

Aggrieving agreements

In brief:

An agreement at an FDR should only be departed from if there is a clear justification. Judges at a final hearing should be informed of matters agreed to at an FDR. In family cases parties should be encouraged to agree as many issues as possible.

Given the huge cut backs in legal aid, increasing emphasis is now placed on encouraging parties to a family law dispute to reach agreements themselves. But what if some issues are agreed to and some are not? What is the position of the agreement at the final hearing? That is an issue which is likely to become an ever more significant one in the years to come. It was addressed by Wildblood QC in the Family Court at Bristol in *AC v SC* [2015] EWFC B76.

The couple were in the mid-40s and had married for around twenty years. The wife lived in the former matrimonial home. The husband and wife had divorced and attended a financial dispute resolution appoint (FDR). There a settlement was reached between them on many matters. On maintenance the recorded agreement was that “The Respondent will pay maintenance including spousal maintenance for 5 years with a ban on extending the term.” However, there was no agreement on the question of quantum and that was referred to the District Judge for a final hearing.

When the matter was heard before the District Judge, he failed to take into account the agreement reached at the FDR concerning the term of the maintenance order. Indeed, he ruled that he could not be confident that the wife would be self-sufficient within the five years and therefore placed no term on the maintenance order. It is worth noting that the wife was represented at the final hearing, but the husband was not.

On appeal against the District Judge’s order, HHJ Wildblood QC held that “things went hopelessly awry” at the final hearing. Interestingly, the hearing before him was brief because it was soon clear the appeal would have to be allowed. Indeed the appeal was compromised with the wife agreeing to an order for periodic payments with an order under s. 28(1A) Matrimonial Causes Act 1973 barring any extension. Despite the compromise, HHJ Wildblood QC gave a full judgment.

The central point was that where an agreement had been reached at an FDR that was a “highly relevant” for a judge at the final hearing. The agreement should have been “the first port of call at the final hearing.” If the agreement is to be departed from there had be an explanation and a justification for doing so. The explanation and justification had to be on substantial grounds. HHJ Wildblood QC, explained: “Where agreement is reached any attempted departure from it has to be justified – the question that inevitably arises is: ‘what vitiating factors are suggested?’” In this case there was no suggestion that, for example, the wife had been deceived or subject to undue influence. In particular, the wife should have been asked why she agreed to a fixed term at the FDR and why she was now seeking to depart from it. In this case nothing by way of justification had been provided by the District Judge. Indeed, remarkably there was no mention of the agreement at all at the final hearing. The District Judge simply made the order based on what he thought should

happen. The complete lack of reference to the agreement was “inexplicable” to HHJ Wildblood QC. He referred to the judgement of Thorpe LJ in *Hill v Haines* [2007] EWCA Civ 1284 at para 56:

‘once parties have reached an agreement to compromise an ancillary relief claim the court will not permit either party to renege save in exceptional circumstances. This proposition was established by this court in Edgar v Edgar [1980] All ER 887. As Lord Justice Ormerod put it: - ‘formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that injustice will be done by holding the parties to the terms of their agreement’.

HHJ Wildblood was aware that appeals against a final hearing should only be permitted if one of the grounds under rule 30 of the Family Procedure Rules 2010 were made out. There must not be a rehearing, but a consideration of where there had been “some procedural irregularity or that, in conducting the necessary balancing exercise, the district judge had taken into account matters which were irrelevant, or ignored matters which were relevant, or had otherwise arrived at a conclusion which was plainly wrong” (per Coleridge J in *V v V (Financial Relief)* [2005] 2 FLR 697) HHJ Wildblood QC had no difficulty in finding this case fell into that category.

Perhaps wisely HHJ Wildblood QC did not attempt an explanation of what had gone wrong. It is all the more concerning given that one of the parties was legally represented. One possibility is that there was some suggestion (at para 10) that at the hearing it was assumed that there is “little difference” between an order with a fixed term and a “joint lives” order as a husband could apply to vary the “joint lives” order if appropriate. As HHJ Wildblood QC stated such a suggestion is “profoundly wrong”. Not least because with a joint life order the burden would be on the husband to apply for and justify a variation, whereas with a fixed term if it needed to be extended it would be for the wife to make and justify the application.

Another possible explanation of what had gone wrong was that the District Judge believed there had been agreement over the extent of the term. In correspondence with the father after the hearing he gave the impression he believed the parties had not reached agreement over the term. He wrote: “Spousal maintenance – again DDJ O’Neill did not make an order but recorded an agreement; also again, the agreed statement of positions shows different positions...that is the basis on which I made the order. A term is not appropriate for the reason that I gave in my judgment.”

To avoid such problems in the future HHJ Wildblood QC suggested that if a spouse is seeking to depart from an agreement reached at an FDR, that fact should be “signaled clearly with a big red hand” in the application. This was particularly important if the other spouse is acting in person.

HHJ Wildblood QC explained why it was important that at a final hearing the judge place significant weight on the FDR hearing. This was because it would encourage the parties to agree as many issues as possible in family litigation. Also because otherwise ‘the message will be sent to judges conducting FDRs involving one or more litigants in person that they are not worth the paper they are written on.’ In a case like this where the parties had resolved some issues, but needed to litigate others, the future litigation should focus on those disputed issues. It would be quite wrong in such a case to treat the agreement as confidential.

An interesting question was raised in HHJ Wildblood QC's judgment about the status of the partial agreement over maintenance (partial in the sense that the term, but not the quantum had been agreed. He accepted that the District Judge at the FDR could not have made an order for maintenance, because a key issue, the quantum, had not been agreed. The agreement, HHJ Wildblood QC suggested, would be best seen as a contract, rather than an unperfected order, which the judge could not depart from. It would be wrong to see it as a partial agreement. It was a full agreement, on a particular issue.

This was not a case where the family justice system covered itself in glory. HHJ Wildblood QC concluded his judgement with these typically sensitive remarks:

It is highly regrettable that people of such modest means should have been caught up in this expensive and flawed process. These are two hard working parents with three children who have had to face the sadness, disruption and financial burden of divorce. As I understand it, this was their first experience of the family court and they attempted to approach this case as litigants in person for most of the time. I can only imagine the tales that they will tell about the operation of that system. I asked them both not to turn the anger that they must undoubtedly feel about these experiences onto the relationship that they must still have with each other as parents of their much loved children.

One can only hope that this case will provide an important reminder of the weight to be attached to FDR agreements and such mistakes will not reoccur.

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