

# FAMILY PROCEDURE RULES 2010

## AN OVERVIEW

1. The Family Procedure Rules 2010 (“FPR 2010”) come into force on 6<sup>th</sup> April 2011. The intention is to modernise procedures in all family courts and to apply common procedures to all family cases, whether in the High Court, County Court or Magistrates Court.
2. The Family Proceedings Rules 1991 (“FPR 1991”) will be completely replaced. In addition the Family Procedure (Adoption) Rules 2005 are subsumed into the FPR 2010 and accordingly replaced.
3. The Civil Procedure Rules 1998 (“CPR”) will continue to apply to:
  - (a) TLATA claims
  - (b) Family Provision claims<sup>1</sup>

### The underlying intentions / purpose of the FPR 2010

4. The *intention* was to achieve a modernisation of the legal language of family law and for this to be coupled with a streamlining of procedures. In addition, as the previous paragraphs suggest, there is to be a single unified code of practice across the courts that deal with family law. In other words, the ideal of a “Family Court”<sup>2</sup> was to be made real by these changes. Finally, the old system where one was obliged to look at Rule 1.3 of FPR 1991 and then navigate one’s way through the various alternative codes under the CPR, SCR and CCR is to disappear. There is no longer a need to use the Rule 1.3 road-map to get to the appropriate destination. Everything should be under one roof.

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<sup>1</sup> These two types of proceedings are not “family proceedings” as defined by s.32 of the Matrimonial and Family Proceedings Act 1984 (“MPPA”)

<sup>2</sup> See the recommendations of the Finer Report on One-Parent Families from 1974

5. However, what happens when, whereas under FPR 1991, one could make up for gaps by looking at the other statutory instruments, there are lacunae in the current rules: things that were provided for under the RSC (e.g. the rules for joinder under SCR 15 r.6) which are simply not replicated under the FPR 2010. This is dealt with below.

The FPR 2010 and the Practice Directions

6. The FPR 2010 are divided into 36 Parts and some, but not all, have attached to them a Practice Direction. The concept of Rules supported by Practice Directions is an import from the CPR. The Family Procedure Rules set out what one has to do. The Practice Directions tell you how you are expected to do it.
7. The third critical ingredient in the new mix is the inclusion of pre-action protocols. These govern the approach that the parties are expected to take and are likely to be of increasing importance when it comes to issues of case management, proportionality and, whisper the word “costs”. The pre-action protocols govern the approach to be taken by the parties prior to the issue of court proceedings and the consequences of non compliance.
8. If the Practice Direction tells you how to about opening a door, the pre-action protocol tells you how to go about letting people through it, so to speak. In a different age, for example, ladies went first. So, the pre-action protocols are likely to be akin to Debretts’ Modern Manners but with edge and teeth.
9. Three aspects of modern practice need to be emphasised:
  - (i) There is a significant increase in the importance attached to forms of ADR; and
  - (ii) There is a growing undercurrent of dissatisfaction with the “no order as to costs” rule amongst practitioners;
  - (iii) There is a similar concern about litigation misconduct
10. The pre-action protocols are designed to encourage “cards on the table” litigation and an early resort to ADR. I suspect that failures to comply with the protocols,

particularly when that rejects ADR or leads to increased costs are more likely to sound in costs going forward.

11. Those practitioners who deal with financial matters and private law children cases need to be particularly aware of:

- (a) Practice Direction 3A (“PD 3A”) which deals with mediation; and
- (b) PD 9A which deals with applications for “financial remedies”

12. A fourth element of the mix after the Rules, the Practice Directions and the pre-action protocols, is the FDR Forms. At the time of writing not all of these have been disseminated and certainly – inevitably – court staff have not been trained in their use. This, again, is addressed below. There are explanations for this tardiness but it does mean that the FPR may have a rather bloody birth. The Forms are touched upon below in the body of the lecture notes. The Forms are intended to be as simple as possible. Tick boxes, predominately, are used and there are guidance notes to assist the litigant in person (and the legal adviser) in their completion. The practitioner should be aware of FPR 2010 5.1 which requires the litigant / practitioner to use the Forms referred to in PD 5A.

#### A spanner in the works

13. I was fortunate enough to join the Family Procedure Rule Committee (“FPRC”) on 1<sup>st</sup> December 2010. The FPRC, together with lawyers and officials from the Ministry of Justice (“MoJ”) had been working long and hard for over six years to bring the FPR 2010 to fruition and I was able to waltz in on 13<sup>th</sup> December 2010 and my first act as a member of the committee was to sign off the Rules that they had spent so many years working on. It wasn’t fair. Nor is it fair that those who have worked so long on this (without remuneration on the part of the FPRC) should be criticised for the fact that there is such a short lead in time to the implementation of the Rules. Nor should the lawyers and officials be criticised. In the short time that I have been involved with their work I have nothing but admiration for the intelligence, sagacity and sheer hard work that they have put in.

14. The FPR 2010 were to be signed off in December 2010. As indicated above, one of the purposes of the new rules was to excise archaic language and the rules had been drafted with this in mind. In order to achieve this it was necessary to update the computer software in use by court staff. This is known as "FamilyMan". Under the old dispensation it was programmed to use old terminology. This was to be ditched and the software updated accordingly. The intention was to bring the procedures of the family courts into the 21<sup>st</sup> century and to help the litigant in person.

15. In October 2010 the Government decided, partly as a result of its cost-cutting programme and partly because of an increase in the estimate for updating the software, that this scheme was unaffordable. As a result it was necessary for MoJ lawyers / staff to redraft at great speed the Forms and Practice Direction reinstating words such as "petition" "prayer" and "decrees nisi and absolute" which had been dropped. There is now a rather ungainly mix of new and ancient terminology in the rules which is unfortunate.

#### Structural changes brought about by the FPR 2010

16. The FPR 2010 introduces a single code for all courts dispensing family justice. One can reduce the most important changes to bullet points:

- The overriding objective;
- The importance of proportionality;
- The emphasis on ADR and mediation
- Changes to what used to be called in a rather general way "ancillary relief"
- New Rules for applications involving the Pension Protection Fund Compensation;
- Changes to the relevant forms for "ancillary relief" cases – now financial remedy applications;
- The representation of children in certain financial remedy (and other) applications;
- The entitlement of the court to make orders on its own initiative;
- The revision of some (but not all) forms;
- Rules on the implementation in the UK of the Hague Convention 1996
- The treatment of appeals from District Judges (no longer as of right)

The overriding objective

17. This is not new in that it was introduced by the Woolf Reforms of 1998 and found its way, from there, into the Civil Procedure Rules 1999 (“CPR”). At the time it was a fairly revolutionary concept and sluiced the civil lawyers out of the Bear Garden. I can remember when that place was awash with posh suits and (in those delightful smoking days) overhung with a fog of cigarette smoke. Whenever I pass through the Bear Garden these days the air is clean and one can hear the lonely clocks ticking.

18. FPR 2010 1.1(1) provides:

*“These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to welfare issues involved.”*

19. The CPR did not emphasise “welfare issues” for obvious reasons. “Welfare issues” are always going to be more to the fore in family cases as they are likely to involve children and the vulnerable, generally, including those who lack mental capacity. The harsh rule suggested by the overriding objective was always going to be tempered, in the civil as opposed to the family context, by the nature of the litigants (sometimes unwilling or unknowing) who found themselves at the doors of the court<sup>3</sup>. I suspect, however, that in the majority of cases in which those who practise in “money cases” there will be little ground for distinction between the application of the overriding objective in such cases as compared with their application in civil cases.

What does the “dealing with a case justly” mean?

20. FPR 2010 at 1.1(2) states:

*“Dealing with a case justly includes, so far as is practicable:*

*(a) Ensuring that it is dealt with expeditiously and fairly;*

*(b) Dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;*

*(c) Ensuring that the parties are on an equal footing;*

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<sup>3</sup> See generally Hedley J in *WSCC –v- M & Others [2010] EWHC 1914* – proportionality must never “trump” welfare

*(d) Saving expense; and*

*(e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*

21. The court is required to give effect to the overriding objective when exercising any of its powers under the FPR 2010 or when interpreting any rules in the FPR 2010.

22. Furthermore by FPR 2010 1.3 the parties are obliged to help the court to further the overriding objective. In other words, the parties are themselves expected to consider, when looking at how a case is being conducted, whether or not they are following the principles set out under FPR 2010 1.1(2). A failure to take those considerations into account *may* have repercussions in the fullness of time, particularly when considered against the backdrop of the Practice Directions and the Pre-Action Protocols.

23. The overriding objective will apply to all existing family proceedings from 6<sup>th</sup> April 2011. Therefore an application for ancillary relief commenced before 6<sup>th</sup> April 2011 will be governed by the wording in the FPR 1991 until 5<sup>th</sup> April 2011 and thereafter by the FPR 2010 wording.

Pre-existing use of the "overriding objective"

24. As stated above the overriding objective was introduced as a concept by the Woolf Reforms. It has undoubtedly been a success and, although not fully part of the FPR 1991 it has been in the process of becoming ubiquitous. See for example:

- Rule 2.51D of the FPR 1991;
- The Public Law Outline (*formerly the Public Law Protocol 2003*); and
- The Family Procedure (Adoption) Rules 2005
- The Criminal Procedure Rules 2010<sup>4</sup>

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<sup>4</sup> See generally (for those who are interested): *R -v B (F) [2010] WLR (D) 212* where the CA rejected the proposition that the overriding objective was a free-standing principle of law. "It created the framework against which all the other rules had to be construed. Thus active case management of the case, including the concept of proportionality, furthered the overriding objective."

It is also used in the *Court of Protection Rules 2007* and the *Criminal Procedure Rules 2010* as well as most new tribunal procedure regulations / rules.

“A new procedural code”

25. What is the significance of the word “new”? Duncan Adam considered this in a lecture he gave on behalf of CLT on Monday 21<sup>st</sup> March 2011. His view, and I concur with this, is that previous authorities on the FPR 1991 should be treated with a degree of caution. One would have to be careful to ensure that, insofar as they were concerned with matters of the interpretation of rules, that the terms of the rules had not changed. This was a significant issue when the CPR were introduced and the RSC in large part fell away. In particular, one would have to be aware of the “overriding objective” and issues such as proportionality when assessing the continuing significance of earlier authorities.

The impact of the introduction of the “overriding objective” What about costs?

26. It is fair to say, at this juncture, that there is a difference of opinion as to the effect that the introduction of the concept is going to have on family law and family law practitioners. It is already being taken into account<sup>5</sup> in ongoing cases but there are two difficulties in the way of the application of the overriding objective:

- (i) The fact that in family proceedings the usual costs rule has, for the moment, been abandoned – the idea that costs follow the event has been in retreat<sup>6</sup> - however such is the landscape against which this particular issue is being fought out, it may well counter-attack; and
- (ii) The fact that in family proceedings must have regard, in addition, in most cases, to the welfare principle.

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<sup>5</sup> See Hedley J in *WSCC –v- M & Others* [2010] EWHC 1914 and Mostyn J in *AA –v- NA & Kab* [2010] EWHC 1282 “Whilst the overriding objective in the CPR strictly does not apply to family proceedings, the spirit if not the letter, of Part 1.1 should be borne firmly in mind when deciding whether or not to order a rehearing.” – Mostyn J – the learned judge overturned conclusions reached at a fact-finding hearing but refused to another fact finding hearing

27. Thus, some practitioners may say that the overriding objective and the failure to follow it will have no real consequences: the no costs rule and the welfare principle mean that costs should not follow the event.
28. This debate is ongoing. I am of the view that, with the growing backlash (as I perceive it at least) against the “no order” principle, courts are going to be increasingly influenced by the fact that failure to comply with the pre-action protocols and to engage in related litigation misconduct has increased costs unnecessarily and will be, by the same token, more likely to make costs orders. It is a combination of a dissatisfaction with the “no order as to costs” rules and the idea that some solicitors / clients are emboldened by the no order principle to behave without heed to risk of a costs order.
29. In the old days civil practitioners could rely heavily on “pleading points” and technical deficiencies in the other side’s pleadings (for example). I suspect that a reliance on technical points that are otherwise without merit will not be successful<sup>7</sup>.
30. The room for technical points (at least to strike a knockout blow) is very limited in family proceedings. However, I suspect (and this is a personal view) that if the courts begin meting out costs penalties for failures to observe / comply with the procedural codes / pre-action protocols and the Practice Directions we may be ushering in a new era of costs orders.
31. The practitioner should be aware of the following new realities:
- The court, if properly engaged with the process, ought to be doing more to dictate the progress of litigation;
  - However, the overriding objective cannot “trump” welfare;

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<sup>7</sup> See generally *Hertsmere Primary Care Trust –v- Balasubramaniam’s Estate* [2005] 3 AER 274. See also *GKR Karate UK Ltd –v- Yorkshire Post* (unreported), a libel case, in which May LJ said obiter: “The overriding objective was to enable the court to deal with cases justly. That includes saving expense and dealing with the case proportionately, expeditiously and fairly. Libel cases were historically notorious for being long, drawn out and expensive, and were especially amenable to the culture of the new procedural code. The court could exclude admissible and relevant evidence of cross-examination which was disproportionately expensive or time-consuming.”

- (My personal view) costs orders are likely to be more common albeit in the family remedy cases and those not involving the welfare of children or vulnerable adults.

### Mediation

32. Part 3.2 provides that:

*“The court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate.”*

If the court considers that ADR is appropriate it may direct proceedings or a hearing to be adjourned for “such specified period as it considers appropriate:

*“(a) to enable the parties to obtain information and advice about alternative dispute resolution; and*

*(c) Where the parties agree, to enable alternative dispute resolution to take place.”<sup>8</sup>*

33. The court can give directions under Part 3 either on an application for mediation or of its own initiative. Should the court direct an adjournment for mediation it should also (3.3(3)) give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved. If (3.3(4)) the parties do not tell the court if any of the issues have been resolved as directed under 3.3(3) the court will give “such directions as to the management of the case as it considers appropriate”.

34. The above is pretty much the substance of Part 3 of the FPR 2010. It covers less than a page. The Practice Direction to Part 3 covers 7 pages. The new Rule as to mediation is brief and clear. The practitioner should be aware that, as has been happening for many years in civil disputes, a judge may rely upon Part 3 to divert a case into mediation / ADR. By the same token a judge may enquire as to whether or not ADR / mediation has been attempted and, if not, why not? That is what Part 3 is there for. It is specifically part of the court’s powers to adjourn a case for the

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<sup>8</sup> 3.3(1)

purposes of mediation whether or not the parties themselves have put the idea forward.

35. Part of the reason that the Practice Direction is so long in comparison with Part 3 itself is that the Government has a strong interest in promoting mediation. It is seen as a way of cutting costs (as well as being a good thing in itself). There has therefore been significant Government input into the Practice Direction. It has to be understood that, notwithstanding reports in the Press, mediation prior to divorce and ancillary relief hearings is not mandatory although the duty to consider mediation is.

36. The aims of the Practice Direction and the Protocol are set out at paragraph 2. The purpose is to:

- (a) *supplement the court's powers in Part 3 of the FPR to encourage and facilitate the use of alternative dispute resolution;*
- (b) *set out good practice to be followed by any person who is considering making an application to court for an order in relevant family proceedings; and*
- (c) *ensure, as far as possible, that all parties have considered mediation as an alternative means of resolving their disputes.*

37. Parties are expected to comply with the Pre-application protocol and explore the scope for resolving their dispute through mediation before embarking on the court process.

#### The Pre-application Protocol (annexed to the Practice Direction)

The Protocol applies where a person is considering making an application to the court for an order in relevant family proceedings. "Relevant family proceedings" cover proceedings for a financial remedy, except avoiding a disposition order or an order preventing disposition and any enforcement proceedings. It also covers all private law children proceedings except where the application is seeking to enforce an

existing order, seek financial compensation for the breach of an existing order or where emergency proceedings have been brought in respect of the same child(ren) and have not been determined.

Before an applicant makes an application to the court, the applicant or solicitor should contact a family mediator to arrange for the applicant to attend an *information meeting about family mediation and other forms of alternative dispute resolution* (a MIAM). Note information about other forms of ADR including collaborative law should also be provided.

There are certain circumstances when the applicant is not expected to attend a MIAM. The first three are assessed and certified by the mediator (see FM1 Part 2) and the others fall into Part 3 of the form which need only be signed by the applicant or the applicant's legal representative.

1. *The mediator is satisfied that mediation is not suitable because another party to the dispute is unwilling to attend a MIAM and consider mediation.* The onus is now on the Respondent to attend a MIAM if invited to do so.
2. *The mediator determines that the case is not suitable for a MIAM.* If this is before either party has been seen (which it must be as there is provision on the form to tick a box when the applicant has attended a MIAM) then what circumstances are going to arise that will fall into this category? A possibility here might be when drugs and drink are involved.
3. *A mediator has made a determination within the previous four months that the case is not suitable for a MIAM or for mediation.*
4. *Any party has, to the applicant's knowledge, made an allegation of domestic violence against another party and this has resulted in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months.* Serious domestic abuse which has resulted in police involvement or a non-molestation application will mean that the applicant is not expected to attend a MIAM. Obviously other domestic abuse situations may mean that mediation is inappropriate.
5. *The dispute concerns financial issues and the applicant or another party is bankrupt.* Once a party is bankrupt any lump sum order or a property adjustment order is void

unless ratified in the bankruptcy. It may also be difficult to get a periodical payments order if the trustee in bankruptcy has an income order in place. If it is likely that one party may be made bankrupt it may still be inappropriate to mediate.

6. *The parties are in agreement and there is no dispute to mediate.* This may sound daft but there are times when a court order is required but there is no opposition to the making of an order. An example of this may be the transfer of a council tenancy. This may need a court order to ensure that the other party is not intentionally homeless.
7. *The whereabouts of the other party are unknown to the applicant.* It takes two to mediate so this makes sense.
8. *The prospective application is for an order in relevant family proceedings which are already in existence and are continuing.*
9. *The prospective application is to be made without notice to the other party.*
10. *The prospective application is urgent, meaning:*
  - (a) *There is a risk to the life, liberty or physical safety of the applicant or his or her family or his or her home; or*
  - (b) *Any delay caused by attending a MIAM would cause risk of significant harm to a child, a significant risk of a miscarriage of justice, unreasonable hardship to the applicant or irretrievable problems in dealing with the dispute (such as an irretrievable loss of significant evidence).*
11. *There is current social services involvement as a result of child protection concerns in respect of any child who would be the subject of the prospective application.*
12. *A child would be a party to the prospective application by virtue of Rule 12.3(1).*
13. *The applicant (or his legal representative) contacts three mediators within 15 miles of the applicant's home and none is able to conduct a MIAM within 15 working days of the date of contact.*
38. The Protocol states that information on how to find a family mediator may be obtained from the local family courts, from the Community Legal Advice Helpline or

at [www.direct.gov.uk](http://www.direct.gov.uk) (the MOJ's and HMCS's Guidance recommends using the key words "family mediation directgov").

39. The applicant or legal representative should provide the mediator with contact details of the other party or parties to the dispute so that they can be contacted to discuss their willingness and availability to attend a MIAM. The applicant should then attend a meeting either jointly or where necessary separate meetings.
40. The mediator needs to consider with the party or parties whether public funding may be available to meet the cost of the meeting and any subsequent mediation. *Where none of the parties is eligible for, or wishes to seek, public funding, any charge made by the mediator for the MIAM will be the responsibility of the party or parties attending, in accordance with any agreement made with the mediator.* There is likely to be some competition between family mediation providers as to the amount they will charge. The MOJ is supporting an open market policy on charging which will mean that services/resolution mediators are free to charge whatever they feel is appropriate. However the FMC is considering a recommendation about what an appropriate fee structure would be. The two options are:
- a) £95 per person (refundable if the parties go on to mediate); £140 per joint (refundable if the parties go on to mediate) £100 for issuing of FMI; or
  - b) Based on current LSC rates - £87 per person excluding VAT. The argument goes that mediators should be charging at least the same as they receive for publically funded mediation as otherwise they will be giving the wrong message to the LSC.
41. The Form FMI having been completed and signed by the mediator needs to be counter-signed by the applicant or legal representative before it is lodged at the court with the application. Copies of the forms can be obtained from the courts or [www.direct.gov.uk](http://www.direct.gov.uk)
42. Parties are therefore expected to explore the scope for resolving a dispute through mediation before embarking on the court process. If court proceedings are subsequently taken, the court will want to know at the first hearing whether mediation has been considered by the parties. In considering the conduct of any relevant family

proceedings, the court will take into account any failure to comply with the protocol and may refer the parties to a meeting with a mediator before the proceedings continue further. In other words, a failure to give serious consideration to mediation could engender court criticism and, in appropriate cases, give rise to costs consequences.

Who can mediate at these meetings?

43. Qualifying mediators must have all of the following:

- They must have successfully completed a FMC approved training course;
- Be a member of a FMC member organisation;
- Meet requirements for Professional Practice Supervision;
- Meet CPD requirements;
- Carry PI insurance;
- Be currently in practice as a mediator

In addition, one of the following four categories:

- Gained FMC (or predecessors) LSC competence assessment recognition or practitioner membership of the Law Society's Family Mediation Panel; or
- Gained accreditation of a FMC member organisation; or
- Written certification from their PPC that they are familiar with assessing eligibility for public funding; or
- If working towards accreditation or LSC recognition, have support of their PPC and attended a one day FMC training course.

44. Practitioners should be aware of the EU Mediation Directive which is covered in the Rules although it does not come into force until June 2011. This is primarily concerned with cross-border disputes and mediation.

Case Management

45. Reference has already been made to the overriding objective. Also of very great significance are the court's case management powers and obligations. In exercising

its case management powers the court is guided by the overriding objective. FPR 1.4(1) provides as follows:

*“The court must further the overriding objective by actively managing cases (emphasis added)”*

FPR 1.4(2) states:

*“Active case management includes:*

- (a) Encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- (b) Identify at an early stage:*
  - (i) The issues; and*
  - (ii) Who should be a party to the proceedings;*
- (c) Deciding promptly*
  - (i) Which issues need full investigation and hearing and which do not; and*
  - (ii) The procedure to be followed in the case*
- (d) Deciding the order in which issues are to be resolved;*
- (e) Encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
- (f) Helping the parties to settle the whole or part of the case;*
- (g) Fixing timetables or otherwise controlling the progress of the case;*
- (h) Considering whether the likely benefits of taking a particular step justify the cost of taking it;*
  - (i) Dealing with as many aspects of the case as it can on the same occasion;*
  - (j) Dealing with the case without the parties needing to attend at court;*
  - (k) Making use of technology; and*
  - (l) Giving directions to ensure that the case proceeds quickly and efficiently*

FPR 1.4(3) empowers the court to

- (a) Extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);*

- (b) Make such order for disclosure and inspection, including specific disclosure of documents, as it thinks fit;*
- (c) Adjourn or bring forward a hearing;*
- (d) Require a party or a party's legal representative to attend the court;*
- (e) Hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;*
- (f) Direct that part of any proceedings be dealt with as separate proceedings;*
- (g) Stay the whole or part of any proceedings or judgment either generally or until a specified date or event;*
- (h) Consolidate proceedings;*
- (i) Hear two or more applications on the same occasion;*
- (j) Direct a separate hearing of any issue;*
- (k) Decide the order in which issues are to be heard;*
- (l) Exclude an issue from consideration;*
- (m) Dismiss or give a decision on an application after a decision on a preliminary issue;*
- (n) Direct any part to file and serve an estimate of costs;*
- (o) Take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.*

46. That last provision is extremely wide and, it is suggested, will be used by the court to fill in perceived lacunae in the FPR 2010. Under the FPR 1991 there was the complex procedural road map under FPR 1.3 which directed the practitioner to the CPR, the SCR and the CCR. Those avenues are now closed as the FPR 2010 is intended to be a self-sufficient code. Thus in the recent case of Goldstone v Goldstone attention was drawn to the fact that there is no specific provision for joinder. Hughes LJ in a postscript to the judgment of the Court of Appeal said this:

71. It should be recorded that with effect from 6 April 2011 the rules position will change with the introduction of the new Family Procedure Rules 2010 in place of the existing Family Proceedings Rules 1991. The 2010 rules remove the default application to family proceedings of the RSC. They are plainly modeled generally on

the CPR, and include a re-statement (in slightly different terms) of the overriding objective, but the CPR continue not to apply directly to family proceedings. After 6 April 2011, the provisions of RSC O 11 and O 15 r 6 will therefore not be applicable to a case such as the present, and nor will CPR 19.2 or 6.36 and its associated Practice Direction. It appears that the new 2010 Rules contemplate that the joinder of parties be accomplished according to the broad discretionary case management powers contained in the overriding objective, viz: 1.4(2) (b)(ii) which makes clear that that objective includes the duty to decide an early stage who should be a party to the proceedings; see also 4.1(3)(o) and Part 18. Since the 2010 rules say nothing about the principles on which joinder of third parties (onshore or offshore) should be exercised, it may be that courts will have recourse by analogy to the principles contained in CPR 19.2 and 6.36 with its Practice Direction 6B. The final resolution of that issue must however await a decision on the point.

47. By FPR 4.3(1) the court may exercise its case management powers on an application or on its own initiative. If the court proposes to make an order of its own initiative it may:

- Give any person likely to be affected by the order an opportunity to make representations by a specified time and in a specified manner (FPR 4.3(2)); or
- Hold a hearing to decide whether to make the proposed order, having given at least five days notice of the hearing to each party likely to be affected by the order (FPR 4.3(3) or
- Make such an order without hearing the parties having given them an opportunity to make such representations (FPR 4.3(4)

48. Where an order has been made under FPR 4.3(4):

- A party affected by the order may apply to have it set aside, varied or stayed and
- The order must contain a statement of the write to make such an application and within any period specified by the court (if not specified, the period is within seven days of the date of service of the order on the party making the application.

49. The family court can make any order subject to conditions including a condition to pay a sum of money into court and specifying the consequences of failing to comply with the order or condition (FPR 4.4). This mirrors the provisions in the CPR.

50. It should also be noted that, when giving case management directions the court will take into account whether or not a party has complied with any relevant pre-action protocol (FPR 4.5).

#### Statements of Truth

51. Statements of truth were originally introduced as part of the CPR / Woolf reforms. They now play a large part in family proceedings and are covered by FPR Part 17. The following documents must be verified by a statement of truth:

- A statement of case;
- A witness statement
- An acknowledgement of service in an application begun under Part 19
- A certificate of service
- A statement of arrangements for children in matrimonial proceedings
- A statement of information filed under Rule 9.26(1)(b)
- An answer to questionnaire in financial remedy proceedings;
- In any other case where required by the Rules or Practice Directions

52. See FPR 17.2(9) – if an application does not contain a statement of facts it need not be verified by a statement of truth.

53. PD 17A sets out the form of the statement of truth verifying statement of case or application notice as follows:

*“[I believe] [the applicant / respondent etc] believes] that the facts stated in this [name document being verified] are true.”*

54. A litigation friend representing a child or a person lacking capacity should endorse any document that would otherwise require a statement of truth with a statement that he / she believes the facts stated in the document to be true.

55. The legal representative may sign the statement of truth on behalf of his / her client. However, the statement signed by the legal representative must refer to the client's belief not his or her belief. See paragraphs 3.7 to 3.9 of PD 17A-- a legal representative when signing must

- Sign in his or her own name; and
- State the capacity in which he / she signs; and
- The name of his / her firm
- Print his / her full name clearly beneath his / her signature

By PD 17A at paragraph 3.8 a signature by a legal representative will be taken by the court as his or her own statement:

- That the particular client has authorised him or her to do so;
- Before signing he / she has explained to the client that in signing the statement of truth he / she would be confirming the client's belief that the facts stated in the document were true and that before signing he / she had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts.

56. If the maker of the statement / other document is illiterate or otherwise unable to read the document must contain a certificate by an authorised person (e.g. commissioner for oaths) who need not be independent of the parties / their representatives to the effect that:

- The document has been read to the person signing it;
- That the person appeared to understand it and approved its contents as accurate;
- That the declaration of truth has been read to that person;

- That the person appeared to understand the declaration and the consequences of making a false declaration (i.e. proceedings for contempt<sup>9</sup> / criminal proceedings); and
- That the person signed or made his mark in the presence of the authorised person

### Divorce

57. Applications for divorce, judicial separation and nullity are now “matrimonial proceedings” – see PD 7A 1.2. Civil Partnership has “civil partnership proceedings”. Final decrees of divorce and dissolution orders of civil partnership become “matrimonial orders” or “civil partnership orders” in the Rules, but not necessarily in the Forms (as a result of the FamilyMan spanner!) The Rules refer to the making of “an application for a matrimonial order”, presently a divorce petition, and to an applicant. The Forms still refer to petitions and petitioners. Across the Rules generally affidavits now become statements of truth although in Part 7 they are still referred to as affidavits. References to applications for decree nisi also remain – in civil partnerships one speaks of a “conditional order” – and similarly the rules still refer to the making of a decree absolute and the pronouncement of a decree nisi. We still have prayers.
58. References to the “special procedure” have been removed.
59. Rule 7.9 allows a “petitioner” to withdraw an application for divorce at any time it has been served by written notice to the court<sup>10</sup>.
60. Where the petition refers to adultery or to an improper association with another person, that other person should not be named in the divorce petition unless the petitioner believes that the respondent is likely to object (that is defend) the making of the divorce. This is in line with the Resolution / SFLA Code of Practice. This formal development, combined with the good established practice (at least for Resolution

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<sup>9</sup> Contempt proceedings in these circumstances can only be brought by the Attorney General or with the permission of the court.

<sup>10</sup> Under FPR 1991 a withdrawal was not possible; only a notice of discontinuance followed by a dismissal of the petition

members) of seeking to agree the terms of the petition should limit further the scope for unnecessary acrimony.

61. The statement of arrangements, D8A, is still required as is the section 41 certificate. Although there had been proposals for the statement of arrangements to be contained within the petition itself, those proposals have been overridden. Part of the reason for overriding was that one would be left with an extremely long divorce petition.
62. If the court fails to give the section 41 certificate it must give reasons in writing for failing to do so (7.25(5) of FPR 2010). This is extremely rare in practice.
63. If the petitioner has applied for costs in the petition then the court may either, if satisfied that the petitioner is entitled to costs, make such an order or, if not satisfied make no direction about costs (7.20(3) FPR 2010). Petitioners should deal in the affidavit in support with anything said by the respondent in the acknowledgement of service about costs. If there is no claim for costs in the petition it cannot subsequently be claimed in the affidavit in support.
64. By FPR 2010 r.7.21 if there is a hearing about costs pursuant to r.7.20(2)(a) a party will not be heard unless two days prior to the hearing that party has given notice of the intention to attend the hearing and apply for / oppose an order for costs.
65. undefended applications for matrimonial orders are dealt with by district judges and circuit judges. Case management hearings are dealt with by district judges. Defended hearings can be dealt with by a district judge or a circuit judge. All hearings for the making of a decree or defended proceedings are in public and the media are entitled to attend.
66. However, see r.7.16, part or the whole of matrimonial proceedings may be held in private if

*“publicity would defeat the object of the hearing, it involves matters of national security, it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality, or a*

*private hearing is necessary to protect the interests of any child or protected party, or it is an application made without notice and it would be unjust to any respondent for there to be a public hearing or the court considers it necessary in the interests of justice.”*

67. See also Rule 7.16(5): - the court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of the party or witness.
68. The respondent still cannot apply at the same time as the petitioner for the decree absolute.
69. A divorce petition / application for a matrimonial order can be amended at any time before an answer has been filed and until application for what is now the special procedure. See Rule 7.13 of FPR 2010 for the provisions for service of the amended petition and ancillary directions.
70. Rule 7.19(4) of the FPR 2010 provides that the affidavit in support of the petition has to state whether there have been any changes in the information given in the petition or statement of arrangements and confirm that, subject to those changes the contents of the petition and any statement of arrangements are true and, where the acknowledgement of service has been signed by the other party, confirming that party's signature on the acknowledgement of service.
71. Rule 7.20(2)(b) on the “special procedure” if the court is not satisfied that a petitioner is entitled to a decree, it can ask for further information or order other steps or set the matter down for a case management hearing. If the case is defended it must be listed for a case management hearing (7.20(4) of FPR 2010).
72. Rule 7.22 specifies what the court should consider and order at the case management hearing. In considering “case management” the practitioner should also keep one finger in Part 4 of the new rules which deal with case management (see below)

73. The practitioner should be aware of the fact that PD 7A, paragraph 7, gives the court specific powers at a case management hearing in respect of matrimonial or civil partnership proceedings to make disclosure and inspection orders.
74. See paragraph 8 of PD 7A for guidance about expediting decree absolute and final orders. This differentiates between the situation where the need for expedition is known before the granting of the decree nisi and where it is discovered subsequently.
75. Where further information is required by the court in respect of matrimonial proceedings, it can order a party to clarify any matter in dispute in the proceedings or to give additional information (see 7.15 of FPR 2010). Paragraph 6 sets out in more detail the procedure for the request for further information including the initial service of a written request for clarification or information and the date for the reply, making it clear that the request is pursuant to 7.15. The request should be concise and confined to the matter in question as well as being reasonably necessary and proportionate. Any objection or inability to reply should then be set out in response.

#### Matrimonial Proceedings Forms

76. The Forms connected to the FPR 2010 are still not complete. Undoubtedly, the FamilyMan problems have added to the delay. A real concern is that the Forms may not be fully available by 6<sup>th</sup> April and / or court staff may not be fully trained up. A further complication is the fact that because the Forms are not to be used prior to 6<sup>th</sup> April 2011 means that there is a need for them not to “go live” on the internet too early.
77. An increasing number of litigants will be acting in person and the Forms are directed to that reality. There is a concentration on a “tick box” format wherever possible. The divorce petition, Form A, originating application in children proceedings and many of the other Forms still carry the essentially the same wording although the style and presentation is different.
78. As long as the essential content remains, law firms are allowed by the Rules to modify them to satisfy the house / brand style.

79. The Forms for matrimonial and civil partnership proceedings by and large commence with the letter D. The divorce petition is Form D8. It is in a tabular / tick box format. There are helpful supporting notes as part of D8. It does not, however, list the available jurisdictional grounds under the Brussels regulation. It requires the date of birth of each party. Questions about the involvement of child support agencies has been moved to the statement of arrangements for children.
80. The petition is to be used for divorce, judicial separation and civil partnership. Provided the essential information is included there would appear to be no reason why practitioners do not customise the forms as part of their own precedents library.
81. What used to be the particulars of the fact alleged is now the “the statement of case”.
82. The petition still concludes with the prayers which includes the prayers for all forms of financial remedy.
83. The form of statement of arrangements is at D8A. This is also tabular and tick box form. At the end of this form, where the arrangements for the children are not agreed, there is a space for the petitioner to state whether there is an intention to resolve those issues directly with the respondent, use ADR / mediation or apply to the court.
84. There is a statement of truth at the conclusion of the statement of arrangements.
85. Form D8B contains the form for an Answer.
86. Form D8N is the appropriate form for an application for a Nullity Petition.
87. Form D13B is the form for an affidavit to dispense with service.
88. The application (D84) and affidavits (D80 A – E) in support of the petition appear at the end of the divorce forms. The affidavits continue to be sworn rather than verified by a statement of truth.

89. It should be noted that the provisions in relation to ADR do not apply to matrimonial proceedings and civil partnership proceedings (see the protocol)

#### Applications for a financial remedy

90. The relevant Part of the Family Procedure Rules 2010 ("FPR 2010") is Part 9. It provides a unified procedure for most financial applications which follows the familiar process for ancillary relief proceedings (a term we no longer use!).
91. The Rules draw a distinction between applications for "financial orders" and all other "financial remedies". "Financial remedies" encompasses "financial orders". Financial orders refers to orders that are broadly within the old definition of ancillary relief. The definitions under the Family Proceedings Rules 1991 ("FPR 1991") were more diffuse. Hence there was a definition of "ancillary relief" at Rule 1.2 of the FPR 1991 but the words "ancillary relief" do not find their way into the FPR 2010. The other definitions in the FPR 1991 of "family provision order" and "financial relief" has also been displaced.

#### Financial Orders and Financial Remedies

92. Under the FPR 2010 under Interpretation (Rule 2.3) there are the following definitions:

"financial remedy" means:

- (a) A financial order
- (b) An order under Schedule 1 to the 1989 Act<sup>11</sup>;
- (c) An order under Part 3 of the 1984 Act<sup>12</sup>;
- (d) An order under Schedule 7 to the 2004<sup>13</sup> Act;
- (e) An order under section 27 of the 1973<sup>14</sup> Act;
- (f) An order under Part 9 of Schedule 5 to the 2004 Act;
- (g) An order under section 35 of the 1973 Act;

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<sup>11</sup> The Children Act 1989

<sup>12</sup> The Matrimonial and Family Proceedings Act 1984

<sup>13</sup> The Civil Partnership Act 2004

<sup>14</sup> The Matrimonial Causes Act 1973

- (h) An order under paragraph 69 of Schedule 5 to the 2004 Act;
- (i) An order under Part 1 of the 1978 Act<sup>15</sup>;
- (j) An order under Schedule 6 to the 2004 Act;
- (k) An order under section 10(2) of the 1973 Act; or
- (l) An order under section 48(2) of the 2004 Act;”

“financial order” means:

- (a) An avoidance of disposition order;
  - (b) An order for maintenance pending suit;
  - (c) An order for maintenance pending outcome of proceedings;
  - (d) An order for periodical payments or lump sum provision as mentioned in section 21(1) of the 1973 Act, except an order under section 27(6) of that Act;
  - (e) An order for periodical payments or lump sum provision as mentioned in paragraph 2(1) of Schedule 5 to the 2004 Act, made under Part 1 of Schedule 5 of that Act;
  - (f) A property adjustment order;
  - (g) A variation order;
  - (h) A pension sharing order; or
  - (i) A pension compensation sharing order;
- (“variation order”, “pension compensation sharing order” and “pension sharing order” are defined in rule 9.3.”

93. A distinction is thus drawn between the usual run of “ancillary relief” orders and other financial remedies being:

- (i) An order / application under Schedule 1 of the Children Act;
- (ii) An order / application for financial provision / relief after an overseas divorce or overseas dissolution of civil partnership;
- (iii) An order / application for financial provision in case of neglect to maintain in cases involving married parties and / or civil partners;

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<sup>15</sup> The Domestic Proceedings and Magistrates' Courts Act 1978

- (iv) An order / application for alteration of agreements by the court during the lives of the parties, whether the agreement arises out of a marriage or out of a civil partnership;
- (v) An order / application for financial provision in the Magistrates' Court;
- (vi) An order / application in the Magistrates' Court for financial provision in cases of neglect to maintain in connection with a civil partnership;
- (vii) An order / application by a party to a marriage / civil partnership for the court to consider his / her financial position after the dissolution of the marriage / civil partnership.

94. Different procedures and Forms are required depending upon whether what is being sought is a financial order or some other form of financial remedy. However, before considering the differing routes it is important to consider issues raised by the pre-action protocol contained in Practice Direction 9A and the Pre-Application Protocol for Mediation Information and Assessment. The application of these two Practice Directions overlaps.

Practice Direction 3A – Pre-application Protocol for Mediation Information and Assessment

95. See notes above.

Practice Direction 9A – Application for a financial remedy

96. A pre-action protocol is annexed to this Practice Direction. It “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.” The following points in the protocol are highlighted:

- It is designed to apply to all applications for a financial remedy and all classes of case from a simple application for periodical payments to an application for a substantial lump sum and property adjustment order;
- It is designed to facilitate the operation of the procedure for financial remedy applications

- Whilst solicitors are requested to bear in mind the advantage of having a court timetable and a court managed process they should also give consideration to the advantages of preparing disclosure in advance and at the same time keep in mind the objective of controlling costs and in particular the costs of discovery. On the other hand the option of pre-application disclosure and negotiation has risks of excessive and uncontrolled expenditure and delay and it 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.
- 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;
- Making an application to the court should not be regarded as a hostile step or a last resort but rather as a way of starting the court timetable, controlling disclosure and endeavouring to avoid the costly final hearing and the preparation for it.

The initial letter and subsequent correspondence

97. Under paragraph 5 of the protocol the tone of the initial letter is emphasised. It should also be seen and approved in advance by the client. See paragraphs 13 to 15 of the protocol, the initial letter / subsequent correspondence:

- Must focus on the clarification of the claims and identification of the issues and their resolution “protracted and unnecessary correspondence and ‘trial by correspondence’ must be avoided.” (emphasis added);
- “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.”;
- “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.”

Disclosure

98. The protocol underlines the obligation of the 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<sup>16</sup>.”

General Principles (paragraphs 8 to 10)

99. All parties are advised always to bear in mind the overriding objective and to 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.

100. Further the principle of proportionality should 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.”

101. “Parties should be informed that where a court is considering whether to make an order requiring one party to pay the costs of the other party, it will take into account pre-application offers to settle and conduct of disclosure.”

Identifying the issues (paragraph 11)

102. “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 and to settle their differences. Openness in all dealings is essential.” (emphasis added).

When an application for a financial order may be made

103. By Rule 9.4 an application for a financial order may be made:

(a) In an application for a matrimonial or civil partnership order; or

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<sup>16</sup> Note that the Good Practice Guide accessible on the Resolution website is slightly out of date in that it does not deal with the impact of *Imerman*

(b) At any time after an application for a matrimonial or civil partnership order has been made.

Where to start proceedings

104. By Rule 9.5(1) an application for a financial remedy must be filed:

- (a) If there are proceedings for a matrimonial order or a civil partnership order which are proceeding in a designated county court, in that court; or
- (b) If there are proceedings for a matrimonial order or a civil partnership order which are proceeding in the High Court, in the registry in which those proceedings are taking place.

105. By Rule 9.5(2) a table is annexed which provides as follows:

<i>Provision under which application made</i>	<i>Court where application must be filed</i>
Section 27 of the 1973 Act	Divorce County Court
Part 9 of Schedule 5 of the 2004 Act	Civil partnership proceedings county court
Part 3 of the 1984 Act	Principal Registry or in relation to an application for a consent order, a divorce county court
Schedule 7 to the 2004 Act	Principal Registry or, in relation to an application for a consent order, a civil proceedings county court
Section 35 of the 1973 Act	High Court, a divorce county court or a magistrates' court
Paragraph 69 of Schedule 5 to the 2004 Act	High Court, a civil partnership proceedings county court or a magistrates' court
Schedule 1 to the 1989 Act	High Court, designated county court or a magistrates' court
Part 1 of the 1978 Act	Magistrates' court
Schedule 6 to the 2004 Act	Magistrates' court

By Rule 9.5(3) an application for a financial remedy under Part 3 of the 1984 Act or Schedule 7 to the 2004 Act which is proceeding in the High Court must be heard by a judge, but not a district judge, of that court unless a direction has been made that the application may be heard by a district judge of the Principal Registry.

Forms (financial orders)

106. When applying for a financial order one issues a Form A, notice of [intention to proceed with] an application for a financial order. This form should be used whether the applicant is proceeding with an application in the petition or making a free standing application. The Form E financial statement is used as before.

Forms (financial remedies other than financial orders)

107. Notice of [an intention to proceed with] an application for a financial remedy (other than a financial order) is made in Form A1. The form of financial statement to be used in respect of an application for a financial remedy other than a financial order should be in Form E1.

Forms applications for financial remedies in the Magistrates' court.

108. In this case Form A2 – notice of [intention to proceed with] an application in the magistrates' court should be used. The financial statement is in Form E2.

Applications (Parts 18 and 19)

109. Parts 18 and 19 are similar in distinction to the old difference between writ actions and originating summons applications (subsequently Parts 7 and 8 of the CPR). The majority of applications will be made pursuant to Part 18. Part 19 is used when the Part 18 procedure does not apply and:

- (a) There is no form prescribed by a rule or referred to in Practice Direction 5A<sup>17</sup> in which to make the application;
- (b) The applicant sees the court's decision on a question which is unlikely to involve a substantial dispute of fact; or
- (c) Paragraph 19.1(5) applies.

110. Paragraph 19.1(5) states:

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<sup>17</sup> The Practice Direction in respect of Forms

“a rule or practice direction may, in relation to a specified type of proceedings:-

- (a) Require or permit the use of the Part 19 procedure; and
- (b) Disapply or modify any of the rules set out in this Part as they apply to those proceedings.”

111. Proceedings started under the Part 19 procedure can be directed to continue as though started under Part 18 (Rule 19.1(3)) and a party can object to the use of the Part 19 procedure on the basis that there is a substantial dispute of fact and the use of the Part 19 procedure is not required or permitted by a rule or practice direction (Rule 19.9)..

Part 18 applications

112. The Part 18 procedure may be used if the application is made (Rule 18.1(2)):

- (a) In the course of existing proceedings;
- (b) To start proceedings except where some other Part of the rules prescribes the procedure to start proceedings; or
- (c) In connection with proceedings which have been concluded

However, Rule 18.1(2) does not apply to

- (a) Applications where any other rule in any other Part of these rules sets out the procedure for that type of application;
- (b) If a practice direction provides that the Part 18 procedure may not be used in relation to the type of application in question.

113. An application for permission to start proceedings has to be made to the court where the proceedings will be started (Rule 18.2). An application notice (in Form A, A1 or A2) must be filed (Rule 18.4) although an application may be made without filing an application notice if:

- (a) This is permitted by a rule or practice direction; or
- (b) The court dispenses with the requirement of an application notice

114. The Application Notice must state (Rule 18.7):

- (a) What order the applicant is seeking; and
- (b) Briefly, why the applicant is seeking the order.

By Rule 18.7(2) a draft of the order sought must be attached to the application notice. By Part 17 the application notice must be verified by a statement of truth.

Application for an order preventing a disposition

115. The Part 18 procedure applies to such an application and such an application may be made without notice (Rule 9.6). Practice Direction 3A in relation to mediation does not apply to such applications.

Applications for interim orders

116. Applications for MPS, maintenance pending outcome of proceedings, interim periodical payments, interim variation orders and any other form of interim order<sup>18</sup> are made according to the Part 18 procedure (Rule 9.7). Where a party makes an application before filing a financial statement (Forms E, E1 or E2), the written evidence in support must (Rule 9.7(3)):

- (a) Explain why the order is necessary; and
- (b) Give up to date information about that party's financial circumstances

Unless the Respondent to the application has filed a financial statement, the respondent must, at least seven days before the court is to deal with the application, file a statement of his means and serve a copy on the applicant (Rule 9.7(4))

Application for periodical payments order at the same rate as an order for MPS

117. By Rule 9.8 where a decree nisi of divorce or nullity of marriage has been made and at or after the date of decree nisi an order for MPS is in force and the spouse in whose favour the decree nisi was made has made an application for an order for periodical payments the spouse in whose favour the decree nisi was made may apply, using the Part 18 procedure, for an order providing for payments at the same rate as those provided for by the order for MPS. Rule 9.9 contains mirror provisions for cases involving civil partnerships.

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<sup>18</sup> An application for any other form of Interim order other than applications for MPS, maintenance pending outcome of proceedings, Interim periodical payments or Interim variation orders may be made without notice (Part 9.7(5))

Applications for financial remedies for children

118. Chapter 3 of Part 9 deals with applications for financial remedies for children. The following people may apply for a financial remedy in respect of a child –Rule 9.10(1):

- (a) A parent, guardian or special guardian of any child of the family;
- (b) Any person in whose favour a residence order<sup>19</sup> has been made with respect to a child of the family, and any applicant for such an order;
- (c) Any other person who is entitled to apply for a residence order with respect to a child;
- (d) A local authority, where an order has been made under section 31(1)(a) of the 1989 Act placing a child in its care;
- (e) The Official Solicitor, if appointed the children’s guardian of a child of the family under rule 16.24;
- (f) A child of the family who has been given permission to apply for a financial remedy

Separate representation of the child on certain applications – Part 9.11

119. Where an application for a financial remedy includes an application for an order for a variation of settlement, the court must, unless it is satisfied that the proposed variation does not adversely affect the rights or interests of any child concerned, direct that the child be separately represented on the application (Rule 9.11(1)). The Court also has the power on any other application for a financial remedy to direct that the child be separately represented on that application (Rule 9.11(2)). Where such a direction is made under either paragraphs (1) or (2) the court may if the person to be appointed consents, appoint:

- (a) a person other than the Official Solicitor; or
- (b) The Official Solicitor

To be the children’s guardian and rules 16.24(5) and (6) and rules 16.25 to 16.28 apply as appropriate to such an appointment<sup>20</sup>

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<sup>19</sup> As defined in section 8(1) of the 1989 Act

<sup>20</sup> Rules governing the appointment of children’s guardians

Procedure in the High Court and County Court after filing an application

120. The procedure after filing an application remains very similar to that already in existence. The Court will fix a first appointment and either the court or the applicant will serve a copy of the notice of application and the notice of the date of first appointment on the respondent (see Rule 9.12). If the applicant serves he must file a certificate of service on or before the first appointment (Rule 9.12(2) (c)(ii)). The date fixed for the first appointment or for any subsequent appointment must not be cancelled except with the court's permission and, if cancelled the court must immediately fix a new date (Rule 9.12(3)).

121. Where the application for a financial remedy includes an application for an order for a variation of settlement, the applicant must serve copies of the application on (Rule 9.13(1):

- (a) The trustees of the settlement;
- (b) The settler if living
- (c) Such other persons as the court directs.

122. In the case of an application for an avoidance of disposition order the applicant must serve copies of the application on the person in whose favour the disposition is alleged to have been made (Rule 9.13(2)). In respect of applications in relation to land copies of the application must be served on any mortgagee (Rule 9.13(3)).

123. By Rule 9.13(4) any person served under paragraphs (1), (2) or (3) may make a request in writing to the court within 14 days beginning with the date of service of the application, for a copy of the applicant's financial statement. And in such circumstances, on receipt of the financial statement or a relevant part of that statement, may within 14 days beginning with the date of service or receipt file a statement in answer.

Procedure before the first appointment

124. This again will be largely familiar to practitioners. Not later than 35 days prior to the first appointment financial statements must be exchanged and filed with the court. Note that the Form may be Form E or Form E1. The financial statement must be verified by an affidavit and it must be accompanied only by the documents that (rule 9.14(2)):

- (i) Are required by the financial statement;
- (ii) Any documents necessary to explain or clarify any of the information contained in the financial statement; and
- (iii) Any documents provided to the party producing the financial statement by a person responsible for a pension arrangement, either following a request under rule 9.30 or as part of a relevant valuation;
- (iv) Any notification or other document referred to in rule 9.37(2), (4) or (5)<sup>21</sup> which has been received by the party producing the financial statement

125. By rule 9.14(3) where a party was unavoidably prevented from sending any document required by the financial statement, that party must at the earliest opportunity (a) serve a copy of that document on the other party and (b) file a copy of that document, together with a written explanation of the failure to send it with the financial statement.

126. Paragraph 5 of Practice Direction 9A needs to be considered when preparing and filing financial statements. It provides that, in preparing a bundle of documents to be exhibited to or attached to a financial statement, regard must be had to paragraphs 11.1 to 11.3 and 13.1 to 13.4 of Practice Direction 22A (Written Evidence). 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.

127. No disclosure or inspection<sup>22</sup> of documents may be requested or given between the filing of the application for a financial remedy and the first appointment

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<sup>21</sup> Rules relating to the Pension Protection Fund

(a) copies sent with the financial statement or in accordance with rule 9.14(3). Not later than 14 days prior to the first appointment each party must file with the court and serve on the other party (Rule 9.14(5));

- (a) A concise statement of the issues between the parties;
- (b) A chronology
- (c) A questionnaire setting out by reference to the concise statement of issues any further information and documents requested from the other party or a statement that no information or documents are required; and
- (d) A notice stating whether that party will be in a position to proceed on that occasion to a FDR appointment

128. Not less than 14 days before the hearing of the first appointment the applicant must (Rule 9.14(6) file and serve on the respondent confirmation:

- (a) Of the names of all persons served in accordance with rule 9.13(1) to (3); and
- (b) That there are no other persons who must be served in accordance with those paragraphs.

129. Practitioners should, in addition to the provisions of Part 9 be aware of and take into account paragraph 4 of Practice Direction 9A. This states that, in addition to the matters listed at Rule 9.14(5) [chronologies etc] the parties should, if possible, with a view to identifying and narrowing any issues between them, exchange and file with the court:

- (a) A summary of the case as 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.

“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.

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<sup>22</sup> See Rule 21.1

Duties of the court at the first appointment

130. The position at the first appointment is little different from that as set out in Rule 2.61D of the FPR 1991. By Rule 9.15(1) the first appointment must be conducted with the objective of defining the issues and saving costs. The court must determine (Rule 9.15(2)):

- (a) The extent to which any questions seeking information must be answered; and
- (b) What documents requested must be produced.

And give directions for the production of such further documents as may be necessary.

131. The court must give directions where appropriate about (Rule 9.15(3)):

- (a) The valuation of assets (including the joint instruction of experts);
- (b) Obtaining and exchanging expert evidence if required;
- (c) The evidence to be adduced by each party; and
- (d) Further chronologies or schedules to be filed by each party

132. Reference is made to Paragraph 5.2 of Practice Direction 9A which states that:

“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.”

133. If the court decides that a referral to a FDR appointment is appropriate it must direct that the case be referred to a FDR appointment (Rule 19.15(4)). If the court decides that a referral to a FDR appointment is not appropriate it must direct one or more of the following (Rule 19.15(5)):

- (a) That a further directions appointment be fixed;
- (b) That an appointment be fixed for the making of an interim order;

- (c) That the case be fixed for a final hearing and, where that direction is given the court must determine the judicial level at which the case should be heard

By Rule 3.3 the court may also direct that the case be adjourned if it considers that alternative dispute resolution is appropriate.

Costs at the First Appointment

134. In considering whether to make a costs order under Rule 28.3(5) the court must have particular regard to the extent to which each party has complied with the requirement to send documents with the financial statement and the explanation given for any failure to comply.

135. The court may also make one or more of the following orders (Rule 9.15(7)):

- (a) Where an application for an interim order has been listed for consideration at the first appointment, make an interim order;
- (b) Having regard to the contents of the notice filed by the parties under rule 9.14(5)<sup>23</sup>, treat the appointment or part of it as a FDR appointment
- (c) In a case where a pension sharing order or a pension attachment order or a pension compensation order is requested direct any party with pension rights to file and serve a Pension Inquiry Form, completed in full or in part as the court may direct;
- (d) In a case where a pension compensation sharing order or a pension compensation attachment order is requested, direct any party with PPF compensation rights to file and serve a Pension Protection Fund Inquiry Form, completed in full or in part as the court may direct.

136. Both parties must personally attend the first appointment unless the court directs otherwise (Rule 9.15(8)).

After the first appointment

137. Between the first appointment and the FDR a party is not entitled to the production of any further documents except:

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<sup>2323</sup> Whether FDR appropriate

- (a) In accordance with directions given by the court at the first appointment under rule 9.15(2); or
- (b) With the permission of the court.

At any stage, however, a party may apply for further directions or an FDR appointment and the court may give further directions and direct that the parties attend a FDR appointment (9.16(2)).

The FDR appointment

138. The procedure, as set out at Rule 9.17 at the FDR is very similar to the existing FDR procedure and there are no material differences from Rule 2.61E of the FPR 1991.

139. However, reference must be made to paragraph 6 of Practice Direction 9A. Paragraphs 6.2 to 6.5 are worth setting out in full:

“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, the 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.”

#### Estimates of Costs

140. See Rule 9.27 of FPR 2010. This is in very similar form to Rule 2.61F of FPR 1991 although the reference to Form H in 2.61F(1) and Form H1 in 2.61F(2) have been dropped although both Forms have been retained – see the Forms Practice Direction 5A and so the Forms will still be used.

#### Costs generally

141. Note that any breach of Practice Direction 9A 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 no order as to costs – see paragraph 3.4 of the Practice Direction.

#### Inspection appointments

142. See FPR Part 21.

#### Injunctions

143. The procedure for Part IV Family Law Act 1996 injunctions is to be found in Part 10 of the FPR and its Practice Direction (the form of application will be as per Part 18). There is one set of rules for the High Court, County Court and Magistrates Court.

- Applications can be made with or without notice (FPR 10.2(2) and (3))
- Applications must be supported by a witness statement verified by a statement of truth
- Form FL 401 is unchanged but the witness statement must give reasons if no notice is given to the respondent

- Part 10.3(1) sets out the procedure for service (not less than two days before the hearing or as the court directs<sup>24</sup>)
- Part 10.3(3) – where there is an application for an occupation order under ss 33, 35 or 36 the applicant must serve the mortgagee and any landlord of the dwelling house in question
  - (a) A copy of the application; and
  - (b) Notice of the right to make representations in writing or orally at the hearing
- The applicant must file a certificate of service after filing the application

144. Part 10.4 deals with transfer of proceedings
145. Part 10.5 – Part IV applications will be heard in private in the High Court and County Court
146. Part 10.6 – personal service on the respondent
147. Part 10.9 – guidance on drafting an order to which a power of arrest is attached
148. Paragraph 10.10 procedure for informing the police of the existence and terms of an order
149. Paragraph 10.11 – procedure when a person is arrested pursuant to a power of arrest
150. Paragraph 10.12 replaces Rule 1 of Order 29 of the CCR in relation to the enforcement of judgments / penal notices
151. Paragraph 10.13 deals with the enforcement of an undertaking in the county court
152. Paragraph 10.14 sets out the power to adjourn the hearing for the consideration of the penalty

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<sup>24</sup> Part 2.9 deals with the computation of time

153. When making an application for a Part IV injunction the practitioner must also have regard to PD 10A

- Paras 4.1 to 7.1 do not apply to magistrates court proceedings and the practitioner must look to s.144 of the Magistrates Courts Act 1980
- Para 2.1 – sets out details for applications for occupation or non molestation orders made by a child under 16
- Paragraph 3.1 -- non molestation order / ouster order with power of arrest made in private and the respondent not given notice of the hearing and not present
- Paragraph 3.3 permits a respondent arrested under a power of arrest to be brought to “any convenient place” if he or she cannot within 24 hours of arrest be brought before the relevant judicial authority sitting in a place normally used as a court room. The press and public should be allowed to attend
- Paragraph 4.1 – High Court / County Court procedure for issuing a warrant of arrest
- Paragraph 5.1 – person arrested under power of arrest should be brought before a judge within 24 hours beginning with the time of arrest
- Paragraph 6.1 – procedure for obtaining bail
- Paragraph 7.1 -- respondent’s rights under section 35(8) of the Mental Health Act 1983 to obtain at his own expense an independent report as to his / her mental condition and that having done so may seek to have any order by which he / she was remanded to hospital for a report on his / her mental health terminated.

154. The relevant forms are

- FL401 – application for a non molestation order / occupation order
- FL403 – application to vary, extend or discharge
- FL407 – application for a warrant for arrest
- FL415 – statement of service
- See paragraph 2.1 of PD 5A (the Forms Practice Direction) for the forms for general committal applications.

#### Costs

155. The Rules on costs are found in Part 28.

- Part 28.1 confirms the general rule that the court may make any order as to costs as it thinks fit;
- Part 28.2 applies (subject to certain modifications) CPR Part 43 (Scope of Cost Rules and Definitions), 44 (General Rules about costs), 45.6 (fixed enforcement costs), 47 (Procedure for detailed assessment of costs) and 48 (special cases)
- Part 28.3 deals with costs in relation to family remedy proceedings

Practice Direction 28A

156. Provides detailed guidance on the application of the costs rules.

Appeals

157. Part 30 deals with appeals. It creates a unified code of procedure for all appeals in family proceedings except to the Court of Appeal, where appeals are governed by CPR 52, and the Supreme Court. The routes of appeal remain unchanged.

158. Part 30 and PD 30A will be considered orally.

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24<sup>th</sup> March 2011