

Encouragement to negotiate

More than a year on from the introduction of the Family Proceedings (Amendment) Rules 2006, how is the new regime working in practice? Frank Prior provides an overview



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There was a time when one might catch the more indiscreet of family lawyers humming the tune to Abba's 'The winner takes it all' on entering a final ancillary relief hearing. Thankfully (most will say) those days came to an end on 3 April 2006 with the arrival of the unexcitingly titled, but nonetheless very welcome, Family Proceedings (Amendment) Rules 2006.

So here we are, more than a year on. In all probability, most of our pre-April 2006 applications have been long since resolved and we are enjoying the new costs regime, but how, if at all, has our practice changed?

The past

Before reviewing how things are now, let us review for a moment the 'way we were', which I assure you will be my last nod to popular music of the 1970s... probably.

Despite the wide discretion available to the judge in a final ancillary relief hearing pre-April 2006, great emphasis was placed on which party's *Calderbank* offer fell nearest the court's final decision.

There was much to be said for that approach in cases where one party made a hopelessly unrealistic offer, but things became particularly complicated when some elements of a *Calderbank* offer fell short and others hit the mark. This is one example of where there was ample opportunity for an unfair costs decision, particularly when the decision was weighted on the basis of who was the applicant and who was the respondent.

If we look back at our respective practices, then it may be fair to say that there was an element of pinning the tail on the donkey in the drafting of any offer. This was due to the wide discretion afforded

to the judge at any final hearing and not particularly clear or consistent case law. In reality there were probably occasions in practice where one had to make an educated guess as to what a court might do and then have one's client place their bet in the shadow of a potential adverse costs order.

There were of course attempts to shed some light on the costs position with the arrival of Rule 2.69 (introduced by the Family Proceedings Rules 1991 and rewritten by the Family Proceedings (Amendment No2) Rules 1999) but that proved to be rather like trying to light a football pitch with a candle – confusing at best and unworkable at its worst.

New regime

The scene was eventually set for a change of approach when Dame Elizabeth Butler-Sloss, then President of the Family Division, called for a general review of the costs rules in the *Norris v Norris; Haskins v Haskins* [2003] appeals. The rest, as they say, is history and we gave a warm welcome to Rule 2.71 (see box, pXX) and bade a not-particularly-fond farewell to Rules 2.69, 2.69B and 2.69D.

So, with no orders as to costs as the norm we set off into our brave new world – a world where Rule 2.71(4)(b) provides that only the most mischievous, difficult or devious of litigants need fear the bite of an adverse costs order. We may have had high hopes then for an increased emphasis on settlement, but has that dream become a reality?

New costs Rules in practice

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cases where perhaps one ought to have been made. Further, there may, in reality, be no real sanction for those who commit to litigate on day one but generally conduct the litigation in a way that avoids the various conduct-based costs triggers. In short, there will always be

eroded by legal costs. Therefore the more prolonged the negotiations, the less there will be to divide at the end of the day – surely a disincentive to even the keenest of gamblers.

Now a greater analysis of costs and how they are incurred is a must. This

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those who will play the system and seek to take advantage of its good intentions.

On the whole, however, the new Rules look well placed to encourage settlement – if only because potential litigants will, from the off, see the ‘pot’

is where the Form H1: Statement of Costs (Ancillary Relief), the more detailed cousin of the relatively brief Form H, has an important job to do and it should be approached with the utmost attention to detail.

Costs orders: Rule 2.71 in all its glory

- (1) CPR Rule 44.3(1) to (5) shall not apply to ancillary relief proceedings.
- (2) CPR Rule 44.3(6) to (9) apply to an order made under this rule as they apply to an order made under CPR rule 44.3.
- (3) In this rule ‘costs’ has the same meaning as in CPR Rule 43.2(1)(a) and includes the costs payable by a client to his solicitor.
- (4) (a) The general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party; but
 - (b) the court may make such an order at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).
- (5) In deciding what order (if any) to make under paragraph (4)(b), the court must have regard to:
 - (a) any failure by a party to comply with these Rules, any order of the court or any practice direction which the court considers relevant;
 - (b) any open offer to settle made by a party;
 - (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
 - (e) any other aspect of a party’s conduct in relation to the proceedings which the court considers relevant; and
 - (f) the financial effect on the parties of any costs order.
- (6) No offer to settle which is not an open offer to settle shall be admissible at any stage of the proceedings, except as provided by Rule 2.61E.

‘Without prejudice’ correspondence

So much for general principles, but has the ‘without prejudice’ proposal become a distant memory?

No, I am pleased to say, and I suspect it can be found alive and well in many of the files in your cabinet. The reason for this is that while our clients’ have an obligation to negotiate, a fact reinforced by Dame Butler-Sloss in the 1992 case of *Gojkovic v Gojkovic No2*, many need the comfort of knowing that they can do so freely and without fear of saying or doing something that will damage their case.

This is the very foundation on which mediation has been constructed and now thrives. It is particularly important at a time when case law suggests that the courts’ approach to ancillary relief is somewhere between inconsistent and incomprehensible and with the donkey, onto which we are still trying to pin a tail, in rude health.

That ‘without prejudice’ proposals would continue to play an important role was clearly envisaged by the drafter of the new Rules, as Rule 2.71(6) provides by inference that such proposals are admissible ‘as provided by Rule 2.61E’.

As we know, Rule 2.61E deals with the operation of the financial dispute resolution (FDR) hearing and, like mediation, the value in such hearings comes from the parties’ ability to negotiate freely and without the fear of having prejudiced their position in the event that matters proceed to a final hearing. The major shift has been that ‘without prejudice’ offers are now genuinely an attempt to settle – rather than a mechanism to position a case prior to trial, to exert pressure or to obtain costs protection.

As it stands, many cases settle by the FDR, or shortly thereafter. This is nothing new and, historically, probably has more to do with the value of the FDR process generally than the change in the costs rules. By that stage, however, the pot may have been reduced by thousands, or even tens-of-thousands, of pounds. Under the new Rules the parties will, as I have mentioned above, be aware that there is probably going to be an indirect correlation between that debt and the value of their ultimate settlement.

Practice points

With the above in mind, in my practice there has been a significant increase in

clients wanting to explore the alternatives to court-based litigation such as mediation and collaborative law, and that must be a good thing.

Risky business

For clients to put their financial future in the hands of a third party, a judge, has always been considered high risk. However, once there was always the hope that if their approach to settlement was found more favourable by the court, they would recover some if not all of their costs. On that basis, there was risk but also the possibility of reward. That is clearly no longer the case and, save for cases where, for example, findings of fact will have a significant impact on the outcome, there can be no logical reason why anyone would 'want their day in court'. In fact, the individual determined to push their luck on a particular issue or in a manner designed to intimidate or wear down their spouse may run the risk of falling foul of Rule 2.71(5)(c), (d) or (e) and feel the bite of a costs order.

Talking tactics

From a tactical point of view, there is much to be said for setting out one's client's stall early, if only in general terms – perhaps pending and subject to completion of the disclosure process, or immediately following it, in cases where there is no factual dispute. There can be few cases where one's client would be prejudiced if, for example, they set out their approach in general terms to, say:

- division of the capital pot;
- their housing need or that of their spouse, or
- the periodical payments term they believe to be appropriate and why.

This can be in open correspondence in which it is made clear that this is the client's initial view, subject to outstanding disclosure.

This invites negotiation early and could mean that a great deal of time and money may be saved in preparing to deal with points that may not actually be in issue. One might find in the first few weeks that there is not much between a client's overall position and that of their spouse. Alternatively, if the clients are far apart at least one would

have started whittling down the issues to a point where an early indication could be sought at a first directions appointment (if used as an FDR) and, in any event, where a judicial indication can be deployed as a scalpel, rather than a blunt tool.

The parties can also weigh the value of the difference between them against the costs to argue the point and the inevitable impact on the size of the matrimonial pot. This in itself provides the

ideal growing conditions for compromise – a word which will perhaps have greater value as the roots of the new rules penetrate deeper into our practices.

Encouraging early settlement

It all sounds great in theory, but of course as seasoned matrimonial lawyers whose skills were honed in an environment where to get it wrong would probably mean an adverse costs order, this 'cards on the table' approach may seem, well, a little uncomfortable. However, we have to evolve or we will soon get left behind.

We must all start thinking about possible models for settlement earlier on in the case, as opposed to compartmentalising the process into mutually exclusive disclosure and negotiation phases. Forming an 'opinion' too early for the inflexible can be dangerous and counter-productive, but I believe we need to adopt a more fluid approach to allow our views to evolve as the mist lifts on the extent of the matrimonial resources through disclosure.

By this I am not suggesting a caution to the wind/lit match to the practising certificate approach, whereby one steams into trying to settle the case without full disclosure, but there can be very few cases where the general framework could not be considered early on and perhaps discussed openly with all concerned – albeit with the usual caveats regarding disclosure, coupled with perhaps an early conference. This will not suit every case, as sometimes to talk about models for settlement too

early and then say 'well... actually we have now changed our minds' could frustrate negotiation.

That said, one might suggest that everyone concerned should be encouraged to commit to negotiations on the basis that models for settlement may evolve with disclosure, and then view negotiation as a creative process (not unlike mediation).

When eventually the financial landscape is clear (or as clear as it might get

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with an eye to proportionality) one can set out the client's open position in more detail, perhaps accompanied by a slightly more generous 'without prejudice' offer, so as to provide the other party with yet another incentive to settle.

Conclusion

It is fair to say that there will be the stalwart who will see weakness where most of us see a new age of compromise, who will drop the first of many court applications like so many bombs on one's client's ships in harbour, before their declaration of war arrives in the DX.

That is perhaps human nature up to a point, but for those who still approach the negotiation process as a 'win or lose' affair there is now real risk. That is because those of us fully committed to the ideals at the heart of the new Rules and the search for creative solutions have Rule 2.71(4)(b) – and we are not afraid to ask the courts to use it, having followed the appropriate Practice Direction of course.

In summary, there is much to commend the new Rules and I believe there is an opportunity for our approach to financial negotiation to evolve with them. ■

Calderbank v Calderbank
[1975] 1 All ER 333

Gojkovic v Gojkovic No 2
[1992] 1 All ER 267

Norris v Norris; Haskins v Haskins
[2003] EWCA Civ 1084