

PROTOCOL FOR PRE/POST-MARITAL AND PRE-CIVIL PARTNERSHIP AGREEMENTS (PMAs) IN COLLABORATIVE CASES

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

www.collaborativefamilylaw.org.uk

We have had positive experiences of agreeing the terms of prenuptial (pre-marital) agreements using the collaborative process although consider that, given the nature of prenuptial agreements and the collaborative process, there are a number of factors which the collaborative lawyer should consider prior to entering this process, as follows: -

1. **Screening**

As in all collaborative cases, it is vital to “screen” the client properly ensuring that the client is suitable for the collaborative process. There is often a power imbalance between the parties (as there is in divorce cases) but PMAs can create particular difficulties given the different nature of the parties’ relationship (they are in love and the dynamics are very different). If the wedding is imminent and there is an urgency to agree the terms, consider whether the collaborative process really is the appropriate way forward.

See the attached participation agreement which has been adapted for where clients are negotiating the terms of PMAs.

2. **Insurance and risk management**

Consider whether one should notify the firm’s insurers in relation to the potential agreement. If in doubt check with insurers generally. While this may not require a separate report to be made on each occasion but it is important to notify them that the firm is advising in cases where PMAs are prepared and signed during the collaborative process.

Ensure that written advice is provided to the client by the collaborative lawyer as to the merits or otherwise of entering into the agreement. We consider that this should be “independent” of the collaborative process i.e. there is no need to show the other party nor the collaborative lawyer the advice although we suggest that each collaborative lawyer should let the other lawyer know that that advice is being provided. As to when that written advice should be provided, we recommend that written advice should be provided at the outset and certainly before the client signs the terms of the prenuptial agreement.

See also points below re other risk management issues.

3. **International aspects**

International aspects to the case (e.g. if one party is a foreign national and advice from a foreign lawyer is required) are not barriers to agreeing the content of a PMA using the collaborative process but separate advice from foreign lawyers will be necessary. As a general rule, we do not consider that joint foreign advice should be obtained, and that it is preferable for each party to seek independent advice which is disclosed during negotiations because of the potential conflict but also for risk management purposes in terms of insurance.

4. Timing

Ensure that there is sufficient time for reflection and consideration of the terms of agreement in between meetings. We do not consider that, in urgent cases, the collaborative process is appropriate. (See 1 above).

5. Notes of meetings

Have a notetaker at each meeting, preferably a trainee or assistant of one of the collaborative lawyers. Any note should be agreed.

6. Format of the meetings

In our experience it is sensible to have a first meeting without a draft PMA having been prepared, to explore the parties' wishes, their respective reasons for wanting to enter into the agreement and the approach of the Court to PMAs and how it differs to its approach in dealing with a claim for ancillary relief).

Prior to the second meeting, the lawyers should have a pre-meeting to discuss their respective clients' expectations in relation to the terms and the specific terms discussed at the first meeting.

At the second meeting agree who should prepare the first draft of the agreement, which should only take place after the general terms have been agreed in principle.

In the final four-way meeting, the collaborative lawyers should summarise each clause for the benefit of both clients. Again, a separate note should be prepared which should be made available to both parties as soon as possible after the meeting.

7. Disclosure

The disclosure requirements should be decided at the first meeting, in terms of the form and the level of financial disclosure required (See the CLCF disclosure protocol). Any valuations obtained should be joint valuations.

8. Review clauses

Both parties need to be advised as to the incorporation of review clauses (to deal with events such as the arrival of a child(ren), ill health, change of circumstances etc) and the intervals which such review clauses may be necessary. In particular consider agreement to enter into a post-nuptial agreement following the Privy Council case of MacLeod. There is no reason why the reviews cannot be achieved through the renewed use of the collaborative process using the original collaborative lawyers or if for example, having retired, a new collaborative lawyer as necessary.

9. Costs

If the parties are not each paying their legal costs, there should be provision that the payer should pay the legal costs up front/on account to the other party's collaborative lawyer, whether or not the PMA is signed. We had have experience where costs can become an issue and we propose an amendment to the participation agreement to this effect.

10. Barristers

As in normal collaborative cases, we see no barrier to the use of a jointly instructed barrister if it is considered necessary. If separate advice from Counsel is taken, this fact (but not necessarily the content of the advice) should be passed on to the other

collaborative lawyer. There is no barrier however to the contents of the separate advice being passed to the other party if the client consents.

CFL
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