

APPLICATION FOR A FINANCIAL REMEDY

This Practice Direction supplements FPR Part 9

Introduction

- 1.1** Part 9 of the Family Procedure Rules sets out the procedure applicable to the financial proceedings that are included in the definition of a ‘financial remedy’.
- 1.2** The procedure is applicable to a limited extent to applications for financial remedies that are heard in magistrates’ courts (namely, those under section 35 of the Matrimonial Causes Act 1973, paragraph 69 of Schedule 5 to the Civil Partnership Act 2004, Part I of the Domestic Proceedings and Magistrates’ Courts Act 1978, Schedule 1 to the Children Act 1989 and Schedule 6 to the Civil Partnership Act 2004). However, unless the context otherwise requires, this Practice Direction does not apply to proceedings in a magistrates’ court.
- 1.3** Where an application for a financial remedy includes an application relating to land, details of any mortgagee must be included in the application.

Pre-application protocol

- 2.1** The ‘pre-application protocol’ annexed to this Direction outlines the steps parties should take to seek and provide information from and to each other prior to the commencement of any application for a financial remedy. The court will expect the parties to comply with the terms of the protocol.

Costs

- 3.1** Rule 9.27 applies in the High Court and county court. The rule requires each party to produce to the court, at every hearing or appointment, an estimate of the costs incurred by the party up to the date of that hearing or appointment.
- 3.2** The purpose of this rule is to enable the court to take account of the impact of each party’s costs liability on their financial situations. Parties should ensure that the information contained in the estimate is as full and accurate as possible and that any sums already paid in respect of a party’s financial remedy costs are clearly set out. Where relevant, any liability arising from the costs of other proceedings between the parties should continue to be referred to in the appropriate section of a party’s financial statement; any such costs should not be included in the estimates under rule 9.27.
- 3.3** Rule 28.3 provides that the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party. However the court may make such an order at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings.
- 3.4** Any breach of this practice direction or the pre-application protocol annexed to it will be taken into account by the court when deciding whether to depart from the general rule as to costs.

Procedure before the first appointment

- 4.1** 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 the details referred to in (c) above, the party should make that information available at the first appointment.

Financial Statements and other documents

- 5.1** Practice Direction 22A (Written Evidence) applies to any financial statement filed in accordance with rules 9.14 or 9.19 and to any exhibits to a financial statement. In preparing a bundle of documents to be exhibited to or attached to a financial statement, regard must be had in particular to paragraphs 11.1 to 11.3 and 13.1 to 13.4 of that Direction. Where on account of their bulk, it is impracticable for the exhibits to a financial statement to be retained on the court file after the First Appointment, the court may give directions as to their custody pending further hearings.
- 5.2** Where the court directs a party to provide information or documents by way of reply to a questionnaire or request by another party, the reply must be verified by a statement of truth. Unless otherwise directed, a reply to a questionnaire or request for information and documents shall not be filed with the court.

(Part 17 and Practice Direction 17A make further provision about statements of truth)

Financial Dispute Resolution (FDR) Appointment

- 6.1** A key element in the procedure is the Financial Dispute Resolution (FDR) appointment. Rule 9.17 provides that the FDR appointment is to be treated as a meeting held for the purposes of discussion and negotiation. Such meetings have been developed as a means of reducing the tension which inevitably arises in family disputes and facilitating settlement of those disputes.
- 6.2** In order for the FDR to be effective, parties must approach the occasion openly and without reserve. Non-disclosure of the content of such meetings is vital and is an essential prerequisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR appointment is an important part of the settlement process. As a consequence of *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231, 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*.
- 6.3** Courts will therefore expect –
- (a) parties to make offers and proposals;
 - (b) recipients of offers and proposals to give them proper consideration; and

- (c) (subject to paragraph 6.4), that parties, whether separately or together, will not seek to exclude from consideration at the appointment any such offer or proposal.
- 6.4** Paragraph 6.3(c) does not apply to an offer or proposal made during alternative dispute resolution.
- 6.5** In order to make the most effective use of the first appointment and the FDR appointment, the legal representatives attending those appointments will be expected to have full knowledge of the case.
- 6.6** The rules do not provide for FDR appointments to take place during proceedings in magistrates' courts.

(Provision relating to experts in financial remedy proceedings is contained in the Practice Direction supplementing Part 25 of the FPR relating to Experts and Assessors in Family Proceedings)

Consent orders

- 7.1** Rule 9.26 (1)(a) requires an application for a consent order to be accompanied by two copies of the draft order in the terms sought, one of which must be endorsed with a statement signed by the respondent to the application signifying the respondent's agreement. The rule is considered to have been properly complied with if the endorsed statement is signed by solicitors on record as acting for the respondent; but where the consent order applied for contains undertakings, it should be signed by the party giving the undertakings as well as by that party's solicitor.

(Provision relating to the enforcement of undertakings is contained in the Practice Direction 33A supplementing Part 33 of the FPR)

- 7.2** Rule 9.26(1)(b) requires each party to file with the court and serve on the other party a statement of information. Where this is contained in one form, both parties must sign the statement to certify that each has read the contents of the other's statement.
- 7.3** Rule 35.2 deals with applications for a consent order in respect of a financial remedy where the parties wish to have the content of a written mediation agreement to which the Mediation Directive applies made the subject of a consent order.

Section 10(2) of the Matrimonial Causes Act 1973 and section 48(2) of the Civil Partnership Act 2004

- 8.1** Where a respondent who has applied under section 10(2) of the Matrimonial Causes Act 1973, or section 48(2) of the Civil Partnership Act 2004, for the court to consider his or her financial position after a divorce or dissolution elects not to proceed with the application, a notice of withdrawal of the application signed by the respondent or by the respondent's solicitor may be filed without leave of the court. In this event a formal order dismissing or striking out the application is unnecessary. Notice of withdrawal should also be given to the applicant's solicitor.
- 8.2** An application under section 10(2) or section 48(2) which has been withdrawn is not a bar to making in matrimonial proceedings, the decree absolute and in civil partnership proceedings, the final order.

Maintenance Orders – registration in magistrates’ courts

- 9.1** Where periodical payments are required to be made to a child under an order registered in a magistrates’ court, section 62 of the Magistrates’ Courts Act 1980 permits the payments to be made instead to the person with whom the child has his home. That person may proceed in his own name for variation, revival or revocation of the order and may enforce payment either in his own name or by requesting the designated officer of the court to do so.
- 9.2** The registration in a magistrates’ court of an order made direct to a child entails a considerable amount of work. Accordingly, when the court is considering the form of an order where there are children, care should be taken not to make orders for payment direct where such orders would be of no benefit to the parties.

Pensions

- 10.1** The phrase ‘party with pension rights’ is used in FPR Part 9, Chapter 8. For matrimonial proceedings, this phrase has the meaning given to it by section 25D(3) of the Matrimonial Causes Act 1973 and means ‘the party to the marriage who has or is likely to have benefits under a pension arrangement’. There is a definition of ‘civil partner with pension rights’ in paragraph 29 of Schedule 5 to the Civil Partnership Act 2004 which mirrors the definition of ‘party with pension rights’ in section 25D(3) of the 1973 Act. The phrase ‘is likely to have benefits’ in these definitions refers to accrued rights to pension benefits which are not yet in payment.

PPF Compensation

- 11.1** The phrase ‘party with compensation rights’ is used in FPR Part 9, Chapter 9. For matrimonial proceedings, the phrase has the meaning given to it by section 25G(5) of the Matrimonial Causes Act 1973 and means the party to the marriage who is or is likely to be entitled to PPF compensation. There is a definition of ‘civil partner with compensation rights’ in paragraph 37(1) of Schedule 5 to the Civil Partnership Act 2004 which mirrors the definition of ‘party with compensation rights’ in section 25G(5). The phrase ‘is likely to be entitled to PPF Compensation’ in those definitions refers to statutory entitlement to PPF Compensation which is not yet in payment.

Annex

Pre-application protocol

Notes of guidance

Scope of the Protocol

1. This protocol is intended to apply to all applications for a financial remedy as defined by rule 2.3. It is designed to cover all classes of case, ranging from a simple application for periodical payments to an application for a substantial lump sum and property adjustment order. The protocol is designed to facilitate the operation of the procedure for financial remedy applications.
2. In considering the options of pre-application disclosure and negotiation, solicitors should bear in mind the advantage of having a court timetable and court managed process. There is sometimes an advantage in preparing disclosure before proceedings are commenced. However, solicitors should bear in mind the objective of controlling costs and in particular the costs of discovery and that the option of pre-application disclosure and negotiation has risks of excessive and uncontrolled expenditure and delay. This option should only be encouraged where both parties agree to follow this route and disclosure is not likely to be an issue or has been adequately dealt with in mediation or otherwise.
3. Solicitors should consider at an early stage and keep under review whether it would be appropriate to suggest mediation and/or collaborative law to the clients as an alternative to solicitor negotiation or court based litigation.
4. Making an application to the court should not be regarded as a hostile step or a last resort, rather as a way of starting the court timetable, controlling disclosure and endeavouring to avoid the costly final hearing and the preparation for it.

First letter

5. The circumstances of parties to an application for a financial remedy are so various that it would be difficult to prepare a specimen first letter. The request for information will be different in every case. However, the tone of the initial letter is important and the guidelines in paragraphs 14 and 15 should be followed. It should be approved in advance by the client. Solicitors writing to an unrepresented party should always recommend that he seeks independent legal advice and enclose a second copy of the letter to be passed to any solicitor instructed. A reasonable time limit for an answer may be 14 days.

Negotiation and Settlement

6. In the event of pre-application disclosure and negotiation, as envisaged in paragraph 12 an application should not be issued when a settlement is a reasonable prospect.

Disclosure

7. The protocol underlines the obligation of parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues. Solicitors owe their

clients a duty to tell them in clear terms of this duty and of the possible consequences of breach of the duty, which may include criminal sanctions under the Fraud Act 2006. This duty of disclosure is an ongoing obligation and includes the duty to disclose any material changes after initial disclosure has been given. Solicitors are referred to the Good Practice Guide for Disclosure produced by Resolution (obtainable from the Administrative Director, 366A Crofton Road, Orpington, Kent BR2 8NN) and can also contact the Law Society's Practice Advice Service on 0870 606 2522.

The Protocol

General principles

8. All parties must always bear in mind the overriding objective set out at rules 1.1 to 1.4 and try to ensure that applications should be resolved and a just outcome achieved as speedily as possible without costs being unreasonably incurred. The needs of any children should be addressed and safeguarded. The procedures which it is appropriate to follow should be conducted with minimum distress to the parties and in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances.
9. The principle of proportionality must be borne in mind at all times. It is unacceptable for the costs of any case to be disproportionate to the financial value of the subject matter of the dispute.
10. Parties should be informed that where a court is considering whether to make an order requiring one party to pay the costs of another party, it will take into account pre-application offers to settle and conduct of disclosure.

Identifying the issues

11. Parties must seek to clarify their claims and identify the issues between them as soon as possible. So that this can be achieved, they must provide full, frank and clear disclosure of facts, information and documents, which are material and sufficiently accurate to enable proper negotiations to take place to settle their differences. Openness in all dealings is essential.

Disclosure

12. If parties carry out voluntary disclosure before the issue of proceedings the parties should exchange schedules of assets, income, liabilities and other material facts, using the financial statement as a guide to the format of the disclosure. Documents should only be disclosed to the extent that they are required by the financial statement. Excessive or disproportionate costs should not be incurred.

Correspondence

13. Any first letter and subsequent correspondence must focus on the clarification of claims and identification of issues and their resolution. Protracted and unnecessary correspondence and 'trial by correspondence' must be avoided.
14. The impact of any correspondence upon the reader and in particular the parties must always be considered. Any correspondence which raises irrelevant issues or which might cause the other party to adopt an entrenched, polarised or hostile position is to be discouraged.

Summary

15. The aim of all pre-application proceedings steps must be to assist the parties to resolve their differences speedily and fairly or at least narrow the issues and, should that not be possible, to assist the court to do so.

