

PART 4

Protocols for ancillary relief

Solicitors should keep under review at all times the availability of public funding and the need to provide clients with costs information at the outset and on a regular basis.

Solicitors are reminded of the requirements of the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003 as clarified in the case of *Bowman v. Fels* [2005] EWCA Civ 226. Solicitors must ensure that they are aware of the provisions of the Law Society's guidance on the law relating to money laundering. This guidance is contained in Annexes 3B1 and 3B2 to the Guide Online, to be found on the Law Society's website at www.lawsociety.org.uk/professional/conduct/guideonline.law,

A hard copy of the money laundering guidance may be obtained from the Law Society's Professional Ethics department.

PRE-APPLICATION PROTOCOL FOR ANCILLARY RELIEF

4.1 GENERAL

- 4.1.1** The Pre-Application Protocol was annexed to Practice Direction (Ancillary Relief Procedure) [2000] 1 FLR 997, and implemented with the new rules for ancillary relief on 5 June 2000. It was produced in consultation with the Law Society and is reproduced in full below as part of this Protocol.
- 4.1.2** It applies to all applications for ancillary relief and financial provision as defined in FPR 1991 (as amended), rule 1.2(1) and/or other applications for ancillary relief.

- 4.1.3** Note that the numbering is not consistent with the rest of this Protocol and for clarity's sake the Pre-Application Protocol will appear in a different font.

1. INTRODUCTION

1.1

1.1.1 Lord Woolf in his final Access to Justice Report of July 1996 recommended the development of pre-action protocols:

'to build on and increase the benefits of early but well informed settlement which genuinely satisfy both parties to a dispute'.

1.1.2 Subsequently, in April 2000, the Lord Chancellor's Ancillary Relief Advisory Group agreed this pre-application protocol.

1.2 The aim of the pre-action protocol is to ensure that:

- (a) Pre-application disclosure and negotiation takes place in appropriate cases;
- (b) Where there is pre-application disclosure and negotiation, it is dealt with
 - i. cost effectively;
 - ii. in line with the overriding objective of the Family Proceedings (Amendments) Rules 1999;
- (c) The parties are in a position to settle the case fairly and early without litigation.

The court will be able to treat the standard set in the pre-application protocol as the normal reasonable approach to pre-application conduct. If proceedings are subsequently issued, the court will be entitled to decide whether there has been non-compliance with the protocol and, if so, whether non-compliance merits consequences.

2. SCOPE OF THE PROTOCOL

2.1 This protocol is intended to apply to all claims for ancillary relief as defined by FPR 1991, rule 1(2). It is designed to cover all classes of case, ranging from a simple application for periodical payments to an application for a substantial lump sum and property adjustment order. The protocol is designed to facilitate the operation of what was called the pilot scheme and is from 5 June 2000 the standard procedure for ancillary relief applications.

2.2 In considering the option of pre-application disclosure and negotiation, solicitors should bear in mind the advantage of having a court timetable and court managed process. There is sometimes an advantage in preparing disclosure before proceedings are commenced. However solicitors should bear in mind the objective of controlling costs and in particular the costs of discovery and that the option of pre-application disclosure and negotiation has risks of excessive and uncontrolled expenditure and delay. This option should

only be encouraged where both parties agree to follow this route and disclosure is not likely to be an issue or has been adequately dealt with in mediation or otherwise.

2.3 Solicitors should consider at an early stage and keep under review whether it would be appropriate to suggest mediation to the clients as an alternative to solicitor negotiation or court-based litigation.

2.4 Making an application to the court should not be regarded as a hostile step or a last resort, rather as a way of starting the court timetable, controlling disclosure and endeavouring to avoid the costly final hearing and the preparation for it.

First Letter

2.5 The circumstances of parties to an application for ancillary relief are so various that it would be difficult to prepare a specimen letter of claim. The request for information will be different in every case. However, the tone of the initial letter is important and the guidelines in paragraph 3.7 should be followed. It should be approved in advance by the client. Solicitors writing to an unrepresented party should always recommend that he seeks independent legal advice and enclose a second copy of the letter to be passed to any solicitor instructed. A reasonable time limit for a response may be 14 days.

Negotiation and Settlement

2.6 In the event of pre-application disclosure and negotiation, as envisaged in paragraph 2.2 an application should not be issued when a settlement is a reasonable prospect.

Disclosure

2.7 The protocol underlines the obligation of parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues. Solicitors owe their clients a duty to tell them in clear terms of this duty and of the possible consequences of breach of the duty. This duty of disclosure is an ongoing obligation and includes the duty to disclose any material changes after initial disclosure has been given. Solicitors are referred to the *Good Practice Guide for Disclosure* produced by the Solicitors Family Law Association [now Resolution – see **Appendix 17** for contact details].

3. THE PROTOCOL

General Principles

3.1 All parties must always bear in mind the overriding objective set out at FPR 1991, Rule 2.51B and try to ensure that all claims should be resolved and a just resolution achieved as speedily as possible without costs being unreasonably incurred. The needs of any children should be addressed and safeguarded. The procedures which it is appropriate to follow should be conducted with minimum distress to the parties and in a manner designed to

promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances.

3.2 The principle of proportionality must be borne in mind at all times. It is unacceptable for the costs of any case to be disproportionate to the financial value of the subject matter of the dispute.

3.3 Parties should be informed that where a court exercises a discretion as to whether costs are payable by one party to another, this discretion extends to pre-application offers to settle and conduct of disclosure (Rule 44.3 Paragraph 1 of the Civil Procedure Rules 1998).

Identifying the Issues

3.4 Parties must seek to clarify their claims and identify the issues between them as soon as possible. So that this can be achieved they must provide full, frank and clear disclosure of facts, information and documents which are material and sufficiently accurate to enable proper negotiations to take place to settle their differences. Openness in all dealings is essential.

Disclosure

3.5 If parties carry out voluntary disclosure before the issue of proceedings the parties should exchange schedules of assets, income, liabilities and other material facts, using Form E as a guide to the format of the disclosure. Documents should only be disclosed to the extent that they are required by Form E. Excessive or disproportionate costs should not be incurred.

Correspondence

3.6 Any first letter and subsequent correspondence must focus on the clarification of claims and identification of issues and their resolution. Protracted and unnecessary correspondence and ‘trial by correspondence’ must be avoided.

3.7 The impact of any correspondence upon the reader and in particular the parties must always be considered. Any correspondence which raises irrelevant issues or which might cause the other party to adopt an entrenched, polarised or hostile position is to be discouraged.

Experts

3.8 Expert valuation evidence is only necessary where the parties cannot agree or do not know the value of some significant asset. The cost of a valuation should be proportionate to the sums in dispute. Wherever possible, valuations of properties, shares etc. should be obtained from a single valuer instructed by both parties. To that end, a party wishing to instruct an expert (the first party) should first give the other party a list of the names of one or more experts in the relevant speciality whom he considers are suitable to instruct. Within 14 days the other party may indicate an objection to one or more of the named experts and, if so, should supply the names of one or more experts whom he considers suitable.

3.9 Where the identity of the expert is agreed, the parties should agree the terms of a joint letter of instructions.

3.10 Where no agreement is reached as to the identity of the expert, each party should think carefully before instructing his own expert because of the costs implications. Disagreements about disclosure such as the use and identity of an expert may be better managed by the court within the context of an application for ancillary relief.

3.11 Whether a joint report is commissioned or the parties have chosen to instruct separate experts, it is important that the expert is prepared to answer reasonable questions raised by either party.

3.12 When experts' reports are commissioned pre-application, it should be made clear to the expert that they may in due course be reporting to the court and that they should therefore consider themselves bound by the guidance as to expert witnesses in Part 35 of the Civil Procedure Rules 1998.

3.13 Where the parties propose to instruct a joint expert, there is a duty on both parties to disclose whether they have already consulted that expert about the assets in issue.

3.14 If the parties agree to instruct separate experts the parties should be encouraged to agree in advance that the reports will be disclosed.

Summary

3.15 The aim of all pre-application proceedings steps must be to assist the parties to resolve their differences speedily and fairly or at least narrow the issues and, should that not be possible, to assist the court to do so.

POST-APPLICATION PROTOCOL FOR ANCILLARY RELIEF

Solicitors should keep under review at all times the availability of public funding and the need to provide clients with costs information at the outset and on a regular basis.

4.2 AIM

4.2.1 The aim of this section is to ensure that disclosure, negotiation and ancillary relief proceedings take place cost effectively and in line with the overriding objective as defined in FPR 1991 (as amended), rule 2.5(1B).

4.3 MAINTENANCE PENDING SUIT

- 4.3.1** At an early stage in proceedings, solicitors should consider with the client whether or not an application for maintenance pending suit is appropriate (taking account of the costs and unpredictability of such applications).
- 4.3.2** Solicitors should consider whether the parties can reach an interim agreement of their own accord, by negotiation between solicitors or by mediation. In the event that agreement does not seem a reasonable prospect, an application for maintenance pending suit and/or interim periodical payments should be issued.
- 4.3.3** The issue of maintenance pending suit and/or interim periodical payments can be dealt with by consideration of brief evidence as to the parties' means and expenses and on submissions only. Although no specific form is required for the sworn statement accompanying the application, solicitors may wish to consider appending to that statement Form E or part thereof showing the parties' respective incomes and expenditure.
- 4.3.4** Solicitors are reminded that legal fees payable by a client may be viewed in some cases as recurring expenses of an income nature which can be included as part of an application for interim periodical payments. If these are being applied for, it is possible to obtain an order directing payment of the costs element of any maintenance order directly to solicitors. This is preferable to solicitors securing from their clients an undertaking to account to their solicitors for that part of the periodical payments that reflects the legal fees, as this type of arrangement can damage solicitor–client relationships.

4.4 FORM A

- 4.4.1** The notice of application should include all financial orders that the applicant might seek. Solicitors must remember that a pension sharing order must be applied for specifically. As soon as possible, solicitors for the party filing Form A should provide information to the other party as to which particular orders sought in Form A are to be pursued.

- 4.4.2** An application for pension sharing or attachment must be made in Form A as required by FPR 1991, rule 2.70. Where details of the pension are available initially, the application should be specific about the order being sought against each individual pension policy. Where insufficient details are available, the application should be made in general terms.
- 4.4.3** At present only courts may serve Form A on the respondent. Solicitors must be aware that they have no control over Form A being served either before or after service of the petition. Particular care should be taken to ensure that Form A is not served before the petition. Solicitors should consider sending a copy of Form A to the respondent's solicitors by way of courtesy as soon as practicable.
- 4.4.4** A copy of Form A must also be served by the solicitor on any pension provider where a pension sharing or an attachment order is sought.
- 4.4.5** Where an application is made in respect of property that is subject to a mortgage, a copy must be served on the mortgagees as soon as practicable and at any event within 14 days.

4.5 PENSIONS

- 4.5.1** The pensions of the parties can sometimes be their most significant assets. It is always important to establish the value of the parties' pension funds and to consider whether it is appropriate for a pension sharing order or a pension attachment order to be made or at least some offsetting to occur in respect of other assets.
- 4.5.2** The Form E that has been used over recent years has been replaced by a new Form E which has been introduced by the Family Proceedings (Amendment) (No. 5) Rules 2005, SI 2005/2922 (L.26). The new Form E should be used in all cases where Form A has been issued on or after 5 December 2005. The section relating to pensions (section 2.13) has been amended and it is now only necessary to provide some basic details of the pension fund together with the cash equivalent transfer value (CETV). As there may be a delay in obtaining

the CETV it is good practice to make a written request for that from the pension provider at an early stage. This should be obtained even in the pension is in payment.

- 4.5.3** Having obtained the CETV of any pensions, solicitors should decide whether in any case it is appropriate to apply for a pension sharing or pension attachment order. Factors that will influence this decision will include the age of the parties, the size of the CETV value of the funds, the length of the marriage, the jurisdiction in which the pension is held and the possible costs involved in the implementation of a pension sharing order.
- 4.5.4** If the case is one where a pension sharing order or attachment order might be appropriate, it is necessary to obtain significant further information from the pension company. A standard Pension Inquiry Form (known as Form P) has been introduced by the Family Proceedings (Amendment) (No. 5) Rules 2005. This should be used as a standard form to be sent to the pension provider. It lists all the information that can and should be obtained from the pension companies. Practitioners should note that not all the information requested is free and that pension companies can make a charge for some elements of it.
- 4.5.5** Pension schemes can vary significantly and in a case where a pension sharing or attachment order is anticipated, it is important that the solicitor does understand the benefits available under the scheme. Many pension schemes will have a scheme booklet that can be of significant assistance.
- 4.5.6** Solicitors also need to be aware that different pension providers calculate the CETV value of their pensions in different ways. It cannot therefore be assumed that comparing the CETV values of two funds is comparing like with like. Where the pension funds are significant, solicitors need to consider taking advice from an appropriately qualified specialist subject to the complexity of the issues and the costs involved.
- 4.5.7** When considering the making of a pension sharing order, solicitors need to remember that the rules provide for a percentage of the fund to be shared. Some courts will allow an order to be made that provides for 'such percentage as shall

yield a transfer of £x'. This would enable a fixed sum to be transferred. However opinions differ as to whether or not such a formula is allowable. Some pension funds will not accept the validity of such a clause, and if it is intended to use this wording it is advisable to check first with the pension company involved to ensure that they will implement the order.

- 4.5.8** In a case in which it is intended to submit a consent order to the court containing a pensions sharing order, solicitors must be aware of the requirements of FPR 1991, rule 2.70. They must provide a copy of the order to the pension provider at least 21 days before submitting the order to the court.

4.6 FAMILY BUSINESSES AND OTHER FAMILY ASSETS

- 4.6.1** Solicitors are reminded of the difficulties of valuing family companies, particularly after the case of *White v. White* [2000] 2 FLR 981, and should consider whether expert advice is required to value the asset in question. They should also consider whether advice is needed on the tax implications of any proposed transfer of assets.

4.7 DOWRIES

- 4.7.1** Dowries are often an area of contention in family cases. Solicitors are reminded that dowries can be enforced in civil courts on a contractual basis.
- 4.7.2** Solicitors should be alert to the fact that demands for dowries may be used as an excuse for violence and abuse. It is important that solicitors establish, preferably at the first interview, whether duress is involved in dowry demands. Solicitors should be aware that dowries paid out under duress may be more readily recoverable. Clients who are the subject of immigration proceedings are likely to be subject to the 'no recourse to public funds' rule (the effect of which is that clients without secure immigration status cannot easily access housing or benefits). They may therefore need money or goods recovered from a dowry claim to support themselves pending a final determination of their application to remain in the UK.

4.7.3 At the first meeting with the client, solicitors should make an accurate list of what dowry has been paid, by whom and for what purpose. If the police agree to assist, clients can be advised to return to the matrimonial home to retrieve as much of their dowry as possible, as it is preferable that solicitors make any request to the police to accompany a client home to collect their belongings because of language difficulties and clients' fear of authority.

4.8 DISCLOSURE

4.8.1 Subject to the provisions of FPR 1991, rules 2.61B(6) and 2.61D(3), the parties have an obligation to make full and frank disclosure of all material facts, documents and other material information relevant to the issues in a case. Solicitors should tell their clients in clear terms of this obligation and of the possible consequences of breach of this obligation. This duty of disclosure is an ongoing obligation and includes the duty to disclose any material changes after initial disclosure has been given.

4.8.2 If clients wish not to disclose a fact or issue which is relevant to the proceedings, solicitors are bound by their duty of confidentiality to clients. However, solicitors also have a duty not to mislead the court. If non-disclosure of a fact or issue is likely to involve solicitors in misleading the court, solicitors must terminate their retainer. Solicitors are referred to the Law Society's money laundering guidance, especially guidance on the case of *Bowman v. Fels* [2005] EWCA Civ 226 (see **Appendix 4**). This is available from the Law Society's Professional Ethics department or the Law Society's website at www.lawsociety.org.uk/professional/conduct/guideonline.law. If solicitors are in doubt as to how they should deal with a specific case, they should contact the Law Society's Professional Ethics helpline.

4.8.3 Solicitors are reminded that they must identify their clients in accordance with the requirements of the Money Laundering Regulations 2003. Clients must be asked to bring two forms of appropriate identification to the first meeting.

- 4.8.4** Solicitors should advise their clients that if they come into possession of a document belonging to the other party, this should be disclosed as soon as practicable, returning the original to the owner. If the contents are privileged, no copy should be taken and clients should be aware that if the document is read by their solicitor he or she may not be able to continue acting for the client. A copy may be taken or obtained if the document and contents are not privileged. Such documentation is known as *Hildebrand* disclosure and all documents in that category should be listed and a list with originals or the copies as appropriate should be sent to the other party. The date when the document came in to the possession of the non-owning party may be crucial. In a questionnaire, queries should not be raised of the owning party on the contents of the document until its existence has been acknowledged and adopted by the owning party.
- 4.8.5** Solicitors should follow Resolution’s *Guide to Good Practice on Disclosure* (see **Appendix 17** for contact details).
- 4.8.6** Solicitors should advise clients that failure to comply with the obligation of disclosure is likely to be considered litigation misconduct within the context of the Family Proceedings (Amendment) (No. 6) Rules 2005, rule 2.71.
- 4.8.7** Solicitors are referred to **para. 1.2.6** of this Protocol regarding the requirements of public funding.

4.9 EXPERTS: GUIDANCE REQUIRED

- 4.9.1** Solicitors should advise clients that experts owe clients a duty of confidentiality but may not have the protection of privilege. They may be under a duty to report to the National Criminal Investigation Service under the provisions of the Proceeds of Crime Act 2002.
- 4.9.2** The guidance on experts contained in the Pre-Application Protocol for Ancillary Relief (see **para. 4.1.3** above, protocol sections 3.8–3.14) must be followed. Solicitors should also follow, where possible, the *Guidance on the Instruction of Single Joint Experts* issued by the President’s Ancillary Relief

Advisory Group (PARAG) and appended to this Protocol at **Appendix 14**.

- 4.9.3** Part 35 of the CPR 1998 on expert evidence applies to ancillary relief proceedings.
- 4.9.4** While it may be necessary to obtain a broad assessment of the value of an asset, for example a shareholding in a private company, a precise valuation of an asset that is not to be sold will not always be necessary. Solicitors should guard particularly against incurring disproportionate costs in pursuing detailed and repeat valuations of assets.
- 4.9.5** Solicitors must ensure all professional witnesses are aware that their duty is to the court and not to the clients. They must be instructed to avoid a partisan approach and to maintain proper professional standards. It is appropriate to make a full note of all conversations with an expert and inform the other party's solicitors and/or the court of these as appropriate.

4.10 CHILD INTERVENERS IN ANCILLARY RELIEF

- 4.10.1** A child may intervene in proceedings to his parents' divorce if the child has, or appears to have, an interest in the matrimonial assets. In such cases the child should be represented by a guardian ad litem (FPR 1991, rule 9.2). There will seldom be a suitable family member and an application should be made for the appointment of the Official Solicitor, subject to his consent, to represent the minor or minors in the proceedings. Rule 9.2A does not apply to proceedings under the Matrimonial Causes Act 1973.

4.11 FORM E

- 4.11.1** Solicitors (or parties where unrepresented) must include full details of their client's financial assets, income and future needs when completing Form E, in order to enable identification of the issues and resolution of those issues prior to the Financial Dispute Resolution (FDR) hearing, to allow that hearing to have a good chance of success. The completed form should be

as comprehensive and clear as possible, and in the case of a short or medium length marriage, should give details of the contribution by each party to the marriage in the form of provider and/or homemaker.

- 4.11.2 If clients complete Form E, solicitors are still obliged to check the forms to ensure, as far as is practicable, that the information provided is full, complete and accurate. It is not good practice to exchange Form E with sections incomplete. In the event that the value of an asset cannot be ascertained by the date that a Form E is due to be exchanged, information should be given to the other party's solicitors as to when the request for the information was made and when a substantive response is likely to be received.
- 4.11.3 Details of conduct by the other party should only be included in paragraph 4.4 of Form E when that conduct is sufficiently exceptional to be relevant. Clients should be advised of the views of courts on the inclusion of conduct, and solicitors should explain why conduct is not usually taken into account. In appropriate cases, solicitors should consider whether they should reserve their position on conduct issues until after the FDR hearing.

4.12 STATEMENT OF ISSUES AND QUESTIONNAIRES

- 4.12.1 The Statement of Issues must set out the issues in dispute between the parties on which the court is being asked to make adjudication. Where major issues have been agreed, this should be indicated briefly in the statement. Statements of Issues should be reviewed before the FDR hearing and again before the final hearing.
- 4.12.2 Where unnecessary or irrelevant issues are raised in the Statement of Issues, and pursued, costs can be awarded against the offending party and solicitors should make this clear to any clients who wish to raise such irrelevant issues.
- 4.12.3 Solicitors must also bear in mind the overriding objective in relation to ancillary relief proceedings: the requirement that cases are to be dealt with in a way which is proportionate to the

amount involved. A matter may be relevant but disproportionate in costs terms to pursue. Each case depends on its own facts.

- 4.12.4 Solicitors are reminded of their duty to safeguard public funds and to report clients to the LSC in the event that they fail to take account of the need to act in accordance with that duty.
- 4.12.5 On drafting questionnaires solicitors should consider proportionality, and although in some cases it might be necessary to ask, for example, for all entries on bank accounts over £500 to be explained, or all credit cards statements to be produced over the previous year, this should not be automatic but only done with good reason, and only if it follows from the Statement of Issues.

4.13 FIRST APPOINTMENT

4.13.1 Solicitors must:

- (a) ensure that clients are aware of the need to attend the first appointment once the date is fixed;
- (b) ensure that clients are aware that the appointment and surrounding negotiations can last for some hours, especially if the appointment is used as an FDR hearing;
- (c) discuss with clients, well in advance of completing Form G, whether it will be possible and appropriate to use the first appointment as an FDR;
- (d) file and serve Form G, Statements of Issues, chronologies and questionnaires 14 days before the first appointment;
- (e) discuss with clients in advance of the first appointment the likely directions to be requested from the district judge;
- (f) in particular, consider with their clients which if any assets need to be valued and how that valuation should take place. Solicitors also need to go through the questionnaire raised by the client's spouse to establish if there are any questions they feel do not need to be answered;
- (g) in the event that the first appointment is treated as an FDR, comply with **para. 4.14.1** below as far as possible;

- 4.13.2** Solicitors may find it is helpful to the court and themselves to prepare a summary of the income, assets and liabilities of the parties, and to provide details of any large discrepancies in valuations between the parties.
- 4.13.3** Solicitors must provide a copy of the costs estimate in Form H to the court at the hearing and to clients at or before the first appointment, and explain to them the significance of that form.
- 4.13.4** If it is intended to seek an order for costs at the hearing the solicitor must also prepare the CPR Statement of Costs (Form N260) and file and serve this at least 24 hours before the hearing date so that the costs can be assessed. If the client against whom costs would otherwise be sought is publicly funded, the other party may nevertheless seek an order for costs under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg. 9(2) or (3) as amended. Note, however, that cost protection in family cases has been limited and is not applicable to certificates granted, or amendments made to add new proceedings to an existing certificate, on or after 25 July 2005 (see also **para. 1.2.4** for further details). The court will need to have enough information before it to decide that it would have made a costs order if the client had not been publicly funded. If so, the court may decide there and then what the client should pay as long as it has enough information before it to determine:
- (a) what is reasonable for the client to pay; and
 - (b) either what the full costs are, or that, whatever they are, they are more than the amount the client has been ordered to pay.

Otherwise it has to decide in principle that the client should pay the costs and postpone the determination of the amount.

- 4.13.5** If it is intended to apply for a pension sharing order or a pension attachment order, under the amendments made by the Family Proceedings (Amendment) (No. 5) Rules 2005, rule 52, solicitors should ask the court to order the party with the pension rights to file and serve a duly completed Pension Inquiry Form (Form P).

4.13.6 Solicitors attending the first appointment must have full knowledge of the case.

4.13.7 Solicitors should give consideration to seeking permission, in appropriate cases, for the filing of affidavits giving a broader presentation of the historical background to the case or on a defined relevant issue as evidence. These affidavits could include:

- (a) the respective contributions of the parties (although in long marriage cases this is likely to be viewed as of little relevance);
- (b) the source of current resources;
- (c) the standard of living during the marriage;
- (d) the main issues in dispute; and
- (e) the financial conduct of the parties;

This is to enable the court to consider all the circumstances of the case as required by the Matrimonial Causes Act 1973, s.25.

4.13.8 Solicitors must be aware that additional enquiries may be disallowed by the court where they do not relate to the Statement of Issues. The necessity to make further enquiries must be balanced by a consideration of what the enquiries will realistically achieve and the increased costs which are likely to be incurred by making them. Solicitors must also be aware that additional enquiries after the first directions appointment cannot be made save with permission of the court.

4.14 FINANCIAL DISPUTE RESOLUTION HEARING

4.14.1 Solicitors must:

- (a) ensure that clients are aware of the need to attend the FDR hearing;
- (b) ensure that clients are aware that the appointment can last all day and that they must be available;
- (c) encourage clients to make offers and proposals in advance of the FDR appointment;
- (d) where they are recipients of offers and proposals, encourage clients to give them proper consideration and respond to them when possible to do so;

- (e) discuss with clients before the FDR what their ‘bottom line’ for settlement is likely to be, bearing in mind the delays and costs likely to be involved in the absence of settlement;
- (f) explain to clients the requirement to use their best endeavours to reach agreement and the judge’s power to impose costs sanctions where one party refuses to make proposals or counter-proposals;
- (g) not seek or encourage parties to seek to exclude from consideration at the appointment, either separately or together, any such offer or proposal;
- (h) not pressure clients to accept offers they are not satisfied with at the FDR;
- (i) confirm subsequently, in writing, any current offer where there is no settlement at an FDR;
- (j) if acting for applicants, file with the court details of all offers and proposals and responses made to and by applicants not less than seven days before the FDR;
- (k) supply a costs estimate in Form H to the court at the hearing and also ensure that it is provided to clients and explained to them.

4.14.2 If the clients are seeking a costs order, the CPR Statement of Costs (Form N260) also needs to be filed and served at least 24 hours before the hearing date so that costs can be assessed, unless the client is publicly funded. If the client against whom costs would otherwise be sought is publicly funded, the other party may nevertheless seek an order for costs under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg. 9(2) or (3). The court will need to have enough information before it to decide that it would have made a costs order if the client had not been publicly funded. If so, the court may decide there and then what the client should pay as long as it has enough information before it to determine:

- (a) what is reasonable for the client to pay; and
- (b) either what the full costs are, or that whatever they are, they are more than the amount the client has been ordered to pay.

Otherwise it has to decide in principle that the client should pay the costs and postpone the determination of the amount.

- 4.14.3** If not applied for at the first appointment, solicitors should give consideration to seeking permission to file an affidavit as outlined at **para. 4.13.7** above.
- 4.14.4** Parties or their solicitors must not disclose the contents of FDR appointments or negotiations on the day, nor refer to them afterwards in the proceedings, either on an open or a *Calderbank* basis. Evidence of anything said or of any admission made during the FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D (Minors) (Conciliation: Privilege)* [1993] 1 FLR 932.
- 4.14.5** Advocates attending the FDR must have full knowledge of the case and should bear in mind the possibility that an FDR can be a lengthy hearing and it can overrun. They should also bear in mind the need to negotiate and should consider carefully whether they can attend more than one FDR in the space of one day.
- 4.14.6** After an FDR solicitors should ensure that the district judge has removed from the file any correspondence relating to offers of settlement.

4.15 PREPARATION FOR THE FINAL HEARING

- 4.15.1** Solicitors must comply with *Practice Direction (Family Proceedings: Court Bundles)* [2000] 1 FLR 536 (see **Appendix 1**). Solicitors must be aware that this Practice Direction applies not only to final hearings but also to all other hearings specified within the Direction. It can be helpful at the earliest opportunity to prepare and keep updated a bundle for exchange. This can then form the basis of a trial bundle where necessary.
- 4.15.2** Not less than 14 days before the date fixed for the final hearing, solicitors for the applicant must file an open statement setting out the concise details and amounts involved of the orders which they propose to ask the court to make. Seven days after that, the respondent must file a similar open statement. The

offer and counter-offer must be served on the other party and filed at the court in accordance with FPR 1991, rule 2.69(e).

4.15.3 Applicants' solicitors, in conjunction with counsel, if counsel is to be the advocate at the hearing, must prepare in advance of the final hearing and, where possible, agree with the solicitors acting for respondents:

- (a) a concise statement of the remaining issues between the parties;
- (b) a chronology of material facts.

4.15.4 In cases estimated to last for five days or more, and in which no pre-trial review has been ordered, an application should be made for a pre-trial review where practicable, at least three weeks before the hearing. Where possible, this should be conducted by the judge or district judge before whom the case is likely to be heard and should be attended by the advocates who are to represent the parties at the hearing. Where possible, all statements of evidence and all reports should be filed before the review and in time for them to have been considered by the parties (see *Practice Direction (Case Management)* [1995] 1 FLR 456).

4.15.5 As with the first appointment and the FDR, solicitors must supply a costs estimate in Form H to the court at the hearing and ensure that it is provided to clients and that it is explained to them. Solicitors should remember that Form H must be signed by a partner of the firm. If a case is likely to last for one day or less and clients are seeking a costs order, the CPR Statement of Costs (Form N260) also needs to be filed and served at least 24 hours before the hearing so that costs can be assessed, unless the proposed receiving party is publicly funded.

4.16 EVIDENCE

4.16.1 Evidence must be confined to relevant facts and matters which are material to the application. Where affidavit evidence is filed the deponents must be available for cross-examination on notice from the other party.

4.16.2 If any further evidence is necessary it must be confined to such matters as answering any serious allegation made by the other party, dealing with any serious issue raised or setting out any material change of circumstances. Evidence should be confined to issues which have been identified and in accordance with the directions given.

4.17 COSTS AND THE STATUTORY CHARGE

Costs

4.17.1 Solicitors must keep in mind at all times the principle of proportionality between the amount at stake and the amount which it is appropriate to spend on resolving the dispute.

4.17.2 Solicitors must consider and explain to clients the factors that may affect the court in considering whether to order costs, either in their favour or against them. These include:

- (a) the conduct of the litigation, for example material non-disclosure of documents and delay in providing disclosure or seeking excessive disclosure;
- (b) the absence of an offer or a counter-offer or an offer made too late to be effective;
- (c) the reasonableness of any offer or counter-offer since unreasonable offers are not helpful and will not be viewed as such by the court.

4.17.3 At the time of the publication of this edition of the Protocol there is likely to be a rule amendment which will lead to a fundamental change in the approach of the courts to making cost orders. Solicitors therefore need to be aware of the current rules relating to cost orders and will need to understand the new rules, if and when they are enacted.

4.17.4 Until any change to the costs rules are made, solicitors need to be aware of the principles set out in FPR 1991, rule 2.69 regarding offers to settle. During the conduct of ancillary relief, either party may make a written offer to the other party expressed to be ‘without prejudice save as to costs’. Although rule 2.69C has been revoked, rule 2.69B is still effective. This provides that if a judgment or order is made which is more advantageous to a

party than the offer made by the other party, then the court must order that other party to pay any costs incurred after the date beginning 28 days after the offer was made, unless the court considers it unjust to do so. It is essential to understand the effect of this rule and to advise clients of the risks of not giving careful consideration to the making of offers.

- 4.17.5** The potential changes in the rules restrict the circumstances in which an order for costs is likely to be made by a court. The thinking behind the new rule is that each party's costs should be seen as a liability and the court should consider that the need to pay costs is one of the needs of each party to be addressed prior to the division of the remaining financial assets. Costs orders will, however, remain appropriate when dealing with litigation conduct. Accordingly the need to consider and explain to clients the factors outlined in **para. 4.17.2** above will still be important.
- 4.17.6** Solicitors are reminded of their duty to safeguard public funds and to ensure that the Funding Code criteria applicable to the case remain satisfied. Solicitors must ensure that they file and serve Notice of Issue of a certificate of public funding and Notice of Discharge of that certificate.
- 4.17.7** In cases where clients are in receipt of public funding, solicitors need to be aware of the requirements of public funding. In particular, they need to ensure clients are aware of the statutory charge and that they understand that there are circumstances in which solicitors' duties in respect of publicly funded work can override their duty of client confidentiality. A solicitor is required to make a report to the LSC, for example, if they believe that the publicly funded client requires the case to be conducted unreasonably or at an unjustifiable expense to the Community Legal Service Fund, or where the solicitor is simply uncertain whether it would be reasonable to continue acting. A costs officer is entitled to disallow all subsequent costs following a failure to report and it is important that the client should be aware of this. On client confidentiality, solicitors are referred to the Legal Services Commission (Disclosure of Information) Regulations 2000, SI 2000/442, reg. 4 and to *The Guide to the Professional Conduct of Solicitors 1999*, Principle 5.03.

The statutory charge

- 4.17.8** Solicitors should consider and discuss with the client, where appropriate, the application of the statutory charge in cases which may result in the recovery or preservation of the possession of property (for example, the protection of a right of occupation of property or the unlocking of the value of property). Such cases can give rise to the statutory charge, even where the title to the property is not in issue (*Parkes v. Legal Aid Board* [1994] 2 FLR 850). Solicitors should remember that the charge does now apply where property is recovered or preserved for the benefit of a third party, such as a child, and may do so even where the case was funded under the Legal Aid Act 1988.
- 4.17.9** Solicitors should be aware that the statutory charge arises where property which was at issue is recovered or preserved. Where the parties have been able to agree throughout on the disposition of an item of property, the charge cannot attach to it. Solicitors should endeavour to narrow the subject matter of the dispute.
- 4.17.10** Solicitors should consider and discuss with clients, where appropriate, the possibility of postponement of the statutory charge where property which is to be used as a client's home or as a home for their dependants, is recovered or preserved – including under Trusts of Land Act 1996. It should be borne in mind that the enforcement of the statutory charge over the property can, at the discretion of the LSC, be postponed until future sale and transferred onto the purchase of a new property from the proceeds.
- 4.17.11** The test is whether the client is in a position to repay the charge, for example by obtaining a small increase on their mortgage. If so, the LSC would expect the charge to be repaid, rather than postponed indefinitely. The LSC has a new power to review existing postponed charges and ask for repayment where the client is well able to do so. This is aimed at clients who can readily afford to repay the charge. Many clients will be in a more secure financial position a few years after their case is concluded. In no circumstances would clients be put in the position of being forced to sell the home they have recovered.

- 4.17.12** Clients who were paying a contribution towards their costs may be encouraged to continue to pay the amount of their contribution, as a condition of enforcement of the charge being postponed, if there is no adverse change in their financial position.
- 4.17.13** The interest rate on postponed charges increased from 5% to 8% with effect from 1 October 2005. All existing statutory charge holders are being encouraged to repay the charge if they are able.

4.18 APPLICATIONS FOR VARIATIONS OF MAINTENANCE ORDERS

- 4.18.1** The procedure for variation applications is as set out in the Ancillary Relief Rules, without any special modifications.
- 4.18.2** On a variation application, it may be important, in order to save costs, to use the first appointment as an FDR in appropriate cases.
- 4.18.3** Solicitors must warn clients that fully contested variation applications are rarely proportionate in terms of the costs incurred. Clients should be encouraged to negotiate and settle without the need for a final hearing.

4.19 CONSENT ORDERS

*This section must be read in conjunction with paras. 1.5.1–1.5.4 of the Main Protocol (see **Part 1**).*

- 4.19.1** Solicitors should take particular care in drafting financial consent orders, including recitals, ensuring that the consent order comprehensively reflects all terms agreed and resolves all financial issues between the parties. Resolution's *Precedents for Consent Orders* (see **Appendix 17** for contact details) are universally used and accepted and have been approved by members of the judiciary. Solicitors should use those precedents whenever appropriate to avoid making unnecessary mistakes in drafting.

- 4.19.2** Solicitors must be aware of the limits of the court’s power with regard to undertakings and should explain to clients the nature and power of an undertaking. Undertakings in consent orders are an essential part of placing each person under an obligation where there is not a statutory remedy available to deal with the point agreed, such as payment of life policy premiums or seeking release of a person from their obligations under a mortgage. This practice was explained and given impetus by Lord Brandon in *Livesey v. Jenkins* [1985] FLR 813, HL. The Law Society and Resolution support this approach. Although doubts have been expressed as to the enforceability of certain undertakings it is best practice to use them and to ensure that clients sign personally all consent orders and statements of information.
- 4.19.3** When a consent order is filed, solicitors should check whether the court requires each or one of the parties to file a Form A. Any application filed by a party whose claims are being dismissed should be marked ‘for dismissal purposes only’ (this is accepted practice in the Principal Registry but it is not necessarily accepted practice in all courts throughout England and Wales). In the event that an application is made for dismissal purposes, solicitors making that application should consider what should be included in it.
- 4.19.4** In certain courts, when undertakings are given by a client, solicitors should be aware that consent orders are to be endorsed by solicitors to the effect that they have explained the effect of an undertaking and the consequences of its breach to their client.
- 4.19.5** Where a pension sharing or attachment order is to be made, the draft consent order and annex must be sent to the pension provider for approval before lodgement, to check that the terms and wording agreed can be implemented.

4.20 PRE- AND POST-NUPTIAL AGREEMENTS AND SEPARATION AGREEMENTS

- 4.20.1** The law relating to agreements on separation made either before marriage or at the point of separation is changing and

developing rapidly. Solicitors must be aware of new cases and keep abreast of changes in the law. The trend is for the courts to show an increasing willingness to respect agreements freely entered into between the parties, especially in relation to pre-nuptial agreements, i.e. contracts entered into before marriage whereby the parties seek to regulate their financial liabilities and responsibilities to one another in the event of a divorce.

4.20.2 Solicitors should be aware of the test set out in *K v. K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120 in determining whether a pre-nuptial agreement should be influential and also the proposals contained in the Government's Green Paper, *Supporting Families* (published on 4 October 1998), although these proposals have not been translated into legislation.

4.20.3 There has been a significant increase in demand for pre-nuptial agreements post *White*, and more recently post *McFarlane* and *Parlour* ([2004] EWCA Civ 872) yet historically many pre-nuptial agreements have been prepared without sufficiently serious consideration as to their potential consequences. Given the current judicial trend, solicitors should approach advising upon and drafting pre-nuptial agreements with serious consideration for the consequences of such agreements.

4.21 CREDIT REFERENCES

4.21.1 Solicitors are reminded that clients may suffer problems from poor credit ratings as a result of the conduct of their former spouse. Clients should be advised of how to rectify any inaccurate information held by a credit agency.

4.21.2 There are three UK credit reference agencies which hold information on the majority of adults. This information ranges from public information such as is contained in the electoral register entries and the county court judgment file to credit information supplied by over 500 members of a closed group of data sharers from the credit industry. This information is supplied to organisations, usually as a result of an application for a service such as credit, or to open a savings account or when the subject of the enquiry applies for a job. The level of

data accessed will vary depending on the purpose of the search and the membership level of the organisation seeking the information. It is almost always supplied with the full consent of the data subject. Exceptions to that rule are made for fraud investigation purposes.

- 4.21.3** Consumers are entitled to see what is held on their own file by making an application for their file under Data Protection Act, s.7 (for which a charge of £2.00 is made) and if they have any queries or disputes the credit reference agency will assist them to resolve the matter.
- 4.21.4** Consumer files hold a variety of information which is built up over time to provide a picture of the profile and credit behaviour of individuals. It also holds information on the ‘financial relationships’ they may have, such as partners and spouses, by creating links between the records of two individuals who have credit accounts, have applied for credit accounts or have declared themselves to be linked. Those links stay on record unless and until they are broken by one of the parties providing evidence that they are no longer financially connected.
- 4.21.5** When advising clients on financial matters, solicitors should advise them that they should apply for a copy of their consumer credit file from each of the three credit reference agencies during the early stages of action to resolve financial matters. This is in order to check whether they are financially linked to their partner. If they are linked they should apply to ‘break’ that link at the earliest opportunity. Guidance supplied with the consumer file explains when and how they can do this and update anything else they consider to be out of date. Details of the three credit rating agencies are given below:
- Callcredit plc, Consumer Services Team, PO Box 491, Leeds, LS3 1WZ, tel. 0870 060 1414, www.callcredit.plc.uk
 - Equifax plc, Credit File Advice Centre, PO Box 3001, Bradford, BD1 5US, tel. 0870 010 0583, www.myequifax.co.uk
 - Experian, Consumer Help Service, PO Box 8000, Nottingham NG80 7WF, tel. 0870 241 6212, www.experian.co.uk