FINANCIAL DISPUTE RESOLUTION IN ENGLAND

By

William Longrigg[1]

In England, a significant method for settlement of financial matters in divorce cases is through a hearing process called Financial Dispute Resolution. The Financial Dispute Resolution (FDR) hearing is a judge-led meeting held for the purpose of discussion and negotiation over financial issues on divorce. It was introduced as part of an experimental rule change on a pilot scheme basis in 1996, which overhauled the procedure in ancillary (financial) relief cases with the distinct aim of reducing delay, facilitating settlement and limiting costs. Over the last 14 years it has undoubtedly been a success in terms of speeding up applications and ensuring as far as possible that cases are settled in the relatively early stages. This article looks at what happens at the FDR hearing and, more broadly, at the ancillary relief procedure leading up to and including the FDR hearing.

The procedure under the Family Proceedings Rule 1991 (FPR 1991) follows three stages, with each stage culminating in a court hearing:

1 From filing an ancillary relief application until the end of the first appointment (or FDR hearing if the parties agree to convert the first appointment to an FDR);

2 From the end the first appointment until the end of the FDR hearing; and

3 From the end of the FDR hearing until the final hearing.

[1] William Longrigg is a family law attorney in private practice. He is a partner with the London, England firm of Charles Russell LLP. Mr. Longrigg may be contacted at William.longrigg@charlesrussell.co.uk.

The old ancillary relief procedure often involved delay and huge costs. Cases could take years to be concluded, rather than months. There was no court-imposed timetable. The Family Proceedings Rules 1999 ensure that, if agreement on financial issues is not easily reached early on in a case, the court has a quick and cost-effective procedure to deal with the assets on divorce and help keep legal fees in check. This is the procedure employed in the great majority of cases.

Stage 1

The process starts with the applicant filing an application for the court to deal with financial issues (Form A). At the time of filing the Form A the court will fix the date for the first appointment within 12 to 16 weeks. This triggers a timetable which cannot be altered without the court's permission. Cases are 'front-loaded', with most of the financial information gathering and exchange taking place within this relatively tight timeframe. The rationale is that full and frank financial disclosure from the outset makes early settlement possible; before effective settlement negotiations can take place, the parties must establish what there is to divide.

Each party is ordered to complete and swear a Form E, a pro forma court document in which each party details assets, resources, income, debt, contributions made to the marital wealth and future needs. Sworn Form Es are exchanged simultaneously five weeks before the first appointment and both parties can then request missing information via questionnaires. Simultaneous exchange ensures that each party puts forward their version of events without reference to information provided by the other.

Two weeks before the first appointment, the parties must also file

- a concise statement of the issues between them,
- a chronology,
- a questionnaire requesting further information and/or documents not provided in the Form E; and
- a notice in Form G which states whether the parties will be in a position to convert the First appointment to an FDR hearing.

Each side must also file a written costs estimate for the first appointment, (and, later, for the FDR hearing and the final hearing). The rationale is that costs should be at the forefront of the minds of the parties so that they can see the implications of their behaviour as the application proceeds. At both the first appointment and the FDR hearing, the court will routinely warn the parties about the inevitable escalation of costs if the matter does not settle and the need to ensure proportionality between costs and the benefits obtained. Not only do regular costs estimates help to remind the parties about the need to adopt a proportionate approach to costs, but they also ensure that the parties are not shocked at the final hearing when confronted with the cost of their litigation to date.

Once the parties have established what there is in the marital 'pot', the court places great emphasis on working towards agreement. There is usually a chain of open or "without prejudice" letters between solicitors. These without prejudice offers enable the parties to lay their cards on the table and make their best offer without prejudicing the position they maintain at a final hearing if they do not settle as these offers cannot be seen by a judge apart from the FDR judge.

Essentially, the First appointment deals with directions and administrative matters in the case while the FDR hearing is much more concerned with attempting to find a solution. One direction which one or both of the parties might request at the first appointment is whether the matter should proceed to the High Court or continue in the lower court where most applications are issued. Only a small minority are deemed suitable for the High Court – where there are very significant assets or an important point of law or complex international elements. An FDR in the lower court would last for one hour and in the High Court half a day or a day.

Stage 2

The FDR will normally take place 3 to 4 months after the First appointment. There may be a longer lead-in in the High Court. The FDR hearing is essentially a process of court-led mediation, giving the parties the benefit of a wholly independent judicial opinion on their case without the need for a full trial and the costs and delay that a full trial necessarily involves. It also gives parties a chance to resolve their differences in a structured way.

Most negotiation takes place outside the courtroom between the lawyers on behalf of the parties. The parties are under a duty under the FPR 1999 to make proposals and to give proper consideration to the proposals from the other. The judge is made aware of all offers and proposals made. The parties are normally given time to attempt to negotiate and the judge may have everyone back in two or three times during the course of the day to see how matters are progressing.

If they are not able to agree on a particular issue, the judge is on hand to offer an early neutral evaluation as to the likely outcome if the matter were to proceed to a final hearing. This evaluation is often a wake-up call to a party maintaining an

unreasonable position. In most cases, the neutral evaluation of the judge is supplemented by an objective analysis of the costs incurred by the parties to date. The parties do not give evidence at the hearing although they may on occasions be asked questions directly by the judge.

The FDR judge cannot impose a final order but can approve an agreement that the parties have reached themselves. Three categories of order are possible:

1 An order adjourning the hearing to another FDR;

2 A consent order disposing of the case; or

3 Directions to progress the case to its final hearing (which in some cases may have already been fixed) and other relevant directions.

The District Judge or High Court Judge has no further involvement with a case after the FDR appointment; the parties are therefore encouraged to negotiate freely without fear that they will prejudice their positions if the case goes to a final hearing. A “cards on the table” approach is essential if the FDR appointment is to have any success and each party should:

- have complied with the directions and provided all financial disclosure in a timely manner;
- have carefully considered his or her position and arrived at a sensible and realistic proposal; and
- be reasonable and must try to settle the case.

The purpose of negotiation is not to determine liability, but to reduce the length and expense of the legal process. The duty is not merely to settle the case, but also to narrow the issues. Parties that fail to negotiate or who arrive at the FDR hearing with the intention of sabotaging it, may be penalised in costs although in practice this seldom happens.

The form of the FDR hearing will depend on the style preferred by the individual judge and the FDR appointment has been described as an innovative and elastic field.

The parties will be bound by any agreement approved by the judge or reached as a result of negotiation. Practitioners are rightfully cautious to protect their client's position and avoid criticism that they have "forced" their clients to settle. There is a fine line between acting in the best interests of a client and ensuring that a client is not reaching an agreement while their state of mind is influenced by the stress of the hearing and the inevitable pressure to settle.

Stage 3

Relatively few cases get to the third and final stage in proceedings. The final hearing begins with each party setting out its case. Both spouses then give oral evidence for the first time. If experts have been involved (such as accountants), they may also be questioned, as may other witnesses if relevant. After the evidence has been given, the judge makes a final, binding order detailing how the parties' finances are to be dealt with. It is common for final hearings to last at least 2 days and up to a number of weeks in particularly complex matters.

Conclusion

The FDR system is not perfect, but it does seem to be very successful. Most cases settle at or soon after the FDR hearing, if they have not settled before. It is rare for a case to go to a final hearing. The disadvantages are that there can be a long wait to the FDR hearing and it is expensive and stressful. Alternative forms of dispute resolution, such as mediation and the collaborative law approach may suit individual clients better.

There is also a suggestion that, as time has gone on, the FDR hearing is used less constructively by practitioners. The gap between the offers made by parties seems greater, with each party realising that more negotiation will take place at the FDR hearing and perhaps pitching offers at a level that makes 'splitting the difference' more advantageous to them.

Despite complaints about the delay in matters proceeding to the FDR hearing and concerns about how constructively it is used by the parties, it is a good opportunity for them to hear the neutral indications of the judge as to the likely outcome of their case and, in most cases, this is enough to disabuse the parties of any unrealistic expectations that are hindering progress in settling. The skill of a experienced practitioner is to advise on the likely outcome and to negotiate a reasonable settlement at an early stage, before costs escalate.