St.Mary's
FAMILY LAW SPECIALISTS

'They can do what!?'

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A huge volume of work is done in the county court by way of boxwork referrals. The court staff provide files to District Judges with various queries about the timetabling of cases, including when parties have requested consent orders or relief from sanctions be endorsed, but also when the court staff has spotted non-compliance with orders. District Judges are asked for their directions on the papers, orders are drawn up and sent out. The reality is that on a standard sitting day a District Judge might be expected to complete 5-10 pieces of boxwork, or more if the list is quiet. This boxwork realistically keeps the 'wheels of justice' within the civil sphere moving forwards. Often piles of boxwork can be seen in DJ's chambers, either on the desk or hiding in a large plastic box at the back of the room.

Any order that the court makes of its own initiative must be accompanied by the power for any party affected to apply to have that order varied, set aside or stayed. This is because the Civil Procedure Rules 3.3(4) specifically gives the court the power to make orders of its own initiative, however when it does so the court has to not only give the party the right to vary, set aside or stay the order but must specifically include within the order a 'statement of the right to make such an application' (CPR 3.3(5)). In many cases no party will oppose the order made, but if they do then the court can either consider that opposition in writing or list a hearing to determine the contested issue.

The reason in a family law article why I am even writing about this, and even then, quoting from the Civil Procedure Rules, is because there appears to be far less use of this practice within the Family Justice system. However as I will set out below the rules are very similar and there is no apparent reason why this type of case management couldn't occur, or might legitimately occur within Family proceedings.

This issue was specifically highlighted to me in a recent case where an application was made within public law proceedings by one party in writing to the court. The allocated judge upon receipt of that application rejected the application without listing a hearing or understanding the position of the other parties to that application. In consultation with other professionals it was widely said that this was wrong or was a denial of the parties Article 6 rights to a fair trial. However for the reasons considered below, wasn't this completely within the remit of the FPR?

Family procedure rules

Practitioners should be aware of the courts 'General Case Management Powers' as set out within Part 4 of the FPR. These rules in conjunction with the overriding objective with Part 1 of the rules, provide a wide ranging set of powers for courts to case manage all litigation before the Family Court.

The overriding objective specifically requires the court to deal with cases justly. However, 'justly' includes dealing with matters 'expeditiously and fairly', 'saving expense' and also allocating an appropriate share 'of the court's resources'. It does not therefore mean that all cases are required to be determined at an oral hearing, nor indeed is Article 6 an absolute right.

Part 4.1(3) of the rules specifically provides for the court to:

a) Extend or shorten the time for compliance with any rule;
b) Adjourn or bring forward a hearing;
c) Require a party to attend court;
d) Hold a hearing and receive evidence via telephone or another means of direct oral communication;
e) Exclude an issue from consideration;
f) Dismiss or give a decision on an application after a decision on a preliminary hearing;
g) Take any other step or make any other order for the purpose of managing the case or furthering the overriding objective.

These are but a small number of the listed powers. I have put the final subsection in bold, as this clearly is a wide catch all provision, that allows a judge to do anything else, provided that they can link it to furthering the overriding objective, which as I have sought to set out above, is itself already wide within its scope. The court's case management powers within Family Law proceedings are thus very wide and can be widened further if good justification can be provided as to the orders made.

Further to this, the case management powers can also be exercised of the court's own initiative. FPR 4.3(4) replicates CPR 3.3(4) in that:

The court may make an order of its own initiative without hearing the parties or giving them an opportunity to make representations.

However (again mirroring the CPR) if the court does do this then a party may apply to have that order set aside, varied or stayed AND the order must contain a statement of the right to make such an application (FPR 4.3(5)). Any such application to vary/set aside/stay an order must be done either within 7 days or whatever period is set by the court (FPR 4.3(6)).

Thus the wide case management powers can legitimately be utilised even without a hearing having been listed, provided that the power to challenge or set aside that order is explicitly granted to the parties. Notably there is no requirement for the challenge to be dealt with at an oral hearing, however this may be appropriate depending on the issue.

Relevance of all this to practitioners

Knowledge of the procedure rules may be thought less relevant or interesting than decisions of the Court of Appeal, however they are fundamental to the understanding of Family Justice. At a time when pressures continue to rise upon the Family Court system, judges are being required to determine more issues on paper or in a way that furthers the overriding objective. The rules make it quite plain that decisions can be made in this way, and thus it can be argued that they should be made in this way, provided that the proceedings are dealt with fairly.

Even on the issue of 'fairness' the overriding objective specifically links 'ensuring' that cases are dealt with fairly, to ensuring that cases are dealt with 'expeditiously'. The rules specifically suggest that a lack of delay and fairness run hand in hand.

On the example that I have listed above, the court is well within its case management powers to determine case management applications on a paper basis. If a party cannot set out a comprehensive and persuasive case in writing, then the application should not succeed. It is difficult to argue that oral hearings are required if parties cannot set out a coherent case in a written application. If the application should succeed, then a greater focus should be placed on ensuring that the written application appears to have sufficient merit to require further consideration at a hearing. There rightly are limits on the court's powers, but realistically those are limited to the court giving the parties the right to seek to amend the order made without a hearing.

Even then, if there is challenge made to the decision on the papers, there is no apparent right for the parties to require an oral hearing to reconsider matters. However that might be seen as appropriate if there are cogent arguments to be made. Also these powers only apply to case management decisions, rather than final decisions. I am clearly not suggesting that care orders can be made on the papers!

These general case management powers are important to understand as professionals may be able to use them to their own client's advantage. Court listings can often delay decisions being taken which might be made faster via a written application. Practitioners must be entitled to request that a court does deal with some interim applications in writing or without the need for a hearing to be listed. Practitioners can of course emphasise these powers to the judges themselves to seek to progress a case.

Further to this, it is often said that something cannot be determined without a paper application having been lodged. In most courts' paper applications for hairstrand testing, or DNA testing, or cognitive testing, or the valuation of the FMH (within FR proceedings) are rarely seen. This is because the court must be entitled to overcome the need for a paper application for the *'purpose of managing the case and furthering the overriding objective'.* Indeed FPR 4.1(4) explicitly provides that the court can require the making of an order be subject to conditions, which could involve the lodging of a paper application or the lodging of a fee after a decision has been made.

Thus whilst the FPR case management powers allow judges to exercise wide ranging powers over cases, the same powers allow advocates to encourage the use of such powers when it will assist their clients. Doing something that objectively furthers the overriding objective, reduces delay or reduces stress on the Family Justice system is rarely going to be criticised by the judiciary.

Plus with the increased number of applications being dealt with on paper, practitioners must be alert to their right to request for the decision to be varied, stayed or set aside, even if that explicit right has not been set out within the court order.

Concluding thoughts

It is unlikely that family cases are likely to become the constant churn of boxwork that is ongoing within the civil jurisdiction. Indeed the fact that many of the decisions will have more long lasting impacts than the determination of a small claim means that it probably shouldn't be. However the constant need to be more efficient within the system means that more and more cases might be said appropriate to be decided without always needing a court hearing to be listed.

That is not to say (as a practicing barrister) that courts can do away with directions hearings about discrete issues, however, there needs to be a greater awareness by family practitioners as to which issues might be better dealt with in writing and the powers that the court already has to be able to decide matters of its own initiative.

The rules are specifically broad to assist the overriding objective and can rarely be subject to challenge. A greater understanding of what can be done is crucial as the rules can often be used to a client's advantage, rather than purely being seen as a way of the court limiting 'justice'. Specifically if courts do seek to make orders of its own volition, parties must have that ability (sometimes forgotten by the court) to challenge that order. If the order appears to provide that no such challenge can be made, then the rules are very clear that the incorrect procedure is being followed.