Ancillary Relief
Pre-Application Protocol

1. Introduction

1. 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 set out in Rule 1A of the Rules of the Supreme Court (Northern Ireland) 1980.
(c) The parties are in a position to settle the case fairly and early without litigation.

1.2 The court will 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 take into account non-compliance with the protocol and, if so, consider whether non-compliance merits consequences.

2. Guidance Notes

Scope of the Protocol

2.1 This protocol is intended to apply to all claims for ancillary relief as defined by Rule 1.3 of the Family Proceedings Rules (NI) 1996. 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 Ancillary Relief applications.

2.2 In considering the option of pre-application disclosure and negotiation, legal representatives 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 legal representatives 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 Legal representatives should consider at an early stage and keep under review whether it would be appropriate to suggest mediation (when available) 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 para 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 or she 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 21 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. If it is considered desirable the parties may wish to consider having the agreement made a rule of court.

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 have a responsibility to inform their clients in clear terms of this duty and of the possible consequences of breach of the duty. This duty of disclosure is an ongoing obligation. Any material changes after initial disclosure has been given should be disclosed. Solicitors are referred to the Guidance Notes for Applications for Ancillary Relief in the High Court.

3. The Protocol

General Principles

3.1 All parties must bear in mind the overriding objective and try to ensure that all claims are resolved and a just resolution achieved as speedily as possible without costs being incurred unreasonably. 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 effected 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. (Order 62 of the Rules of the Supreme Court (Northern Ireland) 1980)

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 relevant. Material should be sufficiently accurate to enable proper negotiations to take place to settle the 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 the Guidance Notes for Applications for Ancillary Relief in the High Court as a guide to the format of the disclosure. Documents should only be disclosed to the extent that they are required by the Guidance Notes. 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 avoided.

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 instruction.

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 Solicitors should note that from the date of the implementation of this protocol all expert witnesses to include estate agents will be expected to sign an expert's declaration.

3.12 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.

3.13 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 be mindful that they will be required to sign the usual expert witness declaration.

3.14 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.

3.15 If the parties instruct separate experts the parties should be encouraged to agree in advance that the reports will be disclosed and attempts should be made to ensure that discuss the issues directly with each other prior to trial with a view to agreeing values or otherwise narrowing issues.

Summary

3.15 The aim of this protocol is 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.