrates Court, appeals to the Court of Appeal.

The Rules are modelled on the CPR. They are set out in 36 Parts supplemented by Practice Directions (PD), dedicated Forms and Pre-Application Protocols (PAP). Some parts of the CPR (including rules from the RSC and the CCR in their updated form) are applied by reference. Existing Guidance will continue in operation as before. No other rules apply.

The Rules and PDs are now all available at: www.familylaw.co.uk/articles/FPRPDs-FullList-16022011. The new Forms are available from the HMCS website. They are designed to be used by laymen and use tick boxes where possible.

Much of the language is modernised, so summons and petition are now "application", the umbrella term for applications and answers is "statement of case"; ancillary relief is now "financial

FAMILY PROCEDURE RULES 2010

TALAK (OR TALAQ) DIVORCES - ENSURING THAT THEY ARE 'EFFECTIVE'

CONTINUED OVERLEAF



GERALD WILSON

Gerald Wilson practices in Family and Property law, primarily in ancillary relief, trusts of land, inheritance, private law children and surrogacy. He appears in both family and civil proceedings and regularly advises family solicitors on civil procedure. He co-authored the first practitioner's textbook on civil partnership, *Civil Partnership: the New Law*, and regularly speaks at seminars on ancillary relief and trusts of land.



PHILIP CONRATH

Since 1998, Philip Conrath has specialised purely in Family Law. He currently deals in all aspects of divorce/relationship breakdown, as well as all issues relating to children and childcare. He is equally comfortable, able, and competent to deal with large money cases as he is when dealing with an adoption or child abduction case.

NEWS

With the new changes to the Family Procedure Rules now in place, we hope that you find our Newsletter informative and helpful. If there is anything you wish to discuss please do not hesitate to call us.

Once again we have our annual **CPD Crammer Days** scheduled for the **13th and 20th October**. Topics and speakers have yet to be arranged, both days will have the same topics and will cover a broad spectrum of Family Law. Please contact Deborah Haigh at dhaigh@tanfieldchambers.co.uk or on 0207 421 5300 to book your place which as ever is free of charge. Please remember that spaces are limited and they are on a "1st come 1st served" basis.

We look forward to seeing you there.

order/remedy", leave "permission", ex parte "without notice"; the special procedure is now just the normal one. But, confusingly, the terms "petition", "decree nisi / absolute" and "prayer" have been preserved on the Forms, though not in the Rules. (They ran out of money to amend the courts' IT.)

The PDs will be the principal guide to how to apply the Rules. But the yardstick will be the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved – r.1.1. "Justly" is defined at length to balance fairness, efficiency and proportionality. But unlike the CPR, welfare is added to the mix. This appears to extend to the welfare of (vulnerable) adults: would that include the depressed spouse who refuses to comply with orders?

WHAT CHANGES DO THE NEW RULES MAKE?

Case Management - r.1.4; Part 4; PD18A para.4

The court must actively manage cases. This includes a general power to further the overriding objective, which should allow it to fill in any lacuna in the Rules.

It can act on its own initiative, both when it gets the papers and in hearings: *The parties must anticipate that at any hearing (including any directions hearing) the court may wish to review the conduct of the case as a whole and give any necessary directions. They should be ready to assist the court in doing so and to answer any questions the court may ask for this purpose.*

Applications are positively encouraged: *Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it. They must be made formally where possible (and so will incur the court fee).*

There is some gentle encouragement to mediation and ADR in Part 3 and the Mediation Info & Assessment PAP. A failure to engage can be taken into account on costs under **CPR 44.3(5)** or, for financial proceedings, under **r.28.3(7)(a)**.

Divorce, etc – Part 7

The "special procedure" is now the standard one. It is planned to allow DJs to hear defended divorces. Petitions count as and are referred to as "applications" in the Rules. There are minor changes to the info required (e.g. dates of birth) in **Form D8**. Cross-Petitions must now be made separately to any Answer (in order to encourage spouses not to defend for the sake of it), but will still be treated as made in the same proceedings - **r.7.14**. Costs will be dealt with upon certifying entitlement to a decree, rather than being referred to the judge on pronouncement. – **r.7.20(3)**. A party may still challenge any decision as to costs upon pronouncement, but must give at least 2 days' notice before doing so - **r.7.21**.

Finance – Part 9

The current AR procedure is retained, but this is now extended (with dedicated Forms A and E) to Part 3, MFPA 1984 (after foreign decree); Sch.1 Children Act; maintenance under ss. 10(2), 27, 35 MCA 1973, DPMCA 1978.

The current AR costs regime is retained for AR cases (including variations), but the court may make such order as it thinks just re Sch.1, interim financial orders, failure to maintain and altering maintenance agreements – **r.28.3**

Replies to Questionnaire must be verified by a Statement of Truth - **PD22A**. For consent orders, Form M1 is replaced by a more detailed **Form D81**, which both parties must sign (or confirm they have seen each other's information). This will also apply to MFPA cases. Undertakings must now be endorsed with a warning notice and signed by the promisor (though not necessarily in front of the court) – **PD33A**.

Best practice is set out in **PD9A** and its **PAP**

- Pre-action disclosure is discouraged on the grounds of costs and delay if any issue is likely to arise in relation to it
- Case summaries, financial schedules and draft directions should be agreed
- Proposed experts' details should be served before the FDA (e.g. valuers!)
- exhibits/attachments must be properly prepared in accordance with **PD22A**, and if bulky may be returned to the parties to hold

No provision has been made for interveners (an oversight!), so existing case law and the court's general case management powers apply. The CPR does not apply - *Goldstone v Goldstone* [2011] EWCA Civ 39.

Children – Part 12

The old rules are largely restated in a new form: the PLO and PLP have become **PD12A** and **PD12B**. There is a new step-by-step guide to abduction in **PD12F**. Surrogacy is dealt with in Part 13; adoption in **Part 14**.

The significant changes are:

- revised rules for wardship - **Part 12, Ch.5**
- new rules to cover proceedings under European regs and the 1996 Hague Convention – **Part 12, Ch.6, s.2**
- the term "Children's Guardian" has been extended to include the old "r.9.5 Guardian ad litem", though the difference in function remains. The Guardian now has a duty to disclose to the parties relevant documents he finds in the files.

Applications

Substantive applications must be issued under the relevant Part for the type of case and its dedicated Forms (listed in Part 5). Apart from those set out above, Domestic Violence is under **Part 10**; Forced Marriage **Part 11**; miscellaneous under **Part 19** (see also Part 8).

Part 18 is used for interlocutory applications (e.g. pre-issue, interim, implementation, permission to apply), those by consent where no hearing is required, or where the rules do not specify. The court can determine whether to have a hearing or determine the matter on paper. Hearings will normally be dealt with on the written evidence only (save in care proceedings) - **r.22.2(1)(b)**.

PD18A 15 draws attention to the power to make a summary assessment of costs upon an interim application. This requires a party to provide in advance a Statement of Costs in CPR Form N260.

A party may keep his address or contact details or those of a child confidential in a separate Form C81, unless the court orders otherwise - **r.29.1**

Part 6 makes detailed provision re service overseas, mirroring the CPR, save that permission is not required.

Evidence - Part 22

Most formal documents, including applications, must now be verified by a Statement of Truth, and will stand as written evidence of their contents. This does not include: Petition or Answer, Form E, affidavits, any application containing no statement of fact. It does now include Replies to Questionnaire; Statement of Info for financial consent order; Statement of Arrangements for children; Certificate of Service.

The use of affidavits has been restricted. They are still required in support of freezing and search orders, committal, undefended decree nisi, and where the court or statute requires them. They are no longer required for FLA, wardship, child abduction, interim applications charging orders, garnishees.

PD22A gives obsessively detailed rules as to video conferences and the format of documents. This just mirrors the CPR.

Taking evidence between EU states under Council Reg (EU) No 1206/2001 is now covered by **rr.24.15, 16** and **PD24A**.

r.21.2 deals with disclosure against non-parties. The procedure is similar to the ancillary relief inspection appointment, but now covers all family proceedings.

Part 23 applies the Civil Evidence Act 1995 to non-children applications.



Experts and Assessors Part 25

This largely mirrors CPR Part 35. **PD25A** gives very detailed directions about the use and instruction of experts. **r.25.1** restricts expert evidence to "that which is reasonably required to resolve the proceedings", which may cut down the use of experts and assessments.

Unless the court directs otherwise:

- There is to be a single joint letter of instruction
- The parties are jointly and severally liable for the fees of the SJE (not in equal shares)
- Written questions must be put within 10 days of service of the report (CPR provides for 28 days)

Where a party proposes an expert as a SJE, he should disclose whether he has consulted him before about the issue – **PD25A 5.3**.

Appeals – Part 30

r.30.3 now requires permission to appeal from any decision of a DJ except a committal or a secure accommodation order under s.25 Children Act. The normal time-limit is 21 days (7 days for ISOs and ICOs). Barder applications to set aside are now to be made by way of appeal – see **PD30A 14.1**. Appeals to the Court of Appeal are still governed by CPR Part 52 (on which FPR Part 30 is modelled).

Enforcement – Parts 32-34

The rules are now harmonised with the CPR - so garnishees are now third party debts orders and the CCR and RSC now apply in their updated form. In addition rr.33.2-4 provides a very useful general application for the payment of money, leaving it up to the court to determine the appropriate method of enforcement.

GERALD WILSON