Last reviewed and edited, January 12, 2009
Includes amendments effective January 1, 2009

RULE 80. DIVORCE AND ANNULMENT

[Rule 80 is abrogated, effective January 1, 2009, to be replaced by Chapter XIII of these Rules.
The text of the abrogated Rule 80 is retained at this point to aid in understanding the advisory notes to prior amendments to Rule 80.]

(a) Applicability of Rules. These Rules shall apply to actions for divorce, annulment, judicial separation, separate support, and determination of parental rights and responsibilities, except as otherwise provided in this rule.

(b) Complaint; Counterclaim; Joinder. In an action under this rule the plaintiff shall use the court approved complaint form or incorporate into the complaint prepared by the plaintiff all of the information on the court form. The complaint shall be signed by the plaintiff. A complaint containing the child custody information required by 19-A M.R.S.A. § 1710 shall be signed under oath. When the residence of the defendant can be ascertained, it shall be stated in the complaint. When the residence of the defendant is not known by the plaintiff and cannot be ascertained by reasonable diligence, the complaint shall so allege. No counterclaim shall be permitted in any action under this rule except for divorce, annulment, separate support, or a determination of parental rights and responsibilities. Failure of the defendant to file a counterclaim permitted by this subdivision shall not bar a subsequent action therefor. A defendant shall also file under oath the information related to children required under 19-A M.R.S.A. § 1710.

(c) Filing of Financial Affidavits and Work Sheets. In any proceeding under this rule in which child support is an issue, the parties shall exchange and file child support affidavits and, child support work sheets as required by 19-A M.R.S.A. § 2004 and, if applicable, the rules of the Family Division In any proceeding under this rule in which there is a dispute about either a division of property or an award of spousal support the parties, prior to mediation or within 60 days after the party's answer and response, whichever is earlier, shall exchange and file a financial statement showing the assets, liabilities, and current income and expenses of both parties and indicating separately all marital and non-marital property. Financial statements, child support affidavits and child support work sheets shall be filed on

forms that the Supreme Judicial Court may from time to time prescribe by administrative order.

All child support affidavits and financial statements shall be signed by the party under oath. The justice or judge may require during the pendency of any action involving a financial order that a new child support affidavit or financial statement containing current information be filed by the parties.

Any financial statement or child support affidavit filed shall be kept separate from other papers in the case and shall not be available for public inspection, but shall be available to the court, the attorneys whose appearances are entered in the case, the parties to the case, their expert witnesses, and public agencies charged with responsibility for the collection of support, as necessary.

If a party fails to file any affidavit, worksheet, or statement required by this rule, the court may make such orders in regard to such failure as are just, including those specified in Rule 37(b)(2), as appropriate.

(d) Orders Prior to Judgment. At any time prior to judgment in any proceeding under this rule in which the court has personal jurisdiction over the parties, the court, on motion after notice served not later than 7 days before the hearing unless a shorter time is ordered by the court, may order either party to pay to the other party or to that party's attorney sufficient money for the defense or prosecution thereof, and to make reasonable provision for that party's separate support; may make such orders as it deems proper for the allocation of parental rights and responsibilities for any minor children, including support; may prohibit either party from imposing any restraint on the personal liberty of the other; and may dissolve or modify a preliminary injunction entered under 19-A M.R.S.A. § 852 and 903. In any action under this rule in which the court lacks personal jurisdiction of the defendant, the court may at any time prior to judgment, on motion after notice served not later than 7 days before the hearing unless a shorter time is ordered by the court, enter any of the foregoing orders that it deems proper that does not involve the payment of, or the allocation of responsibility for the payment of, money.

The provisions of Rule 7(b)(3), (c), and (e) shall not apply to motions for orders prior to judgment under this subdivision. A motion for an order under this subdivision shall be accompanied by a draft order that grants the motion and specifically states the relief to be granted. If child support is in issue, the motion shall be accompanied by a child-support affidavit and worksheet.

Costs may be taxed and counsel fees may be ordered on any motion under this subdivision and the court may in all cases enforce obedience as in other actions. Execution for counsel fees shall not issue until after entry of final judgment.

(e) Guardian Ad Litem. Notwithstanding the provisions of Rule 17(b), a minor party to any proceeding under this rule need not be represented by next friend, guardian ad litem, or other fiduciary, unless the court so orders. Whenever it shall appear to the court to be in the best interests of a minor child of the parties to a proceeding under this rule, the court may on its own motion or on motion of a party, appoint a guardian ad litem. The court may make such provision for payment of a guardian ad litem by the parties as it deems necessary and proper.

(f) No Judgment Without Hearing; Appearance by Defendant; Judgments to Be Final. No judgment, other than a dismissal for want of prosecution, shall be entered in an action under this rule except after hearing, which may be ex parte if the defendant does not appear. Even though the defendant does not file an answer, the defendant may, upon entering a written appearance before commencement of hearing on issues of parental rights and responsibilities for children, alimony, support, counsel fees, and division of marital or non-marital property, be heard on those issues. Unless otherwise ordered by the court on its own motion or on request of a party, any order granting a divorce, annulment, disposition of property under 19-A M.R.S.A. § 953, or other disposition, award, or division of property incident upon a divorce or annulment, other than a temporary order under subdivision (d) of this rule, shall be a final judgment, notwithstanding the pendency of any other claim or counterclaim in the action.

(g) Discovery. In any proceeding under this rule, discovery on issues of alimony, support, counsel fees, and disposition of property may be had as in other actions, but only after the parties have exchanged and filed financial statements. On other issues discovery shall be had only by order of the court for good cause shown.

(h) Pretrial Conference. Rules 16 and 16A shall not apply to actions under this rule, except that on request of a party or on its own motion the court may order a pretrial conference to be held as provided in Rule 16(f) or Rule 16A as appropriate. An action shall be transferred to the trial list by order of the court.

(i) Time of Trial. An action for divorce or annulment shall not be in order for hearing until 60 days or more after service of the summons and complaint; nor shall it be in order for hearing until there is on file with the court a statement signed by the plaintiff, which may be contained in the complaint, stating whether any divorce or annulment actions have previously been commenced between the parties, and if so, the designation of the court or courts involved and the disposition made of any such actions.

(j) Filing of Real Estate Certificate. In every divorce action under this rule in which any party has an interest in real estate, the parties shall file with the court, at least three days prior to the hearing, a certificate that includes the book and page numbers of an instrument that describes the real estate, the applicable Registry of Deeds, and the town, county and state where the real estate is located.

(k) Post-judgment Relief. Except as otherwise provided in Title 19-A:

(1) Any proceedings for modification or enforcement of the judgment in an action under this rule shall be on motion for post-judgment relief. The motion shall be served on the opposing party in accordance with Rule 4, except that when a motion is made in response to a motion filed by a party represented by an attorney, the responsive motion may be served upon the attorney in accordance with Rule 5(b). The opposing party shall file a memorandum in opposition to the motion, including all objections, denials, and affirmative defenses, in accordance with Rule 7(c). The failure to file a memorandum in opposition may permit entry of the modified judgment by default in accordance with Rule 55. The motion and any opposing memorandum shall be accompanied, as appropriate, by the affidavits, worksheets, or financial statements required by subdivision (c) of this rule. Post-Judgment Motions filed in an action under this rule must be accompanied by a properly completed Summary Sheet, which is available from the clerk.

(2) No final order modifying a judgment shall be entered on a motion for post-judgment relief except after hearing in accordance with subdivision (f) of this rule, unless the parties under oath certify to the court that there is a stipulated judgment or amendment and no hearing is necessary.

(3) Upon motion of a party made within 5 days after notice of a decision under this rule, or upon the court's own motion, the justice or judge who has entered an order modifying a judgment on a motion for post-judgment relief shall make findings of fact and conclusions of law in accordance with Rule 52(a).

(l) Transfer From the Superior Court to the District Court. Upon agreement of the parties any action for divorce or annulment pending in the Superior Court may be transferred to the District Court in accordance with the provisions of this subdivision. Transfer shall be effected by filing a notice thereof agreed to by the parties or their counsel and by paying to the clerk of the Superior Court fees in the same amount required in the District Court on removal to the Superior Court, including the entry fee in and the cost of forwarding the action to the District Court. No transfer may be effected at a time while the court is hearing or has under advisement the merits of the action or any motion either prior to or after judgment. The action may be transferred to a division of the District Court, designated by the notice of transfer, which lies within the county in which either party resided at the commencement of the action; provided that after a judgment for divorce or annulment has become final, the action may be transferred to any division of the District Court. The clerk shall thereupon file a copy of the record and all original papers in the action in the District Court in that division. Thereafter the action shall be prosecuted as if all prior proceedings in the action had taken place in the District Court.

(m) Enforcement. The rights and remedies of parties to any proceeding under Title 19-A may be enforced under Rule 66. The availability of Rule 66 does not limit the inherent or statutory authority of the court to impose other remedies or relief as allowed by law.

Advisory Note
January 1, 2003

In 2001, M.R. Civ. P. 4(f)(2) was amended to permit service of a summons and complaint in a divorce action to be completed by registered or certified mail with return receipt. The previous limitation to personal service for divorce cases within the State of Maine was removed by the 2001 amendment. This amendment removes the personal service limitation for post-judgment motions in a divorce, making the rules for service for such motions consistent with the rules for service of original divorce complaints.

Advisory Committee's Notes
May 1, 1999

The adoption of Rule 66 was intended to establish "*procedures* to implement the inherent and statutory powers of the court to impose punitive and remedial

sanctions for contempt." M.R. Civ. P. 66 (a)(1) (emphasis added). The second sentence of Rule 66 (a)(1) ("shall not apply to the imposition of sanctions specifically authorized by other provisions of these rules or by statute") has been interpreted by some to mean that Rule 66 does not apply to actions governed by Rule 80. The purpose of new Rule 80(m) is to resolve any ambiguity as to the application of Rule 66 to pre- or post-divorce remedies when necessary to enforce a lawfully entered court order. Rule 66 cannot be an exclusive remedy as various federal and state laws confer other specific sanctions for violation of court orders. *See, e.g.,* 19-A M.R.S.A. § 2101, *et seq.* (1998) (support enforcement). The Law Court has historically permitted flexible and creative solutions to the unique enforcement issues associated with family law. *See, e.g., Booth v. Booth*, 640 A.2d 1065 (Me. 1994) (use of lien); *Elliot v. Elliot*, 431 A.2d 55, 56 (Me. 1991) (inherent power of court available for enforcement). The trial court, therefore, retains this flexibility, within constitutional limitations, but a party may elect the procedures available under Rule 66.

Advisory Committee's Notes
March 1, 1998

The amendment to Rule 80 (a) was recommended by the Maine Family Law Advisory Commission, while the remaining amendments to Rule 80 were recommended by the Pro Se Divorce Team, a task force appointed by the Court to recommended changes to the rule governing divorce procedure in the light of the substantial number of divorces in which one or both parties appear *pro se*. The amendment to subdivision (a) results from a comprehensive revision to the judicial separation statute, 19-A M.R.S.A. § 851. The statute makes the remedies available in an action for judicial separation virtually the same as those in a divorce, with the exception of dissolution of the marriage. In addition, a counterclaim for divorce may be filed in an action for judicial separation. The amendment recognizes these changes by placing judicial separation actions in the same procedural framework as divorces.

The amendment to subdivision (b) is intended to ensure that the plaintiff uses the court complaint form or, at least, incorporates all of its language into the initial filing of the plaintiff. The use of the court forms ensures that paperwork is uniform and kept to the minimum necessary to process the divorce filings. Several new forms have been adopted by administrative order as a result of the Pro Se Divorce Team's recommendations. The amendments to subdivision (c) require a child support affidavit in appropriate cases and eliminate the requirement of a financial statement except in cases where there is a dispute about property or

spousal support issues. If a financial statement is to be filed, the child support affidavit is not required, but the child support worksheet must be filed. Subdivision (g) is amended to make clear that the financial statements are intended to reduce the need for discovery, not to add to it. The financial statement should be used in lieu of discovery whenever possible. A new subdivision (j) is adopted to require a certificate to provide the court with accurate information on any real estate involved in the action. Subdivisions (j) and (k) are redesignated (k) and (*l*), respectively, and the former subdivision (j) (4) is abrogated to account for the repeal of 19 M.R.S.A. § 777, effective July 1, 1995.

Advisory Committee's Notes
July 1992

Rule 80(d) as adopted effective February 15, 1992, is amended to eliminate the requirement of filing memoranda in support or opposition to motions for orders prior to judgment in family law actions. Such a motion, however, must be accompanied by a draft order and, if child support is in issue, the appropriate affidavit and worksheets. The principal purpose of the amendment is to eliminate the delays incident upon preparation of the memorandum and imposed by the 21-day period for reply provided under Rule 7(c). The amendment is also intended to avoid overburdening the clerks and court with material that will not provide significant useful information.

Rule 80(j) as adopted effective February 15, 1992, is amended to reflect the effect of P.L. 1991, ch. 840, § 4, repealing and replacing 19 M.R.S.A. § 319 with a provision establishing specific procedure and standards for modification of child support orders. Rule 80(j) is expressly made subject to the provisions of 19 M.R.S.A. §§ 311-320 (Supp. 1991) governing child support orders, and former paragraph (2) covering motions to modify such orders is deleted.

Advisory Committee's Notes
February 1992

Rules 80 and 80G are entirely revised and replaced by the present amendment, which is based on proposed changes developed and presented to the Advisory Committee by a working group of the Maine State Bar Association's Family Law Section. The purposes of the new rule are to clarify procedural provisions relating to family law actions and bring them into line with current family law practice and recent state and federal legislation. Rule 80G and Form 7.10 are abrogated by simultaneous amendments.

Rule 80(a) makes clear that the Civil Rules, as modified by Rule 80, apply to divorce, annulment, separate support, and any action related to parental rights and responsibilities for a minor child under Title 19. References in former Rule 80 to other provisions of the rules are thus deleted as redundant. Former Rule 80(i) covering annulment is omitted as superfluous.

Rule 80(b) carries forward provisions of former Rule 80(b) covering pleading. Restrictions on service of process and redundant and obsolete provisions have been eliminated. Guardians ad litem are now covered in Rule 80(e). Provisions concerning counterclaims found in former Rule 80(e) are now included in Rule 80(b). The last sentence of Rule 80(b) requires the child custody affidavit required under Maine's Uniform Child Custody Jurisdiction Act.

Rule 80(c) is entirely new, superseding former Rule 80(n). It incorporates the requirements of the child support guidelines statute and provides for prompt financial disclosure in cases not involving children. The rule outlines procedures for the filing of financial affidavits. The intent is to require the parties to provide the court and mediators with accurate financial information early in the litigation. Former Form 7.10 is abrogated because it will be superseded by forms adopted pursuant to this subdivision.

Rule 80(d) carries forward former Rule 80(c) with clarifying changes and references to newly enacted 19 M.R.S.A. § 692-A relating to preliminary injunctions. The 1990 amendments to Rule 7 are now fully applicable to motions under this subdivision.

Rule 80(e) carries forward the provision of former Rule 80(b) permitting minor parties to proceed without guardians *ad litem* despite Rule 17(b). The new rule adds specific procedures for the appointment of a guardian *ad litem* for a minor child of the parties when the court determines it to be in the best interests of the child.

Rule 80(f) carries forward former Rule 80(d) with language clarifying the procedure in the case of a defendant who does not answer but appears. The intent of the rule is to require a defendant to enter an appearance prior to the commencement of trial if the defendant wishes to participate in the proceeding or to object at hearing. Former Rule 80(d) granted a right to "be heard" before "judgment," which permitted parties failing to answer in accordance with the summons to oppose the judgment after trial but during the appeal period. Rule

80(f) is intended to permit a defaulting party to appear and participate at hearing in accordance with Rule 55, but if a party does not file an answer and enter an appearance before trial, there is no right to participate in the trial at all.

Rule 80(g) is identical to former Rule 80(f).

Rule 80(h), superseding former Rule 80(m), makes clear that the expedited pre-trial and memorandum procedures of Rule 16(a)-(e) do not apply in family law actions. The new rule provides for an optional pre-trial conference on motion of the parties or court. The provision is purposely broad to permit the trial courts to continue their present experimentation in the development of pretrial procedure in family law cases.

Former Rule 80(h), prohibiting a new trial or other relief from judgment "if the parties have cohabited or one of them has contracted a new marriage," is eliminated. The provision carried forward limitations on a pre-1959 statutory procedure that was the equivalent of motions to reopen or modify a divorce judgment under Rules 60(b) or 80(j). *See* R.S. ch. 166, § 66 (1954); *Simpson v. Simpson*, 119 Me. 14, 17, 109 A. 254 (1920), and cases cited therein. Those limitations are now obsolete in light of changes in divorce law and practice. The equitable nature of Rules 60(b) and 80(j) will allow the court to treat post-divorce cohabitation or remarriage flexibly and fairly in the circumstances of each case.

Rule 80(i) is identical to former Rule 80(g).

Rule 80(j) clarifies and strengthens the provisions of former Rule 80(j) concerning post-judgment motions. Post-judgment motions are now labeled "motions for post-judgment relief" and must be served by one of the methods provided in Rule 4 for service of summons, unless the opposing party is represented by an attorney. All objections and other defenses to the motion are to be filed in the memorandum in opposition required by Rule 7(c). The memorandum fulfills the function of an answer, and failure to file such a memorandum may result in a default judgment under Rule 55 modifying or amending the original divorce judgment. Special provision is made to incorporate financial disclosure under this rule, and other special provisions are made for motions seeking modification of child support. A hearing is required unless the parties certify that the motion is uncontested. In actions involving child support, the parties must provide the court with a proposed order incorporating the child support worksheet so as to expedite decisions. The parties may now request findings of fact and conclusions of law in accordance with Rule 52(a) after entry of

a final judgment on a post-judgment motion. Remedies under the statutory conditional withholding order are preserved.

Rule 80(k) is virtually identical to former Rule 80(k).

Former Rule 80(o) governing removal from the District Court is omitted as superfluous.

Advisory Committee's Notes
July 1990

[Note: Former 80(j) is now 80(k)]

Rule 80(j) is amended concurrently with the amendments changing the Motion practice under Rule 7 effective July 1, 1990. The amendment makes clear that provisions of amended Rule 7(b) apply to filing and serving motion and notice of motion in post-judgment divorce proceedings. Rules 7(c) and (e) are also applicable even though they are not expressly incorporated.

Rule 80(j) is further amended to eliminate an apparent inconsistency with the provisions of Rule 5(b) permitting service of a responsive pleading upon a party represented by an attorney by delivery to the attorney. Rule 80(j) provides that a post-judgment motion in a divorce proceeding must be served in hand as provided in Rule 4. The purpose is to assure notice in a situation in which the motion is served long after the opposing party's counsel has withdrawn. When the original motion is served by a party then represented by counsel, however, that problem is not present. Accordingly, the amendment provides that in such a case service may be made upon the original movant's attorney under Rule 5(b).

Advisory Committee's Notes
1984

[Note: Former 80(f) is now 80(g)]

Rule 80(f) is amended to broaden the scope of discovery allowed in divorce actions and to make the same measure of discovery available in actions for annulment under the rule. A similar change is being made in Rule 80G(f) covering actions for separate support and custody. Both amendments will apply in the District Court by virtue of their incorporation in D.C.C.R. 80 and 80G respectively.

Under the amended rule, not merely depositions and interrogatories but all discovery, including production under Rule 34, physical and mental examination under Rule 35, and requests for admission under Rule 36, will be available on what are essentially economic issues. To the enumeration in the former rule of alimony, support, and counsel fees as issues where discovery is available as of course, the amendment adds disposition of property. The intention is to include all property dispositions whether granted under 19 M.R.S.A. § 722-A, or otherwise. *See* Rule 80(d). As under the former rule, discovery on issues other than those enumerated may be taken only upon court order for cause shown. This distinction is maintained in recognition of the "delicacy" of non-monetary issues in marital actions. *See* 2 Field, McKusick, and Wroth, *Maine Civil Practice,* § 80.1 (2d ed. 1970); Reporter's Notes to Rule 80(f), *id*. at 268; Advisory Committee's Note to 1967 amendment of Rule 80(f), *id*. at 271.

Advisory Committee's Notes
1981

[Note: Former 80(d) is now 80(f)]

Rule 80(d) is amended to provide that in divorce actions the presumption of Rule 54(b) that a judgment on less than all the claims in an action is non-final is reversed: An order granting a divorce, annulment, or marital property disposition is final notwithstanding the pendency of other claims in the action unless the court otherwise orders. The amendment is intended to eliminate a trap for the unwary that was sprung in *Parent v. Parent*, 425 A.2d 975 (Me. 1981). Judgments affecting status or title to property should not be subject to uncertainty due to possible failure of counsel to comply with procedural rules.

The rule complements the recent action of the 110th Legislature, which validated all divorce, annulment, and marital property judgments similarly subject to pending claims or counterclaims, except those in which the appeal period was still running on June 30, 1981, the effective date of the Act. P.L. 1981, ch. 529 § 2. In those proceedings, it remains open to the appropriate party to pursue the pending claim or secure its dismissal by proper means. In divorce actions where judgment was entered between June 30, 1981 and the effective date of the rule amendment and a pending claim or counterclaim was overlooked, counsel should either obtain the appropriate dismissal or obtain the appropriate Rule 54(b) order.

Advisory Committee's Note
September 1, 1980

This rule is amended by adding a provision that tracks the language of DCCR 80(*l*)(2) providing for payment of service costs in *in forma pauperis* cases from court funds. Now that the Superior Court has an administrative budget, there is no reason that this expense cannot be assumed in that court also.

Advisory Committee's Note
July 21, 1977

The purpose of the amendment to subparagraph (d) of Rule 80 of the Maine Rules of Civil Procedure is to provide in the case where a Defendant does not file an Answer and is not represented by counsel, that he may be heard on any issues relating to the division of the marital property of the parties to the action, in addition to those already specified in the rule. It should be noted that in order to preserve this right to be heard, the Defendant must file a written appearance before judgment is entered in the case.

Advisory Committee's Note
November 15, 1976

It is the purpose of this amendment to conform the provisions of this rule [80j) in respect to service outside of the state to current postal regulations, providing for "restricted delivery" in lieu of the prior designation "deliver to addressee only". A similar change has previously been accomplished with respect to M.R.C.P. 4(f).

Advisory Committee's Note
November 15, 1976

Rules 80(c) and (e) are amended to reflect more accurately current practice or the intent of the rule. The changes are made at this time for consistency with the very similar provisions of Rule 80G, added by simultaneous amendment.

Rule 80(c), covering orders prior to judgment, now applies to any action under the rule, including annulment as well as divorce. While most of its provisions would ordinarily be inapplicable in annulment proceedings, there seems no reason not to make the rule apply to both. Other changes in Rule 80(c) reflect the current reality that divorce proceedings may be brought on behalf of either husband or wife and that, consequently, the provisions of the rule may run in favor of or against either spouse. The amendment adds an express requirement of notice

and hearing for all orders under it. This procedure was required in any event by virtue of the general provisions of Rule 5-7. See 2 Field, McKusick, and Wroth, *Maine Civil Practice*, § 80.2 (2d ed.1970).

The provision of Rule 80(c) delimiting the jurisdiction of the court over temporary custody motions is changed from children "within the state" to children "subject to the jurisdiction of the court." This amendment is intended to embrace situations in which minor children not within the state may be subject to Maine's jurisdiction on some other ground, such as presence of the parent having custody or a prior valid custody order of a Maine court. The change is consistent with the purpose of the prior language which was simply intended to make clear that jurisdiction in custody matters, in contrast to support, did not depend on personal jurisdiction of the affected parent. See Explanation of Amendments (1962), 2 Field, McKusick, and Wroth, *supra*, at 270.

The second-to-last sentence of Rule 80(c) is changed in the interests of clarity, with no change in substance intended. The change in the final sentence, delaying issuance of execution for counsel fees until after final judgment, also works a change in the applicable statutory provision. See 19 M.R. S.A. § 722. The amendment ties the time of issuance of execution to the more certain event of entry of judgment and allows for the possibility that the amount of counsel fees awarded may be reviewed and revised by the court after hearing on the merits.

Rule 80(e) is amended to include counterclaims for separate support or custody under new Rule 80G among those permitted. The subdivision is reworded to specify that the enumerated counterclaims are the only ones permitted by the rule. The former provision that a counterclaim "may be filed by leave of court at any time prior to judgment" has been eliminated to make clear that the enumerated counterclaims, if included in a pleading as provided in Rule 13(b), may be filed without leave of court. After-acquired counterclaims, or those omitted through inadvertence or the like, may still be added by leave of court under Rules 13(e) and (f).

Advisory Committee's Note
June 6, 1972

The United States Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 789, 28 L.Ed.2d 113 (1971), has held that a state may not constitutionally deprive an indigent spouse of access to the divorce court by requiring payment of filing and service fees:

> ". . . a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." (Id. at 383).

Thus, a constitutional mandate rests upon the Maine Supreme Judicial Court to the extent of its rulemaking power to provide a means by which an indigent spouse may commence a divorce (or related) proceeding *in forma pauperis*. Other states have acted either to provide *in forma pauperis* proceedings in divorce cases (see Mass. Probate Rule 41A approved by Mass. Supreme Judicial Court, Feb. 2, 1972) or to make such proceedings available in any kind of case (see New Jersey Rule 1:13-2 as amended effective Sept. 13, 1971).

M.R.C.P. 80(*l*) provides a means by which the filing fee may be waived by order of the court upon an application supported by affidavit. There will probably be little or no occasion for anyone to seek waiver of the modest $2.00 filing fee now charged in the Superior Court. The costs of making service, however, are of greater consequence and the *Boddie* requirements extend also to those costs. In the amendment of Rule 80 of the District Court Civil Rules which is being made simultaneously, provision is made for payment of service fees as an administrative expense of the District Court. It is believed that the constitutional requirements are thus met.

The *in forma pauperis* rules adopted by some states in reaction to *Boddie* permit use by the indigent of less expensive modes of service. For example, Massachusetts Probate Court Rule 41A provides that:

> "The court in such a case may order service of the order of notice, in a manner reasonably calculated to give notice to the libellee, as for example by a disinterested person or attorney, or by certified or registered mail."

The Committee rejects watering down the divorce service requirements for the indigent plaintiff, believing that the purpose of those special requirements applies alike to the indigent and the non-indigent (see 2 Field, McKusick & Wroth, *Maine Civil Practice* 272-73) and that the constitutional obligations of the courts to the indigent should be treated as raising solely the question of where the moneys for paying service fees are to come from.

The rule does not attempt to spell out tests of indigeney. The Supreme Court has given some guidance on this subject. In *Boddie* (id. at 372–73) it found that affidavits established indigency where they showed that each, person's

> "welfare income . . . barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce."

Similarly, *In re Smith*, 323 F.Supp. 1082 (D.Colo.1971), a recent federal district court decision has applied a liberal definition of the word "indigence" in an action granting waiver of federal bankruptcy filing fees:

> "We will not attempt to set forth a complete definition of indigence, but we think it fair to state that a person who cannot afford to live from day to day and also pay the cost of a court filing fee is indigent for the purpose of being entitled to proceed without prepayment of costs. To require that a person seeking access to court be so destitute as to be unable to maintain himself from day to day would deny access as surely as does the filing fee requirement." (*Id.* at 1092).

An affidavit was accepted by a federal district court in New York "in the absence of evidence to the contrary," although the court pointed out that the trustee had the statutory duty of examining the bankrupt (11 U.S.C. § 75(a)) and that he could adequately provide against possible abuses of the use of affidavits. *In re Kras*, 331 F. Supp. 1207, 1213 (E.D.N.Y.1971).[*]

Advisory Committee's Note
May 9, 1970

The Special Session of the 104th Legislature meeting in January-February, 1970, enacted an amendment to 4 M.R.S.A. § 152 to authorize the remand, or transfer, of divorce and annulment cases from the Superior Court to the District Court. (1969 Laws, c. 587) The rule uses the word "transfer" rather than the

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[*] [Field, McKusick & Wroth note: "This case was reversed *sub nom*. *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). The Supreme Court held that the principle of *Boddie* should not be extended to waiver of the filing fee amounting to no more than $50 as a prerequisite to discharge in bankruptcy." Field, McKusick & Wroth, *Maine Civil Practice* at 553 (Supp. 1981).

statutory language of "remand" which is technically inappropriate in the bulk of actions which have never previously been in the District Court. The difference in language is plainly not one of substance. The rule makes clear what is implicit in the statute; namely, that any pending action may be transferred, even though it had been commenced or even had gone to judgment prior to enactment of the statute. Thus, if the parties find the District Court a more convenient forum for further proceedings to modify an existing Superior Court divorce judgment, they may cause remand of the action regardless how long ago the judgment was entered.

The transfer of the action from the Superior Court to the District Court is in many respects the converse of the removal of actions from the District Court to the Superior Court under D.C.C.R. 73(b). The latter rule is used as a model for the mechanics of transfer prescribed in Rule 80(k). Transfer is accomplished by filing a notice in the Superior Court (which must bear the signature of both parties or their counsel in evidence of their agreement) and by paying to the Clerk of the Superior Court fees in the same amount required in the District Court on removal. Those fees are prescribed in 4 M.R. S.A. §§ 174-75 ($7.00 for removal including entry fee and $5.00 for copies of papers) and are incorporated by reference in Rule 80(k) subject to possible future changes by the Legislature. The Clerk of the Superior Court will file with the Clerk of the District Court in the Division to which the transfer is made a copy of the record in the Superior Court and all the original papers in the case. Compare the procedure for removal from the District Court, Field, McKusick & Wroth, *Maine Civil Practice* § 173.10 (2d Ed. 1970). M.R.C.P. Form 33 added simultaneously with Rule 80(k), provides a form for transfer of a divorce or annulment action to the District Court. M.R.C.P. 84 declares it to be sufficient under the Rules.

The selection of the division of the District Court to which the action is transferred is left up to the parties, subject to the limitation that prior to the time that a judgment of annulment or for divorce from the bonds of matrimony has become final, transfer may be made only to a division in a county where either party resided at the commencement of the proceedings. The reason for this restriction is the provision of 19 M.R.S.A. § 691 declaring: "A divorce from the bonds of matrimony may be decreed in the county where either party resided at the commencement of the proceedings . . . . " *Poulin v. Poulin*, 241 A.2d 611 (Me. 1968), held that this restriction of the county where the divorce might be decreed is a matter of subject-matter jurisdiction.[*] There appears, however, to be no such

* [Field, McKusick & Wroth opined: "But see Section 0.8 of this Supplement for expression of the author's opinion that *Poulin v. Poulin* should not read to make the statutory county

restriction on post-judgment motions, as, for example, motions for modification of the provisions for alimony or child custody or support. It can be anticipated that most transfer of divorce actions from the Superior Court to the District Court will come after judgment. The rule proceeds on the belief that the place of trying post-judgment matters in a divorce action is a matter of venue and not of jurisdiction, and that being a matter of venue both parties by their agreement to the transfer will waive any objection that might otherwise exist to the venue. The above quoted language of 19 M.R.S.A. § 691 is limited to the decreeing of a divorce from the bonds of matrimony, and the last sentence of that same section and also 19 M.R.S.A. § 664 state in broad language that both the District Court and the Superior Court have jurisdiction over actions for divorce in all counties. While it might be suggested that post-judgment transfers be limited to divisions in counties in which at least one of the parties lives at the time of the transfer, such limitation is clearly not necessary if the division of transfer is only a matter of venue.

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restriction jurisdictional in a divorce action where one or both spouses are residents." Field, McKusick & Wroth, *Maine Civil Practice* at 550 (Supp. 1981).

Obviously the availability of transfer to the most convenient division of the District Court is a highly desirable feature. For example, the original Superior Court divorce action might have been commenced in Aroostook County where both parties then resided; after the divorce judgment is final, the husband may have moved to East Hartford, Connecticut and the wife to Biddeford, Maine. By Rule 80(k) the parties may by agreement cause the action to be transferred by the Aroostook County Superior Court to a division of the District Court located in York County where the wife lives or to any other division in the state which the parties choose for any reason - whether to suit the convenience of the parties or their lawyers or of the witnesses, or otherwise.

The judgment of divorce from the bonds of matrimony becomes final by written waiver of appeal, by expiration of the time for appeal, by dismissal of an appeal, or on certificate of decision from the Law Court. Cf. Rule 62(f) ; see, as to waiver of appeal, 2 Field, McKusick & Wroth, *Maine Civil Practice* § 80.3 (2d ed. 1970). Although a Rule 60(b) motion for relief from the judgment of divorce might on the facts of a particular case still be timely, a division of the District Court in a county in which neither party resided at the commencement of the action would not have subject-matter jurisdiction to grant relief that attacks the divorce from the bonds of matrimony itself. Such is one's conclusion from 19 M.R.S.A. § 691. If the divorce action is transferred to a division where the action could not have been originally brought, because neither party resided there at the commencement of the action, and if after transfer a Rule 60(b) motion is filed, the District Court Judge should, if he believes the motion meritorious, transfer the case to a division which would have subject matter jurisdiction. Such a transfer of venue between divisions of the District Court is authorized by 4 M.R.S.A. §§ 155(7) and (8). *See Id*. at § 100.7.

Rule 80(k) contemplates no participation in the transfer process by either the Superior Court Justice or the District Court Judge. It is intended to be simple in operation, put into motion by the agreement of the parties and carried out by the clerk of the Superior Court.

It may be expected that the bulk of the divorce and annulment actions that will be transferred from the Superior Court to the District Court will be those actions which have gone to judgment in the Superior Court and which thereafter involve motions for modification of alimony or child custody or support. The resident District Court Judge can in general provide continuing supervision more satisfactorily than can the Superior Court Justices who in performing their circuit duties come and go from a particular county. Furthermore, the transfer device

should be particularly attractive to the parties to a divorce judgment who have subsequent to commencement of the Superior Court action moved to a different part of the State. It should be noted that a Superior Court divorce action may be transferred to the District Court even though it was commenced or even went to judgment prior to enactment in 1970 of the statutory authorization for remand or transfer. The statute and the rule apply to any pending case.

Advisory Committee's Note
December 31, 1967

As noted in the original Reporter's Note to Rule 80(f), it "does not seem desirable to have the free use of discovery" in the divorce actions. For example, discovery on the subject matter of the grounds for divorce might have undesirable consequences. However, the same undesirable consequences would not accompany discovery as to monetary issues involved in the action. It is believed that the wife should have discovery freely available to discover facts relating to issues of alimony, support or counsel fees.

Explanation of Amendments
(Feb. 1, 1960; August 1, 1962; Nov. 1, 1962)

Rule 80(b) was amended by the addition of the final sentence to make it clear that Rule 17(b) providing for the appointment of a guardian ad litem for an infant does not apply to divorce actions. The court may, however, when it deems it advisable, order such appointment. See § 17.5 of the Text.

Rule 80(c) was almost completely rewritten by the amendment of February 1, 1960. As amended, Rule 80(c) applies only to orders prior to judgment in a divorce action. Rule 80(j), added by the February 1, 1960, amendment, and amended effective August 1, 1962, controls procedures for obtaining orders after judgment. Rule 80(c) provides the procedures for obtaining the relief granted by 19 M.R.S.A. §§ 693-94. The court cannot enter an order for support of the wife and minor children or for money for prosecution of the divorce action under this subdivision unless it has personal jurisdiction over the husband. He must be a domiciliary of Maine or have submitted to the jurisdiction of the Maine courts and further he must have been personally served with a copy of the complaint and summons, either within the state or elsewhere. Service by mail pursuant to Rule 4(f) does not give the court personal jurisdiction, nor does service by publication except in the rare situation covered by Rule 4(d) (1). The court may make orders for the custody of minor children who are within the state pending judgment on a

divorce action in any case, whether or not the errant spouse is subject to the jurisdiction of the court.

The court may order the husband to pay reasonable counsel fees for the prosecution of a motion under this subdivision if requested in the motion and may enforce any order made under this subdivision by issuing its *capias* execution. A *capias* execution will be ordered, however, only when specifically requested by motion and after hearing.

The last sentence of Rule 80(c) simply restates a portion of 19 M.R.S.A. § 722.

A motion under Rule 80(c) for an order pending judgment in a divorce action is similar to a motion in any other civil case. It may be signed by counsel for the party and, in contrast to motions after judgment, may be served upon counsel and pursuant to any of the methods of Rule 5.

Rule 80(j) was added on February 1, 1960, to resolve questions that had arisen during the first few months of operation under the new rules and to make clear that orders modifying or enforcing a divorce judgment are obtained by motion and not by separate action. The rule requires, however, that a motion for alteration or enforcement of an existing judgment shall be delivered to the party himself. Such motions are often brought several years after the judgment, and service upon the attorney of record in the original proceeding imposes an undue burden upon the attorney who may have long been out of touch with the party.

The August 1, 1962, amendment imposes an additional requirement for service of these Rule 80(j) motions. Because of the possible seriousness of the result of a motion for enforcement or modification of a divorce judgment, the rule as amended requires that notice of the motion be by delivery in hand or by registered or certified mail, return receipt requested, deliver to addressee only. Since a motion, and not original process, is being served, such delivery in hand need not be made by an officer.

If service cannot be made by one of these methods after due diligence, the court upon motion may order service by publication or by ordinary mail or both. The provision for publication was found necessary in the case of a party who has moved since the date of judgment and whose present whereabouts are unknown. The provision for service by regular mail, if ordered by the court, is to reach the

party who avoids service in hand and who neither accepts nor refuses registered or certified mail.

The purpose of the second sentence of Rule 80(g), added by amendment effective November 1, 1962, is to put the court on notice in a situation where an unsuccessful plaintiff in a divorce action subsequently commences a new action using the same grounds, hoping to get a different and more lenient Superior Court Justice the next time, or even worse, manufacturing some new evidence for use at the subsequent hearing.

Reporter's Notes
December 1, 1959

An action for divorce or annulment is a suit of a civil nature and so within the coverage of these rules, but they are sufficiently different from other civil actions to require a separate rule. The objective is to make only such changes in existing practice as are necessary for general conformity with the pattern of these rules. There is no comparable Federal rule.

Rule 80(a) simply states that these rules shall apply to divorce actions unless otherwise provided.

Rule 80(b) is taken basically from R.S.1954, Chap. 166, Secs. 56 (amended in 1959) [now 19 M.R.S.A. § 692] and 57 (repealed in 1959). The words "complaint", "plaintiff", and "defendant" have been used to conform to the other rules.

Rule 80(c) incorporates with slight verbal changes the provisions of R.S.1954, Chap. 166, Secs. 59 and 60 [now 19 M.R.S.A. §§ 693-694].

Rule 80(d) requires a hearing in divorce actions. An answer in accordance with Rule 12 is contemplated if the defendant proposes to contest the divorce, but an appearance without answer permits him to be heard on custody, alimony, and the like.

Rule 80(e) provides for counterclaims in divorce actions, in lieu of cross-libels, but expressly makes a counterclaim permissive only so that failure to counterclaim would not preclude a later action for divorce for a cause arising previously.

Rule 80(f) requires a court order for the use of the discovery devices in divorce actions.[*] It does not seem desirable to have the free use of discovery in this type of case. On the other hand, depositions may now be taken in divorce actions under R.S.1954, Chap. 117, Sec. 1 (repealed in 1959), and presumably the court will permit a deposition in the circumstances under which a deposition can be taken under existing law.

Rule 80(g) provides that a divorce action shall be in order for hearing not less than 60 days after service of process on the defendant. This approximates the time limitations in R.S.1954, Chap. 166, Sec. 61 (repealed in 1959), which uses the abolished concept of "return term."

Provision for a new trial in divorce actions will be governed by Rule 59 and by the provisions of Rule 60(b) dealing with relief from judgments. R.S.1954, Chap. 166, Sec. 66 [repealed in 1961], providing for a new trial within three years after judgment, is superseded. Rule 80(h) provides, however, that there shall not be a new trial or relief from a judgment when the parties have cohabited or either has contracted a new marriage since the judgment. This provision is lifted from the superseded statute.

Rule 80(i) incorporates R.S.1954, Chap. 166, Sec. 52 [now 19 M.R.S.A. § 632] dealing with annulment of invalid marriages.

Perhaps some reference to the provisions of R.S.1954, Chap. 166 [now 19 M.R.S.A. §§ 631-752], which are not covered by the rule is desirable. Section 55 [now 19 M.R.S.A. § 691] sets forth the causes for divorce and jurisdiction of divorce actions and is plainly substantive. Section 58 [now 19 M.R.S.A. § 661] is also substantive in that it provides a criminal penalty.

It does not appear necessary to incorporate Sec. 61 (repealed in 1959), providing for jury issues in divorce cases, into these rules. The statute provides that jury issues "may" be framed and that findings of a jury shall have the same force and effect as similar findings in probate appeals. In probate appeals a jury verdict is advisory, and it is for the court to decide the case. In re Look, Appellant, 129 Me. 359, 152 A. 84 (1930). Rule 39(c) already provides that the court may try

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[*] [Field, McKusick & Wroth noted: “By a December 31, 1967, amendment discovery by depositions and interrogatories is permitted on "money issues" as in other actions. See Advisory Committee's Note . . .” 2 Field, McKusick & Wroth, *Maine Civil Practice* at 268 (2d ed. 1970).

any issue with an advisory jury in all actions not triable of right by a jury. This would apply in an action for divorce.

Sections 62 to 65-A [now 19 M.R.S.A. §§ 662, 721-723, 725] and 67 to 70 [now 19 M.R.S.A. §§ 663, 724, 751-752] are not affected by this rule. They are largely substantive, and the procedural provisions seem to fit satisfactorily into the pattern of the rules.