

13. Costs in Family Proceedings

13.1 Some basic reminders

13.1.1 Solicitor-and-own-client costs

Solicitor-and-own-client costs belong to the solicitor. Fundamentally, these are the costs paid by the client to the solicitor and the costs by which the solicitor earns his/her living. Solicitors' bills comprise three elements: profit costs, disbursement (including counsel's fees) and VAT. Judges are rarely concerned with this aspect of costs.

13.1.2 Inter-party costs

Inter-party costs belong to the client. Such costs indemnify the client, in whole or in part, for the cost which he/she must pay to his/her solicitor. It is this aspect of costs which mainly concerns judges. A successful party will often seek from the judge an order that the unsuccessful party should pay his/her costs.

13.1.3 Public funding ("legal aid")

Where a party is publicly funded, the freedom of solicitors and counsel to make a contract regarding cost is limited by statute and regulation. Instead of the solicitor contracting with the client, regulations prescribe the sums which can be charged by and paid to solicitors and counsel. Further, the fact that a party has public funding affects the power of the court to make an order against that party.

13.1.4 The award of costs

Whether to make an order for costs (and if so in what form) is the matter which most concerns judges.

13.1.5 Assessment (formerly "taxation")

This chapter is not concerned with the procedure for assessment of costs (see Chapter 8). Detailed assessment is carried out by costs judges (taxing masters and district judges) and not by the trial judge. However, if costs are to be subject to a summary assessment this can be done only by the trial judge.

13.2 Object of this chapter

The object of this chapter is to explain and illustrate those aspects of costs which are peculiar to, or of special importance in, family proceedings, in order to assist you in making interlocutory and final orders for the payment of costs by one party to the other, and orders for the detailed assessment of the costs of funded proceedings.

13.3 Public Funding ("legal aid")

As from 1 April 2000 the Legal Aid Board has been replaced by the Legal Services Commission, and the legal aid fund has been replaced by the community legal service fund.

Although the provisions relating to legal aid remain substantially the same, the terminology changed, and throughout this chapter assisted persons are referred to as 'funded persons', and legal aid proceedings are referred to as 'funded proceedings'.

Section 11 Access to Justice Act 1999 ("costs in funded cases") limits the power to award costs against a publicly funded litigant. Except in prescribed circumstances, costs ordered against an individual who is so funded shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

- a) the financial resources of all the parties to the proceedings and
- b) their conduct in connection with the dispute to which the proceedings relate.

Regulation 3 Community Legal Service (Cost Protection) Regulations 2000 sets out prescribed circumstances in which costs protection does or does not apply.

The procedure for ordering costs against funded clients and/or the Legal Services Commission is comprehensively dealt with in the Guidance Notes on the Application of sec 11 Access to Justice Act 1999 issued by the Senior Costs Judge and approved by the Master of the Rolls (see White Book, para 48.13 et seq).

13.4 Civil Procedure Rules 1998

The Civil Procedure Rules 1998 (CPR) came into force on 26 April 1999, replace the Rules of the Supreme Court and the County Court Rules. Parts 43, 44, 47 and 48, which deal with costs, are applied to *family proceedings* (except for rr 44.9 44.12, which deal with costs on the small claims track and the fast track, costs following allocation and re-allocation, and deemed costs orders) and *proceedings in the Family Division* by the Family Proceedings (Miscellaneous Amendments) Rules 1999, SI 1999/1012, which revoke the Family Proceedings (Costs) Rules 1991 and the Matrimonial Causes (Costs) Rules 1988.

All bills, including family proceedings bills (except for counsel's fees where the length of the main hearing does not exceed 10 days, see 13.34) are now decided by detailed (or summary) assessment under the CPR 1998 but, in the case of funded proceedings, the *amount* of costs is governed by regulations, currently the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 (LAFP(R)R) and the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 (LACP(R)R).

13.5 The Practice Direction

The CPR 1998 are not self-contained, but are supplemented by comprehensive and detailed Practice Directions made pursuant to section 5 of the Civil Procedure Act 1997. The CPR must always be read in conjunction with the current Practice Direction, 'the Costs Practice Direction' (CPD). References in CPD to 'claimant' and 'defendant' are to be read as references to the equivalent terms used in family proceedings.

13.6 Detailed Assessment

From 26 April 1999 the procedure for the detailed (and summary) assessment of the costs of all family and family type proceedings, whether in the High Court or county court, non-funded or funded, is governed by the CPR.

Only in so far as the *amount* of costs is concerned, is there still a distinction between different categories of funded proceedings, i.e. those which are governed by the LAFP(R)R and those which are governed by the LACP(R)R, see 13.9 below.

Note that by CPR, r 44.17, Part 44 (General Rules about Costs) and Part 47 (Procedure for Detailed Assessment of Costs) do not apply to the assessment of costs in proceedings to the extent that (a) section 11 of the Access to Justice Act 1999 and provisions made under that Act, or (b) regulations made under the Legal Aid 1988 (i.e. LAFP(R)R and LACP(R)R) make different provision.

13.7 Summary assessment

1. Increasingly often, you will be asked to make a summary assessment of costs. Summary assessment of costs is particularly suited to family proceedings as a means of ending the dispute (see e.g. *Leary -v- Leary* [1987] 1FLR384)¹. The former practice (in RSC Ord 62r17) has been replaced by CPR, r 44.7(a) and CPD, ss 13 and 14, which form a complete code.
2. CPD, s 13.1 provides that whenever a court makes an order as to costs which does not provide for fixed costs to be paid, the court should consider whether to make a summary assessment of the amount of costs.
3. By CPD, a 13.9 the court must not make a summary assessment of the costs of a funded receiving party, but it may make a summary assessment of costs payable by a funded party, see CPD, s 13.10 (but see paragraph 13.10 below).
4. By CPD, s 13.2 the general rule is that the court will make a summary assessment at the conclusion of any hearing which has lasted not more than one day, in which case:

the order will deal with the costs of the application of matter to which the hearing related *unless* there is good reason not to do so, e.g. where the paying party shows substantial grounds, that cannot be dealt with summarily, for disputing the sum claimed for costs, or where there is insufficient time to carry out a summary assessment.

5. By CPD, s 13.5, each party who intends to claim costs must prepare, and file and serve not less than 24 hours before the date fixed for the hearing, a written statement, signed by him or his legal representative, of the costs he now intends to claim, showing separately, in the form of a schedule which should follow as closely as possible Form N 260:

¹ In family proceedings the aggravation of detailed assessment of costs could run counter to the aim of reducing contention (*Q -v- Q (Costs: Summary Assessment)* [2002] 2FLR668).

- a) the number of hours to be claimed;
 - b) the hourly rate to be claimed;
 - c) the grade of the fee earner;
 - d) the amount and nature of any disbursement to be claimed, other than counsel's fee for appearing at the hearing;
 - e) the amount of solicitors' costs to be claimed for attending or appearing at the hearing;
 - f) the fees of counsel to be claimed in respect of the hearing (but see 13.34); and
 - g) any VAT to be claimed on these amount.
6. By CPD, s 13.6 the failure by a party, without reasonable excuse, to comply with the rule will be taken into account by the court in deciding what order to make about costs, including the costs of any further hearing or detailed assessment that may be necessary as a result of that failure. However it is too draconian a sanction to wholly disallow costs because a receiving party has failed to file a statement of costs in time or at all (*MacDonald Taree Holdings Ltd* [2001] CPLR 439). Note that by CPD, s 13.8 the trial judge cannot delegate the making of the summary assessment to a costs officer, and that if a summary assessment is appropriate, but the trial judge is unable to make a summary assessment on the day, he must give directions as to a further hearing before the same judge.
7. No-one is in a better position than the trial judge to decide whether a costs order should be made and, where appropriate, to immediately proceed to summarily assess them. It is suggested that trial judges should take a robust view. If you have enough information in the schedule to decide, in accordance with CPR, r 44.5(1) and (3), after brief submissions from each party, whether the costs were proportionately and reasonably incurred and were proportionate and reasonable in amount, then make the summary assessment but if, for whatever reason, you do not have this information, you may think that a summary assessment is not appropriate, in which case you would order a detailed assessment. See also the very helpful *Guide to the Summary Assessment of Costs* published by the Supreme Court Costs Office.
8. If, for whatever reason, having awarded costs you consider it inappropriate to carry out a summary assessment and order a detailed assessment, consider also making an order for a payment on account pursuant to CPR rule 44.3(8).

13.8 Funded Proceedings (see 13.3 above)

The LAFP(R)R and LACP(R)R prescribe fixed amount for most of the items in the bill, and give the costs officer a limited discretion. The regulations are updated from time to time as the prescribed rates are increased. The most recent increase took effect from 2 April 2001.

LAFP(R)R govern the following proceedings -

- a) care proceedings, i.e. proceedings for an order under Parts IV or V of the Children Act 1989, including proceedings under s.25 of that Act (secure accommodation orders);
- b) proceedings for divorce, nullity, judicial separation, and presumption of death and dissolution of marriage;
- c) proceedings for financial relief for the parties to the marriage and the children of the family - including applications for avoidance of transactions, and injunctions, under MCA, s.37;
- d) proceedings in the High Court under MWPA, s.17;
- e) proceedings in the principal registry under MWPA, section 17 to which the Family Proceedings Rules 1991 (FPR), r 3.7(1) applies (applications by a party to pending or intended proceedings in the principal registry for divorce, nullity or judicial separation);
- f) proceedings under Part IV of the Family Law Act 1996;
- g) proceedings for financial relief after an overseas divorce, under Part II of the Matrimonial and Family Proceedings Act 1984;
- h) proceedings under sections 20 or 27 of the Child Support Act 1991;
- i) proceedings under section 30 of the Human Fertilisation and Embryology Act 1990.

The LACP(R)R govern the following quasi-family proceedings:

1. adoption proceedings;
2. proceedings under the Inheritance (Provision for Family and Dependents) Act 1975;
3. proceedings under the Child Abduction and Custody Act 1985;
4. wardship proceedings;

13.9 Costs against funded persons

A common form of order against impecunious and/or funded persons is an order for costs 'not to be enforced without leave of the court'. This form of order does not discriminate between an impecunious, non-funded person, who does not enjoy the protections of section 11 of the Access to Justice Act 1999 and a funded person, who does. In the case of the latter, this is an unsatisfactory form of order, as has been pointed out by the Court of Appeal (see *Parr -v- Smith* [1995] 2 All ER 1031, CA; see also *Chagger -v- Chagger* [1997] 1 All ER 104, CA; *Re R (A Minor) (Legal Aid: Costs)* [1997] 1 FCR 613, CA; and *Wraith -v- Wraith* [1997] 1 All ER 526, CA; see also *Burridge and Another -v- Stafford and Another* [2000] 1 WLR 927, CA.) because it is neither a determination of the funded person's liability, nor a reference for such determination,

and the better order is an order for costs 'subject to an assessment under section 11 of the Access to Justice Act 1999', which brings into operation the detailed assessment provisions of the Community Legal Service (Costs) Regulations 2000, SI 2000/441, which the trial judge in an ancillary relief application is particularly well placed to apply, having usually made findings as to the parties' financial resources and their conduct in connection with the dispute.

Thus an appropriate order must be "Respondent do pay the Applicant's costs to be subject to detailed assessment. Payment of such costs postponed until after an assessment pursuant to Section 11 Access to Justice Act 1999. Such assessment be referred to the district judge and be adjourned generally with liberty to restore."

Note that by CPD, s 13.9 the court must not make a summary assessment (see paragraph 13.8 above) of the costs of a funded receiving party, but that by CPD, s 13.10, a summary assessment of the costs payable by a funded person is not by itself a determination of his liability under section 11.

13.10 Avoid multiple detailed assessments in funded proceedings

You will often be asked, at the conclusion of an interlocutory application, to make an order for a detailed assessment of a funded person's costs, because the legal representative wrongly thinks that such an order is necessary at that stage. If you make such an order, he is tempted to lodge his bill and papers, for detailed assessment, before the conclusion of the proceedings, which creates unnecessary work for the costs officer, and may cause delay.

If asked to make such an order, it is suggested that you point out that an order for detailed assessment in funded proceedings will, if appropriate, be made at the conclusion of the proceedings.

13.11 Special procedure

The majority of divorce and judicial separation petitions proceed undefended by way of the special procedure, in which the question of costs is dealt with by the district judge under the Family Proceedings Rules 1991 (FPR), r 2.36(3) which provides that where a petition contains a prayer for costs the district judge may:

1. if satisfied that the petitioner is entitled to such costs, include in his certificate a statement to that effect;
2. if not so satisfied, give to any party who objects to paying such costs notice that, if he wishes to proceed with his objection, he must attend before the court on the day fixed for pronouncement of decree.

A sensible practice has developed in special procedure cases of claiming costs in the prayer of the petition 'if the suit is defended', or agreeing a sum in advance or simply claiming the costs, thereby avoiding an unnecessary attendance on the date fixed for pronouncement of the decree.

13.12 Should costs of the suit follow the event?

There is no general practice in family proceedings that the costs of the suit should follow the event, because there will be many cases in which such an order will be inappropriate². CPR Pt 44, r 44.3(2)(a), which provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, does not apply to family proceedings³. In petitions based on two years' separation and consent, the petitioner often claims half the costs, which the respondent often agrees to pay. In petitions based on five year's separation, costs are often not claimed. For special procedure cases, see paragraph 13.11 above. Whether or not an order for costs is made in a defended suit will depend upon all the circumstances of the case, including the real cause of the breakdown of the marriage and, in an adultery case, whether the co-respondent knew at the time of the adultery that the respondent was married. It is, however, no longer necessary to make the person with whom it is alleged that adultery has been committed a co-respondent⁵. Costs of the suit include the application for decree absolute, but not any subsequent application, and note that in proceedings after a decree nisi of divorce or a decree of judicial separation no order, the effect of which would be to make a co-respondent or party cited liable for costs which are not directly referable to the decree, shall be made unless the co-respondent or party cited is a party to such proceedings or has been given notice of the intention to apply for such an order⁵.

13.13 Ancillary Relief

13.13.1 *The new rules.*

The Family Proceedings (Amendment) Rules 2006 (S.I. 2006 No. 352) came into force on 3 April 2006.

The new rules apply to all applications for ancillary relief made in a petitioner or answer as from 3rd April 2006 (see r 10 'Transitional Provision').

13.13.2 *Why have the rules changed?*

In the majority of ancillary relief cases it is a difficult exercise to achieve a fair and just financial settlement. Often an order which had been carefully constructed by the court could be destabilised because one party had not beaten a "Calderbank" offer (an offer to settle made "without prejudice save as to costs"). The general view was that the "Calderbank" offers created as many problems as they solved and had introduced an element of "gamesmanship". (In a high value case failure to beat a "Calderbank" offer might make a party liable for a considerable sum in costs). The FPR rules on costs were widely regarded as too complex.

² *Povey -v- Povey* [1972] Fam 40, [1970] 3 All ER 612, [1971] 2 WLR 381, CA.

³ Family Proceedings (Miscellaneous Amendments) Rules 1999, SI 1999/1012, r 4(1)(b).

⁴ FPR, r 2.7(1).

⁵ FPR, r 2.37(3).

A policy decision was taken that as a general rule, each party should have his/her own legal costs. "No order for costs" should be the norm and only exceptionally should this be departed from.

13.13.3 Abolition of "Calderbank" offers

Rules 2.69, 2.69B and 2.69D are now repeated (rules 2.69A and 2.69C had already been repeated). Rule 2.69 allowed parties to make offers "without prejudice save as to costs" and to rely on such offers in connection with a costs application following the final hearing of the application for ancillary relief. That has now gone.

13.13.4 No order for costs

A new r 2.71 has been inserted into the FPR. Of particular importance is r 2.71(4)(a) - The general rule in ancillary relief court proceedings is that the court will not make an order requiring one party to pay the costs of another party.

13.13.5 New rule 2.71

Costs orders

2.71.

- 1) CPR rule 44.3(1) to (5) shall not apply to ancillary relief proceedings.
- 2) CPR rule 44.3(6) to (9) apply to an order made under this rule as they apply to an order made under CPR rule 44.3.
- 3) In this rule "costs" has the same meaning as in CPR rule 43.2(1)(a) and includes the costs payable by a client to his solicitor.
- 4) (a) The general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party; but
 - (b) the court may make such an order at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).
- 5) In deciding what order (if any) to make under paragraph (4)(b), the court must have regard to -
 - (a) any failure by a party to comply with these Rules, any order of the court or any practice direction which the court considers relevant;
 - (b) any open offer to settle made by a party;
 - (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

- (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
 - (e) any other aspect of a party's conduct in relation to the proceedings which the court considers relevant; and
 - (f) the financial effect on the parties of any costs order.
- 6) No offer to settle which is not an open offer to settle shall be admissible at any stage of the proceedings, except as provided by rule 2.61E."

13.13.6 Effect of new r 2.71

The basic rule is "no order for costs" (r 2.71 (4)(c)) which means, of course that each party will have to pay his/her own legal costs. The court has a limited power to order one party to pay another party's costs where it considers it appropriate to do so because at the conduct of a party in relation to the proceedings (r 2.71 (4)(b)).

In deciding what order if any to make under r 2.71(4)(b), the court must have regard to the factors listed in r 2.71(5).

Further, by para 4 of the President's Practice Direction of 28 February 2006 provides:-

"Parties who intend to seek a costs order against another party in proceedings to which r 2.71 applies should ordinarily make this plain in open correspondence or in skeleton arguments before the date of the hearing. In an case where summary assessment of costs awarded under 2.71 would be appropriate parties are under an obligation to file a statement of costs in CPR Form N260 (see CPR P10 supplementing Parts 43 to 48(Costs), Section 13)."

13.13.7 Costs estimates

Two new forms are prescribed. Form H is used to comply with new r 2.61F(1) and Form H1 to comply with new r 2.61F(2).

By r 2.61F(1), at every hearing or appointment each party must produce to the court an estimate in Form H of the costs incurred by him up to the date of that hearing or appointment.

By r 2.61F(2) not later than 14 days before the date fixed for the final hearing of an application for ancillary relief, each party must (unless the court otherwise directs) file with the court and serve on each other party a statement in Form H1 giving full particulars of all costs in respect of the proceedings which he had incurred or expects to incur, to enable the court to take account of the parties' liabilities for costs when deciding what order (if any) to make for ancillary relief.

13.13.8 Practice direction – 28 February 2006**Ancillary Relief: Costs****President's Direction
28 February 2006**

1. The Family Proceedings (Amendment) Rules 2006 make significant changes to the court's power to make costs orders in ancillary relief proceedings. The new rules will come into force on 3rd April 2006. They will apply to an application for ancillary relief contained in a petition or answer filed on or after 3rd April 2006, or to such an application which has not been made in a petition or answer but is made in Form A on or after that date. The rules will also apply to an application under section 10(2) of the Matrimonial Causes Act 1973 or under section 48(2) of the Civil Partnership Act 2004 made in Form B on or after that date. They do not however apply to such applications if they are to be heard by the court with an application which was made before that date.
2. Under the new rules the court will only have power to make a costs order in ancillary relief proceedings when this is justified by the litigation conduct of one of the parties (see new rule 2.71 of the Family Proceedings Rules 1991). When determining whether and how to exercise this power the court will be required to take into account the list of factors set out in the rules. The court will no longer be able to take into account any offers to settle expressed to be "without prejudice" or "without prejudice save as to costs" in deciding what, if any, costs order to make.
3. The new rules require the completion of Forms H and H1 (see rule 2.61F of the Family Proceedings Rules 1991, as amended). Form H is to be used at interim hearings so that the court has available to it a realistic estimate of the costs incurred to date. Form H1 is for use at a final hearing to provide the court with accurate details of the costs which each party has incurred, or expects to incur, in relation to the ancillary relief proceedings. The purpose of this form is to enable the court to take account of the impact of each party's costs liability on their financial situations. Parties should ensure that the information contained in these forms is as full and accurate as possible and that any sums already paid in respect of a party's ancillary relief costs are clearly set out. Where relevant, any liability arising from the costs of other proceedings between the parties should continue to be referred to in the appropriate section of a party's Form E; any such costs should not be included in Forms H or H1.
4. Parties who intend to seek a costs order against another party in proceedings to which rule 2.71 of the Family Proceedings Rules 1991 applies should ordinarily make this plain in open correspondence or in skeleton arguments before the date of the hearing. In any case where summary assessment of costs awarded under rule 2.71 of the Family Proceedings Rules 1991 would be appropriate parties are under an obligation to file a statement of costs in CPR form N260 (see CPR Practice Direction supplementing Parts 43 to 48 (Costs), Section 13 and paragraph 6 below).

5. An order for maintenance pending suit which includes an element to allow a party to deal with legal fees (see *A v A (maintenance pending suit: provision for legal fees)* [2001] 1 WLR 605; *G v G (maintenance pending suit: costs)* [2002] EWHC 306 (Fam); *McFarlane -v- McFarlane, Parlour -v- Parlour* [2004] EWHC Civ 872; *Moses-Taiga -v- Taiga* [2005] EWCA Civ 1013) is an order made pursuant to section 22 of the Matrimonial Causes Act 1973 and is not a “costs order” within the meaning of rule 2.71 of the Family Proceedings Rules 1991.
6. The President’s Direction: Civil Procedure Rules 1998: Allocation of Cases: Costs dated 22nd April 1999 (as supplemented by the President’s Direction: Costs: Civil Procedure Rules 1998 dated 24th July 2000) makes provision in relation to the application of the (Civil Procedure) Practice Direction about costs (Supplementing Parts 43 to 48 of the Civil Procedure Rules) to family proceedings to which the Family Proceedings Rules 1991 apply. Those President’s Directions will apply to a costs order made under new rule 2.71 of the Family Proceedings Rules 1991 as though the reference to the (Civil Procedure) Practice Direction was a reference to that direction excluding Section 6, Paragraphs 8.1 to 8.4 and Sections 15 and 16.

13.13.9 The First Appointment (r2.61D(2)(e))

Rule 2.61D (“The first appointment”) has been amended. The objective of the first appointment is unchanged – to define the issues and save costs. The change is in r 2.61D(2)(e) which now provides “in considering whether to make a costs order under r 2.71(4) [the district judge] must have particular regard to the extent to which each party has complied with the requirement to send documents with Form E...”

13.13.10 The new costs rule summarised.

In theory, the new rules simplify the judge’s task and are transparent for the parties. The costs of sorting out the financial consequences of marriage breakdown are part of the reasonable needs of each party. If both parties conduct the litigation reasonably, no order for costs is required and each party will bear his/her own. If one party conducts the litigation unreasonably the court has the powers to make a costs order against the offending party. This should be rare.

13.14 Proceedings relating to children.

The general practice is to make no order as to costs in children’s cases, but there are exceptions, e.g. where a party has behaved unreasonably in relation to the litigation⁶, or in relation to the costs of interlocutory hearings⁷.

⁶ *R -v- R (Children Cases: Costs)* [1997] 2 FLR 95, CA. See also *Re R (A minor)(Legal Aid: Costs)* [1997] 1 FCR 613, CA; and *Re O (Costs: Liability of Legal Aid Board)* [1997] 1 FLR 465, CA.

⁷ *Re B (Costs)* [1999] 2 FLR 221, CA.

Where a local authority appealed against a costs order made against it in contact proceedings, it was held⁸ that although in civil litigation costs normally follow the event, in child cases it is unusual to make an order for costs where the conduct of the party has not been reprehensible, or the party's stance has not been beyond the band of what is reasonable. It is a matter for the discretion of the court in the light of these criteria as to what, if any, order for costs should be made. In refusing to make an order for costs against a father whose application was hopeless the CA held⁹ that, although there would come a point at which pursuing a hopeless application became unreasonable, hopelessness and unreasonableness were not necessarily the same thing, and in ruling on the question whether pursuit of an application has become unreasonable, a greater degree of generosity might be appropriate where the litigant was acting in person than where he was legally aided with the benefit for advice from counsel and solicitors. If a parent went beyond the limit of what was reasonable to pursue the application, and it was appropriate to take the unusual step of ordering costs against him, it ought to be clear on the face of the transcript, with in the judgment or preferably in the order for costs, why the court was departing from the normal practice.

In deciding whether to make an order for costs at the conclusion of proceedings relating to children, it is impractical and often unnecessary for the court, in a case where resources are slender, to conduct a survey of finances and of likely needs with a view to alighting upon an order which will do the least overall damage to the family and particularly to the children. That is the province of the court in exercising its jurisdiction to make orders for ancillary relief. In proceedings relating to children, the welfare of the children will always be the court's first consideration¹⁰.

In private law Children Act 1989 proceedings where a local authority had not instituted care proceedings, but could well have applied for a care order, and the Official Solicitor has undertaken extensive enquiries both in England and abroad, which had saved the local authority a considerable sum of money, because otherwise those matters would have devolved to the local authority, the local authority was ordered to pay one half of the Official Solicitor's costs¹¹.

Where an applicant succeeded in her appeal against the refusal of a local authority to register her as a child minder, it was held that the proceedings were adversarial and that costs should follow the event¹².

⁸ In *Re M (Local Authority's Costs)* [1995] 1 FLR 535, Cazalet J.

⁹ *Re G (Costs: Child Case)* [1999] 2 FLR 250, CA.

¹⁰ *Keller -v- Keller and Legal Aid Board* [1995] 1 FLR 259, CA; reported sub nom *K -v- K (Legal Aid: Costs)* [1995] 2 FCR 189.

¹¹ *Re M (a minor)(Immigration: Residence Order)* [1995] 2 FCR 793, Bracewell J. See also *Re P (Minors)(Official Solicitor's Costs)* [1993] 2 FCR 550, Booth J.

¹² *Sutton London Borough Council -v- Davis (No 2)* [1994] 2 FLR 569, [1994] 2 FCR 1199, Wilson J.

Where a wife applied for an order for costs against the Legal Aid board the Court of Appeal, notwithstanding that it upheld the judge's finding that she would suffer severe financial hardship unless an order were made, held¹³ that such an order could not be made because, although in conventional litigation costs prima facie follow the event, in proceedings relating to children it is unusual to make an order for costs, and there would not therefore have been an order for costs against the husband. Compare this with a case decided earlier the same year by Wilson J, in which it was held¹⁴ that although it is unusual to order costs in proceedings relating to children, such proceedings are nevertheless adversarial, and the principle that costs should follow the event may be applied.

It is submitted that, where the court considers that a non-legally aided party to proceedings relating to children has suffered severe financial hardship, it would be a proper exercise of the court's discretion as to costs first to make an order for costs against the legally aided party, and then to assess as nil that party's liability under section 11 of the Access to Justice Act 1999.

In cases involving children, it is vital in their interests that the court should have the best up-to-date information available, and it would be wrong to prevent a party from filing evidence in accordance with directions, because the sanction of an order for costs against the defaulting party is available¹⁵.

The court may not make a summary assessment of the costs of a receiving party who is a child unless the solicitor acting for the child has waived the right to further costs¹⁶, but the court may make a summary assessment of costs payable by a child¹⁷.

For further, recent, examples, see cases cited below¹⁸.

13.15 Expert witnesses

There is an increasing tendency to rely upon expert witnesses in family proceedings: accountants, actuaries, valuers, psychiatrists, psychologists, paediatricians, and experts on foreign law (but note CPR r 35.4(1), which provides that no party may call an expert or put in evidence an expert's report without the court's permission). The fees charged by such experts

¹³ *Re G (Costs: Child Case)* [1999] 2 FLR 250 CA.

¹⁴ *In Sutton London Borough Council -v- Davis (No 2)* [1994] 2 FLR 569, [1994] 2 FCR 1199, Wilson J.

¹⁵ *R -v- Nottinghamshire Council* [1993] 1 FCR 576, Douglas Brown, J.

¹⁶ CPD, s 13.11(1); and see CPR, r 48.5.

¹⁷ CPD, s 13.11(2); and see CPR, r 48.5.

¹⁸ *Re G (Costs: Child Case)* [1999] 2 FLR 250, [1999] 3 FCR 463, CA; *Re B (Costs)* [1999] 2 FLR 221, [1999] 3 FCR 586, CA; *R -v- Legal Aid Board, ex parte W* [2000] 1 FCR 165, QBD; *Davies -v- Davies* [2000] 1 FLR 39, CA; and *M -v- H (Cosys: Residence Proceedings)* [2000] 1 FLR 394, Mr Harrison QC sitting as a deputy judge of the High Court.

for preparing reports and opinions, and appearing in court, are often (quite properly) higher than the rates chargeable by the solicitors instructing them. although arguments about the amount of experts' fees are more likely to be addressed to the costs office on detailed assessment, than to the trial judge, you may nevertheless, at the conclusion of a hearing, have to deal with disputes about liability for such fees.

For the desirability of a solicitor's obtaining the prior authority of the Legal Services Commission, before instructing an expert, see regulation 61 of the Civil Legal Aid (General) Regulations 1989.

For all the importance of keeping expert witnesses up to date, and ensuring that they have seen all relevant material before giving oral evidence, and the consequences of failure to do so (in this case a wasted costs order against Counsel) see *Re G, S and M (Wasted Costs)* [2000] 1 FLR 52, Wall J.

By CPR, r 35.7 the court has power to direct that evidence be given by a single joint expert, and para 4.1 of *President's Direction* of 25 May 2000 provides as follows:

'The introduction of expert evidence in proceedings is likely to increase costs substantially and consequently the court will use its powers to restrict the unnecessary use of experts. Accordingly, where expert evidence is sought to be relied upon, parties should if possible agree upon a single expert whom they can jointly instruct. Where parties are unable to agree upon the expert to be instructed, the court will consider using its powers under CPR Part 35 to direct that evidence be given by one expert only. In such cases parties must be in a position at the first appointment or when the matter comes to be considered by the court to provide the court with a list of suitable experts or to make submissions as to the method by which the expert is to be selected.'

In deciding what order (if any) to make as to costs, you will bear in mind the guidelines set out in CPR, r 44.3, and consider the effect of any unreasonable¹⁹ failure to take advantage of CPR, r 35.7. It may be that a single joint expert is more appropriate in proceedings relating to children²⁰ than in ancillary relief proceedings, but it is the writers' view that the evidence of a single joint expert at the hearing of ancillary relief proceedings, even if, for example, each party has employed his own forensic accountant to investigate the affairs of a company, or advise on disclosure, is likely to save time, and reduce expense and acrimony. See now CPR, r 35.8(4)(a) which provides that the court may limit the amount that can be paid by any way of fees and expenses to the expert.

¹⁹ If a party does not accept the single joint expert's report, and has reasonable (not fanciful or speculative) grounds for challenging it, it may be impossible to avoid allowing him to instruct his own expert, but bear in mind CPR r 35.3: 'It is the duty of an expert to help the court on the matters within his expertise [and] this duty overrides any obligation to the person from whom he has received instructions or by whom he is paid', and rule 35.12(1): 'The court may at any stage direct a discussion between experts for the purpose of requiring them to (a) identify the issues in the proceedings, and (b) where possible, reach agreement' and see *Daniels -v- Walker Practice Note* [2000] 1 WLR 1382, CA.

²⁰ See *Re B (sexual abuse: expert's report)* [2000] 2 FCR 8, CA.

13.16 Appeals from detailed assessments in family proceedings

The CPR Section VIII (as amended with effect from 2 May 2000 by r 11 of the Civil Procedure (Amendment No 2) Rules 2000, SI 2000/940) provides as follows:

Right to appeal

47.20 Any party to detailed assessment proceedings may appeal against a decision of an authorised court officer in those proceedings (Pt 52 sets out general rules about appeals).

Court to hear appeal

47.21 An appeal against a decision of an authorised court officer is to a costs judge or a district judge of the High Court.

Appeal procedure

47.22 (1) The appellant must file an appeal notice within 14 days after the date of the decision he wishes to appeal against.

- (2) On receipt of the appeal notice, the court will:
- a) serve a copy of the notice on the parties to the detailed assessment proceedings; and
 - b) give notice of the appeal to those parties.

Powers of the court on appeal

47.23 On an appeal from an authorised court officer the court will:

- a) re-hear the proceedings which have rise to the decision appealed against; and
- b) make any order and give any directions as it considers appropriate.

The general rule as to appeals, including appeals against the decision of a district judge, are set out in Pt 52 of the CPR, but Pt 52 has not yet been applied to family proceeding. Thus, in family proceedings there is no appeal under the CPR from the decision of a district judge either in the county court or in the High Court.

However, Pt VIII of the FPR makes provision for appeals from a district judge in the county court, and it is suggested that, at any rate unless and until Pt 52 Of the CPR is applied to family proceedings, an appeal against the decision of a district judge in detailed assessment proceedings, in family proceedings, may be made pursuant to Pt VIII, which provides that any party may appeal from an order or decision made or given by the district judge in family proceedings in a county court to a judge on notice. No permission is required.

So far as concerns appeals from a district judge in detailed assessment proceedings, in family proceedings in the High Court, FPR, r 1.3 provides that the RSC shall continue to apply, with the necessary modifications, to family proceedings in the High Court, and it is suggested that, for the time being at any rate, such appeals may be made under RSC Ord 58, which in the writer's view is preferable to, and more in the spirit of Pt 52 of the CPR than, the former practice under RSC Ord 62 of bringing in objections, followed by a review.

13.17 Graduated fees – Counsel – family proceedings

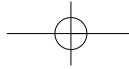
Since 1 May 2001, when the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001, SI 2001/1077, came in to force, counsel's fees in funded family proceedings in the High Court, county courts and magistrates' courts, under a public funding certificate granted on or after May 2001, where the length of the main hearing does not exceed ten days, are no longer governed by the LAFP(R) R 1991, or decided by detailed assessment, but decided by a Regional Director of the Legal Services Commission, with a right of appeal to the Costs Committee, and a further right of appeal to the Cost Appeal Committee.

The court will, however, still have a function to perform, because the order provides that the judge hearing the case shall, at the conclusion of the hearing certify, on a form provided for that purpose, that there are 'special issues' where the proceedings involve –

- a) a litigant in person;
- b) more than two parties;
- c) representation of more than one child by counsel submitting a claim for payment under this order;

or where the proceedings involve or are alleged to involve any of the following *which were of substance and relevant to any of the issues before the court, i.e.*
- d) more than one expert;
- e) a relevant foreign element;
- f) relevant assets which are not or may not be under the exclusive control of any of the parties;
- g) a party who has or may have been involved in the following:
 - i) conduct by virtue of which a child who is the subject of the proceedings has, may have or might suffer very significant harm;
 - ii) intentional conduct which has, could have or might specifically reduce the assets available for distribution by the court.

You thus have discretion in respect of (d) to (g), whereas (a) to (c) are a matter of record. Your decision as to whether or not there are any special issues is final, save on a point of law.



There should not be any difficulty in deciding whether any of the special issues mentioned in paragraph (1) (d) to (g) were of substance and relevant to any of the issues before the court. except perhaps for (1) (g) (i). 'significant harm'²¹ is a concept with which family courts are now familiar, but what is 'very significant harm'? It is suggested that you, as the trial judge, will know it when you see it.

If you should certify a special issue or issues, you complete the form, hand a copy to Counsel at the conclusion of the hearing, and retain a sealed copy on the court file.

'Family proceedings', for the purposes of the Order, are defined as proceedings, other than proceedings for judicial review, which arise out of family relationships, including proceedings in which the welfare of children is determined, and including all proceedings under one or more of the following:

- a) the Matrimonial Causes Act 1973;
- b) the Inheritance (Provision for Family and Dependants) Act 1975;
- c) the Adoption Act 1976;
- d) the Domestic Proceedings and Magistrates' Courts Act 1978;
- e) Part III of the Matrimonial and Family Proceedings Act 1984;
- f) Parts I to V of the Children Act 1989;
- g) Part IV of the Family Law Act 1996;
- h) the inherent jurisdiction of the High Court in relation to children.

²¹ By s.31(9) of the Children Act 1989 'harm' is defined as 'ill-treatment or the impairment of health and development', and s.31(10) provides that where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.

