Proposed changes relating to court bundles in family proceedings: Practice Direction 27A supplementing the Family Procedure Rules 2010

Resolution's response to the Family Procedure Rule Committee

Resolution's 6,500 members are family lawyers, mediators, collaborative practitioners, arbitrators 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 and the best interests of any children in particular.

Resolution is committed to developing and promoting best standards in the practice of family law amongst both its members and amongst family lawyers in general.

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

This response was prepared by Resolution's Children, Legal Aid, Litigants in Person and Pensions, Tax and Financial Remedies Committees.

Responses to consultation questions

Question 1: What are your views about the provision in Chapter 3 of the draft new practice direction as regards who should be responsible for preparing the court bundle?

We agree that the provision in Chapter 3 reflects the unfortunate current reality.

The provisions applying where both parties are in person is probably the best realistically that can be achieved.

Question 2: Do you agree with the draft provision stating what may not be included in a bundle? Should any other items be included, such as photographs, travel documents, educational reports?

We find the overall wording of 4.2 as drafted a bit unhelpful and contradictory. We consider that those items listed **should not usually be included unless the court directs otherwise,** save for letters of instruction, as they are necessary to accompany the expert report.

We suggest that medical notes/records should also be included in the list of documents not usually included in the bundle.

From a Litigants in person (LiP) perspective we can see some sense in being a little more prescriptive and perhaps excluding photographs and travel documents (unless the court directs otherwise).

Educational reports should not be excluded as they can be useful.

We have concerns though about the proposal that only those documents relevant to the hearing are to be included for each hearing in children cases. This plays havoc with the pagination which changes each time and if you have started making advocate notes/annotations/a chronology, you don't want the page numbers to change. In addition, it creates more preparation work and cost to the person preparing the bundle as it means that each hearing requires a new bundle rather than building on the last bundle. If these bundles are being prepared electronically, surely the simplest way to manage the bundle is that the bundle pages stay the same and new documents are added?

Local authority legal representatives tell us that they agree that starting a new bundle each time is going to cause excessive and unnecessary work. And that changing pagination is going to cause difficulties, for example, threshold documents now require page reference numbers to be Re A compliant. Advocates and judges are used to being able to identify the most up to date documents quickly and its helpful to have previous orders and statements to refer to in the bundle when needed. The judge will have a reading list so this seems to be making more unnecessary work and difficulties.

There are already complications with managing multiple and extra bundles in care cases when separate redacted bundles are needed, for example, where there are two fathers, or intervenors. The logistics and complications of having to redo all these bundles for every hearing would be unmanageable and risky.

We also suggest that there should be consideration of having more than one bundle, for example, in a public law injury case, there should be one bundle with the main documents in it and separate 'source' bundle(s) for medical notes/records, contact notes and foster care logs. In this way the main bundle does not get too large to send by email or download etc and is more manageable.

Question 3: Should different provision to that in the draft practice direction be made in relation to bundles filed for subsequent hearings in financial remedy proceedings?

In financial remedy cases, we see no real issue with starting afresh (and distinguishing here between these and children cases) – between one hearing and another what is relevant will change and given the limit on pages it is sensible to effectively start with a blank sheet. From a LiP perspective it may be easier to just add to an existing bundle, but on balance the benefits (given page limits) of starting with a fresh sheet outweigh the downside.

Question 4: What are your views about the appropriate pagination system to be used for bundles in (a) financial remedy proceedings (b) public law proceedings relating to children (c) private law proceedings relating to children and (d) any other proceedings?

Whilst it would make some sense to move towards uniformity of bundles across proceedings with the same rules on pagination, for example, if a bundle is labelled 1 – 350 paginated so the PDF and page numbers match, we give our reasons below for our current preferred difference approach to pagination in bundles for financial remedy and those in children proceedings.

For bundles in financial remedy proceedings, consecutive page numbering works and is far easier to produce than for children bundles. Consecutive pagination also lends itself to the conclusion that a

new bundle should be produced for each hearing (which we have no objection to in financial remedy proceedings). We therefore agree that consecutive pagination is appropriate for financial remedy proceedings (but would provide that the index should be numbered).

Our Children and Legal Aid Committees' general view at this time is that "Bates numbering" works well for both public and private law cases and achieves consistency of references. There is still use of paper bundles only in private law children cases in some smaller courts. An HMCTS online service for private children proceedings has of course not yet been fully rolled out and that seems to still be some way off. Using Bates numbering means that the bundle can be expanded as the case goes along and relevant documents are added in separated sections and the numbering of earlier documents does not change. This makes it much easier to follow the evidence in a case.

There is though the issue of compatibility with paragraph 10.1(c)(ii) of the draft practice direction and the rules for numbering in Children Act proceedings (please see our response to question 8).

Question 5: As regards public law proceedings, should this practice direction make provision for minutes of advocates' meetings to be included, and for templates to be used for case summaries and position statements?

No, our view is that the practice direction shouldn't make provision for agreed minutes of advocates' meetings to be included in bundles in public law proceedings. This would just unnecessarily add more to the bundle (it is the position statements which are needed by the time of the hearing), and would not be feasible, for example, in reality the advocates' meeting may not take place until 5pm on the day before the hearing. It is also going to be impossible in practice to get a note round all the advocates to agree it. The discussions can usually be included in the case summary (if there is time) or in the position statements.

Regarding templates for case summaries and position statements in public law proceedings, it would generally be helpful to refer to case summaries or position statements, preferably position statements, as the terms seem to be used interchangeably. Our members' experience where templates have been used, is that they tend to be cumbersome and unhelpful documents, lending themselves to often including much more information and detail than is required for the hearing. We understand that the templates suggested for case summaries that some advocates are using are often lengthy documents due to their tabular form. If an advocate has text to put in a particular column, it can make the document unnecessarily long due to the formatting. There is a lot of repetition. In addition, advocates when using the case summary template simply write freestyle narrative at the end of the document to get around the restrictions of the table format. Guidance as to the headings for a position statement would be more helpful.

Calling it a position statement, sets out what is required for the document – namely the client's position for the hearing – and we do not believe there is a need for anything more prescriptive. If it is concluded that something more is required, we would have thought that the practice direction could say that a position statement should include something along the lines of –

- The identified issues for the hearing.
- The party's position on the issues.
- What the party is inviting the court to do at the hearing.

Question 6: Do you consider that, as well as setting out limits on the length of position statements, this practice direction should set out more detail about what a position statement should include? If so, what provision should be made?

We wonder if the page limits in paragraph 8.1(a) are overly prescriptive and it would be simpler to have a default limit for hearings up to and including FDR, and then for final hearing.

The page restrictions are also not practical if a template includes columns since as stated above, the use of columns extends the page numbers disproportionately as the width for text is so narrow.

We consider that the level of detail in the practice direction about what a position statement should include is about right and should not be overly prescriptive or contradict what is prescribed elsewhere. But we suggest that the practice direction should provide what should be set out in position statements in relation to confirming the filing of an FM5 and attempts at NCDR as appropriate. Paragraph 8.1 (g) could be expanded to include a wider reference to NCDR.

From a LiP perspective it may well be helpful to provide more guidance on what should be included in a position statement and what the document is really intended to do. Please see the last part of our response to question 5. It might be useful to have a summary of headings for LiPs that a position statement/case summary should cover in a private law children case and public law case. Paragraph 6.4 goes some way to doing this but could be expanded. Although there is reference to Chapter 8 in paragraph 6.4(c) which deals with position statements in more detail, that Chapter then seems to be in reference to position statements in financial remedy proceedings only.

Paragraph 5.4(d) on the purpose in financial remedy proceedings might also need a little more explanation for LiPs and paragraph 8.1 should cross refer back to it.

Question 7: Do you consider that the default 350-page limit should be altered?

There are mixed views around this. We have considered whether on balance we would abolish the page limit with a focus on compliance with the practice direction. There is however a view that a default page limit is still useful, particularly for solicitors working with other parties who are unrepresented who may be fighting to include everything in the bundle. Some members are also concerned about the potential for abusive and/or late filing of excessively long bundles if there is no page limit figure at all.

The 350-page limit is certainly somewhat arbitrary and does not go to the core issue of what is and is not required in the bundle at the particular hearing in the particular case. For example, in financial remedy proceedings a 350-page limit for non-final hearings with a much longer page limit for any final hearing might be appropriate. 350 pages is not a realistic page limit in some public children cases where orders are now required to be so long.

If the 350-page limit, or any page limit, is retained, the process for seeking the court's permission to vary or file a supplemental bundle (which can be helpful for cross examination purposes at final hearing) should be clearer.

Question 8: Should this practice direction require computer-generated page numbering to match PDF "page label" numbering? If so, should the court have discretion to direct otherwise?

No, certainly not for children proceedings.

Ideally the page numbering should match the consecutive PDF numbering, but this would be too prescriptive and unworkable. We think paragraph 10.1 (c)(ii) of the draft practice direction conflicts with the "Bates numbering" system used in Children Act proceedings i.e. we don't think that Bates numbering works electronically and requiring this matching is unachievable in a Bates situation.

The software packages used across local authorities, firms and firms providing legal aid services vary and we also query whether all could accommodate this particular type of numbering. Overly prescriptive changes would we believe particularly impact on compliance in private children proceedings.

The practice direction fails to acknowledge different ways of working and the variety of software systems and packages that are currently in use and that already there are some difficulties when courts are not able to accept some packages that practitioners are using.

In bundles in financial remedy proceedings we understand that the major systems can handle sequential pagination using a non-Bates system to include the index so that pagination and pdf pages match. We would suggest that the practice direction provide for numbering 1 to x starting from the first page of the index, rather than starting at page x with a non-numbered index.

If computer-generated numbering should be required to match the PDF "page label" numbering in financial remedy bundles, the court should have discretion to direct otherwise to take account of any remaining software issues.

Question 9:

(a) Do you consider that the timescales in Chapter 13 are appropriate?

In financial remedy cases, it would in our view be helpful to:

- specify that the ES1, ES2, and the Chronology should be served and filed at court as part of the core bundle; and

- consider whether the bundle should be served five working days before an FDR or final hearing.

In relation to preliminary documents, we suggest that these should be served and filed 24 hours prior to the hearing.

It would be helpful to also provide a timescale for the party responsible for preparing the bundle to provide a draft index to the other party/parties.

In children cases, we query whether all the detail in and the table under paragraph 13.1 is needed in the practice direction. We suggest that all that is needed is provision for the bundle to be agreed, served and filed by 2 days before the hearing.

(b) Should different provision be made for different types of proceedings?

See our response to question 9(a).

(c) Should a hearing template (which is one of the preliminary documents) be filed much further in advance of a hearing so that, for example, any necessary listing adjustments can be sought in good time?

We are not sure that there is any real need for this. We are also unclear how this would work in practice in cases involving LiPs. We suggest that the requirement to think about a hearing template should be brought forward to the end of the hearing at which the final hearing is listed (assuming it is not a case justifying a pre-trial review).

Question 10: Do you have any other comments on this draft practice direction?

- We are concerned that the new draft practice direction seems rigid, over prescriptive and onerous. We hope that the courts will be understanding in applying it particularly whilst it beds in.

- Paragraph 3.2 says a paper bundle must be provided even if the court does not so direct, where there is a realistic possibility of a witness giving evidence in person in the court. That could be unnecessary work, for example, in some courts for CJ hearings the clerk brings up the electronic bundle page for the witness.

  And in Brighton, for example, Caselines is used in care proceedings which is generally popular with advocates and Judges and has made the process of bundles so much easier, cheaper and quicker. Brighton Court is familiar with using e bundles for evidence so this would feel like a step backwards. Could this be required if the court directs in the same way as the requirement to give the Judge a hard bundle if directed?

  Paper bundles may be needed on an ad hoc occasion but should not be an automatic requirement in care proceedings.

- Paragraph 5.4 This should include the FM5 to avoid arguments about whether the FM5 goes in the bundle or not.

  There is also a lack of clarity about whether a chronology is needed in a bundle for all FDAs. Clarifying this would be useful.

- Chapter 7 If a core bundle has been directed, advocates must be remunerated properly if on legal aid by being able to include the number of pages in the complete bundle that they may have considered (i.e. the core bundle may not be sufficient for their preparation).

- Paragraph 10.1 on e-bundles:

  - (e) and (j), we understand the reasoning that all documents to be subject to OCR and resolution not greater than 300 dpi. That is fine with most evidence parties produce but if that includes evidence from other sources it would be impossible
    - handwritten medical notes, police handwritten records, HV Records, School Records, parents' letters to the court, mobile phone texts etc.

- (g) This is possible with evidence of parties but page view cannot always be 100% view when dealing with evidence received from hospitals etc.

- (k) refers to 6.9 above, but there is no 6.9, we think this means 6.8. However, a separate section for a hearing has been tried previously - Section Z - adding last minute documents for a hearing instead of adding to the main bundle, but it was agreed it should be dropped as judges were specifically asking for documents to be added to the main bundle straight away.

- Paragraph 11.2(c) is not fair or appropriate to insist upon for parties, firms representing them or experts and should be removed.

- Paragraph 12.1

  - Page limits generally should be a guide rather than prescriptive.

  - Does the 25 page limit for witness statements include initial and final social worker statements? This is insufficient for a social worker to provide their update, case analysis, apply the welfare checklist and BS analysis. A lot is rightly expected of the local authority to justify a care plan for permanent removal/adoption of a child and whilst recognising the need to be concise a 25 page limit is not sufficient.

  - 40 pages for reports seems too short. We don't believe that such a limit is prescribed in the Part 25PDs.

- Paragraph 14.1(a) Too much information is required, it wouldn't all fit in the space available.

- Paragraph 14(1)(d) If HMCTS can accept bundles sent by Mimecast if they are too large to be sent as a normal attachment, please could this be indicated here.

- Paragraph 19.1 feels a little historic in terms of how courts work in practice where the use of an HMCTS online service is required.

For further information please contact:
Rachel Rogers, Head of Policy: rachel.rogers@resolution.org.uk

Resolution, October 2024