



Family Procedure Rules Amendments – Financial Remedy Considerations

In February 2020, it was announced that a number of amendments were being made to the Family Procedure Rules. A number of those amendments specifically impact financial remedy proceedings and we will look at the new rules before considering their practical impact. Some of the changes came into force on 6th April while the remainder come into force on 6th July 2020:

Rule	Old Rule	Provisions (summarised)
FPR 5.7 (6 th April 2020)	N/A	<p>(1) Any communication between a party to proceedings and the court must be disclosed to, and if in writing copied to, the other parties or representatives</p> <p>(2) Paragraph (1) applies to any communication in which any representation is made to the court on a matter of substance or procedure but does not apply to communications that are purely routine, uncontentious and administrative.</p> <p>(3) A party is not required under paragraph (1) to disclose or copy a communication if there is a compelling reason for not doing so, and provided that any reason is clearly stated in the communication.</p>

		<p>(4) A written communication required under paragraph (1) to be copied to the other parties or representatives, must state on its face that it is being copied to that person or those persons, stating their identity and capacity.</p> <p>(5) Unless the court directs otherwise, a written communication which does not comply with paragraph (4) will be returned to the sender without being considered by the court, with a brief explanation of why it is being returned.</p> <p>(6) In addition to returning a communication under paragraph (5), where a party fails to comply with paragraph (1) the court may, subject to hearing the parties, exercise its case management powers under Part 4.</p> <p>(7) Paragraph (1) does not apply to communications authorised by a rule or practice direction to be sent to the court without at the same time being provided to the other party or parties or their representatives.”</p>
<p>FPR 9.27 (6th July 2020)</p>	<p>(1) At every hearing each party must produce to the court an estimate of the costs incurred by that party up to the date of that hearing or appointment</p> <p>(2) Not less than 14 days before the final hearing, each party must (file with the court and serve a statement giving full particulars of all costs in the proceedings incurred or expected to incur, to enable the court to take account of the parties' liabilities for costs.</p>	<p>(1) One day before every hearing or appointment, each party must file and serve on the court and parties estimate of costs incurred up to date of hearing and appointment</p> <p>(2) One day before first appointment, each party must file and serve on court and parties estimate of costs expected up to FDR if settlement not reached</p> <p>(3) One day before FDR parties must file and serve on court and parties estimate of cost up to FH if settlement not reached</p> <p>(4) 14 days before FH, each party must file and serve on court and parties full statement giving particulars of all costs incurred or is expected to incur</p> <p>(5) a costs estimate must have confirmation that they have been served and discussed with their client</p>

		<p>(6) each party must bring a copy of estimate of costs filed and served to each hearing</p> <p>(7) the amount of cost estimates filed and served and particulars of costs <u>must be recorded in recital to the order</u> in the hearing before they were served</p> <p>(8) in the result of non-compliance, <u>this must be recorded in recital to the order</u> and the court must direct that the relevant cost estimate be served within three days of the hearing (or such time period as directed)</p>
FPR 9.27A (6 th July 2020)	N/A	<p>(1) If the court does not make an appropriate consent order or direct a further FDR, each party <u>must</u> file and serve an open proposal for settlement by such date as directed or <u>within 21 days of FDR</u></p> <p>(2) Where no FDR appointment takes place, each party must file and serve with court and party an open proposal for settlement by such date as court directed or <u>not less than 42 days before FH</u></p>

FPR 5.7 is now a mirror image of CPR 39.8 and it is unlikely that the new rule in respect of communicating with the court will be too controversial. However, the same cannot be said for the changes brought about by FPR 9.27 (future cost estimates) and FPR 9.27A (duty to make open proposals after FDR).

Future cost estimates

Prior to the changes, parties were required to produce at each hearing/appointment an estimate of their costs incurred up to the date of that hearing/appointment (via Form H). After 6th July 2020, if the hearing is an FDA, each party must also produce an estimate of their future costs up to the date of FDR. If the hearing is an FDR, the future cost estimates will be up to a final hearing. If a party does not comply with the new rules, that fact must be recorded

on the face of the order as a recital. The current requirement to produce full particulars of costs 14 days before a final hearing remains unchanged.

Aside from non-compliance being recited in the court order, there does not appear to be any sanction available to the court if a party does not comply with the rules. What happens, for example, if a party at FDR does not produce their costs estimate for a final hearing? It seems unlikely that the failure to produce such estimates will be sufficiently serious as to be relevant when considering costs. It is also worth bearing in mind there is currently no power for family judges to case manage/cap costs in the same way civil judges can under CPR Practice Direction 3E/3F.

Perhaps the real purpose of producing cost estimates is to focus the minds on the financial consequences of continuing to litigate. Virtually every financial remedy practitioner will have heard a judge at FDR say something along the lines of “whatever your costs are to date, you can double that if you go to a final hearing”. Occasionally, that warning will fall in deaf ears, but often it serves as a useful reminder to the parties that every pound spent litigating will be a pound deducted from the marital pot. It may well be the impact of the cost estimate rules is limited to reinforcing that useful reminder in the parties minds.

Open offers after FDR

The biggest change for financial remedy practitioners will be the duty under FPR 9.27A to make an open offer after the FDR hearing, usually within 21 days. It brings wholesale changes to the costs regime and those representing parties in divorce proceedings will need be acutely aware of its implementation. The rationale for this rule is far more obvious but it

does raise a number of potential issues:

- a. At FDR the evidence will not usually be complete, for example s25 statements are yet to be exchanged. How can an open offer in those circumstances be accurate or reliable? A parties position at FDR is often very different to the position taken at final hearing.
- b. What if a party does not make an open offer within 21 days of FDR but does make one at some point before final hearing? Would that be regarded as a failure to comply with their duty to make open offers under para 4.4 of PD28A?
- c. Could a party make another open offer after putting their first open offer within the 21 day period? What will happen if the complexion of a case changes considerably?

Those questions may not have an immediate answer and we will have to see how the judiciary approach the application of the new rules. What is apparent is that the duty under 9.27A does not replace the duty under FPR 9.28 to make open offers before the final hearing (14 days if applicant, 7 days if respondent). An offer made under the new 9.27A is likely to have a different purpose than one made under 9.28, the former being a compromise offer while the latter tends to protect a parties position in respect of costs. It will be interesting to see how the two duties co-exist during the course of matrimonial proceedings.

In any event, non-compliance with the duty under 9.27A will likely have undesirable consequences. The defaulting party may find itself on the receiving end of a costs argument by reference to para 4.4 of PD28A:

*"The court will take a broad view of conduct.. and will generally conclude that **to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which***

the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets."

Such an argument was successful in *MB v EB* [2019] EWHC 3676 where Cohen J found H's refusal to openly negotiate (amongst other things) was serious enough to cap W's liability for H's costs at £150,000. H's costs in total was nearer £650,000 and Cohen J concluded [para 34]:

*"It is self-evident that the payment of something in the region of £1.25m worth of costs between the parties is grossly disproportionate to what was in issue. I find that the wife's offer was light, but I am in no doubt that, **if there had been a sensible (or any) response, there would have been a quick resolution of this case.**"*

It would not be surprising to see judges come down more firmly on those who do not openly negotiate in an attempt to reach settlement. Indeed, we may start to see the issue of costs appearing more frequently in judicial indications at FDR stage (by reference to 9.27A and/or para 4.4 of PD28A). The fact any given case is a 'needs case' will be immaterial as to how a judge decides to exercise their discretion.

Conclusion

It can be easy to overlook changes to the procedural rules even in 'normal' times but the incoming amendments are significant and require consideration. It would be a brave litigant who decides to not comply with their duty to provide costs estimates under 9.27. It would be

a reckless litigant who decides to not comply with their duty to make open offers under 9.27A.