

Forward planning

In the first of a two-part guide, Jemma Pollock outlines key aspects of preparation for a final hearing in financial proceedings, as well as common pitfalls



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Thankfully, most financial cases do not reach a final hearing, but when they do careful organisation can make it easier to deal with the pressures of preparing the case and helping a client faced with giving witness evidence for probably the first time. Good preparation and staying one step ahead also increase the chance of a (favourable) settlement. The first part of this article will provide some tips on preparing your case, and part two will deal with how to prepare your client.

Prepare for the final hearing before the FDR hearing

The key to a good final hearing is getting the directions right. All of the steps are interlinked and timescales are vital, for example, property particulars can only be proposed if what each party can raise by way of mortgage, and what they will have as a deposit on your client's open position, is known. This means considering what evidence will be needed, and in what order, as early as possible.

Luckily help is on hand – the precedent (long-form) financial directions order, issued within the standard orders project commissioned by the president of the Family Division, Sir James Munby, lists the most common directions in significant detail. As part of the preparation for the financial dispute resolution (FDR) hearing, it is helpful to work through this and consider what will be needed if the parties don't settle, and what timescales will be needed to comply. If expert evidence is required, the expert's timescales for a report should be ascertained and the rest of the directions set accordingly.

Also remember that directions can work both forwards (ie a specific date in six weeks' time) or backwards (ie 21 days before the final hearing). Check which timescale is more appropriate, particularly as a hearing date won't be issued immediately.

Finally, consider the need for a pre-trial review (PTR) hearing. This will not always be necessary, but may be helpful in complex cases. Mostyn J's *Statement on the efficient conduct of financial remedy hearings allocated to a High Court judge whether sitting at the Royal Courts of Justice or elsewhere* confirms that all cases allocated to a High Court judge must have a PTR four weeks before the final hearing. If the case is to be heard on circuit, the PTR may be heard by the allocated judge by video link.

Set a timetable and tell everyone about it

Once a directions order has been made, the client, counsel and witnesses should be advised of the hearing date as soon as possible, particularly where availability may be limited.

The dates for each step required should be diarised – not only the deadline, but also when the task needs to be started. If any dates don't work, there will be plenty of time at this stage to liaise with the other side (and if necessary the court) to save that last-minute panic. One tip is to set up a table like the one on p20 so that you, your client and anyone working on the case can keep track of what is needed and when.

Gather evidence Experts

If expert evidence is needed, consider the required directions including

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parameters and how fees are to be paid. Remember that this also includes a valuation of the family home, if one is required. Also, save a headache further down the line by timetabling the report carefully: the standard directions order is really helpful for this and includes suggested directions for a number of different types of expert. Finally, experts rarely attend the final hearing, but if this might be necessary check their availability before the FDR hearing to avoid an issue with dates.

Mortgage-raising capacity

Mortgage-raising capacity evidence is needed in the majority of cases and can be vital to the outcome. It could, for example, be the difference between a client retaining the family home or it being sold. It affects the capital and also spousal maintenance based on income needed to raise a mortgage and affordability of payments. Consider if evidence of the other party's mortgage-raising capacity may be required as well.

In some cases, a written assessment from banks may be sufficient, but do ensure that a range of different lenders are included as they may have very different options. Alternatively, the standard directions order suggests a 'certificate from a mortgage broker' – essentially a short report that can give a more comprehensive and tailored calculation.

Remember that the client will be raising the mortgage after the final hearing, so take into account any likely changes, such as payments of maintenance. If the amounts are not yet clear, ask the adviser to provide a range of calculations based on

varying levels of maintenance (always include one with £0 for maintenance for comparison as well). Knowing the parameters of a client's open proposal will be helpful so as to obtain a calculation based on this, and then potentially an update later based on the other party's open proposal. Also remember to cover the following:

- **Term:** how long should this be given the client's age and anticipated retirement date?
- **Repayment or interest:** interest-only mortgages can mean lower monthly payments, but how would the client repay the loan at the end of the term?
- **Fixed rate or tracker:** in a climate of rising interest rates, this can be the key to whether a mortgage is affordable in the long term. Consider a longer initial fixed product if needed and if the base rate changes before the hearing, obtain an updated report to take this into account.
- **Affordability:** can the client afford the repayments on their anticipated outgoings?

- **Loan to value:** ask the adviser to include any changes based on the deposit available. This could be useful if the other party suggests that your client receives less capital than anticipated.

Updating disclosure

The updating of disclosure is important to ensure that the judge has an accurate

Advise the client at an early stage of the continuing duty of disclosure, as any major changes should be updated regularly and again closer to the final hearing.

view of your client's finances. The standard directions order has a helpful list of what should be updated and it is prudent to also cross-check the financial statement in Form E and any replies to the questionnaire. Consider if anything has changed – will the client have prepared updated accounts, or have a new P60? Similarly, check the updates from the other party carefully so that any missing information can be requested quickly. Also advise the client at an early stage of the continuing duty of disclosure, as any major changes should be updated regularly and again closer to the final hearing.

The other point that is often missed is updating the costs position. If you don't know that the other party has £10,000 outstanding in fees it may make any open proposal impractical. Another tip is to provide the client with a detailed cost estimate so that they can make payments on

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account in tranches, meaning that their legal fees are reflected in their disclosure.

Property particulars

Setting out options for where the client and the other party could live is an important part of persuading a judge that a client's position is realistic. The first step is considering the parameters with the client, ie price range, areas, bedrooms and types of property. Remember to do this for the other party as well – or are you saying that the same properties are suitable for both? Then narrow the options down by looking in

detail at the properties. Consider the following:

- Check journeys to work/school for each party and any children. One tip is to run an online journey planner for the time of the person's journey to exclude any arguments about traffic issues. Also check public transport options and frequency of connections.
- Look at school catchment areas and their Ofsted ratings.
- Check the distance to local amenities, any upcoming changes to the area and the crime statistics.
- If a property appears to be priced low for the area, is there a reason? Does it have a train line or busy road nearby, or is it affected by other issues such as a flood risk or works needed?
- Read the particulars carefully – barristers will be happy if you hand them an easy argument. My personal favourites are:
 - Ground-floor flat in a well-kept building with a communal garden, but 'It is a condition of purchase that residents be over the age of 60 years' (the other

Sample checklist

Date	Task	Person	Tips
23 April	Updating disclosure preparation	Client	Set out for the client what is needed from them and when – asking them to send updating disclosure early means that there is time to check it and request the one month that will inevitably be missing from the bank statements.
2 May	Mortgage-raising capacity and updating disclosure due (serve)	Solicitor	Remember to include details of whether the direction is to serve, file and serve and/or exchange.
	First draft s25 statement	Client	Set a timetable if a client will prepare first drafts of documents. Also consider their particular needs: do you need to plan around their holiday or other commitments close to a deadline?
9 May	Property particulars due (serve)	Solicitor	
14 May	Conference with counsel	Both	Is an early conference to review the draft statement and discuss the open offer required?
21 May	First draft open proposal	Solicitor	
23 May	Section 25 statement due (file and serve)	Solicitor	
	Draft bundle index	Solicitor	Don't forget other preparations, even though they may not be in the directions order.
30 May	Open proposal due (file and serve)	Solicitor	As the hearing gets closer, timescales become tighter so don't forget things such as costs and briefing counsel.
	Form H1 due (file and serve)	Solicitor	
	Updating brief to counsel	Solicitor	
6 June	Open proposal due from other side	Solicitor	Include any deadlines for the other party to keep track of.
	Finalise bundle and deliver	Solicitor	Cross-check the requirements of the Family Procedure Rules 2010 (FPR 2010), PD 27A for the deadlines and adapt the table accordingly.
8 June	Conference with counsel	Both	Do you want a conference close to the hearing to assist with preparing your client?
13 June	Final hearing	Both	

party might not be eligible for a retirement flat).

- Modern new-build property, but 'Price listed is based on purchasing a 40% share of the property via shared ownership' (shared ownership may be an option but in many cases the costs and terms will be prohibitive).
- Particulars proposed by the other party: for them, a house with a sauna in the back garden, for my client – 'this house really is a blank canvas' (estate agent language for bare floorboards and horrible wallpaper!).

Once you have chosen potential properties, print the particulars in colour and obtain the official brochure rather than a printout of a web page. Also consider how you can help the judge – they may not know the area so prepare a map of the properties and key places including schools, work and stations, and summarise details such as journey times in a table. The next step is getting clients to visit the properties, or at least the areas, which will be covered in more detail in the concluding part to this article.

Final preparations

Open proposals

Pitching your client's open proposal is very important as it presents their position to the judge. Start discussing this early with the client and counsel, and ensure that the position ties in with the evidence. Also update your advice to the client, including on their position, the risks of a final hearing and concessions that they may/may not be prepared to make.

A key tip is to have a working asset schedule and a 'net effects' table that calculates the outcome of each proposal made. This can calculate the capital needed for your client to have their housing fund (taking into account their mortgage-raising capacity, stamp duty and purchasing/moving costs). Make sure that these figures match up to the property particulars for each party, and don't forget other capital needs such as cars and outstanding legal fees (including for implementation). Finally, run through the precedent financial

remedy order (issued as part of the standard orders project), so that you don't miss details such as insurance or automatic variations.

Bundles

Bundles can often be left to the last minute but preparing them properly can make the hearing easier for your client and counsel. Start preparing the index two to three weeks before

- if in the High Court, check the statement of Mostyn J on efficient conduct for more specific provisions about bundles and filing requirements.

Preliminary documents

Don't forget the preliminary documents, particularly if in the High Court (Mostyn J's statement gives guidelines and penalties for

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the hearing if you can and reread FPR 2010, PD 27A as a refresher of the main relevant parts.

Key points to remember are:

- bundles should comprise one A4 lever arch file, with a maximum of 350 pages, printed single sided – if more than one bundle is necessary a direction must be sought, ideally before the FDR hearing;
- bank statements and correspondence should usually not be included, but if they will be relevant seek a specific direction to prevent a debate with the other side;
- check with counsel in advance if there is anything they want included;
- paginate each section individually as it makes it easier to add late documents;
- make sure there are enough copies (ie, for the judge, witness, each barrister, each solicitor, your client and a spare just in case), and also ensure that they are filed in accordance with PD 27A;
- if an index cannot be agreed with the other side, take separate bundles with the disputed documents; and

any failure to comply). An easy way to share the workload is to agree with counsel what they will prepare with their skeleton argument. Remember that PD 27A requires some documents to be agreed by all parties if possible, so start this in advance and if not agreed, highlight any differences. Also, consider if the client will have input and leave enough time if so.

Costs

Form H1 has to be filed and served 14 days before the hearing, showing all costs up to and including the final hearing, as well as disbursements (therefore counsel's fees, refreshers and deeming dates should be agreed in advance) and implementation costs. Accurate costs can be important for the open proposals as well as ensuring that the client has sufficient funds from the capital to meet your fees, so this last step is worth the time to calculate properly.

Conclusion

Preparation for a final hearing is vital for a client's case, and the details really can make a difference to outcomes. The key thing is to start considering that preparation even before the FDR hearing to save time and potential difficulties going forward. Part two of this article will cover the next step of preparing the client, in relation to their statement and for giving evidence at the hearing. ■

Getting ahead

In the conclusion to a two-part guide, Jemma Pollock sets out key considerations when preparing witness evidence in financial proceedings



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Until the final hearing clients may have been one step removed from the proceedings, with the preparation mainly dealt with by their solicitor and the court hearings by their barrister. For a client, their witness evidence is probably the first time that their voice is actually heard directly, and it is likely to be one of the most stressful things that they will ever do. As a family lawyer, sitting in court watching a client give evidence is one of the most daunting parts of our job. While most lawyers have never given witness evidence themselves (and hopefully never will!), it is really important to know how to help clients to prepare for this stage in the proceedings in order to minimise the risks to their case.

Witness statement

Once in court, you will have no control over what your client says in the witness box and this is the point at which their case comes down entirely to them. However family lawyers do still play an important role because for the vast majority of family cases, the witness statement will stand as evidence in chief. Indeed r22.6(2), Family Procedure Rules 2010 (FPR 2010) and Mostyn J's statement on the efficient conduct of financial remedy hearings state that this must be the case unless directions have been made by the court to the contrary.

As emphasised in the first part of this article, the importance of preparation and timetabling cannot be overstated. Nowhere is this more important than in preparing a client's witness statement. Work should be

commenced on this well in advance, and as should discussions with your client as to how it will be done. Will your client prepare a first draft and if so, by when? Do you want counsel to review the statement, or even have a conference to discuss any points? Considering these practicalities in advance can really help when you sit down to actually start drafting the statement. Also remember that:

- The statement has to be in your client's words and reflect their case – this sounds obvious, but it is very easy to focus on preparing the best possible case, not necessarily what your client wants to say. The statement is their open position and cross-examination will be much easier for them if their written evidence is in their own words. Some clients do adopt a position that you might not recommend, but this is their opportunity to be clear about their case and your chance to work with them to present it in the best way possible.
- To help with the preparation, meet with the client to take a proof of evidence or give them a statement structure with the key headings and a bullet-point list of things to complete. This will then make it easier for you to work with their priorities as the starting point.
- Check the directions order – the standard order for directions for financial remedy proceedings provides for the statement to be

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limited to dealing with the relevant factors of a certain statute, usually of course s25, Matrimonial Causes Act 1973 (MCA 1973). The order might also be more specific, such as that the statement should not refer to conduct or that it should specifically deal with a particular point in dispute.

- Before either you or the client start working on the statement, take a step back and carry out an assessment of the overall case. Look at the pleadings and arguments made by both parties to date, and if it helps prepare a table of what each has said on specific points (if it is an s25, MCA 1973 statement, do this for each of the criteria listed in the section). That will then help to set out what needs to be covered, both to support your client's case and to respond to the other arguments.
- Remember that the statement should be concise. Leave the legal arguments to counsel and focus on the practical points that your client needs to cover to support their position.
- Get the formalities right – FPR 2010, PD 22A is specific as to the requirements for formatting and headings.
- Incorporate other evidence – for example, property particulars and

mortgage evidence should support what your client says about their housing needs. Also consider any additional evidence that may be needed to support your client's case and exhibit this to the statement. For example, if your client will need to return to work, this is a chance

the hearing to prepare themselves and send them key information a couple of weeks in advance so that they start thinking about it and ask any questions. Giving evidence can be very stressful and this may not dawn on the client until immediately before the final hearing, so giving

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to set the parameters by exhibiting advertisements or applications for suitable jobs, as well as details of necessary training (including timescales and costs).

- Remember to cross-check the statement with your client's Form E and other pleadings, both as to what has been said previously, but also where an explanation is needed as to anything that has changed since.

Preparing for the hearing

The next step is to help your client to prepare for the hearing itself. Again a bit of forward planning can help. Suggest that your client sets aside a quiet day or two before

them as much information as you can about what will happen and what they need to prepare will really make a difference.

The most important thing for your client to do is to reread their statement to make sure that they know their case inside out. Their witness evidence is their chance, for the first time, to justify their position themselves. In particular, although the figures for a financial remedy hearing are vitally important, many people will find it very difficult to answer questions about these under pressure. Preparation is therefore key, so that they can always fall back on their strong and clear messages, and also so that they know where to find the information in their witness statement if needed.

Practicalities

- Don't forget to outline the practical details in relation to your client giving evidence, for example, will they swear an oath or affirm? Should they sit or stand? How do they address the judge? These are aspects of the court process that your client is likely to be unfamiliar with.
- Check that your client has made practical arrangements – how are they getting to court? If they have children, do they need to make child care arrangements? Where and when are you meeting them (and make sure that this leaves enough time in case there are travel problems)?
- The client may have been to the court building before, but if not it can be helpful to suggest that they visit the court in advance, and take them into the courtroom before the hearing if possible so that they can see where everyone will be sitting and where the witness box is.
- Explain in advance about the limitations where a witness is under oath over a lunch break or overnight, and the limited communication that you can have with your client during this period.
- Give your client a copy of the court bundle before the hearing. They have probably never seen one before, and it will ease the pressure on them when they are asked to turn to pages in it during their evidence if they are familiar with it already.

As well as the statement, it is useful to also review the other statements so that your client can consider anything that they want to respond to and also points that they may be challenged on in cross-examination. While your

client knowing their position on future housing inside out. After repeatedly telling clients to visit the property particulars proposed by them and the other party (and being ignored most of the time!), I have

really important. Remember that barristers prepare to cross-examine regularly, so their input into how your client should prepare can be very helpful.

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client will not directly give their evidence in chief (as their statement will serve that purpose), further information about a point in dispute can be useful for cross-examination – either for the client if they are taken to their position on that point, or for counsel in relation to the cross-examination of the other party.

One key tip, and again a recurring theme, is the importance of your

experienced first-hand a client being cross-examined about the suitability of the properties they had proposed, where the client described in detail to the judge the area and the child's walk to the bus stop for school. The judge made provision for housing in our client's favour – all because the client had actually been there.

Finally, a conference with counsel close to the hearing can be

Preparing to give evidence

Some cases can turn entirely on the credibility of witnesses, which is easy to overlook when the focus in financial remedy cases is usually the disclosure and practicalities. Do therefore make sure that you do not leave the preparation that your client needs until the last minute, whether this is a conference with counsel, written information or formal witness familiarisation training.

Witnesses cannot be coached however. Most clients will put you in this position before giving evidence, often through a panic about giving evidence and a lack of understanding about what you can or can't help them with. The best way to approach this is to explain clearly to the client about giving witness evidence and the limitations of how you can help. If the client

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needs further guidance on their specific circumstances, counsel will be able to assist with this as well.

What you can do is help your clients with how they approach giving witness evidence. Explain what will happen in each stage of their time in the witness box, ie initial introductions, evidence in chief (if it is allowed), cross-examination and re-examination. Talk to them about how they give evidence, speaking slowly and clearly, taking their time to think about each question before answering, and addressing their answers to the judge. Remind them that the judge is the most important person – one tip often passed on is for them to sit in the witness box with their feet pointed towards the judge, as this will angle their body to help them give their answers in the judge's direction more naturally.

In some cases, you may feel that your client needs more support before giving witness evidence. Many third-party legal services providers now provide 'witness familiarisation' training, or something similar. These courses provide detailed information to clients about the process and procedure of giving evidence, as well as working on skills that they can practise and use to deliver their evidence as best as possible. They often include mock hearings and cross-examinations. These providers also cannot coach the witness about answers in their specific case, so many ask for only very limited details about the nature of the case and evidence that the client will be giving. However they can use the time and expertise to work with the client on generic skills or in a case-study scenario. This is something that is becoming more common and can be very beneficial for many witnesses.

Other witnesses

In addition to your client, there may be other witnesses, whether expert witnesses or witnesses of fact, for either side. Don't forget about them in the run-up to the hearing – the same considerations apply as for your client, although an expert witness is likely to be experienced in giving evidence. In particular, consider the following:

- Witnesses who are not a party to the proceedings are more likely to get cold feet in the run-up to the hearing. Ultimately if they are supporting your client's case, it is your responsibility to get them there to give their evidence. Check their availability, explain

to them whom they are now in dispute with over matters that are personal to them both. However their reactions are important. Remind your client to stay silent and to try not to react, regardless of what is said. Make sure that you have paper ready for them

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the process and their duties (in writing) in advance, and consider if you may need to issue a witness summons.

- When preparing statements for other witnesses, remember that they are an independent witness probably on a specific point, although their evidence will be in support of your client's case. You will also probably know the witness less well than your client, or indeed may never have spoken to them before. A slightly different approach is therefore needed, ie take a detailed proof of evidence and be careful about leading them – you can point out inconsistencies but their evidence must be their own words.
- Once other statements have been prepared, send them to your client to read as part of their preparation as well – other witnesses are independent so there may be inconsistencies with your client's case, but these can usually be dealt with so long as your client is prepared to explain in their witness evidence.

You cannot of course control the evidence that the other party or witnesses give. However you can control what your client does (to some extent!). Watching the other party give evidence can at times be really difficult for clients; it is usually someone very close

to write comments to you, which you can then pass to counsel if appropriate (and explain in advance that you are a filter for these as counsel will not thank you for constantly interrupting them). Also consider in advance who is going to be in court and where they will be sat so that your client has as much support as possible – for a final hearing you may want someone to take a detailed note to help counsel with submissions, but it is also important to have someone there for the client.

Finally, also consider if specific arrangements are needed for a witness, for example a video link or translator. Provisions in relation to arrangements for a vulnerable witness are set out in the new Pt 3A, FPR 2010 and PD 3AA. This is outside of the scope of this article but where these provisions apply, detailed preparation and directions from the court are likely to be needed, so doing this well in advance can save those last-minute headaches the week before the hearing.

Conclusion

This topic could be covered by three simple words, ie 'preparation is key'. Taking some time to review timescales, prepare witnesses and consider practicalities will ensure that when the final hearing arrives, you will have set out your client's position as far as possible and done all you can to help them with their evidence – what the judge may then decide is out of your hands! ■