Best practice

Appeals; trips and traps

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The rules regarding appeals are comprehensively set out in Part 30 of the Family Procedure Rules 2010 ('FPR 2010') and the accompanying Practice Directions ('PDs'), which require careful reading. The purpose of this article is not to repeat those rules, but to explore the court's interpretation of those rules and set out some of the issues that will need to be considered.

Time limits

It is worth pointing out at the outset that the parties are not able to agree any variations to time limits set by the FPR 2010 or any order. All time limits must be strictly complied with or an application to vary the time limit must be made. When diarising deadlines it is important to note that time starts to run from the date upon which the judge below made their decision, rather than the date when the order reflecting that decision was drawn up (see *White Book* para 52.4.2 relying on *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645).

Applying for permission

Permission is generally always required. The very limited exceptions to this rule are set out in r 30.3(1).[1] But which court should you apply to?

The FPR 2010 (at r 30.3(3)) give you two alternatives: (a) the lower court at the hearing at which the decision to be appealed was made; or (b) the appeal court in an appeal notice. So which court should you choose? Fortunately the courts (and in particular Jackson LJ) have given us further guidance.

Permission should usually first be sought from the lower court at the hearing at which the decision to be appealed was made. In *P v P (Variation of Post-Nuptial Settlement)* [2015] EWCA Civ 447, [2016] 1 FLR 437 Jackson LJ confirmed that the appellant is not required to apply to the lower court for permission to appeal, but it was good practice to do so. Ideally, a party should apply for permission to appeal when the judge delivers or hands down judgment. He cited the five reasons for this set out in para 52.3.4 of the *White Book* as follows:

a. The judge below is fully seised of the matter and so the application will take minimal time. Indeed the judge may have already decided that the case raises questions fit for appeal.

b. An application at this stage involves no additional costs.

c. No harm is done if the application fails. The litigant enjoys two bites of the cherry.

d. If the applicant succeeds and the litigant subsequently decides to appeal, they avoid the expensive and time-consuming permission stage in the Appeal Court.

e. No harm is done if the application succeeds but the litigant subsequently decides not to appeal.

It is important to note that if an application for permission to appeal is not made at the hearing when judgment is given or handed down or at a later hearing adjourned for the purpose of considering any application made for permission to appeal, the lower court has no jurisdiction to grant permission to appeal. Therefore, if an application is not made at one or other of those hearings, it can only be made to the appeal court.

1 The only exceptions are where the appeal is against a committal, or secure accommodation order or is against a refusal to grant habeus corpus for release in relation to a minor or where the decision was made by lay magistrates or a lay justice.

The test for permission

The test is set out at FPR 2010, r 30.3 (7). Permission should only be given where:

(a) the court considers that the appeal would have a real prospect of success, or

(b) there is some other compelling reason why the appeal should be heard.

Again, the courts have provided us with guidance on how to interpret this rule.

Real prospect of success

Jackson LJ has given recent guidance in *Re R (A Child: Possible Perpetrator)* [2019] EWCA Civ 895, [2019] 2 FLR 1033 in which he noted that there were two interpretations of the requirement for a 'real prospect of success' in case law, both of which are referred to in the *Red Book* (p 1909). That commentary reads:

> 'In *NLW v ARC* [2012] 2 FLR 129, Mostyn J held that a "real prospect of success" meant it was more likely than not that the appeal would be allowed at the substantive hearing: "anything less than a 50/50 threshold could only mean there was a real prospect of failure". Moor J, however, has held that a "real prospect of success" is one that is realistic rather than fanciful, and does not mean a greater than 50/50 chance of success. . . . The weight of current first instance authority follows the approach of Moor J.'

Jackson LJ used this appeal to resolve any remaining doubt and rejected Mostyn J's interpretation that the test required more than 50/50 chance of success. He confirmed that the correct test is that the case must be realistic, rather than fanciful. This applies to all applications for permission to appeal to the Family Court, High Court and Court of Appeal. There was no requirement that success should be probable, or more likely than not.

Compelling Reason

Jackson LJ has given recent guidance in *Re J-S (Children)* [2019] EWCA Civ 894 where he highlighted what was said by Thorpe LJ in *Re O (Family Appeals: Management)* [1998] 1 FLR 431:

> 'Exceptionally, there are family appeals that raise a difficult point of law or principle. There the judge at first instance may well wish to grant leave himself. But if the proposed appeal seeks only to challenge the exercise of his judicial discretion in a family case, it would generally be helpful to this court if the judge at first instance was to leave to this court the decision as to whether or not the appeal should be entertained.'

He suggested that this applied with particular force to permission applications where 'compelling reason' was relied upon and in most cases, the Court of Appeal should be left to decide whether to grant permission to appeal.

An appeal does not lead to an automatic stay of the original order

This is set out in r 30.8, but is important to note; if a stay is required, it must be applied for separately, usually at the time that permission to appeal is applied for.

The test for appeal

An appeal will be allowed if the original decision was found to be 'wrong' or 'unjust because of a serious procedural irregularity in the proceedings in the lower court'. The court does not begin afresh.

The well known principles set out in *Piglowska v Piglowska* [1999] 2 FLR 763 apply:

- The court will bear in mind the advantage that the first instance judge had in seeing the parties and the other witnesses.
- The reasons for the judgment will always be capable of being better expressed. The appellate court should resist the temptation to subvert the principle that it should not substitute its own discretion for that of the judge by a narrow textual analysis, which enables it to claim that the judge misdirected him or herself.

- There is the principle of proportionality between the amount at stake and the legal resources (of the parties and the community) that it is appropriate to spend on resolving the dispute.

It is extremely difficult to appeal a finding of fact, on the basis that the trial judge had the advantage of having seen and heard the witnesses, as highlighted in the recent case of *M v F (appeal: fact finding)* [2019] EWHC 572.

Fresh evidence

The appeal court will consider only the evidence that was before the first instance court. If the appellant wishes to adduce any fresh evidence, they will need permission from the appeal court. If the evidence was in existence at the time of the original trial, in exercising that discretion, the court will consider the requirements set out in *Ladd v Marshall* [1954] 1 WLR 1489:

(a) the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(c) the evidence must be apparently credible.

Costs

The respondent's cost of the permission application

Although the rules state that in most cases, permission hearings will be determined without input from the respondent, there may be occasions when the court lists an application for permission hearing and requires the attendance of all parties. If this occurs, it is important not to forget para 4.24 of PD 30A:

> 'Where the court does request –
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> (a)submissions from; or
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> (b)attendance by the respondent,
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> the court will normally allow the costs of the respondent if permission is refused.'

Calderbank offers

It is important to note that *Calderbank* offers are admissible in appeals.

In *WD v HD* [2015] EWHC 1547, [2017] 1 FLR 160 the court considered the issue of *Calderbanks* on appeals in a financial remedies case for the first time. Financial remedy proceedings have a presumption of no order as to costs pursuant to FPR 2010, r 28.3(8): No offer to settle which is not an open offer to settle is admissible at any stage of the proceedings, except as provided by r 9.17 (which deals with FDRs). The husband's counsel argued that, 'at any stage of the proceedings' included appeals. Moor J disagreed. There was also, in his view, the issue of encouraging litigation to settle. He was acutely aware of the needs of parties to be able to protect themselves in relation to the damaging cost of appeals. Rule 28.3 referred to first instance proceedings only. He was therefore prepared to admit any *Calderbank* offer that had been made.

In public or private?

In the Court of Appeal and Supreme Court the default position is that the appeals will be held in public. But the default position in relation to hearings in the High Court is that they take place in private. Does this also apply to appeals in the High Court? This became more relevant in 2016 when the routes of appeal were amended resulting in more appeals being heard in the High Court, rather than the Court of Appeal.

In his judgment of *In re MF (Family Proceedings: Appeals in Private)* [2018] EWHC 3841, Mostyn J determined that the default position, was that the appeal should be heard in private in contrast to the appeals in the Court of Appeal where the default position was that they would be heard in public. If the court was to make a decision disapplying the default position then it had to justify this on the facts of the case.

However, in December 2018, the rules were changed to introduce r 30.12A which provides that a judge can order than an

appeal in the High Court may be heard in open court, subject to appropriate reporting restrictions.

This was brought to the attention of Mostyn J who nevertheless remained of the view that there must be an individual fact specific reason for disapplying the general rule.

Practice Direction 30B was brought into force on 1 October 2019 and resolves the debate. The new PD confirms that the appeal court will ordinarily order an appeal to be heard in open court, subject to appropriate reporting restrictions, except where there is good reason not to do so. There is a standard form order that should be used. The court will not normally impose restrictions in financial remedy cases where no minor children are involved.

These are just some of the issues that fall to be considered when faced with the prospect of an appeal. But above all, Part 30 and the accompanying PDs must be kept very close to hand!