The unbearable pointlessness of the questionnaire

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As family lawyers, we live in an increasingly rule-bound world. Bundles must comply with PD 27A; witness statements with PD 22A. Preliminary documents must be '. . . as short and succinct as possible' (PD 27A § 4.4), and now must not exceed the page limits at PD 27A § 5.2A. The court's general power to further the overriding objective (r. 4.1(o)) can be used to manage areas which once were left to the lawyers: eg limiting the length of Section 25 statements. The exception to this codification is the questionnaire.

There has never been much by way of guidance, either in the Family Procedure Rules 2010, or in the Family Proceedings Rules 1991 (see r 2.61B), as to what should and should not be contained in a questionnaire. Whereas many parts of the Family Procedure Rules 2010 are closely modelled on the Civil Procedure Rules, there is – perhaps surprisingly – no equivalent in the FPR of CPR PD 18 § 1.2 which provides that a request for further information in civil proceedings '. . . should be concise and strictly confined to matters which are reasonably necessary and proportionate'.

And what little guidance there is in the FPR is generally completely ignored. FPR r 9.14(5)(c) provides that 14 days before a first appointment, the parties should exchange a questionnaire '. . . setting out by reference to the concise statement of issues any further information and documents requested'. This is rarely done in practice. Instead, questionnaires are referenced against the sections of a Form E, which can mean that any discrepancy is picked up, regardless of relevance. In some cases, particularly where external advice has been taken in the drafting, a questionnaire becomes a lengthy audit of the Form E, in some cases running to 15 or 20 pages of densely drafted questions.

The problems with lengthy questionnaires

First, the Family Procedure Rules puts the control of disclosure firmly in the hands of the court, although in practice for every judge who takes a laissez faire approach ('. . . why shouldn't your client answer that') there is one who adopts a firmer line ('. . . why does she need to ask the question'). Unlike in civil procedure, the parties are not supposed to answer questionnaires outside court (cf. CPR PD 18 §1.1). Indeed, FPR r 9.14(4) provides that '. . . no disclosure . . . may be requested or given between the filing of the application for a financial remedy and the first appointment . . . ', save in accordance with r 9.14(5) (see above).

Secondly, it is simply not possible at a first appointment lasting 30 minutes or even 1 hour for the court to properly exercise its case management powers and go through a lengthy questionnaire in detail, while also dealing with other contentious directions. As a result, one of two things generally happens: either the hearing overruns (to the disadvantage of the other listed cases), or, more commonly, the court and/or the other

party acquiesces by agreeing to answer the questionnaire in full, or to answer 'saving just exceptions';

Thirdly, a party's willingness to answer a lengthy questionnaire is rarely the end of the matter, since an imperfect reply naturally leads to a schedule of deficiencies, which in some cases can be an inordinately long document, generating much heat but little light. Making provision for a party to reply to a questionnaire 'saving just exception' is more often than not a recipe for satellite litigation, where the parties invariably end up in dispute as to whether an exception was just. Indeed, many courts (such as the Central Family Court) refuse to endorse directions which provide for 'just exception', on the basis that this is an abnegation of the court's duty to manage disclosure.

Fourthly, to state an obvious point, the costs of preparing replies, and of the other party poring over those replies, can be significant. In particular, where one party sets hares running, by raising issues of marginal (or no) relevance which are then chased down, costs will generally rise for both parties.

However, the great unspoken truth is that while on occasion a questionnaire will draw a reply or provide disclosure which hits the bullseye, in general the majority of replies, and the mass of produced disclosure, which can fill several lever arch bundles, often serve no useful purpose. A litmus test for a questionnaire is how often it is referred to at a final hearing. Generally, the focus of cross examination will be on the contents of Form E and the Section 25 statement. With some notable exceptions, replies to questionnaire are only referred to in passing; indeed, since the implementation of FPR PD 27A, the vast majority of documents exhibited to replies will not even reach the court bundle.

What should and what should never be in a questionnaire

This is not to say that questionnaires do not serve a useful purpose, or that some brilliant and incisive questionnaires have been drafted; rather, that the time has come for questionnaires to be brought into line with other areas of financial remedy procedure, so that unnecessary and irrelevant material is cut. The following seven points are offered as to the drafting of a questionnaire; the overall objective being a significant reduction in length, thereby permitting the court to perform its function of proportionately managing disclosure:

(1) As a general rule of thumb, it is helpful to try to think backwards. If this case was being prepared for final hearing, and cross-examination, what narrative explanations and documents might be helpful? For example, might it help to have a copy of a mortgage application form (or similar), which would contain a party's declaration as to his income when it serves his purpose to be optimistic as to his income? Might it help, where there is an issue of earning capacity, to have a copy of the curriculum vitae? Would it have helped to ask in a questionnaire for that party's own narrative case on their earning capacity? There is nothing more frustrating to the effectiveness of a line of cross-examination when a court (or an opponent) objects that these were points which should properly have been put in the questionnaire, or that this is disclosure which could have been called for then;

(2) There is no need in a questionnaire to request updating disclosure, property particulars or evidence of mortgage capacity. All of these three areas can, and indeed should, be dealt with as case management directions in the first appointment order;

(3) It is generally a waste of time drafting questions which seek to interrogate a party's schedules of outgoings. The vast majority of judges will strike through these requests as a matter of principle, either because the questions amount to cross-examination, or because a schedule of outgoings is of limited evidential value. Indeed, it might be said that the Augean Stable of financial remedy work would be a lot cleaner if schedules of outgoings were removed altogether:

'. . . In this field of litigation budgets prepared by the parties often have a high degree of unreality – usually the applicant wife's budget is much inflated. Most unusually, in this case the wife's budget seems to have been rather understated in many respects.' *Purba v Purba* [2000] 1 FLR 444 per Thorpe LJ at 449.

'. . . The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.' *SS v NS (Spousal Maintenance)* [2014] EWHC 4183, per Mostyn J.

(4) In terms of what documents can be requested, the family court implicitly follows the civil rules, ie questionnaire can legitimately seek documentation which is within a party's control, in his physical possession, or he has a right to inspect of possess it (cf. CPR 31.8). It cannot be used to seek documentation belonging to a third party, where an application under FPR r 21.2 may be used;

(5) There is generally no purpose in repeating questions already answered in the Form E, such as 'Please conform that the Respondent really has no other bank accounts'. Many judges will simply delete these questions, on the basis that the contents of the Form E have already been confirmed with a statement of truth.

(6) A questionnaire should not be an opportunity to set out contentious material, or drafted in such a way as to recite and introduce comment, before putting the question;

(7) Where a request seeks, for example, disclosure of credit card statements, or an explanation as to holidays, it is particularly important to have in mind FPR r 9.15(5)(c), and ask: to what issue does this question go to?

Tightening up of procedure

Ultimately, it may be time for some clarity and predictability to be injected into the court's approach to questionnaires, which could start with the court controlling the elephantine growth of some questionnaires, by enforcing the provision of FPR r 9.14(5), i.e. requiring that a questionnaire is referenced to the statement of issues, and disapproving the 'audit' school of cross-referencing a Form E. This could have two benefits: firstly, it would require more careful drafting of schedule of issue (which too often is an unhelpfully bland document containing issues such as 1. Division of capital, 2. Income, 3. Pension); secondly, it would require a concentration of minds on the issues.

In terms of possibly amending the existing FPR, it is not easy to understand why FPR PD 9 could not be amended to incorporate CPR PD. 18 §1.2 (that a questionnaire '. . . should be concise and strictly confined to matters which are reasonably necessary and proportionate'). In due course, the page limits which now apply to most documents could be extended to questionnaires, save (for example) where the court makes an exception. Finally, the lacuna within the rules concerning fast track applications (FPR r 9.18–9.21A) might be filled, to allow for short questionnaires in financial remedy claims which come under the fast track. Currently FPR r 9.19 makes no allowance for questions to be raised in such a case, whereby the court may not at a first hearing be in a position to properly deal with requests for further information.