

COSTS IN ANCILLARY RELIEF CASES

The implementation of the Family Proceedings (Amendment) Rules 2006 on 3rd April 2006, has radically changed the way the courts approach costs in ancillary relief cases commenced after this date.

THE NEW GENERAL RULE

The starting point is :

“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....” (r2.71 (4) (a))

Rule 2.71(1) makes it clear that this rule contains discrete & self contained provisions as to costs in ancillary relief proceedings by providing that **CPR r44.3(6)-(9)**, (those rules which govern costs in civil proceedings & provide , inter alia that costs are in the discretion of the court & normally follow the event), shall not apply to ancillary relief proceedings, as defined by **FPR 1991**. **CPR r44.3(6)-(9)** continue to apply to ancillary relief proceedings but those rules relate to the mechanics of the assessment of costs & not to the principles governing the award for costs.

EXCEPTIONS TO THE GENERAL RULE

Rule 2.71(4)(b) contains

‘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)’.

The matters which the court has to take into account are detailed below.

The only matter which may trigger an order for costs is the conduct of a party, in relation to the proceedings, often referred to as 'litigation misconduct'

The court may order costs at any stage in the proceedings.

Applications for costs may therefore be made at any stage, where it seems appropriate.

Rule 2.71(5) sets out matters which should guide the court:

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;

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.'

Some examples of the operation of the rules

a) Failure To Comply With Rules Orders etc.

Failure to file Form E

Failure to provide information

b) Open Offers

This rule must be read with the rule as to offers to settle contained in **Rule 2.71(6)**; ‘no offer to settle which is not an open offer to settle shall be admissible at any stage of the proceedings....’

(There is an exception to this which relates to FDR appointments only & is not relevant here)

Only open offers will be considered.

‘Calderbank letters’ are redundant.

When will a court think it may be appropriate to make a costs order under this rule ?

c) Whether It Is Reasonable To Raise Allegations Or Issues & The Manner In Which They Were Pursued Or Responded To

A party who raises an issue & pursues it, in the light of the evidence, will be liable for the other party’s costs in dealing with that issue.

Failure to concede an obvious issue .

Causes a party unnecessary work.

d) Any Other Aspect Of Conduct In Relation To The Proceedings Which The Court Considers Relevant

‘Catch all’

The others above are not exhaustive.

Conduct must be shown to have increased costs

e) The Financial Effect On The Parties Of A Costs Order

The Court must still take into account what the financial consequences of such an order would be.

The judge may, therefore, make a costs order if either or both parties have failed to comply with the amended Family Proceedings Rules 1991, with a direction made in the particular case or with a general practice direction made by the court, provided that the failure to comply with the Rules is relevant.

Relevance will probably be judged by reference to whether costs have been increased or proceedings delayed or lengthened.

APPLICATION OF THE CIVIL PROCEDURE RULES

CPR 44.3 (1) to (5) sets out the general rules in relation to costs which formerly applied, with some exceptions, to family cases.

The orders which a court may make are set out in **CPR 44.3 (6) to (9)**.

These continue to apply to family proceedings. If the court makes a costs order the court may order that one party must pay:

- a) a proportion of another party's costs;
- b) a stated amount in respect of another party's costs;
- c) costs from or until a certain date only;
- d) costs incurred before proceedings have begun;
- e) costs relating to particular steps taken in the proceedings;
- f) costs relating only to a distinct part of the proceedings; and

g) interest on costs from or until a certain date, including a date before judgement.

If the court has ordered costs to be paid by the other party, request that the court orders an amount to be paid on account, before costs are assessed. **CPR 44.3 (7)**

(It will help cash flow!)

The Basis Of Assessment

There are two basis of assessment – standard assessment & indemnity assessment.

Unless otherwise stated assessment will be on a standard basis. In funded cases assessment is always on a standard assessment.

When the order for costs is on the inter partes basis with no funded element involved, the court may order costs on an indemnity basis, but this is unusual.

The difference between the two bases is that on the standard basis the taxing officer must resolve any doubt in favour of the paying party, whereas on the indemnity basis the taxing officer must award all costs save where they are found to be unreasonable in amount or where they are unreasonably incurred.

Indemnity costs are more generous & are more likely to reflect the actual cost to the client, & are frequently awarded when the court wishes to demonstrate its disapproval of some action by the paying party, which has led to the order for costs.

However, to make a full indemnity order against a party is a draconian thing to do & it would be rare for a court to adopt this approach.

H v H (Clean break: Non-disclosure:Costs) [1994] 2 FLR 309

SUMMARY ASSESSMENT

There is no presumption of detailed assessment

The general rule in para 13.2 of PD in Part 44 of CPR did not imply a general rule requiring detailed assessment of costs in hearings lasting longer than a day. On the contrary, the exercise of the power to make a summary assessment must be considered in every case. In family cases aggravation of detailed assessment ran contrary to the satisfactory resolution of disputes.

Q v Q (Family Division costs : summary assessment) [2002]2 FLR 668, Fam)

Discrete Issues

Many aspects of family matters are dealt with in the same attendance, telephone call or letter, so it is important to distinguish between them for the purposes of summary assessment of the costs of an interim application.

Consider separate files relating to each aspect, or to a specific hearing such as MPS.

Ensure separate letters are written regarding different aspects. (You will be able to satisfy the Judge that you are not over-charging, and yourself that you are charging enough !).

PROVIDING ACCURATE COSTS ESTIMATES

File & serve the Form H at every hearing or appointment.

Remember to file & serve 14 days before the final hearing.

Failure to do so without reasonable excuse may be taken into account when deciding what order, if any, to make about costs **CPR 44.3(4)(a)**

The same rule applies to private funded parties & legally aided parties.

SUMMARY ASSESSMENT – BE PREPARED

If a party is intending to apply for summary assessment of costs he should file a schedule of costs in CPR Form N260.

Form N260 may be amended specifically for use in family proceedings as a result of the Consultation Paper published October 2004 “Costs in Ancillary Relief Proceedings and Appeals in Family Proceedings”

- The costs liability of a party cannot simply be deducted from the calculation of the current assets (**Leadbeater v Leadbeater [1985]FLR 789 CA & H v H [1997] 2 FLR 57**). Invite the Judge to “credit back” capital already spent on costs. This should be contained in the Form H, or if necessary can sometimes be identified from bank statements, &/or appropriate questioning.
- Inform the District Judge in closing submissions of the total outstanding costs liability. Although , costs arguments should be addressed “separately” only once the court has made the order, it may be helpful to outline in advance the effect upon the party, if the Judge were minded that there should be no order as to costs.
- Have separate costs statements for specific dates/events as well as a costs statement for the entire case.
- Try to “knock down” the other party’s costs.
 - Check hourly rates
 - Identify any individual issues which may have been unreasonable to argue e.g. dispute over a valuation &/or unreasonable conduct in the litigation e.g.

lengthy correspondence, failure to give proper disclosure.

LIMITING THE STATUTORY CHARGE

- i) Agree in writing at an early stage what assets are not in dispute. This may limit the assets which potentially attract the statutory charge, or at least provide a costs argument if such agreement is withheld.
- ii) If successful in respect of a non-molestation or occupation order rather than conceding costs, ask the Judge to make an order for costs, with any enforcement to be determined at the conclusion of the ancillary relief claim.
- iii) Apply for the discharge of the existing certificate where practical to avoid the costs of any further proceedings adding to the charge under the same certificate on assets preserved.

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