

11. Ancillary relief

11.1 Introduction

Ancillary relief refers to financial provision orders for parties to marriage, civil partnerships and children of their families as found in Part II Matrimonial Causes Act 1973 (MCA) ss. 21 - 40 save for an order under s.27(6) and by Chapter 3 s.72 Civil Partnership Act 1994 (CPA), Schedule 5 Part 1 paragraph 2(1) and for procedure contained in the Family Proceedings Rules 1991 (FPR) as amended by The Family Proceedings (Amendment) (No 5) Rules 2005 effective from December 2005 which now includes reference to financial relief following claims of separation or dissolution in Civil Partnerships. Those rules so far as costs are concerned in the proceedings have been further amended by the Family Proceedings (Amendment) Rules 2006 including a new rule 2.71 effective for all new applications made on or after 3rd April 2006. The previous law and rules as to costs apply to all applications made before that date and continuing thereafter. Costs are dealt with elsewhere in the Book.

Financial Relief has the meaning assigned to it by s.37 MCA and Schedule 5 para. 74 CPA. Ancillary relief is defined in rule 1.2(1) in a matrimonial cause; or civil partnership cause as defined by s. 32 CPA, and means:

- An avoidance of disposition order - s.37(2)(b) or (c) MCA and in Civil Partnership Proceedings an order under paragraph 74(3) or (4) of Schedule 5 CPA
- A financial provision order - in matrimonial proceedings means any of orders mentioned in s.21(1) of the MCA except an order under s.27(6). In civil proceedings partnership proceedings, any of the orders mentioned in para. 2(1) of Schedule 5 Part 1 CPA thus an order for:
 - Periodical payments.
 - Periodical payments to spouse for child of the family and an order for periodical payments to such person as may be specified by one of partners for benefit of a child of the family
 - Payment to a child of the family
 - Secured Periodical payments for spouse or partner
 - Secured Periodical payments order in favour of child of family - in case of partnership to a person specified to be paid one of the partners for benefit of the child, or
 - For child of the family
 - A Lump Sum order. In the case of Civil Partnerships note should be taken of Schedule 5 para. 3 where an order for interim lump sum may be for the purpose of enabling a partner to meet any liabilities or expenses reasonably incurred in maintaining

him(her)self or a child of the family. Furthermore an order for lump sum may be deferred or provide for payment by instalments which by order could be secured. Interest can be ordered on the deferred element or in the case of payment by instalments but the payment date for interest calculation cannot be before a specified date earlier than the date of the order.

- A Lump Sum order for child of the family - and in case of partnership for one of partners to pay to specified person for a child of the family, or
- To a child of the family
- An order for maintenance pending suit - s.22 MCA: or
- An order for maintenance pending outcome of proceedings - Schedule 5 para. 38 CPA
- A property adjustment order - s.21(2) and s.24 MCA or Schedule 5 para. 7(1) CPA:
 - Transfer of property order
 - Order for settlement of property and
 - Order for variation of settlement - and these include variation of Pre-Nuptial and Post Nuptial settlements: *C v C (Variation of Post-Nuptial Settlement)* [2003] EWHC 742(Fam) [2004] 2FLR 1 Wilson J

As yet agreements made pre-registration of civil partnerships as to status have not been defined.
- A variation order, - s.31 MCA or Schedule 5 Part 11 CPA
- A pension sharing order - s.21A MCA or Schedule 5 Part 4 CPA
 - Ss.24B to D MCA and paras. 15 to 19 Schedule 5 CPA in sharing and
 - Ss.25B to D MCA and in respect of arrangement (Pension Attachment)

A Pension Attachment order can only be ordered in respect of a Petition in respect of dissolution of marriage presented after 1st July 1996 and for Pension Sharing in respect of petitions presented on or after 1st December 2000. Do remember that this relief is not available in applications ancillary to Judicial Separation petitions or petitions for separation orders in partnership.

Do note that a pension sharing order may not be made in respect of a pension arrangement which is the subject of a pension sharing order in relation to the civil partnership or has been the subject of pension sharing between the partners. This also applies to shareable state scheme rights, nor to prejudice any requirements that may be imposed in respect of future benefits under part 6 of Schedule 5. You should also now bear in mind that rule 118(F) FPR (Amendment) No:5 Rules 2005 introduces Form P which should be used in every case when

a pension is significant, and where a pension sharing order might be made. It can be used voluntarily where scheme member signs the authority on first page. If not, it can be ordered to be completed at First Directions Appointment (see below)

When you are sitting you should have available in the District Judge's room a Family Court Practice (Red Book published by Jordans) and Rayden and Jackson on Matrimonial Causes or Butterworths Family Law Service (Vols. 4 and 7 (Bulletins for update)) and "At a Glance" a very useful guide of tax rates, mortgage payments, motoring costs, average earnings etc. published by the Family Law Bar Association. If you are not experienced in the work or the court where you are sitting it might be advisable to ring the court to see what books are available to you, and if none then you should take your own if you have one!

It has been recognised that District judges have speciality in ancillary relief cases - *Cordle v Cordle* [2001] EWCA Civ 1791 Thorpe LJ, but big money cases should be transferred after consultation with your Family Liaison Judge to the High Court. What is a big money case is uncertain but guidance in your area should be sought from a Full-time District Judge. Property inflation may take assets in many marriages over £1,000,000, but this may involve only the Matrimonial Home and a small amount of investments when transfer will not be justified and may be disproportionate. However where there is dispute as to disclosure (see below) and valuations especially over business interests, the operation thereof, and particularly with property abroad or investments offshore and/or trusts then complexity will justify transfer if over that amount.

Ancillary Relief proceedings relating to civil partnerships are at the moment restricted to the Principal Registry and specially designated civil partnership proceedings county courts. The High Court Registries that may entertain civil partnership proceedings are those with the designated county court registry in its district. You should refer to the Civil Courts (Amendment) Order 2005 (2005 No. 2923) and rule 1.2 paras. (vii) to (ix).

Appeals from your orders in cases heard in the County court are to specially ticketed Circuit Judges under FPR rule 8.1(3), as a review. It is not a re-hearing, nor is fresh evidence admitted unless it is in the interests of justice that it should be - see *Cordle v Cordle* (above).

Your role as the judge is important at every stage. The rules are a procedural code - see rule 2.51B that applies rules 2.51D to 2.71 FPR to any application for ancillary relief, applications under s.10(2) MCA and s.48(2) CPA, with the overriding objective of enabling the court to deal with the case justly - rule 2.51D(1). The rule at para.(2) states that dealing with a case justly includes so far as practicable -

- (a) Ensuring that the parties are on an equal footing
- (b) Saving expense
- (c) Dealing with case in ways which are proportionate -

- (i) to the amount of money involved
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) Ensuring that it is dealt with expeditiously and fairly; and
- (e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

The court must seek to give consideration to the overriding objective when exercising its powers under the rules and interpreting the rules, and in doing so the parties are required to assist the court in furthering the objective - FRR 2.51D (3) and (4).

By the Practice Direction of 31st January 1995 at paragraph 4 it is a duty **owed to the court both by the parties and their legal representatives to give full and frank disclosure** in ancillary relief applications, and sets out what the parties and their advisers must do by using their best endeavours - see Red Book page 2562 (2006 edition); [1995] 1 FLR 456. You should also consider the decision in *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424.

You must actively manage the cases that come before you to further the objective which includes:

- (a) Encouraging the parties to co-operate with each other in the conduct of proceedings.
- (b) Encouraging the parties to settle their disputes through mediation, where appropriate
- (c) Identifying issues at an early date;
- (d) Regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues
- (e) Helping the parties to settle all or part of the case;
- (f) Fixing timetables or otherwise controlling the progress of the case;
- (g) Making use of technology; and
- (h) Giving directions to ensure that the trial of a case proceeds quickly and efficiently.

The application should be actively managed whenever it comes before the court whether by paper application or at the key hearings, the First Directions Appointment and Financial Dispute Resolution hearing (see below) that will take place before the final hearing in nearly every application. The purpose is to avoid unnecessary trials and to define as early as possible

the issues and to control costs. At every stage the court before a hearing should be presented with an estimate of costs incurred to date, what paid and the likely amount of the costs if the case proceeds to trial.

To ensure that a case can be actively managed your objective should be to see that you have had the opportunity to have read the key material in advance of the hearing. To ensure this can be done it is essential that the parties observe the timetable set by the court and the court files are kept in reasonable order and available to you at your arrival at court.

You should remember that the application is your investigation – FPR 2.62.4. You make take evidence orally and may at any stage of the proceedings whether before or during the hearing, order the attendance of any person to be examined and order the disclosure and inspection of any document, or require further statements, but not sworn statements from persons who are not parties – *Wynne v Wynne and Jeffers* [1980] 1WLR 69. The following points may assist:

- If you do order statements from a party they should be sworn and serve as part of that party's evidence in chief.
- Do not order attendances for production of documents where production will help dispose of an issue or the case and save costs, and do not do so to produce documents that a party could not be compelled to produce at trial.
- If you do order a person to attend for examination then remember that person is entitled to representation and the conduct of the hearing and attendance before the final hearing must not be oppressive and must give respect to privacy of person's correspondence – *Frary v Frary* [1993] 2FLR 696 and may require consideration of Article 8 Schedule 1 Human Rights Act 1998.
- Application for an appointment should not be made ex-parte but should be supported by evidence – *B v B (Production Appointment: Procedure)* [1995] 1 FLR 913.

Do remember if you consider that the issue is complex or that the case merits consideration by the judge then you should transfer it – FPR 2.65. Pending the final hearing you may make interim orders that you consider just, but not interim capital orders for appropriation of property – *Wicks v Wicks* [1998] 1 FLR 479 in matrimonial causes.

Do also bear in mind the decision in *Bowman v Fells* [2005] EWCA Civ 226 [2005] 2 FLR 247 where the court held that the involvement of professionals in advising clients in the proceedings does not mean they becoming involved in an arrangement that might lead to disclosure having to be made under Part VII, s.328 Proceeds of Crime Act 2002.

If you hear the application, after your investigation your duty is to make such order as you consider just, and indeed you make interim orders on the same basis (see later). Complimenting MCA 1973s.24A and Part 3 Schedule 5 CPA (orders for the sale of property following the making of secured periodical payments, lump sum orders and property

adjustment orders) is your power to order sale of land under CCR Order 31 rule1 as that rule applies to causes or matters in the Chancery Division - FPR 2.64.

11.2 The Protocol

The Pre-application protocol appears in the President's Practice Direction 25th May 2000 [2000] 1 FLR 997 in anticipation of the new rules then shortly to come into force (5th June 2000) as amendments to FLR and governing the application for ancillary relief. In particular under 2.1 the court "*will expect the parties to comply with the terms of the protocol.*"

The summary says that the aim of pre-application proceedings is, "*to assist the parties to resolve their differences speedily and fairly or at least narrow the issues and, should not that be possible, to assist the court to do so.*"

The following points should be considered from the protocol when you are dealing with an application at a directions hearing, whether it be a first directions appointment or financial dispute resolution hearing.

- It is designed to apply to all kinds of applications for ancillary relief.
- Starting the application is not regarded as a hostile act.
- Option of pre-application disclosure and negotiation should only be followed where both parties agree, and there are not likely to be issues about disclosure.
- The parties should consider whether mediation is an option.
- The parties must bear in mind the overriding objective.
- Principle of proportionality should be borne in mind at all times to ensure that the costs of procedure are proportionate to the financial value of the subject matter of dispute - see *Piglowska v Piglowski* [1999] 2 FLR 763 HL
- You are entitled to consider failure to make pre-application disclosure and offers may amount to conduct that can within your discretion lead to costs penalties CPR 44.3(5).
- Parties should seek to clarify issues. For this purpose they "*must provide full, frank and clear disclosure of facts, information and documents which are material and sufficiently accurate to enable proper negotiations to take place to settle their differences. Openness in all dealings is essential.*"
- If entering into voluntary disclosure should use Form E (see below) as guide to disclosure of assets.
- If possible identify experts where expert value is necessary - i.e. where parties cannot agree values- and where possible from single valuer jointly instructed. The costs should

be kept proportionate, and made clear to expert that might ultimately be reporting to the court so that should be bound by the guidance given in CPR Part 35.

- If agree separate instructions of valuers then should agree that reports should be disclosed.

The protocol is an important step that the parties should use to avoid an aggressively adversarial application and should enable the parties to know the substance of each other's case and importantly have given advance disclosure of their assets. You should enquire whether the parties had participated in one.

Does the Protocol apply to applications for financial relief in respect of partnerships?

You should now bear in mind rule 2.71(5) so far as costs are concerned because failure to observe the Protocol may amount to conduct as failure to observe a practice direction if the court considers this relevant.

11.3 The Application

1) As the person applying is known as the applicant FPR 2.51B and may be the respondent to the main suit, you may when drawing your orders seek to identify the parties ("applicant husband/wife or in civil partnerships applicant (name) and respondent (name)") appropriately to avoid confusion when the respondent may be the petitioner in the main cause.

Do note that a respondent to the main suit is entitled to be heard on the application whether or not he/she has filed an answer or an acknowledgement of service indicating that wishes to be heard - FPR 2.52.

The persons who may apply are set out in FPR 2.54 when the applicant is a child. Other than a parent or guardian the list includes:

- (a) A person who has a residence order in respect of child of the family, and any other person entitled to apply for a residence order.
- (b) A Local Authority where a care order has been made.
- (c) The Official Solicitor if a guardian ad litem under FPR 9.5.
- (d) The child who has been given permission to intervene in the cause to apply - see *Downing v Downing* [1976] 3WLR 335 where child at University and requiring maintenance applying to intervene. Of course it may now be more appropriate for a child in those circumstances to apply under s.15, Schedule 1 Children Act 1989.

You should note that where the application is for variation of a settlement order, and unless the court is satisfied the variation would not adversely affect the estate or interest of a child, direct that the children be separately represented. This may be done by application made on

behalf of the child by solicitor or counsel. You may then appoint the official solicitor or other fit person, provided that such person does not have any interest adverse to the child and a certificate to this effect is filed, to represent the child as guardian ad litem and give directions - FPR 2.57.

The applicant should apply in the prayer of the petition or answer - FPR 2.53(1), and should state the form of relief being sought if for:

- (a) Maintenance pending suit or outcome of proceedings (aa)
- (b) Financial provision order (for definition see above).
- (c) Property adjustment order
- (d) Pension sharing order.

The requirements of what the petition should contain are set out in Appendix 2 to the FPR.

If not contained in the prayer to the petition then the permission of the court may be sought in Form A or, at trial itself, or where the parties are agreed, without permission in Form A, and if the form of relief sought is not required to be made in the petition or answer, then can be made on notice in Form A - FPR 2.53(2) and (3).

It is the writer's view that where an application for ancillary relief in the form sought in a consent order has been made in the petition or answer it is not necessary for a Form A to be filed for the making of a consent order.

There is no time bar to an application for ancillary relief that may be made many years after the dissolution of the marriage, but there is a statutory bar that re-marriage prevents an application if not made in the petition or answer - MCA 1973 s.28(3). You should also note the provisions of Part 12 Schedule 5 CPA.

2) Do not forget under MCA s.10(2), s.48(2) to (5) CPA in respect of decree nisi or conditional decree pronounced on factual grounds of two years separation by consent (MCA s.1(2)(d); s.45 (b) CPA) and five years separation (MCA s.1(2)(e); s.45(c) CPA) the respondent may apply for consideration of his/her financial circumstances that may bar the pronouncement of decree absolute unless you are satisfied there are no circumstances justifying delay, or the court has obtained satisfactory undertaking to make financial provision for the respondent as the court may approve. Such application should be made by notice in Form B - FPR 2.45. the application will be treated as an application for ancillary relief, and all references to form A in the rules shall apply.

3) If the marriage in which a decree nisi of dissolution has been pronounced but not made absolute and the marriage is in accordance with usages of Jews or other religious usages; and if the parties must co-operate if the marriage is to be dissolved according to those usages on

the application of one of the parties you have a discretion to prevent the decree being made absolute until you have a declaration of both parties that they have taken the necessary steps according to those usages, or you are satisfied that in all the circumstances of the case it is just and reasonable to do so, knowing that an order made may be revoked at any time. Where the applicant is a Jewess and wishes to obtain a "Get" from a religious court you should be reluctant to allow a decree absolute before the get is obtained, or to make a final order for ancillary relief until you know that a "Get" has been given and accepted by both parties. If you do grant the final decree before you are satisfied that religious formalities have been concluded you may find that the woman is tied in the marriage, and will be unable to re-marry according to her religious usages - MCA s.10A.

The application is made on notice supported by evidence - FPR 2.45A.

The form of declaration and the required documents that must be filed with it by the parties following an order preventing the decree absolute being made absolute to prove compliance with the religious usages are set out in FPR 2.45B.

11.4 The Form A - FPR 2.61A

(a) This is the form that gives notice of intention to proceed with an application for ancillary relief contained in the petition or answer, and must be in a designated county court in that Registry of the High Court. The Principal Registry is a designated county court for this purpose.

Form A must indicate the following:

- The terms of Pension Sharing Order (sharing or attachment) sought.
- The land should be identified where a transfer of property or avoidance of disposition order is sought, and whether the land is registered or not. If it is the Land Registry Number should be stated, and particulars of any mortgage(e) to which the land is subject
- Give details of any third party interest alleged to exist - FPR 2.59(2).

If this information is not given then you may direct that it should be at the First Directions Appointment. This is necessary for the reasons of service upon interested parties (see below).

(b) On the filing of form A the court office must fix a first appointment (FDA) between 12 and 16 weeks from that date and give notice of the appointment, which must be given to the respondent within 4 days.

Once the date for FDA is given and any subsequent date they cannot be cancelled without your permission, and if you do agree to cancel a date then you should immediately order a new one - FPR 2.61(5). This is consistent with active case management and emphasises that the timetable is for the court to control consistent with the overriding objective.

(c) Service of Form A

The requirement to serve Form A within 4 days may lead to difficulties if the whereabouts of the respondent is not known, or if the respondent is a serviceman. The Practice Direction of 13th February 1989 sets out how various government departments may be requested by you to disclose addresses to the court. Following the change of provision of benefits and Tax credits disclosure from the Revenue may only be sought under the court's inherent jurisdiction. As the county court has no inherent jurisdiction you should transfer the application to the High Court (provided you are a District Judge or Deputy District Judge of the High Court, and the court you are in is a High Court Registry) and make the order. For the form of order you should refer to the guidance issued by the President's Office in November 2003 - see the Family Court Practice 2005 edition, page 2633.

Under FPR 2.59(3)-(5) copies of Form A and E (see below) completed by the applicant, shall be served on:

- the trustees of a settlement and the settler, if alive, where an application of variation of a settlement is sought
- where an avoidance of disposition order is sought; the recipient of the disposition
- such other persons as you may direct
- Form A must be served on a mortgagee named therein who may apply within 14 days of service apply to be served with Form E.
- Form A should be served on the pension provider together with prescribed information set out in the rule - FPR 2.70(6)-(7).
- Any other person you direct to be served.

Any person who is required to be served with Form A and Form E may within 14 days of service or receipt of Form E file a sworn statement in answer.

Consideration should be given to the special provisions under FPR rule 2.70 where the applicant seeks a pension sharing order, because unless the person seeking the person with the pension rights has details of the value of the rights or benefits no older than 12 months before the date of the first appointment, that person must within 7 days of receiving notice of the first appointment request the person responsible for the pension arrangement to furnish values of the arrangement, and then serve that information within 7 days of receipt on the applicant - paras. (2) & (3). There are consequential provisions within the rule under paragraph 8 & 9 that would allow the person responsible for the pension arrangement against which an application is made to file and serve an answer within 21 days of provision by the applicant of part 2.13 of Form E, at the arranger's request. This is a very rare occurrence, but if it does happen then the court must, within 4 days of filing the answer, give the responsible

person notice of the date of the first appointment at which the responsible person is entitled to be represented.

Under FPR 2.60(1) where an allegation of adultery under s.1(2)(a) MCA is made or an improper association with a named person then you may order service of the document or part of it that contains the allegation on that named person together with Form F (Gives notice of the allegation - see FPR Appendix 1).

If an allegation of adultery or an improper association is made then if the third party is named he/she may file a sworn statement in answer to the allegation - FPR 2.60(3). You must then decide whether or not the named person should continue to play a part in the proceedings and/or whether the allegation is of significance in the application. If the is marriage short, but is a big money case then see the effect of conduct, and generally - *Miller v Miller* [2006] UKHL 24.

11.5 The First Appointment:

The document that will dominate your file at first appointment will be the form E, the current form of which is to be found in Schedule 1 to the Family proceedings (Amendment) (No. 5) Rules 2005. This should contain all the information concerning the party's means. It is a sworn document. It is that party's disclosure of their assets and liabilities and should be "full and frank" disclosure. Guidance notes are contained on the front of the document that make this very clear. If a party does not have the information necessary then to answer all of the questions then this should be stated and that the disclosure will follow. That party should then send the information as soon as possible or be directed to do so, giving a date and time for compliance. If served voluntarily after Form E, if an explanation for failure to serve is not given in Form E, then it should be given with Disclosure - FPR 2.61B(5). Wilful failure to disclose information may amount to conduct that the court will find inequitable to disregard at a final hearing - MCA s. 25(2)(g). This may have costs consequences FPR 2.71. Form E is divided into sections to show you:

- General information about the parties and children .
- Properties owned by the parties, whether in their sole name or jointly and their values together with details of mortgages and other charges secured.
- Savings, including all cash sums and personal belongings held and worth in excess of £500.00. Investments and where they are, whether in sole name of person swearing the document or in joint names of parties.
- Life Assurance Policies.
- Business assets and directorships.
- Debts and liabilities again whether sole debts or joint liabilities.

- Income in the past year together with P60 and P11D and if in business profits from all sources in the past 2 years.
- Benefits, if received and tax credits.
- Pensions.
- Summary of the above to show the court the net worth of the party swearing the document.
- Information as to future need for housing, income and outgoings.
- Other factors considered relevant under MCA s. 25(2), in particular sections concerning particular contributions and behaviour that a party wishes the court to take into account.

There should be attached to Form E the following documents

- Any valuation of the matrimonial home obtained in the last 6 months.
- Any valuation obtained of any other real or leasehold property.
- Mortgage statements or statements and/or statements of other charges on land.
- Bank and Building Society statements for previous 12 months.
- Surrender value of life policies.
- Last 2 years accounts of any Company in which the party is a director and any valuation of the company.
- Cash Equivalent Transfer Value (CETV) obtained in the previous 12 months of any Pension arrangement or copy of letter of request to Pension trustees or Managers seeking the value.
- Last 3 payslips and last P60.
- If self-employed or partner in a firm last 2 years' accounts.

You should also note that in respect of maintenance of children Box 1.13 seeks an estimate of CSA (Child Support Agency) calculation.

You should also note that if there has been an application to the CSA for child maintenance then you have no jurisdiction to make Child Periodical Payment orders save in special circumstances set out in Child Support Act 1991 s.8. e.g. School fees; top-up maintenance; paying party not resident; step-parent the paying party.

Form E should have been exchanged at the same time, and filed simultaneously by the parties not less than 35 days before the hearing - FPR 2.61B(1)-(3).

No disclosure or in section of documents may be made or given between the filing of the application and first appointment unless by Form E, except at least 14 days before the hearing, each party must file with the court and serve on the other party:

- (a) A concise statement of issues between the parties.
- (b) A chronology.
- (c) A questionnaire **setting out by reference to the statement of issues** any further information and documents requested from the other party, or a statement stating no further information is required. The latter you will find is very rarely or ever provided!
- (d) A notice in Form G stating whether the party will be able at the hearing to treat it as a Financial Dispute Resolution hearing (FDR) - see later.
- (e) Information confirming the names of all persons served under FPR 2.59(3)-(4) and that there are no other persons who have to be served.

These provisions contained in FPR 2.61B(6)(7) and (9) and before should be closely monitored at the hearing, as a failure to comply will inevitably upset the timetable unless you maintain management of the application to ensure that the rules are complied with and information is supplied as quickly as possible to stop cost spiralling and to bring the application to resolution as quickly as possible within the parameters of the overriding objective. You are obliged to consider these matters under the rules: FPR 2.61D.

The parties are obliged to attend the FDA personally unless the court orders otherwise - FPR 2.61D(5). Non-attendance therefore without good reason should result in a costs order being made against the defaulting party.

If a party has not exchanged or filed Form E within time then you should consider adjourning the FDA and consider ordering costs against the party who is in default. You may order the FDA to be adjourned to the FDR in a relatively straightforward case and give directions for compliance by that date backed with a penal notice if necessary. The attachment of a penal notice to an order compelling filing and service of Form E against a party in default should be seriously considered in any event.

You should not allow questionnaires to be "fishing" expeditions. The highlighting above should be noted. If the questionnaire is not relevant to the issues between the parties you should be asking the requesting party what the relevance of the question is, and strike it if it has no relevance. Under FPR 2.61D you must consider the extent to which the questionnaire should be answered, and what documents, if any should be produced, giving directions accordingly. You should also bear in mind the provision of rule 2.61D(2) as from 3rd April 2006 when

considering whether or not to make a costs order under rule 2.71(4) as particular regard must be given to the extent that a party has complied with the requirement to send documents with Form E.

You should also give consideration to, and direct if necessary:

- The valuation of assets (including where appropriate the joint instruction of joint experts)
- The filing and service of a Pension Enquiry Form in Form P in full or in part where information about party's pension is required in answer to application for pension arrangement or sharing is made - see *Martin-Dye v Martin-Dye* (CA) 26th May 2006.

In respect of instruction of experts consideration should be given to FPR 2.61C where Civil Procedure Rules (CPR) 35.1 to 35.14 apply with modification except CPR 35.5(2), definition of an expert; and 35.8(4)(b) - limitation of expert's fees and ordering party to pay money into court as security.

The Best Practice Guide of December 2002 suggest that initially the parties should jointly instruct experts, but the instruction of experts is subject to the overriding objective. Consideration should be given to the decision in *Daniels v Walker* [2001] 1WLR 1382 and *Cosgrove v Pattison* (2001) The Times 13th February. You should note that expert evidence should be restricted to that which is reasonably required in the proceedings. The parties should be encouraged to agree upon the experts they require and where joint instructions are to be given to a single expert then fees should be shares equally. If parties instruct the single expert separately then copies of those instructions should be served on the other party. Questions of the expert may be put within 28 days of receipt of the report.

It may be beneficial when directing as to experts to be instructed to write in to the order that a copy should be served on the expert so that he will be aware of the court's timetable and you may think of suggesting that a copy of CPR 35.14 is given to the expert that will remind him/her of the right to apply to the court for directions in respect of any difficulties experienced in the preparation of the report, that is for the court, in any event.

Do note that from 1st October 2005 by Family Proceedings Amendment Rules No. 4 2005 (new rule FPR 10.20A) it will not be necessary to obtain the court's consent to disclose the relevant case papers to the expert for the purpose of reporting.

- Must unless it is considered unnecessary direct that the case be referred to an FDR.

You may not consider that an FDR is necessary in a straightforward application for variation of periodical payments order where you cannot resolve the application at the FDA, especially where the parties are litigants in person, or where the extra hearing will make the burden of costs, where parties represented, disproportionate. If you decide that an FDR is not appropriate then you must order one or more of the following:

- A further directions appointment.
- That an appointment be fixed for the making of an interim order.
- Fix a final hearing, and if doing so decide the level of judiciary to hear the application.

To assist you should consider the contents of the Practice Direction of 5th June 1992 [1992] 1 WLR 586, or FCP page 2639 para. 4. Cases should only go to the High Court where the complexity, difficulty or gravity of the issues merit the transfer, and if in doubt, contact should be made with the Family Liaison Judge or before doing so first discuss with your Designated family Judge, and in particular consideration should be given to:

- (a) The capital value of the assets involved, **and the extent to which they are available for, or susceptible to, distribution or adjustment.**

You will have knowledge of capital values in your area. The fact that there may be a matrimonial home worth over £1 million + does not mean that the case merits transfer, or indeed more than one property, if there are no other issues being argued that make the application complex. What is a big money case it is submitted is not just based on values of assets but must also take into account other issues, eg:

- (b) Any substantial allegations of fraud or deception or non-disclosure.
- (c) Any **substantial** contested allegations of conduct.

You should bear in mind that the decision of the Court of Appeal in *Cordle v Cordle* (above) and also that an appeal from you can be transferred to the High Court where you feel, whether on application by a party or otherwise, that the appeal raises an important point of law or there is some other justification for the transfer.

- That the application should be adjourned for out of court mediation, or private negotiation: or **exceptionally generally**.
- Make an interim order where an application has been made under FPR 2.69F for maintenance Pending Suit or the outcome of the proceedings (see below), but this is your discretion and may have to be adjourned for this purpose dependent upon time available to you in a list with a number of FDAs.
- Treat the hearing as an FDR subject to form Gs filed by the parties, or at least resolve some of the issues but in that event you must consider FPR 2.61E (below).

Orders for valuation of Pensions can be made against Government Departments, e.g. Ministry of Defence where details of service pension has not been given. You may also wish to consider valuation of pensions by an actuary where it is argued that CETV may not be appropriate valuation.

If a party has not produced Form E you should order filing and service by a date and time, and if the failure is wilful then the order should be supported by a penal notice (see above), and/or a provision that the party should attend the next hearing which may be for further directions or the FDR, similarly supported, and a warning that in default orders may be made in the party's absence based upon the evidence before the court. You should be wary of Article 6 Schedule 1 Human Rights Act 1998.

If you think it would be advantageous for the court to have statements from the parties concerning issues that are to be argued, such as contributions or conduct then you should order them to be filed and served by a time and date.

You should note that a party may apply for further directions. It may be possible to deal with an application on paper, but where an order is made against another party without notice for non-compliance or for production of documents, that have been ordered to be produced and have not been, then you should give that party permission to apply within a specified time after service of the order for relief from any sanction order that you may have made. You should note that a party, after FDA is not entitled to seek production of further documents other than as ordered in your directions - FPR 2.61D(3).

11.6 Interim Applications – FPR 2.69F

At any stage in the proceedings a party may apply on notice for maintenance pending suit or the outcome of the proceedings or interim periodical payments or an interim variation order. The hearing date must not be within 14 days of the notice of application having been filed - FPR 2.69(1) &(2) unless time has been abridged (see below).

It is the duty of the applicant to immediately serve the respondent with the application, and if made before the filing of Form E then the following should also be served:

- A draft of the order sought.
- A **short sworn statement** setting out the reasons for the order sought and information about the applicant's means.

Not less than 7 days before the hearing of the application the respondent **must** (unless he/she has already filed form E) file with the court and serve on the other party a sworn statement in answer to the application - FPR 2.69F(4) & (5).

Do note that a party by FPR 2.69F(6) may apply for any other form of interim order with or without notice, but where made with notice then the above provisions apply to it. Of course an application may be made to abridge time under CCR Order 13 rule 4. If the application is made without notice then the provisions of paragraph 1 of the rule apply. It is not easy to contemplate the making of an order in such circumstances unless Form E has been filed, certainly if any order is made there should be a return date given so that the other party can be heard as quickly as possible, or at the very least being given permission to apply on short notice.

It should be noted that if the application is for MPS then the grounds are set out in s.22 MCA 1973 and Part 8 para. 38 of Schedule 5 CPA. The court has discretion to make an order for periodical payments against the other spouse from a date no earlier than the presentation of the petition until final decree, **as the court considers reasonable**. The court does not have to enter into the enquiry under s.25 MCA 1973 or under Part 5 Schedule 5 CPA.

The order may include a provision to meet the costs liability of the applicant - *A v A (Maintenance Pending Suit: Provision for Legal Fees* [2001] 1FLR 377, approved by the Court of Appeal in *Wermuth v Wermuth (No 2)* [2003] EWCA Civ 50 [2003] 1FLR 1029. The President's Practice Direction introducing the new costs rule FPR 2.71 makes it clear that an order for MPS including provision for a partner's costs is not a costs order but an order under s.22 MCA and therefore rule 2.71 does not apply but will of course apply to any application for costs of the application. There is no reason why the same principles should not apply to Civil partnerships.

An application for MPS, should be continued as interim periodical payments from final decree in Divorce, Separation, Nullity proceedings or a conditional order of dissolution or nullity of civil partnership, if it is felt that the ancillary relief proceedings will not be resolved before final decree, as the order will normally make provision for payment by the receiving party of essential outgoings to enable the home to be run, and may include top-up provision for the support of children, or payment of school fees. Do remember apart from a school fees order you have no power to order payment to a recipient that is not a party to the proceedings. Thus if payment is required to mortgagee, Insurer or service provider of essential services to the matrimonial home applicant and children may be residing, and in receipt of benefits, thought will have to be given to recitals by agreement for payment of these items as preamble to order, or by undertakings, although breach will not permit committal proceedings. Judgment Summons proceedings may be possible but see FPR Part VII rule 7.4 onwards.

Remember under FPR 2.67, if order for MPS not made to continue as interim periodical payments, or a final order for periodical payments is sought in the same terms, then the party in whose favour the order is made may request in writing that the order continue as an order for periodical payments provided that an application for relief has been made in the prayer of the petition, application or answer. Where such a request is made, the proper officer shall serve on the paying spouse or civil partner a notice in Form 1 requiring any objection to an order to be made to be filed in court and served on the applicant spouse or civil partner within 14 days after service. If no objection is received by the court you may make the order without attendance and provide for it to be served on the parties.

During the hearing it will be a matter for you how much oral evidence you will entertain, if any, as the order will in the ordinary application be for a short term and designed to preserve the status quo to maintain the family, but of course the more wealth there is the more complex might be the issues, and the application will largely be 'needs' based.

11.7 Applications under s.37 MCA 1973.

The application is intended to prevent a spouse or partner from conducting transactions intended to prevent the court from making orders for financial relief or reducing assets available for consideration in the application. The section covers applications for ancillary relief save for applications under MCA 1973 s.31(6) (Variation of secured periodical payments orders from estate of deceased former spouse secured on property) and s.35 (Variation of maintenance agreements). In Civil Partnership applications Part 14 applies to applications brought under Parts 1,2,4,8, 9 or 11 (other than para. 60(2), or para. 69 of the Schedule

The powers under this section supplement the power to make orders under the county court's limited inherent jurisdiction under s.38 County Courts Act and the County Court Remedies Regulations 1991. It also supplements the High Court's powers to make freezing orders under s.37 Supreme Court Act 1981, but do note that any application for a Search orders, and world wide orders to prevent disposition of property outside the United Kingdom will have to be made in the High Court, and will require transfer of the application for this purpose.

If an application for ancillary relief has been made then **the court may** if it is satisfied by sworn evidence on the application of the applicant for ancillary relief make the following orders provided that the dealing or disposition referred to in the case of proceedings relating to marriage did not take place before 1st January 1968, and in the case of Civil Partnerships before the registration thereof:

- (a) restrain the other party or take such other appropriate action to prevent that party from disposing of or transferring out of the jurisdiction any property, or otherwise dealing with any property **with the intention of defeating the claim for financial relief;**
- (b) that the other party has, with that intention made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;
- (c) in a case where an order has been made for financial relief the party against whom the order has been made has made a reviewable disposition with the intention of defeating the order then the court may make an order setting aside the disposition.

By FPR 2.68(1) you have the power to make an order under (a) above, but in the event of you thinking it should be heard by the judge you can transfer it under FPR 2,65.

Where you make an order to set aside a disposition, and you may do so in respect of any disposition before or after marriage except one for valuable consideration (other than marriage) to a person without notice of the intention and acting in good faith under (b) and (c) above, then you shall give consequential directions as you think fit for giving effect to the order that may include the payment of money or disposal of property. You may order monies to be paid into court or to be held by the party's solicitor. This may be beneficial in the event

of subsequent bankruptcy putting the applicant in the position of a secured creditor, *re Mordant* [1996] 1 FLR 334.

For an analysis of the court's powers under (a) above you may wish to refer to the decision of Mumby J in *Re A* [2002] EWHC 611, [2002] Fam 213.

You should note the statutory presumption where the disposition takes place less than 3 years before an application made under the paragraphs above, and you conclude under (a) and (b), that the disposition or other dealing would have the consequence, and under (c) has had the consequence of defeating the application for financial relief then, unless the contrary is shown, it is deemed that the disposition or dealing did have that intention.

The section does not apply to a disposition made by will or codicil, but covers all those activities mention in MCA s.37(6) MCA, and Para. 75(2)(b) Schedule 5 CPA, but disposition does not include the surrender of a tenancy. If it is believed that a tenancy whether sole or joint is about to be surrendered then an application should be made under (a) above to you to restrain the surrender, if an undertaking is not proffered, *Newton Housing Trust v Al Sulemein* [1998] 2 FLR 690 HL; *Bater v Greenwich London Borough Council* [1999] 2 FLR 993. By s. 166 Pensions Act 1995 you may also make orders in respect of terminal grants and pension rights.

Property includes property outside of the jurisdiction, but not that belonging to third parties, *Hamlin v Hamlin* [1986] 1 FLR 61 and see the interesting case *McCladdery v McCladdery* [1999] 2 FLR 1102 CA..

The application to restrain disposal of property will be made usually without notice, and should be accompanied by a draft order and sworn statement. You should provide for an early return date (usually 7 days), and/or give permission to apply.

An application to set aside a disposition that has already taken place under (b) and (c) should be made in Form A and shall be heard where practicable at the same time as the final hearing for ancillary relief - FPR 2.62(2).

Remember these orders are draconian in consequence, and if involving Bank accounts being frozen you should be careful to ensure that in your order that you make some provision for the maintenance of the other spouse or partner, and order that spouse or partner by the return date to file sworn evidence of means, and in answer to the allegations made, if there is not already form E filed so that you will have some knowledge of that party's needs.

11.8 The Financial Dispute Resolution Appointment (FDR) – FPR 2.61E

By paragraph (1) of the rule the appointment must be treated as a meeting “**held for the purposes of discussion and negotiation**” and paragraphs (2) to (9) of the rule apply. Thus the following should be noted:

- You should have on the file not later than 7 days before the hearing, from the applicant details of all offers and proposals, and responses to them, including those made wholly or partly without prejudice, but such disclosure to you does not make material admissible at the final hearing if it is otherwise privileged. If requested such material must be returned to the party filing it - paragraph (5). This is an odd provision because the without prejudice correspondence will have to be given back or concealed from the judge conducting the final hearing in any event otherwise he/she will be compromised. Do not forget that proposals purportedly made under the Calderbank provision now have no value in Ancillary Relief proceedings in respect of the final hearing for proceedings commenced after 3rd April 2006 (Family Proceedings (Amendment) Rules 2006 as only open offers will be considered: FPR 2.71(6).
- If you conduct the FDR you must have no further involvement with the case unless:
 - i You adjourn the FDR.
 - ii You make a consent order.
 - iii You give further directions.
- The parties attending the final hearing must use their best endeavours to reach agreement on issues between them. To this end the parties and Advocates should have attended at least an hour before the time of the hearing, or be sent out to continue to negotiate on the basis of any assistance you have given them to reach agreement.
- The parties must personally attend the appointment unless you or a colleague has ordered otherwise. Failure to attend without good cause should lead to costs sanctions.
- Costs estimates should be up-dated and filed at the hearing on Form H - FPR 2.69F(1), but for applications made on or after 3rd April 2006 the new rule 2.61F should be noted which provides that at every hearing and appointment each party must produce an estimate of costs in Form H incurred to the date of the hearing and appointment.
- The appointment is privileged and information given is not admissible at the final hearing, save where an offence is committed or admitted - *President's Practice Direction of 25th May 2000*.
- You may adjourn the FDR to return to you if you think this will facilitate agreement, and/or the parties request you to, but not where you feel that there will not be an agreement and where one party is seeking to delay settlement and the final hearing date given will have to be vacated with a subsequent enhancement of costs disproportionate to the outstanding issues.
- At the conclusion of the hearing the court should give consequential directions, if necessary, make a consent order if agreement reached, or approve heads of agreement.

If there is not heads of agreement because of time constraints an accurate note of terms agreed should be made and your approval sought, so that that the terms become an unperfected order of the court rather than a contractual agreement - *Rose v Rose* [2002] 1 FLR 978. This also has tax consequences as the source of any transfer of assets is by order of the court - see *Xydbias v Xydbias* [1999] 1 FLR 683.

- Where appropriate, if there is no agreement then you should order the filing of evidence and fix the final hearing date. It is useful to order the filing of chronologies and schedules of assets for the district judge conducting the final hearing, particularly where there may be a large number of assets and/or liabilities.

When conducting the appointment you will expect the parties to be open and candid with you. Your approach should be to try and bring the parties within reach of an agreement.

If the parties cannot reach agreement and you are giving directions for the final hearing, you should consider, as stated above, the issues in the case. It may assist it looking at the time given for the final hearing to order sworn statements from the parties as to factual issues in dispute to serve as evidence in chief, but you should be specific about the issues to be dealt with in this way by your direction, e.g. if there is a dispute over contributions made to the marriage by a party, or a party is alleging conduct that the court is being asked to find is inequitable to ignore.

It may be necessary to update valuation evidence from experts if there has been fluctuations in the relevant area since the original valuation was received. If the instruction has been to a single joint expert then a letter up-dating the valuation should be sufficient. If there is disputed valuation evidence and the experts have not met, then you should ensure that there should be a meeting between them to restrict areas of dispute and where possible for schedules of areas of dispute to be tried to be agreed and signed by the experts.

You may wish to give directions for the filing of bundles before the final hearing - see below.

11.9 Consent Orders.

By MCA s.33A and Part 13 Schedule 5 CPA the court notwithstanding any other provisions of those Acts may make a consent order on provision of information prescribed in the rules.

Agreement may be reached between the parties at any stage of the proceedings, or before an application is proceeded with. Provided that an application for ancillary relief covering the relief sought in the order is made in the prayer of the petition, application or answer Form A is not required to be lodged with the application for the consent order - FPR 2.53.

Before or during proceedings for ancillary relief, if not at a hearing then you will receive the request to make a consent order in your box work. By FPR rule 2.61 you should receive:

- 2 copies of the draft of the order in the terms sought.
- 1 copy should be endorsed with a statement by the respondent, signed by him, that he agrees to the terms of the order sought.
- A statement of information (which may be made in more than one document) which shall include the following information:
 - The duration of the marriage, the age of each party and of any minor or dependant child of the family.
 - An estimate in summary form of the approximate value of the capital value of assets and net income of the parties and any minor child of the family.
 - The proposals to accommodate the parties and any minor child of the family.
 - Whether either party has remarried or formed a civil partnership or has any present intention to do so or cohabit with another person.
 - Where the order includes provision for pension sharing, a statement that the person responsible for the pension arrangement has been served with the documents required under FPR rule 2.70(11) and that no objection to the order has been received within 21 days from service:
- Unless service has already been effected under FPR rule 2.70(7) (service requirements after making application on Form A – see above) notice of application for consent order.
- A draft of the proposed consent order
- An address for the applicant for service of any notice the person responsible for the pension arrangement is required to serve under the Divorce etc (Pensions) Regulations 2000.
- An address to which any payment for the applicant is to be sent by the person responsible, and where the payment is to be made to a bank, a building society or the Department of National Savings, sufficient details of the applicant's account to facilitate direct transfer.
 - Where the terms of the order provide for transfer of property subject to a mortgage that the mortgagee has been served with notice of application and that no objection has been received within 14 days of service, and
 - Any other significant matters.

The information should be supplied on Form M1 (above).

Where you are making a consent order for interim periodical payments or variation of

periodical payments then under paragraph (2) of the rule the information required is restricted to details of net income and compliance with the information concerning notification to those responsible for pension arrangements above.

Where parties attend an appointment for the making of a consent order you may dispense with the requirement of lodging a statement of information, or give such directions for the provision of information as you think fit – paragraph 3 of the rule.

As the procedure is your enquiry you must be satisfied that the order is fair and just. If you feel that you do not have enough information then you should raise queries of the parties to meet the requirements of justice. Although information may be given by the parties on separate forms the process of agreement is dependant upon the parties having given full and frank disclosure to one another of their means, thus you may need to be satisfied that that is the case – *Jenkins v Livesey (formerly Jenkins)* (above). If there has not been the necessary disclosure then the order risks being set aside.

If the parties or a party has remarried and there is no prayer for the relief sought in the consent order, in the prayer of the petition or answer, then consider MCA 1973 s.28(3) which will bar the applicant from obtaining that financial relief.

By MCA 1973 s.28(1)(a) & (b) and s.28(1)(A) the time constraints for making a final periodical payments order and secured periodical payments order are set out.

By the provisions of MCA 1973 ss. 23 & 24 you cannot make an order unless there has been a decree nisi of divorce or nullity or decree of judicial separation, but you can direct that a consent order be made on pronouncement of decree when setting the main suit down for this purpose as an undefended cause on the prayer of the petition or answer under FPR rule 2.24. Agreements made before decree-nisi can be made the subject of consent order, subject to validation on decree nisi.

Similarly by operation of the sections of MCA 1973 the provisions of the order do not take effect until final decree so that you should take care that the terms of the order reflect this if made before decree absolute of divorce or nullity.

If when considering a consent order you do not think that the order is fair, and/or despite requests made of the parties you do not think the information supplied by the parties is sufficient for you to make the order then you should arrange for a short appointment for the parties to attend before the court for the terms of the order to be considered. You should be particularly careful where one or both of the parties is not legally represented.

11.10 Bankruptcy

A bankruptcy order automatically vests the bankrupt's property in the Official receiver or trustee in bankruptcy responsible for managing the bankrupt's estate from the date of the bankruptcy order. Any disposition made by the bankrupt from the date of filing of the petition

is automatically void except where made pursuant to a court order or ratified by the court under s.284 Insolvency Act 1986.

The effect of a spouse or partner being bankrupt or becoming bankrupt during proceedings is dramatic. This is also the case, if a spouse or partner is subject to an Individual Voluntary Arrangement, under the Insolvency Act. Special care and consideration should be given to an application where a trustee in bankruptcy, or a spouse or partner is subject to an IVA.

An example of the difficulties that might arise is shown in *Mountney v Trebarne* [2002] EWCA Civ 1174 CA. The court held that a property adjustment order ordering a husband to transfer his interest in the matrimonial home to the wife had the effect of conferring on her an equitable interest in the home the moment the order took effect (i.e. on decree absolute, she would acquire the equitable interest and equity treats as done that which ought to be done). The position of such a wife was analogous to that of a purchaser under a specifically enforceable contract. Thus the trustee in bankruptcy took subject to the wife's interest under the order, and the wife was therefore entitled to enforce the order against the trustee. There was no need and no justification in imposing a constructive trust on the trustee.

MCA 1973 s.39 and para. 77 Part 14 Schedule 5 CPA provides that where a settlement of property or transfer of property had to be made to comply with an order this did not prevent the transfer being a transaction in respect of which an order might be made under s.339 or 340 Insolvency Act 1986 as being a transfer at an undervalue or a preference.

11.11 The final hearing.

Where the time estimate is more than half a day the President's Practice Direction of 10th March 2000 applies and a bundle should be filed such time before the final hearing as should already have been directed, but if not then not less than 2 days before the hearing date. The bundle should be provided by the applicant unless another party agrees to do so. You should explore this with the parties at the FDR if the applicant happens to be a litigant in person and the respondent is represented. The bundle should be sub-divided and contain material divided in sections as follows:

- Applications and orders.
- Statements and affidavits
- Expert's reports and other reports to be referred to; and
- Other documents, divided into other sections as appropriate.

At paragraph 3.1 of the direction material to be included in a bundle is further defined and provides there should be:

- (a) A summary of background to the application, if possible limited to one side of A4.

- (b) A statement of issues to be determined.
- (c) A summary of orders sought by the parties.
- (d) A Chronology if this is not contained in the statement under a.
- (e) Skeleton arguments as may be appropriate, together with copies of authorities relied upon.

The contents wherever possible should have been agreed, and the party preparing it should paginate it and provide an index to all other parties prior to the hearing. The bundle should be in a ring binder or lever arch file limited to 350 pages to each bundle.

In any event by FPR rule 2.69E not less than 14 days before the final hearing the applicant must file with the court and serve on the other party an open statement which sets out concise details, including the amounts involved, of the orders sought from the court. Not more than 7 days after service of the applicant's statement the respondent must file in the court and serve on the applicant his/her proposals in a like manner.

Although the application is your enquiry it is conducted in traditional adversarial manner, as a civil hearing and the applicant is required to prove the case for the orders sought to the civil standard as defined by Lord Nicholls in *Re H (minors) (sexual abuse: standard of proof)* [1996] AC 563, "on the balance of probabilities, the more unusual the allegation, the more cogent the evidence should be."

Look in the file or bundle to make sure there has been a decree-nisi of divorce or a conditional order or decree or conditional order of nullity or decree or order of judicial separation. If not then you cannot hear the case unless you in a position to grant a decree or conditional order on site by the agreement of the parties, provided that you have the material in front of you to do so.

It may be that the Advocates will ask for time. You should not allow them time that will prejudice the time estimate for the final hearing and should only allow time if it is being used effectively and constructively in negotiations.

You might wish to help if the trial advocates seek views on issues. Be wary of this because that should have been done at FDR. Make sure if you do see the advocates with or without the parties that you have the tape running.

When it comes to giving your judgment you should ensure:

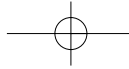
- You deal with factual disputes and give reasons for your findings of fact.
- Identify the circumstances of the case.

- If there are minor children (under the age of 18) having considered the circumstances of the case you have given their welfare first consideration - MCA 1973 s.25(1). And para. 20 Part 5 Schedule 5 CPA
- You identify the factors set out in MCA 1973 s.25(2) and para. 21(2) Schedule 5 CPA that are relevant to the application and make findings concerning them and give reasons for doing so remembering that no one factor is more important than the other, *White v White* [2002] 2 FLR 981. The judgment of Lord Nicholls should be your starting point for application of principles especially where sufficient assets to provide easily for parties' needs. The more difficult cases might be where there are not, then your priority will be providing a home during minority of children and ensuring that caring parent is sufficiently provided for when the children are no longer dependent, without being unfair to non-caring parent who may have to accommodate children during contact. You may be faced with very hard choices, and thus you should make clear how you balance the factors in your judgment, and why you have exercised your discretion arriving at what you consider a fair distribution of the parties' assets.
- Do remember now that for applications on or after 3rd April 2006 that the parties costs will be part of their needs that they will have to meet under FPR rule 2.71 unless a party is ordered to pay all or part of the costs under the conduct provisions of the rule. The starting position, and what is the normal provision is that each party will be responsible for their own costs as the rule provides for there being no order for costs - see the costs chapter.
- In cases where that is appropriate treat equality as the yardstick for dividing assets, both capital and income, being careful where one party might earn substantial income when young but have a limited career, *White v White* (above), *McFarlane v McFarlane*; *Parlour v Parlour* [2004] EWCA Civ 872, and consider *Q v Q* (*Ancillary Relief: Periodical Payments*) [2005] EWHC 402 [2005] 2 FLR 640
- In terms of contribution be wary of breaking up inherited property or property gifted to a party specifically, that has been in the family for generations such as in farming families, but where assets are not sufficient to achieve fairness you may be forced to do so. *White v White* (above).
- Be wary of claims of so-called "stellar contributions" as that may lead you into the trap of discriminating between spousal contributions, *Cowen v Cowen* [2001] EWCA Civ 679 [2001] 2 FLR 192, *Lambert v Lambert* [2003] 1 FLR 139.
- For consideration of short marriage, expectations of spouse in big money cases and effect of conduct causing breakdown, consider *Miller v Miller* [2006] UKHL 24, and now also in respect of fair division of working spouse's earnings in making Periodical Payments order where spouse high earner, income rich rather than capital, long marriage other spouse mother and carer, having given up career, *McFarlane v McFarlane* [2006]

UKHL 24. These cases are reported together and the judgments of Lord Nicholls and Lady Hale merit special consideration as expand and comment on principles in *White v White* (above) as applied to circumstances in these cases.

- Consider whether you can terminate the financial obligations of the parties towards each other (“clean break”) immediately or in a defined date or time in the future, under MCA s.25 and s.28 and Para. 28 part 5 CPA. This may be influenced by whether or not the carer of minor children, or where they are undergoing full-time education, has sufficient funds to sustain the family without continuing periodical payments, and whether the other party has sufficient funds to care for him/herself, entertain the children for contact, and assessment already made under Child Support Act.
 - Do note that the section does not apply to applications made in proceedings for judicial separation or separation orders.
 - One of the parties may be re-training and expecting to re-enter full time working that will enable there to be independence. You should be wary in those circumstances of barring any further application before the date fixed for the clean break if there is no clear evidence that independence will be achieved.
 - Be also aware on a variation application under MCA s.31(7) and para. 53 Part 11 Schedule 5 CPA there may be a lump sum award, *Pearce v Pearce* [2003] EWCA Civ 1054CA.
- Do not forget that loss of pension rights does not apply in proceedings for judicial separation or separation order.
- Be wary of arguments about shareholdings and cases where family companies are involved, where family members live well without any visible means of support – ideal, with big money cases, for High Court Judges who have the expertise and to look behind veils without being criticised for trying to do so. Also look carefully at trusts, particularly discretionary trusts, *Charman v Charman* [2006] 1WLR 1053CA.
- Whilst you can look for guideline cases which help with principles you should operate you should keep in mind that the factors referred to and the general circumstances of the case have to be applied; and each case should turn on its own particular facts.
- If there is evidence of illegality revealed during the proceedings such as clear non-disclosure to the Revenue of income or capital gain, or non-disclosure to Customs and Excise, then you may find guidance as to whether you should disclose set out in the judgments of Wilson J in *R v R (Disclosure to the Revenue)* [1998] 1 FLR 922 and Charles J in *A v A, B v B* [2000] 1 FLR 701.

The above are nowhere near exhaustive of the problems that you may face in an application, but might give a flavour of the work and take you to some judgments that will help.



You should ensure that at the end of the case an order is drawn that clearly reflects your intentions and remember that if you are ordering a sale of property owned by one or both of the parties, specified in the order under the powers of s.24A MCA or Part 3 Schedule 5 CPA that order is to facilitate the making of an order for financial relief under MCA 1973 ss. 23 and 24 and under Part 1 of Schedule 5 CPA and cannot take effect until decree absolute or final decree. In fact none of the final orders you make for financial provision can take effect until there is a final decree of dissolution of marriage or nullity or equivalent under CPA, thus your orders should be dependant upon final decree if not yet granted.

