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Financial Remedies and the Family Procedure Rules 2010

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The Family Procedure Rules 2010 ('FPR') takes the ancillary relief practitioner through three distinct stages: apprehension, wishful thinking followed by a nagging sense of unease. Apprehension at the sheer volume of material contained in the FPR and Practice Directions ('PD'); wishful thinking upon finding the 'ancillary relief rules' re-packaged but substantially unchanged in FPR Part 9 and finally, a nagging sense of unease: surely the rules have not been so comprehensively re-written in order to remain the same? What has changed, and how significantly? This article considers the impact of the FPR on ancillary relief and similar financial proceedings. A 'road map' is attached at the end, setting out where provisions from the Family Proceedings Rules 1991 ('the 1991 Rules') can be found in the FPR.

New Code, New Definitions

The first Part of the FPR signals that the rules represent a fresh start: '... these rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly ...' (FPR Pt 1.1). The significance of the words 'new procedural code' are considered by O'Hare and Browne in relation to Pt 1.1 of the Civil Procedure Rules 1998 ('CPR'):

'By setting out a new procedural code, the court is freed from the dead weight of old case law which was built upon the old rules. Procedural problems and uncertainties in cases should be resolved by reference to the rules and cases thereon. Previous case law is not definitive and is only of value where it appears to illustrate the overriding objective.' (*Civil Litigation* (Sweet & Maxwell, 14th edn, 2009), at para 1.008)

One of the most significant changes in the FPR is that the rules that previously governed ancillary relief (now re-branded as 'financial orders': FPR Pt 2.3) cover other financial applications including Sch 1 to the Children Act 1989, Part III applications for financial relief after a foreign marriage and other less common applications for financial relief such as failure to maintain and an application under the Matrimonial Causes Act 1973 (MCA), s 10(2): which are collectively known as 'financial remedies' (FPR Pt 2.3). Accordingly, a Sch 1 application involves the same procedure as a claim for a financial order, albeit with different forms and a different regime on costs (see below). It should be noted that FPR Pt 9 does not cover all financial claims (a ragbag of other provisions are dealt with at FPR Pt 8) and the FPR do not apply at all to TOLATA claims or applications for family provision under the Inheritance (Provision for Family and Dependants) Act 1975 which continue to be governed by the CPR.

Pre-Application Protocols

The FPR makes minor modifications to the 2000 Pre-Application Protocol ([2000] 1 FLR 997), changing terminology, adding references to collaborative law and possible sanctions under the Fraud Act 2006 (Annex to PD 9A). Breach of this protocol will be taken into account on the issue of costs (PD 9A [3.4]).

More newsworthy has been the addition of a second protocol (attached to PD 3A) that, with certain exceptions, 'expects' (although does not 'require') prospective applicants to attend alternative dispute resolution (ADR) resulting in the filing of a Family Mediation Information and

Information Form (Form FM1). Thereafter, the court is required 'at every stage' to consider whether ADR is appropriate (FPR Pt 3.2) and may, of its own initiative, adjourn a case so that ADR can take place (FPR Pt 3.3).

Overriding Objective and Case Management

The 'overriding objective' at FPR Pt 1.1 follows the wording of CPR Pt 1 and r 2.51D of the 1991 Rules adding the tailpiece: '... having regard to any welfare issues involved'. The court's active case management duties are re-ordered and expanded at FPR Pt 1.4.

FPR Pt. 4.1 inserts a list of 'the court's general powers of management' which include (a) extending or shortening the time for compliance with any rule, practice direction or court order, (e) directing that a hearing should take place by telephone, (t) staying the proceedings, (h) consolidating and (l) and excluding an issue from consideration (Pt 4.1(3)(l)). Court directions can also be conditional upon a party paying a sum of money into court and can specify the consequences of failure to comply (Pt 4.1(4)). The court is also expressly given the power to strike out a statement of case (Pt 4.4, see below).

Preparation for a First Appointment

The FPR provide for parties to file 'financial statements' (eg Form E for ancillary relief/financial order, Form E1 for Sch 1 etc) which should be 'verified by an affidavit' in accordance with FPR Pt. 9.14(2), Pt 22.12 and PD 22A. Exhibits should 'not be stapled' and should be consecutively numbered (PD 22A [13.1] and [13.3]). The court may refuse to admit 'defective' documents or exhibits in evidence (PD 22A, 14.1) and return the documents to the parties advisers. Otherwise, the 'practice direction documentation' provisions of r 2.61B of the 1991 Rules are repeated at FPR Pt 9.14(5). The devil however can be found in the detail of PD 9A which provides at [4.1] that:

'In addition to the matters listed at rule 9.14(5), the parties should, if possible, with a view to identifying and

narrowing any issues between the parties, exchange and file with the court –

- (a) a summary of the case agreed between the parties;
- (b) a schedule of assets agreed between the parties; and
- (c) details of any directions that they seek, including, where appropriate, the name of any expert they wish to be appointed.

4.2 Where a party is prevented from sending [draft directions] ... the party should make that information available at the first appointment.'

Moreover, PD 25A ('experts') provides that '... so far as appropriate' (PD 25A, [5.8]) parties who intend to instruct an expert should comply with provisions which originally derived from the Public Law Outline ([2008] 2 FLR 668) and Practice Direction of 1 April 2008 relating to children proceedings ([2009] 2 FLR 1383). These include the making of preliminary enquiries of the proposed expert (PD 25A, [4.1]) and the service by 11 am on the eve of the FDA of: (a) a 'written proposal' setting out the detail of the instruction [4.3]; and (b) a draft order setting out the detail of the order [4.4].

If followed to the letter, parties could end up filing up to 10 separate documents before FDA: (a) the requisite concise statement of issues, chronology, questionnaire and FDR notice 14 days beforehand (FPR Pt 9.14(5)) and costs estimate (FPR 9.27(1)); 'if possible'; (b) an agreed case summary, agreed schedule of assets and proposed directions (PD 9A, [4.1]); and, where permission is sought to instruct an expert, 'so far as appropriate' (c) a written proposal setting out proposed expert instruction and a detailed draft order relating to the expert instruction (PD 25A, [4.3, 4.4]). It remains to be seen whether these provisions which alternatively 'require' or 'encourage' will be more honoured in the breach.

Directions

Expert Evidence

PD 25A provides that the letter of instruction should be sent within 5 business

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days of the hearing [4.5]. The FPR also inserts a power, which will doubtless lift the spirits of district judges up and down the country, that in the event of disagreement, the court can determine the content of a letter of instruction (FPR Pt 25.8(2)) or provide for the parties to give separate instructions (FPR Pt 25.8(3)).

The substantive provisions of CPR Pt 35.1 to 35.14 relating to expert evidence are repeated in FPR Pt 25 save that the time limit for questions after the report reduced from 28 days (CPR Pt 35.6) to 10 days unless 'the court directs otherwise or . . . a practice direction provides otherwise' (FPR Pt 25.6).

Replies to Questionnaire

Replies to questionnaire should now be verified by a statement of truth (FPR PD 9A [5.2])

Affidavit Evidence

The tendency of the FPR to micro-manage is most evident in the provisions relating to affidavit evidence which should be

produced on "durable quality A4 paper with a 3.5 cm margin", typed on one side, either securely bound or endorsed on each page with the case number and initialled (FPR PD 22A [3.3]).

FDR

The provisions of r 2.61E of the 1991 Rules are replicated at FPR Pt 9.17. Any doubt as to the privilege that attaches to all discussions at FDR (whether or not they relate to offers to settle) is laid to rest by the wording of FPR PD 9A at [6]:

'... evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D* [1993] Fam 231, [1993] 1 FLR 932' (ie indicating that the maker had in the past caused or was likely in the future to cause serious harm to the well-being of a child).

Interim Applications

Maintenance Pending Suit

An application for maintenance pending suit (MPS) should be made using the Part 18 procedure (FPR Pt 9.7) giving 14 days notice (FPR Pt. 18.8(b)(ii)) and attaching a draft order to the notice of application (FPR Pt 18.7). Oral evidence will not generally be permitted (FPR Pt 22.7).

The FPR provides that MPS applications, which previously fell under the general rule of no order as to costs (rr 2.71(4), 1.2 of the 1991 Rules), are now exempted from this general rule and fall to be determined under CPR Pt 44 (FPR Pt 28.3(4)(b); Pt 28.2).

Freezing Orders

Several of the provisions of CPR Pt 25 relating to freezing orders, search orders, security for costs and other interim remedies have been directly imported into the FPR at Pt 20. In the most common situation of a without notice freezing order, practitioners should note that the application notice, evidence in support and draft order should be filed with the court two hours before the hearing wherever possible, and 'except in cases where it is essential that the respondent must not be aware of the application, the applicant should take steps to notify the respondent informally of the application' (PD 20A, [4.3]).

Reversing the traditional Family Division approach (discussed in *Re W (Ex Parte Orders)* [2000] 2 FLR 927) an injunction order should contain undertakings to pay damages '... unless the court orders otherwise' (PD 20A [5.1]).

Striking Out

For the first time, the FPR inserts express powers to 'strike out a statement of case' (FPR Pt 4.4) including '... ordering written material to be deleted so that it may no longer be relied upon' (see the Glossary). Previously, an application to strike out could only be considered as part of the court's inherent jurisdiction (*Rose v Rose* [2003] EWHC 506 (Fam), [2003] 2 FLR 197). The applicable is the civil test (no reasonable grounds, abuse of process or failure to comply with a rule, practice

direction or court order: FPR Pt 4.4(1), cf CPR Pt 3.4(2)) which may be guided by such authorities as *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926.

Final Hearing

The rules of evidence in ancillary relief final hearings, previously a candidate for the world's shortest book, are now set out at FPR Pts 22 to 24 which adopt civil evidential rules (CPR Pt 32) with the following saving provision:

'The court may permit a party to adduce evidence, or to seek to rely on a document, in respect of which that party has failed to comply with the requirements of this Part.' (FPR 22.1(3))

FPR Pt 22.1 invokes the court's power to control evidence, including the exclusion of evidence which might otherwise be admissible and that cross-examination may be limited. Significantly, examination in chief will only be allowed with the court's permission: a party is only allowed to amplify his witness statement or give evidence in relation to new matters with the permission of the court, provided there is good reason (FPR Pt 22.6). As a 'general rule' oral evidence will only be heard at a final hearing unless required by the court or any other provision (Pt 22.7). Provisions for notices to admit fact and hearsay notices can be found at Pts 22.14 and 23. Not all of these provisions are novel: some can be found hidden in the detail of old Practice Directions ([1995] 1 FLR 456). However, the FPR give prominence to provisions which, if followed strictly, may reduce many a time estimate.

Costs

The 'general rule' remains that there will be no order as to costs (FPR Pt 28.3(6)) applies to financial order applications, and *Calderbank* letters cannot be taken into account (Pt 28.3(8)). This 'general rule' includes variation applications, with the proviso that PD 28A [4.4] invites the court to be watchful on proportionality. However, this 'general rule' does not apply to all 'financial remedy' applications: the costs of Sch 1 applications or applications under ss 27 or 35 of the MCA 1973 (PD 28A, [4.2]) are determined under the court's discretion and can have regard to *Calderbank* offers.

Appeals

The confusion of the previous different rules on appeal (depending on whether the applicable rules were RSC Ord 58 or r 8.1 of the 1991 Rules) is replaced by a single set of rules on appeal (FPR Pt 30) based upon CPR Pt 52. Parties must now seek permission to appeal from the trial judge (FPR Pt 30.3). Where the lower court refuses permission a further application may be made to the appeal court the test being, does the appeal have a real prospect of success or is there some other compelling reason why the appeal should be heard (FPR Pt 30.3(7))? Where an appellant seeks permission from the appeal court an appellant's notice should be filed within 21 days with the respondent's notice 14 days due thereafter unless the court directs otherwise (FPR Pt 30.4). Where an appeal raises important point of principle or practice, provision for leapfrog appeal up to the Court of Appeal: FPR Pt 30.13. Appeals to the Court of Appeal are still governed by CPR Pt 52.

Consent Orders

Submission of a consent order is covered by FPR Pt 9.26 which provides at Pt 9.26(2) that both parties should sign an expanded statement of information, including confirmation that they have read the financial information disclosed by the other party.

Transitional Arrangements

According to PD 36A, where an 'initiating step' has been taken before 6 April 2011, such as a 'step using forms or other documentation required by the previous rules', the previous rules will apply in the first instance. If the case comes to court for the first time on or after 6 April 2011, the presumption will be that the FPR will apply (PD 36A, [4.4]).

A Table summarising all the FPR 2010 provisions can be found in March [2011] Fam Law 216.