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The 'Woolfing' of family procedure: proposals for change

Reform of the FPR is underway. Elissa Da Costa looks at the potential changes and likely impact



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As many family practitioners will no doubt be saying, 'not before time' have Her Majesty's Courts Service and the Family Procedure Rule Committee joined forces to work on a rule change to improve procedures in the family courts. Indeed, those who carry out adoption work will have had a taster of this simplification process in the Family Procedure (Adoption) Rules, which were made in October 2005. Reforming the rules for conducting the variety of family work in all the courts is long overdue, and necessary because of the various sets of rules which currently apply and cause no end of confusion.

The present position

Currently, the rules of court governing procedure in family proceedings in the High Court, county court and magistrates courts are contained in a number of statutory instruments, made under different rule-making powers. In addition, the Civil Procedure Rules 1998 (CPR), which came into force on 26 April 1999 in the civil courts, are not applied to family proceedings generally, although some of the CPR are applied to costs in family cases and appeals, and yet other family proceedings are still subject to the pre-CPR Rules of the Supreme Court and county court rules, both of which are now, in the words of the 'Family Procedure Rules' consultation paper (see reference points box):

... difficult to find, outdated and out of line with those applying to civil proceedings.

It is intended that the proposed FPR will be made by one body, the FPR Committee, under powers contained in a single statute, the Courts Act 2003.

Purpose of the new rules

In the same way in which the CPR provided a new procedural code for both the county courts and High Court, promoting uniformity of procedure regardless of level of court, the FPR aim to achieve the same objective so that the same practice and procedure will be followed in magistrates courts, county courts and the High Court.

Principles

The FPR will be modelled on the CPR with the aim of ensuring that:

- (a) the family justice system is accessible, fair and efficient; and
- (b) the rules are both simple and simply expressed.

In order to achieve these aims, four principles are suggested with which to imbue the new regime:

- (1) modernisation of language;
- (2) harmonisation with the CPR;
- (3) creation of a single unified code of practice in addition to rules; and
- (4) alignment of the procedures in all levels of court.

What will this mean? Modernisation of language simply means that where archaic and outdated terms appear in existing family rules, these will be replaced by terms more fitted to the 21st-century court user. The harmonisation point is obvious given the number of statutory instruments currently providing the procedural framework in family proceedings.

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However, the consultation paper explains that:

... in one or two subject areas, such as rules relating to domestic enforcement of court orders, the new Family Procedure Rules may fall back on the CPR with adjustments rather than incorporating rules modelled exactly on the CPR within the rules.

As well as the plethora of secondary legislation presently governing family procedure, there are various other guidance documents including protocols and practice directions. The intention is instead to:

... create rules and practice directions for family proceedings that will contain all necessary procedural guidance for court users. Consideration is also being given to the use of appropriate pre-action protocols, which are used in the CPR.

It is proposed that the procedures in all three different types of family courts be aligned unless there are strong reasons not to do so.

The proposed rules

Under the heading of modernisation of language and process, which comprises part 1 of the consultation paper, views are sought on the suggestion that there might be service of documents by e-mail, which is not currently permitted. It remains to be seen whether this method is included in any new procedural regime given the issues of security with e-mail and the sensitive and personal nature of family proceedings, particularly those involving children.

The proposed amendments to terminology (see box, right) will be familiar to those with knowledge of the Civil Partnership Act 2004.

Views are sought on an appropriate term for the recipient parties referring to the terms respondent, co-respondent and party cited, which can often cause confusion to the litigant in person. It is also proposed that all three terms currently in use should be replaced by 'respondent'.

Part 2 of the consultation paper deals with matrimonial and civil partnership proceedings, in which proposed changes include, by default, a restriction on the time limit in which a respondent has to make an application. The dual procedures whereby a respondent applying for a divorce or dissolution has the choice of either

filing an answer incorporating a cross-petition or a freestanding petition are difficult to manage and it is considered more efficient if the rules reflect the current practice under CPR 20 (counter-claims and other additional claims), the main aim of which is to manage a claim conveniently and efficiently. One result of this proposal is that respondents would be left with a restrictive time limit in which to apply for their order. Currently they can make a freestanding application at any time, whereas under the new rules an application by a respondent would constitute a cross-application in the same proceedings and would thus have to be made within 21 days of the date by which they are required to acknowledge service of the original application, unless the court permits otherwise. It may be the case that a restrictive time limit will ensure that only serious applications are made and will discourage those who simply wish to apply as a means of delay and irritation to their prospective former spouse.

In adultery petitions, naming of the other party is strongly discouraged as a matter of good practice, unless there is a compelling reason to do so. Not naming is considered a more mature and conciliatory approach and one that is conducive to the reduction of animosity in a case. There is a suggestion that the

new rules take this a stage further by including a practice direction providing that the person with whom the respondent is alleged to have committed adultery should not be named and that such naming would be necessary only to support the application where the respondent was likely to defend the divorce or there were other special reasons. The question posed is whether there should be a complete ban on naming the other party under all circumstances. While this would have all the current advantages of not naming, there are disadvantages:

- (a) the respondent's ability to defend their case may be prejudiced; and
- (b) the applicant may be unable to provide evidence of the adultery on which they have sought to rely without the option of naming the other party with whom it is alleged the adultery took place.

Other suggestions are that if there is not an absolute ban on naming the other party, where the person is named they would not automatically be made a party to the proceedings, with the adverse effect of a party being cited but not entitled to receive a copy of the application in which they are named, such that there is the potential for a

Proposed terminology amendments	
Current term	Proposed new term
Decree nisi	Conditional order
Decree of divorce	Divorce order
Decree of nullity	Nullity order
Decree of judicial separation	Judicial separation order
Decree absolute	Final order
Ancillary relief	Financial order
Cause	Case or proceedings
Maintenance pending suit	Maintenance pending outcome of proceedings
Petition	Application
Petitioner	Applicant

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person to be named in proceedings without their knowledge and without the opportunity to refute the allegations.

It is also being suggested that the special procedure provisions for undefended divorces should be extended to applications for the annulment of marriages or civil partnerships. Currently the special procedure cannot be used in cases of nullity, requiring there to be a hearing in every case whether defended or not. If the court can be satisfied on the papers before it, is there any merit in

- whether a child has special health or educational needs; and
- whether there are or have been any other court proceedings.

In appropriate cases, the court would be able to intervene under the Children Act 1989.

It is also suggested that the questions above could be incorporated into the application form (previously a petition) such that it might be useful to have two

- (2) in any application for a search order, a freezing injunction or an order requiring an occupier to permit another to enter their land; and
- (3) in any application for an order against anyone for alleged contempt of court.

It is proposed that under the new FPR the following documents would be verified by statements of truth:

- an application or response (including amended versions);
- a reply complying with an order to provide further information about the contents of an application or response;
- a witness statement;
- a certificate of service;
- a statement of arrangements about children of the family; or
- any other document where a rule or practice direction requires it.

CPR 22 provides that parties may only rely on evidence verified by a statement of truth, which, it is claimed, is easier for the lay public than attempting to swear an affidavit.

Although not specifically referred to in the consultation paper, it is submitted that if the new FPR are to mirror the CPR, then affidavits will still have a place and that applications under s37 of the Matrimonial Causes Act 1973 would continue to be supported by affidavit evidence, as would applications for committal for contempt in breach of injunction cases.

Financial proceedings are covered in part 3 of the consultation paper and it is:

... envisaged that proceedings for ancillary relief will no longer be ancillary to the divorce/dissolution proceedings to which they relate.

(See paragraph 48 of the consultation paper). As a consequence, an application will begin all proceedings rather than there being a separate notice of intention to proceed with an application as currently made in the petition. Ancillary relief proceedings are proposed to be

The consultation paper proposes to have statements of truth instead of affidavits, which is the current practice under the CPR save in a few circumstances.

holding a hearing and putting the parties through unnecessary distress in an uncontested matter?

As for the statement of arrangements for children, there is:

... some debate as to the relevance of some of the questions and whether these are best dealt with as part of the divorce process or dealt with separately if needed.

(See paragraph 28 of the consultation paper). There is also a degree of overlap between the information that is required under Rule 2.3 of the current FPR 1991 as amended and that given in applications under s8 of the Children Act 1989. Furthermore, comment has been made that the information given to the court may not be timely, especially when details are given of the current residence of the children, which may very well change as a consequence of the divorce. The current proposal is that the statement is simplified to include questions regarding:

- details of the child's names, date of birth and gender;

versions of the application form, one for cases with children and one for those without.

While the advantages are obvious in that information is not repeated, there are fewer forms to complete and parties are only asked questions relevant to their circumstances, there are potential disadvantages where the wrong form is used by the parties or where there are no children at the time the application is made. If a child is born later but before pronouncement of a matrimonial or civil partnership order, what procedural provision would there be for notifying the court of the change in circumstances?

A final proposal in this part of the consultation paper is whether to have statements of truth instead of affidavits, which is the current practice under the CPR save in a few circumstances as set out in Practice Direction 32, paragraph 1.4, which provides that under the CPR, affidavits must be used as evidence in the following instances:

- (1) where sworn evidence is required by an enactment, rule, order or practice direction;

Ancillary relief proceedings

Given that the proposed reforms to the rules are to extend to the magistrates courts, this will mean that ancillary relief proceedings will be heard there too, but it is expected to extend only to those proceedings involving relatively small sums of money such that do not merit the level of detailed disclosure found in the county court and High Court. In recognition of that, a simplified ancillary relief procedure is proposed, set out at paragraph 53 of the consultation paper.

called 'proceedings for a financial order', which, it is submitted, is a phrase capable of being understood far more widely than the current title. It is proposed that the term 'financial remedy' will apply to all of the proceedings to which the ancillary procedure will apply.

Views are sought as to whether the proposed ancillary relief rules should apply to the following:

- applications under s27 Matrimonial Causes Act 1973 or part 9 of Schedule 5 to the Civil Partnership Act 2004 (failure to maintain);
- applications under the Matrimonial and Family Proceedings Act 1984 or Schedule 7 to the Civil Partnership Act 2004 (financial provision following overseas divorce/dissolution);
- applications under s35 Matrimonial Causes Act 1973 or paragraph 69 of Schedule 5 to the Civil Partnership Act 2004 (alteration of maintenance agreement during lifetime of the parties); and
- applications under Schedule 1 to the Children Act 1989 (financial provision for children).

It is submitted that the new rules should embrace all the above but particularly applications under Schedule 1 to the Children Act 1989, which have been plagued by inadequate forms for engaging in a detailed forensic examination of the parties' means. Most courts have resorted to the current ancillary relief forms E and the use of questionnaires pursuant to the comments made by Thorpe LJ in *Re: P (Child: Financial provision)* [2003]:

An aspect of this litigation that has struck me is its seeming irrelevance given the scale of the father's fortune. Acrimonious exchanges further corrode adult relationships that have already foundered. Moreover, the future relationship between the father and L is problematic. Accordingly, it seems sad that these money issues have had to be fought out. What help have the parties had to resolve their differences without contested hearings? We were told that there had been no attempt at mediation. Procedural reforms introduced in 2000 ensure that the court has the duty to explore settlement of Matrimonial Causes Act claims

before directing a trial. Would not such an obligation be appropriate in Schedule 1 claims, certainly where capital provision is sought?

The proposed reforms to family procedure would seem to encode the current practice that is only available if the parties consent to it.

Under the new draft rules it is also intended that matrimonial and civil

ignorance of the effect of that on a later application for a financial order. Put simply, anyone who failed to apply for a financial order before remarrying or entering into another civil partnership would lose their entitlement to apply. It is therefore intended that a:

... prominent warning of the consequences of remarriage on the right to apply for a financial order be given on

Ancillary relief proceedings are proposed to be called 'proceedings for a financial order', which, it is submitted, is a phrase capable of being understood far more widely than the current title.

partnership proceedings will be separated from related financial proceedings such that applications for financial orders will not be included within the application for the matrimonial or civil partnership order, which could lead to people remarrying or entering into a subsequent civil partnership in

the application for a divorce, dissolution or nullity order and on the acknowledgment of service.

(See paragraph 56 of the consultation paper).

Children's proceedings form part 4 of the consultation paper. Two freestanding

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Reference points

'Family Procedure Rules – A New Procedural Code for Family Proceedings (Consultation Paper 19/06)' is available at: www.dca.gov.uk

publications are intended to be incorporated into the new FPR, namely:

- the Private Law Protocol Programme; and
- the Protocol for Judicial Case Management in public law Children Act cases (Public Law Protocol).

In addition, and in order to provide further flexibility in cases involving children, as well as reduction of delay, it is

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proposed that the new rules will permit the fixing of the final hearing date at any point in the proceedings and the varying of the timetable at any hearing.

It is also intended that the court will be given 'robust case management powers' modelled on CPR 29, which deals with multi-track cases and one of the hallmarks of which is the ability to tailor the case management to the individual case, as well as to provide the court with general case management powers modelled on CPR 3, which would be applied to all public and private law Children Act proceedings. 'Robust case management' rather suggests that there will be more court intervention such as case management conferences, pre-trial reviews and schedules of issues such as are currently in use in public law cases pursuant to the Public Law Protocol. Views are sought as to whether these tools would be helpful in private law children cases. It is submitted that robust judicial attitudes might assist parties at war over their children.

Finally in this part – and, it is also submitted, long overdue – there is consideration of amendments to the current

Children Act forms to render them more user friendly, with more direct questions and tick boxes. It is also envisaged that any new forms would be accompanied by comprehensive user notes.

The proposed changes to the rules in family proceedings in magistrates court are to be found in part 5 of the consultation paper, which sets out the procedural differences that currently exist between the magistrates and the higher courts. The proposed extensions to the powers of magistrates courts are as follows:

- The power to order disclosure against a non-party (similar to CPR 31.17).
- The power to stay proceedings – although magistrates have limited

specific powers in this regard, it is proposed they should have a general power to stay proceedings.

- The power to issue a witness summons – currently this applies only to proceedings commenced by complaint, whereas the proceedings under the new FPR will begin by application.
- Appointing, changing or removing a solicitor from the court record.
- The authentication of documents – this is currently covered by Rule 9 of the Family Procedure (Adoption) Rules 2005, which is intended to apply to all family proceedings in all levels of court.
- Providing for evidence by way of affidavit – although there is a move away from affidavits generally, save in certain circumstances, as a consequence of the proposed alignment of procedure in all family courts, it is proposed that affidavits should be used in magistrates courts where the new FPR require it.

- The power to make civil restraint orders – it is proposed that Rule 16 and the Practice Direction to part 3 of the Family Procedure (Adoption) Rules 2005 should be applied to all levels of court.

- The power to grant interim injunctions – the magistrates court has no inherent jurisdiction to grant injunctions equivalent to the High Court under s37 of the Supreme Court Act 1981 or the county court under s38 of the County Courts Act 1984, although it does have some statutory powers to grant injunctions under the Family Law Act 1996, part 4 (the question is whether there should be a general power).

- The provision of written reasons in the family proceedings courts – currently these require the justice's clerk to record in writing the court's reasons for its decision before an order is made, which often creates a delay because of the time required for the preparation of written reasons. This is different from the practice in the higher courts where judgments are delivered orally at the same time as the order is made. The consultation paper makes it clear that HMCS does not intend that justices should make their order and agree the reasons afterwards, but that there should be an adjustment to avoid delay.

Appeals are dealt with in part 6 of the consultation paper which sets out the number and variety of ways in which appeals are commenced from decisions of a magistrates court in family proceedings and proposes a single process of appeal.

Conclusions

The questionnaire accompanying the consultation paper, comprises 43 questions covering the six areas identified within the course of this article. The consultation ended on 1 December 2006. The response paper is intended to be published in about five months time but as yet there is no timescale given for the implementation of any new Family Procedure Rules. ■

Re: P (Child: Financial provision)
[2003] 2 FLR 865