

## THE NEW COSTS RULES?

- Where are we now?
- Where are we going?
- What are the problems the solution might cause?

### 1. Where are we now? – the current position

See Thorpe LJ in *Norris v Norris; Haskins v Haskins* [2003] 2 FLR 1124 para 61:

‘As a matter of principle the determination of any question of costs in ancillary relief proceedings must be governed by CPR 44.3 together with r 2.69 of the Family Proceedings Rules 1991, in its current form, namely r 2.69, 2.69B and 2.69D. The harmonious integration of these separate codes is, in my judgment, best achieved by treating CRP 44.3 as covering all cases. If in a specific case no *Calderbank* offer has been written then the judge will apply CPR 4.3 without more. In a case in which a *Calderbank* offer or offers are relied upon then I consider that the judge should apply CPR 44.3 notionally inserting into the exercise r 2.69 of the Family Proceedings Rules 1991 in substitution for CPR 44.3(4)(c).’

### 2. What does this mean?

- (i) Effectively that the court has a very wide discretion about awarding costs. Its discretion cannot be fettered but can legitimately include consideration of a number of factors, including:
- Culpability in conduct of litigation
  - Material non-disclosure
  - Delay or excessive zeal in seeking disclosure
  - No offer or no counter offer
  - Offer made too late to be properly considered
  - Need to use available money to house children.

- (ii) The Calderbank offer(s) influence but cannot govern the discretion
- (iii) The starting point is that when an offer has been made, if the applicant receives no more or less than the offer made she or he is at risk of paying the other side's costs after communication of the offer and a reasonable time to consider it.

**3. Where are we going? – the approach of the Costs Sub Committee of the President's Ancillary Relief Advisory Group.**

Their approach is to say no orders for costs unless unreasonable behaviour/exceptional circumstances. This is the approach supported by Mr Mostyn QC in *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108 and the Court of Appeal in *Norris*.

**4. Problems?**

- What does 'unreasonably' mean anyway?
- Calderbanks in through the back door.
- The impact on the publicly funded solicitor.

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