Flowchart Companion

Not What I Ordered: Attacking Financial Remedy Orders

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This is a short companion to the flowchart titled *'Not what I ordered: attacking financial remedy orders'*.

The flowchart is intended to identify which routes to set aside or vary a financial remedy order are available on your facts, as well as some basic information about procedure under the Family Procedure Rules 2010 ('FPR') and (in some cases) legal test.

Save where there is a statutory variation jurisdiction under s31 of the Matrimonial Causes Act 1973, in trying to reopen or set aside orders for financial remedy, a litigant is usually swimming against the tide. There are powerful arguments about finality and the need to bring an end to litigation,[1] and these principles operate to set a high bar before any attempts to revisit a final order can succeed. It may feel as though the law is against you every step of the way. Time is always of the essence, and any undue delay is likely to be fatal even to an otherwise good application.

Starting from the top left of the flowchart:

FPR 27.5: Jurisdiction to set aside an order made at a hearing the party did not attend

I would describe this as a procedural jurisdiction to revisit an order. It applies to all orders, rather than just final orders, providing they were made at a hearing at which the party did not attend. It is based on rule 39.3 of the Civil Procedure Rules 1998.

[1] For instance, Cobb J in *De Renee v Galbraith-Marten* [2023] EWFC 141 said at ¶22:
'It is undesirable to allow litigants two bites at the cherry; I should be wary not to allow a litigant to re-litigate afresh a matter which has already been decided (or in this case, agreed).'

I note that the authors of the Family Court Practice 2025 ('the Red Book') disagree with me that this can be used to set aside financial remedy orders, pointing out that there is a dedicated set-aside regime for these orders under FPR 9.9A.[2] My view is that FPR 27.5 can be used to set aside a financial remedy order, because:

a. The set aside regime referred to in FPR 9.9A (as explored below) is said by PD9A ¶13.5 to be engaged when certain conditions are met, none of which are procedural in nature. There is no reference to any procedural matters.

b. I have firsthand experience of this rule being used to set aside a financial remedy order.

The procedure to be followed is not specified in the rule. My view is that the part 18 process should be followed,[3] with the addition that a witness statement should be filed as required by FPR 27.5(2). It is fundamental that any application under this rule is made promptly.

Appeals

This article is not intended to be a detailed look at the appeals process. Suffice it to say that the bar to success is high, and time limits strict.

Some attempts to set aside an order, primarily under *Barder*, used to be approached as an appeal out-of-time. This was a confused, clumsy procedure,[4] and FPR 9.9A was created for this reason. I mention this because many of the authorities on setting aside orders are filled with references to appealing out of time, which is no longer required.

Undertakings

Undertakings are not variable, but the court has a jurisdiction to release a party from his or her undertaking.[5] The test, essentially, is whether it would be just to do so. The court may choose to do so on an absolute basis, or on a conditional basis; for instance, that a revised undertaking is offered.[6]

My view is that an application for this should be made under the part 18 procedure.

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[2] Commentary under FPR 27.5, Red Book 3.1124[1]: ''*[This rule] does not apply to financial remedy applications that have their own set aside regime under FPR 2012, r 9.9A'*
[3] FPR 18.1 (2): An applicant may use the part 18 procedure if the application is made (a) in the course of existing proceedings… or (c) in connection with proceedings which have been concluded.
[4] Described and lamented by Sir James Munby P in *CS v ACS (Consent Order: Non-Disclosure: Correct Procedure)* [2015] EWHC 1005 (Fam)
[5] *Mid Suffolk District Council vs John Edgar Clarke* [2006] EWCA Civ 71 ¶15
[6] *Birch v Birch* [2017] UKSC 53 ¶5

Section 31 of the Matrimonial Causes Act 1973

There is a statutory jurisdiction to vary certain types of financial remedy orders. These are:

1. An order for maintenance pending suite, periodical payments or secure periodical payments;
2. A lump sum by instalments;[7]
3. A deferred lump sum;
4. A settlement of property order made in judicial separation proceedings;
5. A pension sharing order (before implementation);
6. An order for sale.

An application under this section should be made on form A. My point above about the uphill struggle in attacking financial remedy orders does not apply so easily to these applications, because they are permitted by statute, but they should still be well-judged and well-timed.

Supervening events

Barder

The *Barder*[8] jurisdiction is familiar to practitioners, as is its notoriously high bar. The requirement that the supervening event be *'unforeseeable'* is fatal to many applications under this jurisdiction, and applications founded on the 2008 financial crisis (which in one case changed the husband's share of the assets on division from 57% to minus 5%),[9] and economic downturn linked to the Covid-19 pandemic[10] have failed. If the facts fit, the procedure is the one set out in FPR 9.9A. Acting promptly is one of the essential limbs of the test.

Thwaite

The *Thwaite*[11] jurisdiction is *prima facie* more generous, but also much more uncertain. The starting point is that the order must not have been executed. If it has not been, then *Thwaite*

[7] There is a difference of judicial opinion as to whether or not the overall quantum can be varied (supported by Lord Wilson in *Birch v Birch* [2017] UKSC 53 ¶26), or just the timing and amounts of individual payments (Mostyn J's view in *BT v CU* [2021] EWFC 87 ¶97)
[8] *Barder v Barder (Caluoria Intervening)* [1988] AC 20
[9] *Myerson v Myerson* [2009] EWCA Civ 282
[10] *FRB v DCA (No 3)*]2020] EWHC 3696
[11] *Thwaite v Thwaite* [1981] 2 FLR 280

is authority for the court having a jurisdiction to revisit the order. The basis for this appears to be that the parties' claims are not dismissed if the order has not been executed.[12]

Peel J said: [13]

> The essence of the jurisdiction is that the court may adjust an executory order (i.e. before it has been complied with) if it would be inequitable not to do so, most commonly where there has been a significant and necessarily relevant change of circumstances since the order was made…

The difficulty with the *Thwaite* jurisdiction is that it has been attacked by Mostyn J in two different decisions.[14] His criticisms are not rehearsed in this document. The author commends an article by Nicholas Allen KC published in the Financial Remedies Journal last month on precisely this issue.[15] Suffice it to say that there is some difficulty with whether or not this jurisdiction exists at all, and this creates a risk for an applicant relying on it.

My view is that if the facts are right, *Barder* should be pleaded alongside *Thwaite* even if the order is executory. The procedure is the same as *Barder*, set out in FPR 9.9A.

Vitiating factors

Vitiating factors are factors which existed at the time of the making of a consent order which are grounds to set it aside. Some are listed in PD9A at ¶13.5:

> The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake...

Alongside *Barder* and *Thwaite*, these were described as the '*traditional grounds'* by Mostyn J.[16] There is a wealth of case law under each heading which is beyond the scope of this document.

Gwynneth Knowles J in *Akhmedova v Akhmedov* stated that the categories of cases listed in the practice direction were not closed, although the jurisdiction should be exercised with great caution.[17] Mostyn J disagreed with this in *CB v EB*.[18]

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[12] *Thwaite* ¶9G
[13] *Rotenberg v Rotenberg* [2024] EWFC 185 at ¶55
[14] *R v R (Financial order replacement) (C intervening)* [2018] 4 WLR 68 and *BT v CU* [2021] EWFC 87
[15] Thwaite – The Jury Remains Out
[16] *CB vs EB* [2020] EWFC 72 ¶19
[17] *Akhmedova v Akhmedov & Ors (No. 6)* [2020] EWHC 2235 (Fam) at ¶131
[18] *CB vs EB* ¶56

My view is that the 'traditional grounds' are not exhaustive. It appears that undue influence is arguable,[19] and presumably therefore, outright duress would also amount to a vitiating factor capable of being grounds to set aside an order. Another example is lack of capacity, which in an earlier case Mostyn J felt was arguable when granting permission to appeal.[20]

The procedure to be used is the one set out in FPR 9.9A.

Conclusions

Under most of these headings, a prospective applicant should proceed with caution. If an application is to be made, it must be made quickly. Failure will almost certainly be punished in costs.

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[19] Undue influence was entertained by HHJ Willans in *HP v AP* [2023] EWFC 49 (B) at ¶12
[20] *MAP v RAP* [2013] EWHC 4784 (Fam) at ¶39