FRC efficiency statement – an update from the trenches

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It's been 3 months since the FRC Efficiency Statement (Statement on the Efficient Conduct of Financial Remedy Hearings Proceeding in the Financial Remedies Court below High Court Judge Level) was released. The statement heralded a new, more collaborative approach to financial remedies cases.

How has the profession adapted to this change? Have there been any growing pains? What is the general consensus on this 'brave new world'? This article will look to answer these questions and attempt to outline best practice by shamelessly rewording edicts from those far more able than the writer.

Earlier this year I outlined a general 'at a glance summary' for the busy financial remedies practitioner struggling to get to grips with the new system. In the interests of self-improvement, I have condensed the summary further into tabular form.

Stage of Proceedings	FRC Efficiency Requirements	Notes
Allocation	Allocation questionnaires to be completed on issue	Identify where the case is complex to extend the listing time beyond 45 mins
FDA (directions only)	Agree directions (if possible) for accelerated procedure Agree and file ES1 Agree and file ES2	
FDA (utilised as FDR)	Agree and file market appraisal for the FMH If unable to agree, file competing market appraisals File and serve property particulars for both parties File and serve indicative material on borrowing capacity File and serve questionnaires Comply with other requirements at FDR, below	All must be provided 14 days before the hearing Parties should be prepared to explain why an agreed valuation is impossible Questionnaires should be no longer than 4 pages (12-point, 1.5 spacing) Date for final hearing may be fixed on this date
FDR	Agree and file an updated ES1 Agree and file an updated ES2 Agree and file a neutral composite chronology If the FDR fails, a timetable for the final hearing should be prepared and agreed if possible	All documents to be filed 7 days before the FDR Time estimate of 1–1.5 hrs Usually to be listed in the morning Parties to be available all day
Pre-trial review	If final hearing listed for 3 or more days To be held c.4 weeks prior to the final hearing Timetable for the final hearing to be prepared and agreed if possible	Timetables should: Allow time for judicial reading and writing Not normally allow more than 30 mins for opening Not normally allow for evidence in chief
Final hearing	Agree and file an updated ES1 Agree and file an updated ES2 Agree and file a neutral composite chronology	The court considers it unacceptable to be presented with competing asset schedules and chronologies

In the writer's experience, and from the anecdotal accounts drawn from other financial remedy practitioners, compliance with the efficiency statement has been effective. The additional front-loading has generally been met with positive feedback. In the writer's view, front-loading of financial remedy cases can only be a good thing. It allows the parties to focus their attention on the essential elements of the case whilst pressurising them to disregard some of the arguments traditionally referred to in judicial parlance as 'brave' (I'm sure we can all think of a few such arguments we've reluctantly pursued on instructions).

However, the rollout of the new efficiency statement has not been without hiccups. Notably, within the first 24 hours of release, the original ES2 schedule of assets was recalled as a result of the non-pension assets total not including the value of the husband's chattels.

Indeed, the ES2 seems to have been the primary cause of 'teething problems'. On 1 February 2022, Mostyn J and HHJ Hess released an advisory notice, endorsing the FLBA money and property subcommittee's note on the correct use of the ES2. As with the FRC statement itself, the ES2 advisory notice bears reading in full. It is mercifully short and includes an exceptionally helpful sample ES2. However, for those of us who are routinely scraping by without enough time to properly feed and water ourselves, the main points are summarised below in Q&A format.

The ES2 – general

What is the purpose of the ES2?	To record the assets, liabilities and income values in a simple and neutral format. It is designed to prevent disagreements about the way in which assets are presented. The guidance makes clear it is the advocate's job to make arguments on computation by reference to the competing figures in the ES2.
What is best practice for completing the ES2?	To be passed between solicitors at the same time updating disclosure is served
Do values have to be agreed?	No. Each column (Wife/Husband/Joint) is divided into two. This allows both parties to set out their case on the assets.
Do the parties need to agree/approve the other side's figures?	No. The ES2 is designed to easily highlight the parties' respective cases on computation.
What if both parties are using the same figures?	Both sides of each column should be completed by each party. Even if the same figures are being used.
What if the figures used are different?	The cells containing the competing figures should be highlighted in yellow. There is no need to highlight the differing totals as a result of the disputed figures.
Do I need to list liabilities as negative numbers or does the ES2 automatically deduct them from the total?	Yes. All liabilities need to be entered as negative figures. The ES2 helpfully converts negative figures into parenthetical red type.
Can I include the totality of the combined resources?	Yes. The FLBA note and sample ES2 outlines a helpful way to include this information: directly under the 'total assets' box, add a further box outlining each party's case on the total assets.

The ES2 – disputes over assets

Considerable effort has been taken to confirm the position in respect of computational disputes:

What do I do where there is a dispute over whether an asset should be included in the ES2 at all?	That dispute will be addressed by way of advocate's submissions at the appropriate time. If one party seeks to exclude, for example, non-matrimonial property, that party will leave their side of the column blank whereas the other side will enter the asserted value. As above, the difference should be highlighted in yellow.

What about assets that are owned by third parties?	Where it is asserted that one or both parties have a beneficial interest in property owned by a third party that property should be included in the ES2. If there is a dispute over the existence or extent of the beneficial interest, the parties should populate their side of the column with their case, whether that be a nil value or a different calculation.
What about jointly owned assets by the parties?	Jointly owned assets should be included in their entirety in the 'joint' column. It is not acceptable to apportion beneficial interests on each half of the column.

The FLBA guidance helpfully addresses some of the more glaring issues faced by practitioners attempting to make use of the ES2. However, as can be expected with a new way of working, issues have also arisen in respect of the ES1 case summary. Though arguably not as troubling as issues with the ES2 (because unclear cases on computation will likely cause significant delay in judicial reading time and unnecessary argument at the outset of hearings), essential aspects of the ES1 are still being left inadequately addressed.

The ES1 – common issues

The most common shortfalls in ES1 case summaries (based on the experience of the writer and anecdotal accounts from various FR practitioners) are:

- Entering monthly net income in the annual income box.
- Not highlighting disputes over net income with an asterisk.
- Not highlighting disputes over remarriage or cohabitation with an asterisk.
- Legal costs estimates not matching figures in Forms H/H1.
- 'Issues in the case' not being formulated as appropriate.
- 'Orders sought at the hearing' left blank, or worse, state 'to be addressed by counsel'.

Issues like those addressed above are to be expected in the early stages of new procedure. It is understandable that the new approach hasn't yet taken firm root. The view from those of us preparing low to medium money cases is that the ES1 and ES2 invariably improve the efficiency with which cases are prepared and presented. The ability for a judge not familiar with a case to look at two key documents and immediately be appraised of the essentials is invaluable. However, as the transparency project article 'Remote Justice: A Family Perspective' illustrated rather embarrassingly at the start of the pandemic, what seems to work well for the profession doesn't necessarily benefit the clients we serve.

When the efficiency statement was released, there were some queries as to whether the focus on front-loading causes more animosity earlier in proceedings. In the writer's view, this concern is not borne out. It tends to be the case that there is a magic window of settlement once full disclosure has been given and any questions arising out of that disclosure are answered. It may be that some clients are still emotionally raw in the early stages of proceedings. This should be offset by firm and realistic legal advice no matter the issues in the case. It can only be good that clients and their legal representatives are forced to realistically evaluate the case they intend to present earlier in proceedings.

Any animosity should generally be mitigated by a fully understanding of that party's case and that presented by their soon to be ex-spouse. The time between the FDR and final hearing is the opposite of that magic window for settlement, in which both sides' positions harden and any opportunity to settle inversely correlates to legal costs incurred.

This article has primarily focused on the primary documents required in contested financial remedy proceedings, but what of the other guidance laid down in the efficiency statement?

Other guidance

Position statements (Skeleton Arguments/Notes)	FDA: 6 pages max Interim application: 8 pages max FDR: 12 pages max Final hearing: 15 pages max 1.5 spacing, 12-point font These limits are best practice. The 'backstop' page limit is 20 pages as outlined in PD 27A 5.2A.1. However, advocates who exceed these limits should be prepared to explain themselves. Position statements should be emailed to the hearing judge by 11am on the working day before the hearing. They should be exchanged no more than 1 hour after filing.
The duty to negotiate openly	All parties should inform the court of their compliance with the duty to negotiate openly and reasonably at every hearing.
Drafting orders	Draft orders must be agreed and filed on the day of the hearing unless wholly impracticable in which event the order must be filed in 2 working days of the hearing. This is a statement of best practice. The 'backstop' is 7 days as outlined in FPR 29.11(3)(a).
Wellbeing	It is not reasonable to expect an email sent late in the day to be answered early on the next working day. Emails sent after 6pm shouldn't be expected to be answered before 8:30am the next day. Sending emails between these times is strongly discouraged. Email correspondence between these hours is acceptable if it will lead to a settlement being reached or the issues being narrowed.
Penalties	If advocates fail to comply with the requirements: to provide agreed schedules of assets and chronologies; not to exceed the prescribed length of position statements; or filing position statements outside the prescribed times They risk an order being made disallowing a proportion of their fees. Be warned!

How has this other guidance fared in the new landscape? Generally speaking, the prescriptive rules in respect of position statements have been welcomed. However, it is fair to say that practitioners are concerned about the requirement that statements are filed by 11am the working day before the hearing. In fact, much professional vexation has arisen out of the focus on meeting senior judiciary-imposed timings that simply aren't possible for the average financial remedy practitioner. It is rightly concerning to think one may be financially punished for breaching these deadlines when the vast majority of practitioners are doing their best against overwhelming odds.

In many cases, advocates with busy diaries simply cannot commit to filing position statements on the Friday before an FDR on Monday because they are either in court or valiantly attempting to agree and file a draft order in accordance with the FRC guidance. The order drafting guidance could be fairly criticised as focussing on the best-case scenario rather than what is reasonably possible for practitioners to do in the course of a working week. The same reproach can be directed at the 'wellbeing working hours' outlined in the guidance. Again, in an ideal world, practitioners would be able to close their laptops at 6pm, enjoy a restful night and then boot up at 8:30am to crack on with a new day. The preceding sentence is enough to evoke a wry smile from anyone with a financial remedies practice.

Perhaps the criticism in the above paragraphs represents the inevitable groans of a system in flux. Maybe, given enough time, the front-loading of cases and firm focus on deadlines and page limits will settle into the new routine of practice. The extent to which this guidance "sticks" is arguably dependent upon the extent to which the judiciary are prepared to sanction parties and their representatives for non-compliance. It may be that as the new

practice establishes itself, sanctions for failing to comply with the efficiency statement will be more commonplace. We are, after all, only three months down the road towards Mostyn J and HHJ Hess' definition of efficiency.

The FRC efficiency statement represents a seismic shift in financial remedies practice. Its rollout was inevitably going to raise concerns with the profession, as all change does. It remains to be seen the extent to which the new drive towards efficiency will affect cases heard at County Court level. With talk of the FRC collecting data in respect of small to medium money cases to develop guidance on likely settlements in similar cases, perhaps we will see this in empirical form soon enough.