PART 5

Cohabitation

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.

5.1 SCOPE

5.1.1 English law does not recognise cohabitation as a defined legal status. As yet, very few rights exist for cohabitants. However, in practice increasing numbers of the population live together without marrying. The problems they face on relationship breakdown are often similar to those faced by couples who have married. The lack of a single statute to deal with cohabitants can make the task of resolving those problems complex. It appears likely that the law will change in this area in some respects, and solicitors should be aware of prospective changes and the need to advise clients accordingly.

5.1.2 Much of the Protocol applies equally to cohabiting couples as to married couples. In particular, the approach contained in the Main Protocol (see **Part 1**) and the sections relating to children, domestic abuse and mediation are equally relevant to cohabitation breakdown as they are to divorce.

5.1.3 However, in the area of finances, the options available to cohabitants on relationship breakdown differ greatly from those available to spouses on divorce. This section of the Protocol deals mainly with financial claims which arise on cohabitation breakdown, including same sex relationships.

5.1.4 Solicitors must be aware that same sex couples who register their relationship under the Civil Partnership Act 2004 acquire rights akin to those of married couples and should not be treated as cohabitants.

5.2 ADVICE AT THE COMMENCEMENT OF OR DURING COHABITATION

5.2.1 If solicitors are asked to advise a cohabitant and there are children in the family, the solicitors should discuss the importance of obtaining parental responsibility.

5.2.2 Experience shows that many clients are unaware of their legal position when they cohabit and they often have misconceptions as to the rights or lack of rights that they may have. Clients may consult solicitors either at the commencement of their relationship or during it and solicitors should use such opportunities to explain to clients their legal position. Clients should also be advised of the written material available on the subject, for example the leaflets provided by the LSC and available on their website. Cohabitants may also wish to consider the 'living together agreement' which is published on the website of Advice Now. Details of the websites of these organisations are contained in **Appendix 17**.

5.2.3 Clients may seek advice at the commencement of a relationship. If so, clients should be encouraged to consider entering into a cohabitation agreement, if such an agreement would be beneficial to the clients. Parts of the agreement may be enforceable through the courts. Solicitors should have access to precedents for cohabitation agreements at all times (model cohabitation agreements can be found in *Cohabitation Law and Precedents*, Sweet and Maxwell, 1999). Solicitors must advise clients that they can only act for one of the parties in drawing up such an agreement and that the other party must be separately represented.

5.2.4 Often clients will consult solicitors when they are intending to purchase a property together. In such circumstances, careful consideration needs to be given as to how the property should be owned. Solicitors must discuss with clients the implications of owning a property either as joint tenants or tenants in common and whether a declaration of trust is desirable and/or whether they want to enter into a cohabitation agreement.

5.2.5 Where cohabitants decide to prepare a declaration of trust at the time of purchase of a property, solicitors can only act for both cohabitants in preparing the declaration if it is clear that there is an agreement from the outset as to all the terms of the declaration and there is no conflict of interest.

5.2.6 At all relevant times, solicitors should advise clients who cohabit about the importance of making wills, making pension and death in service benefit nominations, considering life assurance policies and the benefits of parental responsibility agreements. Solicitors should also advise as to what might occur in the event that these matters are not dealt with.

5.2.7 Cohabitants should be advised that there is no equivalent to the spouse exemption for them on inheritance tax (IHT) and therefore gifts made within seven years of death will attract IHT. At the time of the making of a will estate planning should be discussed. Practitioners should advise clients of the effect of the ruling in *Holland* v. *IRC* [2003] WTLR 207. The judgment in this case confirmed that the lack of spouse exemption from IHT for cohabitants is not in breach of the Human Rights Act 1998. Unless there is a change in the law in relation to cohabitants there will be no tax relief on any gifts between them other than in the normal way. Once the Civil Partnership Act 2004 comes into force, there will be an IHT exemption for registered partners equivalent to the spouse exemption for married couples.

5.2.8 Solicitors are reminded that they may need to liaise with conveyancing practitioners or third parties who are involved in any existing wills, trusts or settlements. They should obtain letters of authority from their client where appropriate. Solicitors should avoid giving investment advice unless suitably qualified or a specialist in this area.

5.3 ADVICE FOLLOWING RELATIONSHIP BREAKDOWN

5.3.1 At the first meeting or early on in the case, solicitors should consider and advise, where appropriate, on all the matters referred to in **Part 1**. The sections relating to reconciliation and other support services apply equally to cohabitation.

5.3.2 The paragraphs relating to family dispute resolution and mediation are also equally applicable in cohabitation cases. Accordingly, solicitors must, at an early stage, unless it is clearly inappropriate to do so, explain the mediation process and advise clients on the benefits and/or limitations of mediation in their particular case as well as the role of solicitors in supporting the mediation process. The suitability of mediation should be kept under review throughout the case and clients should be referred to mediation when and where appropriate.

5.3.3 The rest of **Part 1** will also apply equally to cohabitation cases and should be referred to. It is important that solicitors screen appropriately for domestic abuse and consider whether there are any urgent issues to be dealt with. The list of examples of urgent issues in the Main Protocol (see **paras. 1.1.17–1.1.18**) applies equally to cohabitation (with the exception of interim maintenance which is not available to unmarried parties).

5.3.4 Solicitors should check whether a client has made a will and, if so, consider with them whether it is still appropriate in the circumstances.

5.3.5 Solicitors should consider whether it is necessary to register a restriction at HM Land Registry to protect a client's interest in a property.

5.3.6 **Paragraphs 1.1.19–1.1.33** as to children and **para. 1.1.43** as to the provision of information are equally applicable to cohabitation cases, although it is acknowledged that the availability of standard information for cohabitants is not as wide as for other family matters.

5.3.7 Under **para. 1.1.44** of the Main Protocol it is important that solicitors should, at the end of the first meeting or at an early stage, outline the possible remedies that are available and the possible outcomes, as far as this is practical with the information available. It is important that clients are not given unrealistic expectations either of what can be achieved or of the time the matter may take to resolve.

5.3.8 Solicitors should advise clients that they might have claims in both property law and family law. Property law may relate to claims for a beneficial interest in a property by way of constructive or resulting trusts dealt with under Trusts of Land Act 1996, or proprietary estoppel and equitable accounting. If a couple has children, a client may have claims under Children Act 1989, Sched. 1 and the Child Support Act 1991. In exceptional cases this can extend effectively to support of the parent as well as the child. Practice and procedure for property law and family law claims are very different, the former being governed by CPR 1998 as amended, the latter by FPR 1991 and FPCR 1991 as amended. This is a developing area of law (see for example the case of *Oxley* v. *Hiscock* [2004] EWCA Civ 546, CA, 6 May 2004) and solicitors must ensure that they are aware of the latest case law and be confident in their knowledge before offering advice on this area.

5.3.9 Requirements for solicitors to provide costs information as outlined in the Main Protocol (see **paras. 1.2.1–1.2.17**) apply equally to cohabitation cases.

5.3.10 The provisions within the Main Protocol as to communications with the other party, the giving of notice of issue of proceedings, the steps to be taken when parties have already reached agreement and awareness of human rights law, are all applicable to cohabitation cases.

5.4 PRIOR TO ISSUING PROCEEDINGS FOR FINANCIAL MATTERS

Voluntary disclosure and mediation

5.4.1 Solicitors must consider and discuss the following with clients:

(1) The importance of pre-application disclosure and negotiation. An application must not be issued when settlement is a reasonable prospect. Solicitors are referred to the Pre-Application Protocol for Ancillary Relief (sections

2.1–2.4 reproduced at **para. 4.1.3** of this Protocol). Making an application to the court should not be regarded as a hostile step or a last resort but rather as a way of starting the court timetable, controlling disclosure and endeavouring to avoid the cost of final hearing.

(2) The most appropriate form of dispute resolution for the case, based on clients' needs and individual circumstances, at an early stage. Solicitors must discuss mediation with clients, except where it is inappropriate to do so, and advise on whether it is likely to be suitable to their case and, where appropriate, refer them to an appropriate mediator (see **Part 7** on Mediation).

Identifying the issues

5.4.2 Solicitors must seek to clarify the parties' claims and identify the issues between them as soon as possible. To achieve this they must provide, as soon as possible, a full, frank and clear disclosure of facts, information and documents which are material and sufficiently accurate to enable proper negotiations to take place in order to settle their differences. Openness in all dealings is essential.

5.5 PRE-ACTION PROTOCOL

Civil Procedure Rules 1998 as amended

5.5.1 Although there is no protocol specific to Trusts of Land Act 1996 cases, solicitors (or parties where unrepresented) must comply with *Practice Direction – Protocols* which applies to all types of civil cases and therefore to cohabitants in proceedings under Trusts of Land Act 1996.

5.5.2 The common objectives of all the pre-action protocols are as follows:

(a) to encourage the exchange of early and full information between the parties about any dispute between them which might need resolution by a court;

(b) to enable the parties to avoid proceedings by agreeing a settlement of the claim before commencement of proceedings, either through negotiation directly between them, with or without the assistance of a mediator if appropriate, or negotiation between the solicitors;

(c) to support the efficient management of proceedings where litigation cannot be avoided.

5.5.3 Accordingly, the court will expect the parties and their legal advisers to act reasonably in exchanging information and documents relevant to the claim and generally to try to avoid the necessity for the commencement of proceedings (in accordance with the overriding objective and the matters referred to in CPR 1998, rule 1.1(2)(a), (b) and (c)). In view of the nature of family proceedings, the parties and their representatives should act in a conciliatory and constructive manner at all times.

Pre-action procedures for Trusts of Land and Appointment of Trustees Act 1996 claims

5.5.4 For Trusts of Land Act 1996 claims, solicitors (or unrepresented parties) should comply with the following key elements for pre-action procedure, if appropriate, unless there are good reasons for not doing so. These have been adapted from the protocols used in personal injury and clinical negligence cases. They should:

(1) Send an initial letter (referred to in CPR 1998 as a 'letter of claim') setting out the following information in concise form:

(a) a clear summary of uncontroversial facts;
(b) the main allegations of fact, including where appropriate a summary of what was said by the parties at the time;
(c) an indication of the exact financial claim;
(d) indications as to witnesses and a summary of their evidence;
(e) disclosure of relevant documents.

Care should be exercised to ensure that the tone of the letter is non-threatening and sets out facts in a non-aggressive way. If addressed to a party who is not represented the letter must advise the party to seek legal advice and should enclose a second copy of the letter to facilitate this.

(2) If possible and appropriate, refrain from issuing proceedings for six weeks, during which time full disclosure should be given and negotiations commenced.
(3) Give a preliminary reply within two weeks of receiving the initial letter of claim.
(4) Give a full reply within four weeks of receiving the letter of claim.

5.5.5 Preparation of the initial letter of claim will involve a substantial financial commitment from clients. Solicitors must give proper advice to ensure that the claim is framed in the correct way.

5.5.6 Solicitors must consider and discuss with clients the fact that failure to comply with a pre-action protocol may lead to an order for indemnity costs and other financial penalties.

5.5.7 Solicitors must consider with clients whether the immediate issue of proceedings is required in order to obtain protection of assets.

5.5.8 If matters between the parties are concluded without the issue of court proceedings, the outcome should be recorded in a deed.

Issue of proceedings

5.5.9 Applications for an order under Trusts of Land Act 1996, s.14 (usually brought under CPR 1998, Part 8) will be issued on Form N208 with a claim form, a signed statement of truth and a witness statement or affidavit of the claimant. They attract a civil procedure court fee.

5.5.10 Solicitors will be aware that the proceedings will offer only a declaration of an equitable interest in a property and a consequential order, for example an order for sale. Solicitors should note that if there is to be a substantial question of fact raised within a case it may more appropriate to issue the proceedings under Part 7 procedure.

5.5.11 After all the parties have filed statements within the proceedings and disclosure has been given, it is possible for either or both of the parties to make an application to the civil court for a transfer to the family courts. This enables all issues relating to one family to be heard together.

5.5.12 Solicitors should note that county courts have jurisdiction in Trusts of Land Act 1996 applications whatever the value of the property in dispute. The Principal Registry of the Family Division, which sits as a county court, has full jurisdiction to deal with applications under Trusts of Land Act 1996, s.14 and such claims can be issued out of the Principal Registry of the Family Division (see CPR 1998, Practice Direction 2B, para. 3.2 and *Practice Direction (Family Division: Allocation of Cases: Costs)* [1999] 3 All ER 192, [1999] 1 WLR 1128).

5.5.13 Solicitors are advised to consider carefully CPR 1998 when undertaking an application under Trusts of Land Act 1996, and if they feel that they are not sufficiently proficient in this area, should consider taking advice from a more experienced civil practitioner or transferring the file to another solicitor.

5.6 CLAIMS UNDER THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

5.6.1 Most firms distinguish between contentious probate work and claims under the Inheritance (Provision for Family and Dependants) Act 1975 ('Inheritance Act 1975'). In some firms, Inheritance Act 1975 cases are dealt with by family lawyers.

5.6.2 Solicitors should not undertake without supervision any work which they know to be outside their area of expertise.

5.6.3 If a case appears complex or beyond the expertise of a practitioner they should consider whether the case should be passed to a member of the Association of Contentious Trust and Probate Lawyers. Solicitors are referred to the draft protocol which can be found on the Association's website at **www.actaps.com**. A failure to follow even this draft protocol can lead to a costs penalty.

5.6.4 Solicitors must understand that claims brought under Inheritance Act 1975 are governed by CPR 1998 and the claim form provides that they should be issued under CPR 1998, Part 8, even though often Part 8 procedure is not appropriate if there are substantial disputed facts. Particular care needs to be taken as to the persons who are to be parties to the proceedings as it would be usual to have the personal representatives and the beneficiaries of the estate as separate defendants.

5.6.5 Solicitors must note that the time limit for issuing a claim is six months from the date of the issue of the grant of representation, for example the date of the grant of probate.

5.6.6 In the recent case of *Parnall* v. *Hurst* [2003] WTLR 997 the court confirmed it was not appropriate in Inheritance Act 1975 cases to prevent a grant from being issued while negotiating a claim by entering what is known as a caveat. The judge in that case said:

> 'It is elementary that the only proper object of a caveat is to prevent the issue of a grant in respect of a testamentary paper which, on the caveator's case, is not the last valid Will of the deceased. To enter a caveat where the caveator's intention is to make an Inheritance Act 1975 claim is wholly wrong: first, because ex hypothesi, the validity of the Will is admitted; second, because a delay in the grant of probate entails a corresponding delay in getting the caveator's claim on foot.'

5.6.7 Instead, to be put on notice of the issuing of a grant in an estate a request should be made to the Probate Registry for a standing search. The fee is currently £15 and covers a period of six months. Successive periods can be covered by making additional applications. If in that period a grant is issued the Registry will send notification of the person who has extracted the grant and solicitors can obtain a copy of the grant. It will therefore be possible to issue a claim within the time limits of the grant.

5.6.8 In view of the time limit for issuing a claim, pre-issue negotiation is necessarily limited, but this may serve to focus the minds of those involved.

5.6.9 It is helpful to agree, wherever possible, that a directions hearing in an Inheritance Act 1975 case be treated similarly to an FDR hearing so that the judge gives an indication of his or her view of a case and an indication to the parties of the costs implications of continuing to a final hearing.

5.6.10 Solicitors requiring information on the subject of probate are referred to the *Probate Practitioner's Handbook*, fourth edition (Law Society, 2003). Chapters 10 and 11 deal with the issue of contentious probate and Inheritance Act 1975 claims.

5.7 FINANCIAL ISSUES RELATING TO CHILDREN

Private law proceedings relating to children

5.7.1 Proceedings relating to children will be brought under the Children Act 1989, including proceedings under Schedule 1 for financial provision for children. Solicitors are referred to **Part 3** of this Protocol for guidance on acting in private children law cases.

Pre-application Protocol for claims under the Children Act 1989, Schedule 1

5.7.2 Financial claims under Schedule 1 of the Children Act 1989 have no specific pre-application Protocol. Nonetheless, many of the issues are dealt with in the Pre-application Protocol for Ancillary Relief (see **Part 4** above) which are relevant to such claims. This should be followed where it will assist the process.

Applications under Schedule 1 of the Children Act 1989

5.7.3 As the procedural rules for applications under the Children Act 1989 are not designed primarily for financial applications, solicitors should consider whether there is a need for more disclosure than the standard forms allow. In cases where the standard statement of means might not be sufficient, solicitors should consider applying for a direction allowing service of a detailed questionnaire or use of Form E. Solicitors should also consider, in more complex cases, whether to apply for a direction that a number of the rules of the ancillary relief procedure should apply, particularly in relation to:

(a) statements of apparent issues;
(b) chronologies; and
(c) cost estimates.

5.7.4 It is good practice to provide costs estimates and solicitors should do so in Children Act 1989, Sched. 1 cases.

5.7.5 When dealing with final orders, if a property is to be held on trust, careful consideration should be given to who the trustees will be, and where professional trustees are appointed, whether they expect payment and how they might be paid, especially if there is an ongoing trust.

Jurisdiction and in which court to commence proceedings

5.7.6 Before proceedings relating to disputes about property, money, other belongings and children are issued, solicitors must consider carefully where they should issue the application. Where proceedings about different issues are being conducted in relation to the same couple, all proceedings must, where possible, be heard in the same court. If there are applications under Trusts of Land Act 1996 and under the Children Act they should be consolidated and heard together (*W* v. *W* [2004] 2 FLR 321). The county court has unlimited jurisdiction under Trusts of Land Act 1996 but solicitors should refer to CPR 1998, Part 7.2 and the Practice Direction supplementing that (particularly section 2).

5.7.7 Solicitors should be aware that proceedings may not be started in the High Court unless the value of the claim is more than £15,000, but that if the financial value of the claim, the amount in dispute and/or the complexity of the facts, legal issues, remedies or procedures involved and/or the importance of the outcome of the claim to the public in general are such that claimants and their solicitors believe that their claims ought to be dealt with by a High Court judge, then the case should be issued in the High Court.