Forms and formats

Chris McIntosh outlines best practice and protocol for voluntary disclosure in financial proceedings

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'The format of voluntary disclosure will depend, to a certain extent, on the purpose for which it is being provided. There is no standardised document to assist with disclosure in preparation for a pre-nuptial agreement, despite adequate financial disclosure being one of the factors on which the strength of such an agreement is likely to be adjudicated.'

Since the new rules in relation to ancillary relief came into force in 2000 the use of Form E has standardised financial disclosure as part of the court procedure. Previously disclosure was provided by affidavits of means. However, when it comes to voluntary disclosure of financial information there are fewer guidelines, and in some cases none at all. This article will deal with the circumstances in which voluntary financial disclosure is appropriate and those in which it is not, together with other matters to be taken into account.

Format of voluntary disclosure

The format of voluntary disclosure will depend, to a certain extent, on the purpose for which it is being provided. There is no standardised document to assist with disclosure in preparation for a pre-nuptial agreement, despite adequate financial disclosure being one of the factors on which the strength of such an agreement is likely to be adjudicated (on the basis of the criteria helpfully summarised in *K v K (Ancillary Relief: Prenuptial Agreement)* [2003]). A Form E is unlikely to be considered appropriate, and instead disclosure is often provided by summary schedules, usually with supporting documentation.

Likewise, in mediation and collaborative law there is no standardised document for disclosure, although Resolution provides its mediators with a form which is not dissimilar to a Form E for court proceedings. Many collaborative lawyers use Form E for the structure it provides and in case the process fails.

Since it was recommended in *Morgan v Hill* [2006] it is becoming more established practice for Form E to be used in cases based on Schedule 1 to the Children Act 1989, although this is not obligatory.

In divorce and ancillary relief situations the Law Society provides a pre-application protocol (considered in more detail below). Paragraph 3.5 of the protocol sets out that voluntary disclosure should be provided by exchange of:

> ... schedules of assets, income, liabilities and other material facts, using Form E as a guide to the format of the disclosure.

That is to say, practitioners have no obligation to use Form E for voluntary disclosure and in some cases (particularly where the financial resources of the parties are limited or straightforward) it may be simpler and more effective to provide disclosure by schedules of assets, liabilities and income, together with supporting documents. However, disclosure by Form E has the advantage that practitioners are familiar with the format of the document and, if it proves necessary to issue proceedings further down the line, the parties need only update their Form E, as opposed to starting it from scratch. In addition, they have the benefit of ensuring that disclosure is comprehensive and, if the finances prove to be more complicated than originally envisaged, not using Form E may prove to be a false economy.

Pre-application protocol

The protocol dates from April 2000 and was created with the

intention of building on and increasing what Lord Woolf in the July 1996 Access to Justice report called:

> ... the benefits of early but well informed settlement which genuinely satisfy both parties to a dispute.

It can be located on p68 of the 2009/2010 *At a Glance* guide, or on the court website at www.hmcourts-service.gov.uk/cms/937.htm. The Resolution *Guide to good practice on disclosure in ancillary relief* refers practitioners to the pre-application protocol at paragraph 4.1, but does not expand on it.

The aim of the protocol (set out in paragraph 1.2) 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 objectives of the Family Proceedings (Amendments) Rules 1999;

(c) the parties are in a position to settle the case fairly and early without litigation.

The protocol does not state that voluntary disclosure should be the default position in all cases, but that it should be used in 'appropriate cases'. Indeed, it further states that:

> ... solicitors should bear in mind the advantage of having a court timetable and court-managed process.

And:

> The option of pre-application disclosure and negotiation has risks of excessive and uncontrolled expenditure and delay.

Non-compliance

Notwithstanding the protocol's notice of the potential disadvantages of proceeding by voluntary disclosure, it also contains the alarming warning that:

> [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.

Practitioners have no obligation to use Form E for voluntary disclosure and in some cases (particularly where the financial resources of the parties are limited or straightforward) it may be simpler and more effective to provide disclosure by schedules.

Anecdotally, it appears that the pre-application protocol is not raised by judges in relation to costs.

Is this something about which practitioners should be concerned? As a general rule, it appears not. Once the process of voluntary disclosure has started parties have an obligation from the protocol not to issue proceedings 'when a settlement is a reasonable prospect' (paragraph 2.6), but no such obligation appears to exist if no voluntary disclosure has taken place at all. In such circumstances it is difficult to imagine when issuing a Form A without considering pre-application disclosure would be likely to be criticised.

The consequences threatened by the protocol seem unlikely to take the form of a lesser award unless the non-compliance falls within s25(g) of the Matrimonial Causes Act (MCA) 1973 and is therefore conduct of such magnitude that it would be inequitable for the court to disregard it.

The other option open to the court would be for a party to be penalised in costs. The general rule (r2.71(4)(a) of the Family Proceedings Rules (FPR) 1991) is that the court will not require one party to pay the other party's costs. However, r2.71(4)(b) states that:

> ... the court may make such an order at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).

Therefore, although there appears to be no obligation to attempt voluntary disclosure before issuing proceedings, any pre-application disclosure should be approached with the overriding objective of avoiding any allegations of inappropriate conduct further down the line.

Overriding objective

Rule 2.51 of FPR 1991 sets out the court's overriding objective to deal with cases justly, which involves the court endeavouring to ensure that both parties are on an equal footing, save expense and deal with the case proportionately and expeditiously. Notwithstanding the court's published intentions, clients may feel that the voluntary disclosure route provides them with the opportunity to save costs, both in financial and emotional terms. They may also be put off by the likely duration of court proceedings.

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The overriding objective includes the prescription that the court must actively manage cases. One of the ways that the court is specifically enjoined to achieve this is by:

> ... regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question.

Without the court being present in the role of watchdog, there is a danger that one party may attempt to use the process as a fishing expedition, or to ask for ever more information with a view to avoiding reaching a settlement. Moreover, it can be easy for timescales to slip without the court's obligation to fix times and control the progress of the case.

After Form A

As a middle way, practitioners may be tempted to suggest to clients that a financial application should be issued as a default position, but that in the meantime voluntary disclosure could be provided to try to reach a settlement before the first directions appointment (FDA). Strictly speaking this is not permitted under r2.61B(6) FPR 1991, which states that 'No disclosure or inspection of documents may be requested or given between the filing of the application for ancillary relief and the first appointment', other than copies sent with Form E (or shortly afterwards, if unable to send them with the Form E) and in accordance with the FDA documents. However, there is no prohibition from exchanging Forms E early and, if providing extra disclosure on a voluntary basis, this may be the catalyst for settling a case. It seems unlikely that many practitioners would wish to adhere rigidly to this rule in any event. If the FDA is to be used as an financial dispute resolution appointment (FDR) it may prove necessary to answer short questionnaires before this hearing.

External disclosure

When financial disclosure is provided as part of the court process this is covered by the implied undertaking that the information and documents will not be disclosed to anyone outside the original purpose of the disclosure. This was set out by Lord Denning at paragraph 896 of *Riddick v Thames Board Mills Ltd* [1977]:

> In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose.

The reason for this is that documents are disclosed under the compulsion of the court process and the:

> ... public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires.

However, this raises the question of whether information provided as part of the voluntary disclosure process which is not, strictly speaking,

provided under compulsion is covered by the same implied undertaking.

At paragraph 72 of *Clibbery v Allan* [2002] Dame Elizabeth Butler-Sloss clarified this and confirmed that the implied undertaking covers documents and information disclosed as part of the process of voluntary disclosure:

> The implied undertaking extends... to voluntary disclosure in ancillary relief proceedings, to the information contained in the documents and to affidavits and statements of truth and witness statements. All such information is required for the full and frank exchange of financial information and all the relevant circumstances which may be necessary to enable the court to know, in order to come to a fair conclusion in accordance with the exercise of its statutory jurisdiction. In my judgment, the obligation to respect the implied undertaking will also be imposed by the court in cases analogous to ancillary relief and found in Part III of the 1991 Rules (see for instance applications in cases of failure to provide reasonable maintenance or application to alter maintenance agreements, rr3.1, 3.5).

Mortgagees and pension providers

Serving pension providers in ancillary relief proceedings is generally governed by r2.70(6) and r2.70(7) FPR 1991, which provide that a copy of the Form A should be sent to the pension provider on the making of or giving notice of intention to proceed with an application for ancillary relief that includes a request for a pension sharing order or pension attachment order.

If the parties are resolving financial matters by voluntary disclosure, whether through mediation, collaborative law or solicitor negotiation, rather than through the court process, it is possible to reach agreement and be ready to lodge the consent order only to realise that the pension providers and mortgagees have not been notified of the agreement. Under r2.61(1)(dd), for the court to make a pension sharing or attachment order the pension providers must have been given 21 days from the service of the documents set out in r2.70(11) to object to the making of such an order.

Under r2.61(1)(e) mortgagees must have been given 14 days from the service of the notice in which to object to any proposed transfer.

Advantages and disadvantages

The advantages of proceeding by voluntary financial disclosure in appropriate cases are clear. If the parties have an amicable relationship and the finances are relatively straightforward, or if each of the parties has a clear idea of the finances as a whole, voluntary disclosure can be quicker and easier than going through the court process. It therefore has the potential to save money and stress for the parties.

The clearest disadvantages also relate to timescales and costs. Without the court timetable, which forces parties to comply with the procedure, there is a danger that disclosure can take far longer than it should, especially if the finances are complicated. This could have a knock-on effect on the costs if it later proves necessary to resort to the court process, since the costs are likely to be duplicated. In terms of stress, the court process provides a framework which can support an emotionally fragile client.

Where one party may be dissipating or disposing of assets, the other party will be unable to apply for an order under s37(2)(a) MCA 1973 or paragraph 74(2) of Schedule 5 to the Civil Partnership Act 2004 for an order restraining their spouse if an application for ancillary relief has not been filed (r2.68 FPR 1991). Although it is, of course, possible for the client to file a Form A and proceed that way, there is often a degree of urgency in such cases. Note that an application for a freezing order under the court's inherent jurisdiction would potentially still be possible, even if a Form A has not been issued.

Although a detailed analysis of the effects of bankruptcy in ancillary relief cases is beyond the remit of this article, the date on which the Form A is issued may have implications if the respondent is made bankrupt. Moreover, the setting of a timetable leading towards a final court hearing and order must make sense from the point of view of the spouse of anyone for whom bankruptcy appears even a slight possibility.

In Clibbery v Allan *Dame Elizabeth Butler-Sloss confirmed that the implied undertaking of non-disclosure covers documents and information disclosed as part of the process of voluntary disclosure.*

Conclusion

Careful consideration should be given to whether, in the case of each client, they are likely to be able to achieve their aims better by voluntary disclosure than through the court process. Also explore whether voluntary disclosure might serve the overriding objective better than initiating court proceedings at the start of the case. However, not all cases are suited to such an approach and practitioners should not shy away from initiating proceedings at an early stage where appropriate. ■

Clibbery v Allan
[2002] EWCA Civ 45
K v K (Ancillary Relief: Prenuptial Agreement)
[2003] 1 FLR 120
Morgan v Hill
[2006] EWCA Civ 1602
Riddick v Thames Board Mills Ltd
[1977] 1 QB 881