

# COSTS

## **This Practice Direction supplements FPR Part 28**

### **Application and modification of the CPR**

- 1.1** Rule 28.2 provides that subject to rule 28.3 of the FPR and to paragraph (2) of rule 28.2, Parts 43, 44 (except rules 44.3(2) and (3), 44.9 to 44.12C, 44.13(1A) and (1B) and 44.18 to 20), 47 and 48 and rule 45.6 of the CPR apply to costs in family proceedings with the modifications listed in rule 28.2(1)(a) to (d). Rule 28.2(1)(c) refers to modifications in accordance with this Practice Direction.
- 1.2** In addition to the modifications to the CPR listed in rule 28.2(1), in rule 48.1(1)(b) after paragraph (ii) insert '(iii) section 68A of the Magistrates' Courts Act 1980.'
- 1.3** Rule 28.2(2) provides that Part 47 and rules 44.3C and 45.6 of the CPR do not apply to proceedings in a magistrates' court.

### **Application and modification of the Practice Direction supplementing CPR Parts 43 to 48**

- 2.1** For the purpose of proceedings to which these Rules apply, the Practice Direction about costs which supplements Parts 43 to 48 of the CPR ('the costs practice direction') will apply, but with the exclusions and modifications explained below to reflect the exclusions and modifications to those Parts of the CPR as they are applied by Part 28 of these Rules.
- 2.2** Rule 28.2(1) applies, with modifications and certain exceptions, Parts 43 to 48 of the CPR to costs in family proceedings. Paragraph 1.2 of this Practice Direction modifies rule 48.1(1)(b) when it applies to family proceedings. Rule 28.2(2), by way of exception, disapplies Part 47, rules 44.3C and 45.6 of the CPR in the case of family proceedings in a magistrates' court. Rule 28.3, again by way of exception, additionally disapplies CPR rule 44.3(1), (4) and (5) in the case of financial remedy proceedings, regardless of court.
- 2.3** The costs practice direction does not, therefore, apply in its entirety but with the exclusion of certain sections reflecting the non-application of certain rules of the CPR which those sections supplement.
- 2.4** The costs practice direction applies as follows –
  - to family proceedings generally, other than in magistrates' courts, with the exception of sections 6, 15, 16, 17 and 23A;
  - to family proceedings generally, in magistrates' courts only, with the exception of sections 6, 15, 16, 17, 23A and sections 28–49A;
  - to financial remedy proceedings, other than in magistrates' courts, with the exception of section 6, paragraphs 8.1 to 8.4 of section 8 and sections 15, 16, 17 and 23A;

- to financial remedy proceedings in magistrates' courts only, with the exception of section 6, paragraphs 8.1 to 8.4 of section 8, sections 15, 16, 17, 23A and sections 28–49A.
- 2.5** All subsequent editions of the costs practice direction as and when they are published and come into effect shall in the same way extend to all family proceedings.
- 2.6** The costs practice direction includes provisions applicable to proceedings following changes in the manner in which legal services are funded pursuant to the Access to Justice Act 1999. It should be noted that although the cost of the premium in respect of legal costs insurance (section 29) or the cost of funding by a prescribed membership organisation (section 30) may be recoverable, family proceedings (within section 58A(2) of the Courts and Legal Services Act 1990) cannot be the subject of an enforceable conditional fee agreement.
- 2.7** Paragraph 1.4 of section 1 of the costs practice direction shall be modified as follows – in the definition of 'counsel' for 'High court or in the county courts' substitute 'High Court, county courts or in a magistrates' court'.

### **General Interpretation of references in CPR**

- 3.1** References in the costs practice direction to 'claimant' and 'defendant' are to be read as references to equivalent terms used in proceedings to which these Rules apply and other terms and expressions used in the costs practice direction shall be similarly treated.
- 3.2** References in CPR Parts 43 to 48 to other rules or Parts of the CPR shall be read, where there is an equivalent rule or Part in these Rules, to that equivalent rule or Part.

### **Costs in financial remedy proceedings**

- 4.1** Rule 28.3 relates to the court's power to make costs orders in financial remedy proceedings. For the purposes of rule 28.3, 'financial remedy proceedings' are defined in accordance with rule 28.3(4)(b). That definition, which is more limited than the principal definition in rule 2.3(1), includes –
- (a) an application for a financial order, except –
    - (i) an order for maintenance pending suit or an order for maintenance pending outcome of proceedings;
    - (ii) an interim periodical payments order or any other form of interim order for the purposes of rule 9.7(1)(a),(b),(c) and (e);
  - (b) an application for an order under Part 3 of the Matrimonial and Family Proceedings Act 1984 or Schedule 7 to the Civil Partnership Act 2004; and
  - (c) an application under section 10(2) of the Matrimonial Causes Act 1973 or section 48(2) of the Civil Partnership Act 2004.
- 4.2** Accordingly, it should be noted that –
- (a) while most interim financial applications are excluded from rule 28.3, the rule does apply to an application for an interim variation order within rule 9.7(1)(d),
  - (b) rule 28.3 does not apply to an application for any of the following financial remedies –
    - (i) an order under Schedule 1 to the Children Act 1989;
    - (ii) an order under section 27 of the Matrimonial Causes Act 1973 or Part 9 of Schedule 5 to the Civil Partnership Act 2004;

- (iii) an order under section 35 of the Matrimonial Causes Act 1973 or paragraph 69 of Schedule 5 to the Civil Partnership Act 2004; or
- (iv) an order under Part 1 of the Domestic Proceedings and Magistrates' Courts Act 1978 or Schedule 6 to the Civil Partnership Act 2004.

- 4.3** Under rule 28.3 the court only has the power to make a costs order in financial remedy proceedings when this is justified by the litigation conduct of one of the parties. When determining whether and how to exercise this power the court will be required to take into account the list of factors set out in that rule. The court will not be able to take into account any offers to settle expressed to be 'without prejudice' or 'without prejudice save as to costs' in deciding what, if any, costs orders to make.
- 4.4** In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute.
- 4.5** Parties who intend to seek a costs order against another party in proceedings to which rule 28.3 applies should ordinarily make this plain in open correspondence or in skeleton arguments before the date of the hearing. In any case where summary assessment of costs awarded under rule 28.3 would be appropriate parties are under an obligation to file a statement of costs in CPR Form N260.
- 4.6** An interim financial order which includes an element to allow a party to deal with legal fees (see *A v A* (maintenance pending suit: provision for legal fees) [2001] 1 WLR 605; *G v G* (maintenance pending suit; costs) [2002] EWHC 306 (Fam); *McFarlane v McFarlane*, *Parlour v Parlour* [2004] EWCA Civ 872; *Moses-Taiga v Taiga* [2005] EWCA Civ 1013; *C v C* (Maintenance Pending Suit: Legal Costs) [2006] Fam Law 739; *Currey v Currey* (No 2) [2006] EWCA Civ 1338) is an order made pursuant to section 22 of the Matrimonial Causes Act 1973 or an order under paragraph 38 of Schedule 5 of the 2004 Act, and is not a 'costs order' within the meaning of rule 28.3.
- 4.7** By virtue of rule 28.2(1), where rule 28.3 does not apply, the exercise of the court's discretion as to costs is governed by the relevant provisions of the CPR and in particular rule 44.3 (excluding r 44.3(2) and (3)).

