

PROTOCOL FOR DISCLOSURE IN COLLABORATIVE CASES

Collaborative Family Law (of which all members are IAML fellows)

www.collaborativefamilylaw.org.uk

1. Introduction

Disclosure is of vital importance when dealing with financial matters on separation, divorce or dissolution of a civil partnership.

This is equally applicable in collaborative work where particular problems can arise because, by its nature, collaborative work involves completing the disclosure process without any of the parameters or regulatory framework available where Court proceedings have been started.

Resolution, to which all collaborative lawyers in England and Wales belong, has a code of practice which requires members to emphasise to clients the importance of being open and honest in all dealings. This is reinforced by the Family Law Protocol which requires lawyers to try to avoid mistrust between the parties by encouraging at an early stage full, frank, clear and continuing disclosure of information and openness in dealings.

This protocol aims to give guidance as to what the Central London Collaborative Forum's members consider to be good practice in relation to disclosure in collaborative cases.

2. First Steps

When identifying cases suitable for collaborative work, practitioners will be aware that a case where one party has doubts as to whether or not the other is going to make full and frank disclosure may be a factor influencing the decision as to whether or not the collaborative process is appropriate.

Lawyers will need to be very clear indeed with their clients that even though the case is proceeding on a collaborative basis, disclosure is of vital importance and that this disclosure has to be full, frank and continuing and must also deal with assets whenever held and with what may be called "extraneous" matters dealt with in 4.3 below. Collaborative practice is not a cheat's charter.

Prior to the first four-way meeting, it will often be useful and helpful to discuss the issue of disclosure with the lawyer acting for the other spouse/partner. In that discussion it will usually be sensible to reinforce the need to make full, frank and open disclosure and to enquire as to whether or not that has been impressed upon the other party, and if not ask for assurance that it will be.

It is also sensible to have a discussion with the solicitor for the other spouse / partner as to their views on whether or not their client will make full, frank and honest disclosure.

Before the first meeting it may often be sensible to discuss with the lawyer the precise format that is most suitable for disclosure in the case in question and what further steps may be taken in the case of, say complex assets as discussed in 5 below.

3. The first four-way meeting

The importance and method of disclosure should be on the agenda at the first four-way meeting and this provides another opportunity to reinforce the need for full, frank and honest disclosure and to discuss the mechanisms for achieving this before the collaborative agreement is signed.

At this meeting, or earlier, it is a good idea to talk through with clients the different types of disclosure and to discuss the method.

It is important to point out that full investigation or requesting additional information should not be considered to be in any sense a hostile act, but merely something that we as lawyers must do to fulfil our professional obligations.

4. Different forms for provision of disclosure

4.1 Form E

The problem with Form E and the collaborative process is that much of Form E has to be discarded, notably the preliminary page of basic information, and the so-called narrative sections at the end. This makes for a rather scrappy looking document.

What is actually required for the collaborative process are parts 1 to 3 of Form E. Collaborative practitioners who wish to use Form E in collaborative cases may find that the Form E adapted for mediation suits collaborative work better than the full version. A copy of the "mediation Form E" is attached to this document.

4.2 Asset Schedule

This is likely to be the most appropriate method in most cases. We have prepared a template of an asset schedule specifically designed to include all the assets listed in parts 1 to 3 of Form E, with provision for – annotated notes, on the right hand side. In most cases we think this will be the most suitable basic form of disclosure. It also has the merit of directing the couples to the different types of assets. The asset schedule can be updated as the collaborative process develops and the final version can be attached to the M1 form at the end. Its use though must not detract or take attention away from the so-called extraneous factors (see 4.3 below) and where relevant these will need to be added or noted.

4.3 Extraneous factors which might effect the outcome

These can be many and various. They include, but are not limited to, the following:

- The fact that one party intends to remarry;
- Inheritance prospects;
- Forthcoming bonuses;
- Impending redundancy;
- A deal in the offing;
- A new market for previously illiquid assets.

This list is not exhaustive.

5. The complex case

Complex financial situations do not make cases unsuitable for collaborative work. Indeed the very opposite is often true. It is precisely in such complex cases that collaborative work can produce imaginative and very cost-effective results and come up with solutions that Courts simply cannot order. Cases should not, therefore, be deemed to be unsuitable for collaborative work simply because the assets are complex or cross-border.

However, a complex asset structure does bring with it the possibility, or indeed likelihood, that further investigation of the assets and verification will be needed.

This should be dealt with between the lawyers prior to the first meeting so that it does not come as a surprise at the first meeting and subsequent meetings.

It may be appropriate in some cases to engage a financial advisor to interpret financial documentation. Whilst this might be done jointly, in some circumstances it may be better for one party to instruct the accountants/financial advisors.

These steps will of course need to be agreed and where it seems likely that this will need to be done, it should be done at as an early a stage as is possible.

6. Timing

It is important when scheduling meetings in collaborative cases to be realistic about the timescales involved. Very frequently in a wish to make progress swiftly, meetings are scheduled but then have to be adjourned because the necessary work has not been done or information which is needed has not been obtained. Therefore, meetings need to be scheduled realistically.

CFL
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