Draft Statement on the Efficient Conduct of Financial Remedy Hearings proceeding in the Financial Remedies Court below High Court Judge Level

Resolution's response

Resolution's 6,500 members are family lawyers, mediators and other family justice professionals, committed to a non-adversarial approach to family law and the resolution of family disputes.

Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family, particularly the best interests of any children.

We also campaign for better laws and better support and facilities for families and children undergoing family change.

This response has been prepared by Resolution's Pensions, Tax and Financial Remedies Committee.

Comments on new proposed efficiency statement

General comments

1. We very much welcome the attempt to 'codify' the efficient conduct of relevant hearings. It is however necessary to acknowledge Practice Direction 27A Family Proceedings: Court Bundles (Universal Practice to be applied in the High Court and Family Court) (PD27A) and how this statement sits with that to avoid any confusion about the status of each, and to address some apparent inconsistences between them, especially for litigants in person. On clarification of the status of the statement, it might be helpful to confirm that it is not intended that further or different 'guidance' will be issued by individual FRCs.

2. We hope that a version for litigants in person will be available on implementation. Paragraph 19 of the *President's Memorandum: Witness Statements*, 10 November 2021 says that a guide for litigants in person litigating in the Family Court will be prepared in due course. This is going to be needed urgently to aid understanding and ensure compliance with the same rules and standards being applied to hard pressed professionals.

3. We are unclear exactly how this statement sits with the detail of the proposed fast-track process for cases with a value of under £250,000 under which the First Appointment and final hearing would be listed within a period, and the First Appointment would be presumed to be a combined First Appointment/FDR. Again, given the numbers of litigants in person likely to use a fast-track process, guidance for them will be essential.

4. It would be helpful for the statement to cover what happens if the case goes into family arbitration at any stage, and what happens if a case comes back into the court proceedings for determination before final hearing.

Allocation

We welcome the inclusion of paragraph 5 about allocation to an individual judge where possible and judicial continuity.

There should be reference under *Allocation* to fast-tracking (as mentioned above) as what type of track the case will proceed in is a question of allocation. An initial fast-track limit of £250,000 seems to us to be about right, and we trust this level will be kept under review.

We wondered whether the allocated Judge should indicate their approach to transparency (how they intend to sit, their approach to reporting, and anonymisation whether of litigants or participants, in the light of the President's Transparency Review), at/before a First Appointment, to then be recorded on the face of the First Appointment Order. This would ensure clarity and consistency for all participants including third parties, enable any issues arising out of this approach to be addressed at an appropriate stage, and encourage the provision of accurate time estimates.

First Appointment

Paragraph 6

There should be reference to the fact that cases will usually be listed for a remote First Appointment. Our understanding is that the majority of hearings at which no evidence is to be given (excluding FDRs) should be heard remotely further to the work led by HHJ Farquhar.

There does not appear to be provision for the parties to indicate that a First Appointment hearing is not required at all. We believe that would be a useful addition so that the court can dispense with the need for such and list for an FDR. It should be clear what process the court will follow where the parties have agreed the terms of the First Appointment Order.

There should be clarity as to the approach where both parties want/s to treat a First Appointment as an FDR, on the basis that the court will be notified in advance. For example, lawyers will need to advise their clients whether that will lead to a remote FDR at what would have been the First Appointment, or whether the hearing will be re-listed for an in-person FDR.

Paragraph 7b.

We suggest that the words 'Unless wholly impracticable' are added at the beginning of this paragraph (as in the current paragraph 7c.).

At this stage, many clients are uncertain about the resources available, or are in a state of emotional shock, so are uncertain about where they would (or could) choose to live or about the relevant price bracket for a property. We would prefer to see reference to no more than five sets of property particulars showing a range of the costs of housing in the locality of the family home or the locality where each party would prefer or wish to live.

We appreciate the general efforts to frontload the evidence to narrow the issues at an early stage and promote settlement. Given the time lapse before any final hearing, it would be helpful for the statement to provide consistency around the updating of evidence at a later stage, particularly if the resources turn out to be quite different from those which formed the basis of compliance with this paragraph; parties should not be prohibited from filing updated property particulars (and updated

borrowing capacity evidence) at a later time and paragraph 18 could be amended to include this. Otherwise, the risk is that the previous particulars will turn out to be of little or no help to a judge.

Paragraph 7c.

In respect of each party's borrowing capacity, we think that consideration should be given to requiring the applicant to file with the court a jointly obtained mortgage broker report, unless that has proved impossible, with the parties prepared to explain the reason for the impossibility to the court. We think this is likely to lead to better evidence and a cost saving compared to narratives.

In any event it would be helpful to clarify, where each party files their own evidence as to borrowing capacity, that information and correspondence sent to a mortgage broker should be disclosed.

Paragraph 7d.

We would take out the reference to 'exceptional case', as there will be many cases that are not exceptional that will warrant a longer questionnaire, for example where poor disclosure has been provided.

Paragraph 8

Given that position statements of up to 5 pages in length should be filed for the First Appointment (para 21a.i. of the statement), our view is that the proposed composite case summary will simply add to the applicant's costs without necessarily assisting the court and should not be expected.

Paragraph 9

We wondered whether a date for final hearing should be fixed where the parties agree a private FDR, or at least that the exceptionality test should fall away. The purpose of this is to provide a carrot to parties to agree to a private FDR (if they wish).

Other points relating to First Appointment

We suggest that the efficient conduct of these hearings would be aided by some guidance on what can be expected at First Appointment where there is potential for the case to be transferred within the Family Court at or post First Appointment i.e. if disclosure shows that the financial remedy proceedings should be decided at High Court Judge level.

We suggest that it should be made clear that any third party interests should be identified in time for the First Appointment as unrepresented parties are often unaware that such interests will need to be addressed.

Given the current consultation on a proposal for a Standard Reporting Permission Order, we also suggest that parties are encouraged at least 14 days before the First Appointment, or following confirmation from the court as to the approach to transparency during the particular proceedings, to consider whether there are any such issues, and to inform the court accordingly, so that the time allowed for the First Appointment (which is already tight) can be adjusted accordingly.

FDR

Paragraph 11

It is worth stating that all FDRs should be listed in the morning as recommended in *The Financial Remedies Court – The Way Forward,* September 2021. We suggest that the statement should

confirm that 'exceptional circumstances' in this context should be stated, if applicable, on the face of the Order at FDA, for example due to time zone issues (flagged by the parties).

Paragraph 15

The meaning of a final hearing template should be clarified, or a template annexed to the statement, to provide clear guidance for litigants in person.

Preparation for final hearing

Paragraph 18

We are unclear of the correlation between this paragraph and PD27A which refers to case summaries (6 pages maximum). It will lead to confusion if this is not clear, especially for litigants in person.

Section 25 and other witness statements

We appreciate the aims behind this section but are not sure how successful and understood it will be in practice, especially by litigants in person, as there seem to us to be some inconsistencies.

For example, given the limit on what can be included in the court bundle, we query the assistance provided by referring in the statement to where in the disclosure a document is located (paragraph 14f.), because this may fall outside the documents permitted for inclusion in the court bundle. This could cause difficulties if a party is not able to exhibit documents which have already been disclosed. For example, a party may wish to refer in their statement to transactions on bank statements which have been disclosed but will not form part of the court bundle and pursuant to this paragraph could not be exhibited to the statement.

Paragraph 15k. is contradictory in that it says that statements should not be longer than 15 pages, but 25 pages should be regarded as the maximum. The page limit excludes the exhibits and so we are likely to see more documents exhibited and referred to in summary form within the body of the statement. This will not reduce the documents before the court or judicial reading and creates a conflict with the page limit for court bundles.

Bundles

Paragraph 20c.

Again, there is an apparent inconsistency between this and PD27A para 4.1 (this does not prevent the inclusion in the bundle of specific documents which it is necessary for the court to read or which will actually be referred to during the hearing, without any need for a specific prior direction of the court). Otherwise, there is the risk of the making of unnecessary interlocutory applications to address issues concerning bundles. It is not always possible for the court to determine the bundle (and rarely possible or appropriate for the FDR Judge), and post FDR much may happen in cases without a PTR that may require certain documents to be included.

Position statements

Paragraph 21

We suggest that this paragraph should start off with the words "Best practice dictates that…" to tie in with paragraph 22. It is also confusing that PD27A refers to position statements (3 pages) and

skeleton arguments (20 pages maximum). As mentioned earlier, some clarification of the status of each of these for the benefit of litigants in person should be included. The page limits for position statements (if skeleton arguments aren't filed also for a final hearing) are very tight for matters with assets in excess of, say, £2m or where there are complications, for example, alleged non-disclosure, psychiatric or physical ill health, or significant premarital assets combined with asserted present need.

Paragraph 23

The filing of position statements by 14:00 the day before the hearing is very tight for First Appointments or even FDRs when the nature of the work means many advocates will be in court the morning before either hearing, and are likely to struggle to comply with this.

Paragraph 24

This paragraph could simply remind practitioners and litigants in person of the requirements of PD27A para 5.2A.1.

Final hearing

Paragraph 26

We suggest that it should be acknowledged here that the waiver of any privilege will not be required, for example, if the lay client had an issue which caused the non-compliance.

Duty to negotiate

Paragraph 28

Negotiations before an FDR are conducted without prejudice. We suggest that it would be helpful for the court to be provided at each hearing with a separate schedule of offers setting out the date and status (i.e. without prejudice or open) of each proposal, and who made it. This would more clearly differentiate between without prejudice negotiations and proposals made before an FDR, and open offers.

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