

Bird & Turner's Forms and Precedents in Matrimonial Causes and Ancillary Matters

THIRD EDITION



Sweet & Maxwell

**Bird and Turner's
Forms and Precedents in
Matrimonial Causes
and
Ancillary Matters**

THIRD EDITION

BY

R. C. Bird, LL.B. (Bristol)

*District Judge Bristol County Court and
Bristol District Registry of the High Court*

WITH CONTRIBUTIONS BY

Gerald Angel

Senior District Judge of the Family Division

FOREWORD TO THE THIRD EDITION BY

The Hon. Dame Elizabeth Butler-Sloss, D.B.E.

A Lord Justice of Appeal

LONDON
SWEET & MAXWELL
1992

Published in 1992 by
Sweet & Maxwell Limited of
South Quay Plaza, 183 Marsh Wall,
London, E14 9FT
Phototypeset by
Promenade Graphics Limited
Printed in Great Britain by
BPCC Hazell Books,
Aylesbury, Bucks
Member of BPCC Ltd.

First Edition 1985
Second Edition 1988
Third Edition 1992

**A catalogue record for this book is available from the
British Library**

ISBN 0-421-460504

All rights reserved.

No part of this publication may be reproduced
or transmitted, in any form or by any means, electronic,
mechanical, photocopying, recording or otherwise,
or stored in any retrieval system of any nature,
without the written permission of the copyright
holder and the publisher, application for which
shall be made to the publisher

©
R. C. Bird
1992

Bird and Turner's
Forms and Precedents in
Matrimonial Causes
and
Ancillary Matters

AUSTRALIA
The Law Book Company
Sydney

CANADA
The Carswell Company
Toronto, Ontario

INDIA
N. M. Tripathi Private Ltd.
Bombay
and
Eastern Law House Private Ltd.
Calcutta

M.P.P. House
Bangalore

Universal Book Traders
Delhi

ISRAEL
Steimatzky's Agency Ltd.
Tel Aviv

PAKISTAN
Pakistan Law House
Karachi

Foreword

There have been considerable changes, both in procedure and in practice, since the first edition was published in 1985. This third edition is particularly welcome as courts and practitioners grapple with the regulations under the Children Act. The section on children is comprehensive and includes, for instance, applications and orders in emergency protection and child assessment, recovery, education supervision, the Hague Convention and registration of child minders; and even a helpful note on the likely effect of the Child Support Act when it comes into force in 1993. In the part devoted to divorce and ancillary relief, I particularly noticed the schedules of assets designed to show the effect of orders in financial applications.

This book of precedents contains under one umbrella all the likely applications in family proceedings, both in private and public law, and ought to be an indispensable edition to the libraries of all courts and practitioners engaged in family work.

April 1992

Elizabeth Butler-Sloss

Preface to Third Edition

In this book we give precedents for applications and orders in the matrimonial and family jurisdictions of County Courts and the High Court. "Precedent" in this book means a form of words by which some application to the court may be made or a form of words by which the court gives effect to its decision on the application by an order of the court. In this sense precedents are lawyers' tools of trade, and are, of course, in constant use. Without precedents lawyers would have to create a new form for every application which would be time consuming for them and confusing to the court.

It was the occasional feeling that something like this was in fact happening that led Colin Turner and myself to consider the feasibility and desirability of this book. Cases are sometimes prejudiced by the use of incorrect forms of application. Such applications may result in confusing orders being issued by the court.

We have no wish to set down rigid forms of words which must be followed and, indeed, this would not be possible due to the variety of circumstances possible in any class or category of case. For some precedents, for example, forms of affidavit, we have given hypothetical circumstances in an attempt to give an idea of what ground needs to be covered. Our constant theme and guiding principle is that the wording of the precedent is dictated by the requirement of the statute, rule or legal principle under which the application is made. We hope therefore that those using this book will study the notes to each precedent so that the form of words may be seen in the proper context of the law which governs it.

The introduction of the Children Act 1989 and the Family Proceedings Rules 1991 have rendered much of the first and second editions of this book obsolete, but the publishers and authors have been encouraged to prepare this third edition which is up to date as at January 1, 1992.

My original co-author Colin Turner retired from his position as Senior District Judge at the Principal Registry in April 1991 and has taken no part in the third edition, though his influence is everywhere to be seen in the material which survives from previous editions. His successor as Senior District Judge, Gerald Angel, has kindly contributed the section on children.

I am grateful to Dame Elizabeth Butler-Sloss for once again kindly agreeing to write the foreword and for her encouragement and helpful

PREFACE TO THIRD EDITION

advice. I must also thank His Honour Judge Nigel Fricker Q.C. who has permitted me to use and adapt his specimen forms for injunctions.

Colin Turner and I concluded our joint Preface to the Second Edition by saying that "all errors and omissions are the fault of my co-author." That is a statement which I can no longer make.

January 19, 1992

Roger Bird

Editorial Note

AFFIDAVITS

Attention is drawn to the direction of the Lord Chief Justice, given on July 21, 1983, applicable to the Court of Appeal and to all divisions of the High Court as follows:

Any affidavit, exhibit or bundle of documents which does not comply with R.S.C., Ord. 41 and this direction may be rejected by the court or made the subject for an order for costs.

Affidavits

1. *Marking* At the top right-hand corner of the first page of every affidavit, and also on the backsheet, there must be written in clear permanent dark blue or black marking (i) the party on whose behalf it is filed, (ii) the initials and surname of the deponent, (iii) the number of the affidavit in relation to the deponent and (iv) the date when sworn. For example: "2nd Dft: E W Jones: 3rd: 24.7.82."

2. *Binding* Affidavits must not be bound with thick plastic strips or anything else which would hamper filing.

Exhibits

3. *Marking generally* Where space allows, the directions under para. 1 above apply to the first page of every exhibit.

4. *Documents other than letters* (i) Clearly legible photographic copies of original documents may be exhibited instead of the originals, provided the originals are made available for inspection by the other parties before the hearing and by the judge at the hearing. (ii) Any document which the court is being asked to construe or enforce, or the trusts of which it is being asked to vary, should be separately exhibited, and should not be included in a bundle with other documents. Any such document should bear the exhibit mark directly, and not on a flysheet attached to it. (iii) Court documents, such as probates, letters of administration, orders, affidavits or pleadings should never be exhibited. Office copies of such documents prove themselves. (iv) Where a number of documents are contained in one exhibit, a front page must be attached setting out a list of the documents with dates which the

exhibit contains, and the bundle must be securely fastened. The traditional method of securing is by tape, with the knot sealed (under the modern practice) by means of wafers; but any means of securing the bundle (except by staples) is acceptable, provided that it does not interfere with the perusal of the documents and it cannot readily be undone. (v) This direction does not affect the current practice in relation to scripts in probate matters, or to an affidavit of due execution of a will.

5. *Letters* (i) Copies of individual letters should not be made separate exhibits, but they should be collected together and exhibited in a bundle or bundles. The letters must be arranged in correct sequence, with the earliest at the top, and properly paged in accordance with para. 6 below. They must be firmly secured together in the manner indicated in para. 4 above. (ii) When original letters, or original letters and copies of replies, are exhibited as one bundle, the exhibits must have a front page attached, stating that the bundle consists of so many original letters and so many copies. As before, the letters and copies must be arranged in correct sequence and properly paged.

6. *Paging of documentary exhibits* Any exhibit containing several pages must be paged consecutively at centre bottom.

7. *Copies of documents generally* It is the responsibility of the solicitor by whom any affidavit is filed to ensure that every page of every exhibit is fully and easily legible. In many cases photocopies of documents, particularly of telex messages, are not. In all cases of difficulty, typed copies of the illegible document (paged with "a" numbers) should be included.

8. *Exhibits bound up with affidavit* Exhibits must not be bound up with, or otherwise attached to, the affidavit itself.

9. *Exhibits other than document* The principles are as follows; (i) the exhibit must be clearly marked with the exhibit mark in such a manner that there is no likelihood of the contents being separated; and (ii) where the exhibit itself consists of more than one item (e.g. a cassette in a plastic box), each and every separate part of the exhibit must similarly be separately marked with at least enough of the usual exhibit mark to ensure precise identification. This is particularly important in cases where there are a number of similar exhibits which fall to be compared. Accordingly, (a) the formal exhibit marking should, so far as practicable, be written on the article itself in an appropriate manner (e.g. many fabrics can be directly marked with an indelible pen) or, if this is not possible, on a separate slip which is securely attached to the article in such a manner that it is not easily removable (N.B. items attached by Sellotape or similar means are readily removable). If the article is then enclosed in a container, the number of the exhibit should appear on the outside of the container unless it is transparent and the number is readily visible. Alternatively, the formal exhibit marking may be written on the container or, if this is not possible, on a separate slip securely

attached to the container. If this is done, then either (i) the number of the exhibit and, if there is room, the short name and number of the case, the name of the deponent and the date of the affidavit must be written on the exhibit itself and on each separate part thereof or (ii) all these particulars must appear on a slip securely attached to the article itself and to each separate part thereof; (b) if the article, or part of the article, is too small to be marked in accordance with the foregoing provisions, it must be enclosed in a sealed transparent container of such a nature that it could not be reconstituted once opened, and the relevant slip containing the exhibit mark must be inserted in such container so as to be plainly visible. An enlarged photograph or photographs showing the relevant characteristics of each such exhibit will usually be required to be separately exhibited.

10. *Numbering* Where a deponent deposes to more than one affidavit to which there are exhibits in any one matter, the numbering of such exhibits should run consecutively throughout, and not begin again with each affidavit.

11. *Reference to documents already forming part of an exhibit* Where a deponent wishes to refer to a document already exhibited to some other deponent's affidavit, he should not also exhibit it to his own affidavit.

12. *Multiplicity of documents* Where, by the time of the hearing, exhibits or affidavit have become numerous, they should be put in a consolidated bundle, or file or files, and be paged consecutively throughout in the top right-hand corner, affidavits and exhibits being in separate bundles or files.

Bundles of documents generally

13. The directions under paragraphs 5, 6 and 7 above to apply to all bundles of documents. Accordingly they must be (i) firmly secured together, (ii) arranged in chronological order, beginning with the earliest, (iii) paged consecutively at centre bottom and (iv) fully and easily legible.

14. Transcripts of judgments and evidence must not be bound up with any other documents, but must be kept separate.

15. In cases for trial where the parties will seek to place before the trial judge bundles of documents (apart from pleadings) comprising more than 100 pages, it is the responsibility of the solicitors for all parties to prepare and agree one single additional bundle containing the principal documents to which the parties will refer (including in particular the documents referred to in the pleadings), and to lodge such bundle with the court at least two working days before the date fixed for the hearing.

DISTRUTION OF FAMILY BUSINESS

The following Practice Direction was issued on April 6, 1988, and governs the distribution of Family Division business between the High Court and the county court. As it is referred to at various stages in this book the Practice Direction is set out here in full.

PRACTICE DIRECTION (FAMILY DIVISION: BUSINESS: DISTRIBUTION)

1. These directions are given under section 37 of the Matrimonial and Family Proceedings Act 1984 by the Precedent of the Family Division, with the concurrence of the Lord Chancellor, and apply to all family proceedings which are transferable between the High Court and county courts under sections 38 and 39 of that Act. They supersede the directions given on February 23, 1987: *Practice Direction (Family Division: Business: Transfer)* [1987] 1 W.L.R. 316. They do not apply to proceedings under the following provisions (which may be heard and determined in the High Court alone):

- (a) section 45(1) of the Matrimonial Causes Act 1973 (declaration of legitimacy or validity of a marriage), where the petition was filed before April 4, 1988;
- (b) the Guardianship of Minors Acts 1971 and 1973 in the circumstances provided by section 15(3) of the Guardianship of Minors Act 1971;
- (c) section 18 of the Adoption Act 1976 where the child is not in Great Britain (freeing for adoption);
- (d) section 17 of the Adoption Act 1976 or section 53 of the Adoption Act 1976 (Convention adoptions);
- (e) Part III of the Matrimonial and Family Proceedings Act 1984;

to an application for an adoption order where the child is not in Great Britain, or to an application that a minor be made, or cease to be, a ward of court.

2. (1) Family proceedings to which these directions apply (including interlocutory proceedings) shall be dealt with in the High Court where it appears to the court seised of the case that by reason of the complexity, difficulty or gravity of the issues they ought to be tried in the High Court.

(2) Without prejudice to the generality of sub-paragraph (1), the following proceedings shall be dealt with in the High Court unless the nature of the issues of fact or law raised in the case makes them more suitable for trial in a county court than in a High Court:

- (a) petitions under section 1(2)(e) of the Matrimonial Causes Act 1973 which are opposed pursuant to section 5 of that Act;

- (b) petitions filed before April 4, 1988, in respect of jactitation of marriage;
- (c) petitions for presumption of death and dissolution of marriage under section 19 of the Matrimonial Causes Act 1973;
- (d) proceedings involving a contested issue of domicile;
- (e) applications under section 5(6) of the Domicile and Matrimonial Proceedings Act 1973;
- (f) applications to restrain a respondent from taking or continuing with foreign proceedings;
- (g) suits in which the Queen's Proctor intervenes or shows cause and elects trial in the High Court;
- (h) proceedings in relation to a ward of court—(i) in which the Official Solicitor is or becomes the guardian ad litem of the ward or of a party to the proceedings; (ii) in which a local authority is or becomes a party; (iii) in which an application for blood tests is made; (iv) where any of the matters specified in (i) below are in issue;
- (i) proceedings concerning children in divorce and under the Guardianship Acts where—(i) an application is opposed on the grounds of want of jurisdiction; (ii) there is a substantial foreign element; (iii) there is an opposed application for leave to take the child permanently out of the jurisdiction or where there is an application for temporary removal of a child from the jurisdiction and it is opposed on the ground that the child may not be duly returned;
- (j) applications for adoption or for freeing for adoption—(i) which are opposed on the grounds of want of jurisdiction; (ii) which would result in the acquisition by a child of British citizenship;
- (k) interlocutory applications involving—(i) *Anton Piller* orders; (ii) *Mareva* injunctions; (iii) directions as to dealing with assets outside the jurisdiction;
- (l) petitions in respect of declarations under Part III of the Family Law Act 1986.

3. (1) Proceedings in the county court for an order within sub-paragraph (2) shall be heard and determined in the High Court where either the county court or any party to the proceedings considers that any such orders, if made, should be recognised and enforced in Scotland or Northern Ireland under Part I of the Family Law Act 1986.

(2) The orders referred to in sub-paragraph (1) are those made by the county court in the exercise of its jurisdiction relating to wardship so far as it gives the care and control of a child to any person or provides for the education of, or for access to, a child, excluding an order relating to a

child of whom care or care and control is (immediately after the making of the order) vested in a local authority.

4. In proceedings where periodical payments, a lump sum or property are in issue the court shall have regard in particular to the following factors when considering in accordance with paragraph 2(1) above whether the complexity, difficulty or gravity of the issues are such that they ought to be tried in the High Court—

- (a) the capital values of the assets involved and the extent to which they are available for, or susceptible to, distribution or adjustment;
- (b) any substantial allegation of fraud or deception or non-disclosure;
- (c) any substantial contested allegation of conduct.

An appeal in such proceedings from a registrar in a county court shall be transferred to the High Court where it appears to the registrar, whether on application by a party or otherwise, that the appeal raises a difficult or important question whether of law or otherwise.

5. Subject to the foregoing, family proceedings may be dealt with in a county court.

6. Proceedings in the High Court which under the foregoing criteria fall to be dealt with in a county court or a divorce county court, as the case may be, and proceedings in a county court which likewise fall to be dealt with in the High Court shall be transferred accordingly, in accordance with rules of court, unless to do so would cause undue delay or hardship to any party or other person involved.

April 6, 1988

Stephen Brown P.

STATUTORY PROVISIONS

Supreme Court Act 1981

Distribution of business among Divisions

61.—(1) Subject to any provision made by or under this or any other Act (and in particular to any rules of court made in pursuance of subsection (2) and any order under subsection (3)), business in the High Court of any description mentioned in Schedule 1, as for the time being in force, shall be distributed among the Divisions in accordance with that Schedule.

(2) Rules of court may provide for the distribution of business in the High Court among the Divisions; but any rules made in pursuance of

this subsection shall have effect subject to any orders for the time being in force under subsection (3).

(3) Subject to subsection (5), the Lord Chancellor may by order—

(a) direct that any business in the High Court which is not for the time being assigned by or under this or any other Act to any Division be assigned to such Division as may be specified in the order;

(b) if at any time it appears to him desirable to do so with a view to the more convenient administration of justice, direct that any business for the time being assigned by or under this or any other Act to any Division be assigned to such other Division as may be specified in the order; and

(c) amend Schedule 1 so far as may be necessary in consequence of provision made by order under paragraph (a) or (b).

(4) The powers conferred by subsection (2) and subsection (3) include power to assign business of any description to two or more Divisions concurrently.

(5) No order under subsection (3)(b) relating to any business shall be made without the concurrence of the senior judge of—

(a) the Division or each of the Divisions to which the business is for the time being assigned; and

(b) the Division or each of the Divisions to which the business is to be assigned by the order.

(6) Subject to rules of court, the fact that a cause or matter commenced in the High Court falls within a class of business assigned by or under this Act to a particular Division does not make it obligatory for it to be allocated or transferred to that division.

(7) Without prejudice to subsections (1) to (5) and section 63, rules of court may provide for the distribution of this business (other than business required to be heard by a divisional court) in any Division of the High Court among the judges of that Division.

(8) Any order under subsection (3) shall be made by statutory instrument, which shall be laid before Parliament after being made.

Schedule 1

Distribution of Business in High Court

★ ★ ★ ★ ★

Family Division

3. To the Family Division are assigned—

(a) all matrimonial causes and matters (whether at first instance or on appeal);

- (b) all causes and matters (whether at first instance or on appeal) relating to—
 - (i) legitimacy;
 - (ii) the exercise of the inherent jurisdiction of the High Court with respect to minors, the maintenance of minors and any proceedings under the Children Act 1989 except proceedings solely for the appointment of a guardian of a minor's estate;
 - (iii) affiliation or adoption;
 - (iv) non-contentious or common form probate business;
- (c) applications for consent to the marriage of a minor or for a declaration under section 27B(5) of the Marriage Act 1949;
- (d) proceedings on appeal under section 13 of the Administration of Justice Act 1960 from an order or decision made under section 63(3) of the Magistrates' Courts Act 1980 to enforce an order of a magistrates' court made in matrimonial proceedings or with respect to the guardianship of a minor;
- (e) applications under Part IV of the Family Law Act 1986;
- (f) proceedings under the Children Act 1989.

Matrimonial and Family Proceedings Act 1984

What is family business

32. In this Part of this Act—

"family business" means business of any description which in the High Court is for the time being assigned to the Family Division and to no other Division by or under section 61 of (and Schedule 1 to) the Supreme Court Act 1981;

"family proceedings" means proceedings which are family business;

"matrimonial cause" means an action for divorce, nullity of marriage or judicial separation;

and "the 1973 Act" means the Matrimonial Causes Act 1973.

★ ★ ★ ★ ★

Directions as to distribution and transfer of family business and proceedings

37. The President of the Family Division may, with the concurrence of the Lord Chancellor, give directions with respect to the distribution and transfer between the High Court and county courts of family business and family proceedings.

Transfer of family proceedings from High Court to county court

38.—(1) At any stage in any family proceedings in the High Court the High Court may, if the proceedings are transferable under this section, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to a county court.

(2) The following family proceedings are transferable to a county court under this section, namely—

- (a) all family proceedings commenced in the High Court which are within the jurisdiction of a county court or divorce county court;
- (b) wardship proceedings, except applications for an order that a minor be made, or cease to be, a ward of court or any other proceedings which relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; and
- (c) all family proceedings transferred from a county court to the High Court under section 39 below or section 41 of the County Courts Act 1984 (transfer to High Court by order of High Court); and
- (d) all matrimonial causes and matters transferred from a County Court other than as mentioned in paragraph (c) above.

(3) Proceedings transferred under this section shall be transferred to such county court or, in the case of a matrimonial cause or matter within the jurisdiction of a divorce county court only, such divorce county court as the High Court directs.

(4) The transfer shall not affect any right of appeal from the order directing the transfer, or the right to enforce in the High Court any judgment signed, or order made, in that Court before the transfer.

(5) Where proceedings are transferred to a county court under this section, the county court—

- (a) if it has no jurisdiction apart from this paragraph, shall have jurisdiction to hear and determine those proceedings;
- (b) shall have jurisdiction to award any relief which could have been awarded by the High Court.

Transfer of family proceedings to High Court from county court

39.—(1) At any stage in any family proceedings in a county court, the county court may, if the proceedings are transferable under this section, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to the High Court.