FINANCIAL REMEDIES COURT

WEST MIDLANDS REGION PRACTICE DIRECTION

ISSUED WITH THE APPROVAL OF MRS JUSTICE LIEVEN, FAMILY PRESIDING JUDGE FOR THE MIDLAND CIRCUIT

This local practice direction exists in order to assist judges and practitioners to deal efficiently with cases heard in this region, and to promote consistency. It is intended to supplement the Family Procedure Rules 2010, the FRC Efficiency Statement and the FRC Primary Principles promulgated on 11 January 2022. For these documents, see:-

https://www.judiciary.uk/guidance-and-resources/notice-from-the-financial-remedies-court-4/

For the avoidance of doubt, these continue to have precedence over this document. However, judges will continue to have discretion as to the manner in which cases before them are managed.

2. Gatekeeping and Allocation

The use of the Gatekeeping and Allocation Questionnaire (Schedule 3 of the FRC Primary Principles dated 11.01.22;) must be completed unless it is wholly impractical to do so as Form A contains very limited information to enable a case to be suitably allocated. Schedule 2 of that document indicates some of the factors which might merit allocation to the complex track but ultimately allocation is a judicial decision, and it is acceptable for a solicitor to indicate they are unsure of the appropriate allocation and mention any factors which may be relevant.

There is a Gatekeeping procedure which involves an experienced judge reviewing cases which could be considered complex so an early indication of complexity assists greatly. Cases are allocated to the Standard or the Complex list. Cases in the Complex list will be heard in Birmingham by judges at all levels (CJ, Recorder, DJ and DDJ), all of whom have experience of FR work whereas cases in the Standard list can be heard at any court centre in the region, usually by a DJ or DDJ.

There should be a degree of fluidity between the lists. A case in the Standard list can be moved to the Complex list, especially if an issue of complexity arises during the life of a case or is not known at the Gatekeeping stage, and vice versa. In the event that a case being heard at a court outside Birmingham is thought suitable for re-allocation to the Complex list, the judge dealing with the case should in the first place bring the case to the attention of HHJ Rowland, HHJ Ingram or DJ Dickinson. A brief summary of the issue(s) of complexity will assist the judge to give appropriate directions.

3. The First Appointment

It is good practice for legal professionals to have discussed the issues in a case in advance of all hearings with a view to agreeing directions and narrowing issues; accordingly timely attendance at court is essential, which usually means at least 60 minutes before the commencement of a hearing to engage in pre-hearing discussions.

Use of the forms ES1 and ES2 at this and all subsequent hearings is mandatory. Judges may refuse to hear a case or impose costs penalties for a failure to comply, and the former practice of each party submitting rival schedules of assets will not be tolerated. Guidance as to the proper use of the ES2 can be found at

https://www.judiciary.uk/wp-content/uploads/2022/02/Note-on-the-Correct-Use-of-the-ES2-with-example.pdf

It is important to note that the design of the ES2 is intended to enable each party to set out their own figures and to explain the reasons for their rival contentions.

Wherever possible parties should leave the First Appointment with a date for the Financial Dispute Resolution, and orders directing the listing of a FDR on the provision of dates of availability are to be avoided, wherever possible. If such schedules are to be provided, a single schedule with the availability of all participants is preferred.

Parties are encouraged to use the Accelerated First Appointment Procedure (see the Fourth Schedule to the FRC Good Practice Protocol dated 7 November 2019). While the Procedure stipulates the filing of documents no later than 14 days before the First Appointment, judges will be sympathetic to requests to use it if the request is filed later. However, practitioners must be aware of the risk that a request to use the Procedure sent late to the court cannot be placed before a judge in time to approve the proposed directions. Unless the Court has confirmed that the proposed directions have been approved by a judge, the parties **must** assume that the hearing will go ahead and their attendance is required at the hearing. The standard form of order to accompany a request to use the Accelerated First Appointment must be used and the order must be accompanied by relevant documents such as Forms E (without exhibits) and draft questionnaires.

No order using the Accelerated First Appointment Procedure will be approved unless it contains a recital that "***neither party intends to contend that the other party's conduct should be taken into account as a relevant factor pursuant to section 25(2) (g) Matrimonial Causes Act 1973***". If either party is unwilling to the inclusion of such a recital they must attend in person at the First Appointment to set out a case for conduct to be a relevant issue so that the judge can give directions in accordance with the judgment of Peel J in ***Tsvetkov v Khayrova [2023] EWFC 130***, paragraph 46 and ***N v J [2024] EWFC 184***. The judge's directions may include a refusal to permit the issue of conduct to be litigated unless the high threshold of relevance has been reached. In the event that a conduct issue becomes apparent at a later stage than the First Appointment, the party raising it must seek the court's directions so that appropriate directions can be given. These directions relate to s.25(2)(g) conduct and not to litigation conduct which may arise at any stage of litigation.

At any hearing, matters of non-compliance with the Rules may be recited in the order. Such matters may be relevant if a different judge presides over any subsequent hearing and issues of costs arise.

4. Experts

Judges are entitled to expect that PD25D of the Family Procedure Rules 2010 will be complied with when an application is made for expert evidence to be admitted. This includes;

- Confirmation that any instruction is within the expert's area of expertise;
- The likely time scales for a report to be filed;
- A costs estimate;
- A draft letter of instruction (with particular emphasis on the questions to be answered).

Cost-capping of expert's fees and a restriction on the questions to be answered, especially in relation to pension reports, are to be encouraged.

In an appropriate case parties should consider jointly instructing a mortgage adviser to provide estimates of each party's mortgage capacity if that is likely to be a magnetic factor.

If at the First Appointment parties wish to defer the instruction of an expert it is sensible to recite the reasons for doing so in the order.

5. Alternative Dispute Resolution

The FRC encourages the use of ADR. There has been a recent increase in the use of private FDRs ("pFDR"), and not only in "big money" cases. Where parties propose a stay for ADR or to attend a pFDR, the case must be listed for directions or a mention a suitable time (usually 4 weeks) after the ADR event, with the hearing vacated on the filing of a consent order and D81.

Practitioners are reminded that a pFDR should only be adjourned pursuant to an agreement of both parties or an order of the court: see paragraph 15 of the Efficiency Statement of 11 January 2022.

6. Questionnaires, Position Statements etc

The limit on the size of these documents set out in the Efficiency Statement of 11 January 2022 is critical to keeping costs within realistic bounds and hearings suitably focussed on the issues. Practitioners should be aware that judges will scrutinise them to ensure adherence.

Position statements should be filed by 11am on the day before any hearing save in exceptional cases.

7. Bundles

The limit of 350 pages is to be adhered to unless a judge has given permission for it to be exceeded for which an application will be required, and a new page limit imposed. PD27A of the Family Procedure Rules 2010 sets out the applicable rules for bundles, and section 4 ("Contents of the Bundle") should be considered when building any bundle. The "weeding out" of unnecessary material (eg pages other than the summary in an agreed valuation) or repeated documents is an essential aspect of building a bundle.

Paragraphs 6.2 and 6.3 require the bundle to be delivered to counsel 3 working days before a hearing and the court 2 working days before.

The default requirement is for bundles to be filed in electronic form for all hearings. They must comply with the General Guidance on Electronic Bundles (29 November 2021) and the President's Guidance on E-Bundles for Use in the Family Court (21 December 2021). It is essential that electronic bundles must be bookmarked, searchable and capable of OCR scanning: any failure to comply with this requirement may cause a hearing to be aborted with costs consequences, especially if it is a final hearing. Any electronic bundle should have continuous pagination, to include the cover sheet and index so that each printed page corresponds to the PDF page number.

A judge, at his or her discretion, may require paper bundles to be provided, and a paper bundle must always be available for witnesses.

8. Lodging Documents

This Practice Direction is drafted on the basis that all cases will be managed on the FR Portal. It is the responsibility of practitioners to ensure that they upload all documents to the Portal, do so under the correct tab and label them correctly (which party, a description of the document and a date). Guidance about use of the portal can be found here:

https://www.gov.uk/government/publications/myhmcts-how-to-use-online-financial-remedy-services

9. Correspondence with the Court and Judges

If a party proposes to amend an existing direction, for example to convert an attended hearing to a remote hearing or to adjourn a hearing, an application must be made and the relevant fee paid. While a degree of latitude was permitted by judges during the exceptional times of the Covid pandemic, formal procedures should now be followed.

If, with the permission of the judge, documents such as position statements are sent to the judge's email address, they must also be uploaded to the FR portal.

If correspondence is to be sent to the FRC in relation to an upcoming hearing, the name and number of the case, the hearing date and the word "URGENT" should be included in the subject line. The same formula should be adopted for filing Position Statements with the hearing centre.

10. Section 25 Statements

In all but the most exceptional cases, the parties should be ordered to file statements dealing with the section 25 factors following an unsuccessful FDR, but in many cases the statements can be limited to specific factors, such as earning capacity and needs. A limit to the length of the statements as well as the matters they can address are examples of good case management.

Attention is drawn to paragraph 22 of the FRC Efficiency Statement of 11 January 2022 for the content of s.25 and other witness statements.

If a party raises conduct allegations (other than litigation misconduct) in a section 25 statement without having previously sought directions in accordance with paragraph 46 of ***Tsvetkov***, the Court will consider the following sanctions – (a) ruling that the issue of conduct is not to be raised in the final hearing, (b) directing the statement to be removed and re-filed without the offending parts and (c) imposing a costs penalty.

Where an "add back" argument is to be deployed, it should be noted that this is a species of conduct so the Court's directions must be sought so that a procedure akin to that described in paragraph 46 of ***Tsvetkov*** can be followed, enabling the allegation to be set out with particularity and the accused person given an opportunity to respond. Such arguments raised for the first time in a section 25 statement filed simultaneously with the other party's statement should be treated in the same way as conduct raised without prior directions having been sought.

11. Listing for Final Hearing

Any order listing a case for final hearing must include a trial template which should include adequate time for judicial reading and consideration of and delivery of a judgment. Evidence in chief will ordinarily not be permitted, and then only with permission of the judge in relation to specific issues. Advocates must expect the duration of cross-examination to be curtailed so that the trial template is adhered to.

In every case with a time estimate of 3 days or more a pre-trial review should be listed when trial advocates will be expected to attend.

Mostyn J observed in ***Augousti v Matharu [2023] EWHC 1900 (Fam)*** in relation to the importance of case management:

> *30. ….This means that where a time estimate has been provided, it is incumbent on the parties to strain every sinew to ensure that the case is concluded within that time estimate (which includes allowing time for the writing of the judgment) and that it does not spill over, as happened in this case, to a later date for submissions to be made and for the judgment be written.*
>
> *31. Going part-heard is a bane with potentially damaging consequences on a number of fronts. One consequence may well be that another case will be thrown out of the list. Another is that parties, as here, often seem to think that the delay opens the door to the adducing of further*

evidence. A further downside is that the evidence about facts in issue begins to fade from the judicial memory. And obviously, circumstances can change during the interregnum.

12. Appeals

An appeal notice must be filed with the court office for the hearing centre where the decision was made against which the party proposes to appeal. Having taken the fee, that court office will pass the file on to the FR appeals section at the Birmingham administrative hub.

There is a dedicated email address for FR appeals: frbirminghamappeals@justice.gov.uk

HHJ Ingram is the judge responsible for the gatekeeping and initial directions orders for appeals, and she is the nominated judge who can declare an appeal to be "totally without merit" pursuant to Rule 30.3 (5A) & (5C) FPR 2010.

For the time being, appeals in this region are dealt with "off the portal". An announcement will be made if this practice is to change.

HHJ Rowland

Lead Judge for the West Midlands Region of the Financial Remedies Court

July 2024