



Revised Finance Pre-Action Protocol

On 29 April 2024 important changes were made to FPR Part 3 and Part 28 to promote non-court dispute resolution (NCDR). These changes include requiring the court to encourage parties to use NCDR, the introduction of a new form (FM5) requiring parties to set out their views on NCDR, and making a failure (without good reason) to attend NCDR an express reason for the court to consider making a costs order. For a commentary on these changes see [the blog by Nicholas Allen KC, Andrew Day and Rhys Taylor in the Financial Remedies Journal](#).

To support these changes the pre-action protocol (PAP) annexed to FPR PD 9A has also been updated. A copy of the new PAP can be found [here](#). In summary:

- The PAP applies to all applications for a financial remedy as defined by FPR 2.3. It applies whatever the size of the case, whether it is determined by reference to sharing or needs, and whether the parties are legally represented or not [para 2].
- It provides that any legal representative instructed should (1) give a copy of the PAP to all parties and (2) explain the meaning and implications of the PAP to their client, before they start court proceedings [para 4].
- The objectives of the PAP are to encourage appropriate engagement in NCDR, to enable the parties to understand each other's position, to assist the parties in deciding how to proceed, to identify the issues in dispute, to narrow the scope of the dispute, to try to settle the issue without court proceedings, to support efficient management of dispute



resolution, and to reduce the costs of resolving the dispute [para 5].

● To comply with the PAP the court will usually expect parties to have attended a MIAM (unless a valid exemption applies), to have considered and, unless there is good reason for not doing so, proposed and engaged in NCDR, provided full disclosure to the other party, clearly set out their position (including the orders they would wish the court to make were proceedings started), and attempted negotiation by making reasonable proposals for settlement [para 6].

● NCDR (which is defined by FPR 2.3) means methods of resolving a dispute other than through the court process. It includes, but is not limited to, mediation, arbitration, neutral evaluation and the collaborative process [para 10]. Before starting court proceedings parties should bear in mind that many (if not all) of the benefits of having a court timetable can be achieved via a NCDR process such as arbitration [para 17]. A similar point was recently made by Nicholas Allen KC (sitting as a Deputy High Court judge) in *NA v LA* [2024] EWFC 113, at [15].

● The court may consider the parties having obtained advice via the ‘single lawyer’ or ‘one couple, one lawyer’ scheme as good evidence of a constructive attempt to obtain advice and avoid unnecessary proceedings, provided they have complied with paragraph 6 of the PAP [para 11].

● Although there is a place for constructive negotiation via correspondence between legal representatives, that alone shall not be a sufficient attempt at NCDR for the purposes of



the PAP. Other forms of negotiation between legal representatives, such as round table meetings, may be considered sufficient depending on when and how they took place [para 12].

- Legal representatives should make parties aware that if they have not attempted at least one form of NCDR before starting court proceedings the court may (on being informed by a party that this is the case or by the court finding out of its own initiative) decline to commence or suspend the Form C court timetable [para 15]. For an example of where this has already been ordered by the court, see the recent decision of *NA v LA*.

- There may be good reasons (including where there is a real risk that one party may start competing proceedings in another jurisdiction or dissipate assets) to start court proceedings before attempting NCDR, but the court will still expect parties to attempt NCDR once the urgent issue which necessitated court proceedings been issued has been resolved [para 20]. This was the context in which the court recently made orders to encourage NCDR in *NA v LA*.

- If a party is not willing to attend NCDR they should give reasons in writing so the other party (and, if proceedings are started, the court) are clear as to their position [para 16]. When the court is considering whether to make a costs order it will take into account any pre-action offers to settle, a failure (unless exempt from doing so) to attend MIAM, the FM5, whether a party has provided appropriate financial disclosure, and a failure (without good reason) to attend NCDR [para 25].



- All correspondence must focus on the clarification of claims, identification of issues and their resolution [para 26]. The impact of any correspondence upon the reader must always be considered [para 27]. Where a first letter is drafted by a legal representative it should be approved by the client [para 28]. Legal representatives writing to an unrepresented party should always recommend that he or she seeks independent legal advice [para 29].
- The PAP underlines the duty of the parties to make full and honest disclosure of all material fact, documents and other information relevant to the issue [para 3]. Legal representatives must tell their clients in clear terms of the duty to provide honest disclosure and of the possible consequences of providing false information without an honest belief in its truth [para 33].

In addition to the revised PAP all parties should also receive a letter from the President of the Family Division when financial remedy proceedings are commenced. The letter will explain that the court expects all parties (and their legal representatives) to have tried to reach an agreement about their finances before coming to court, and to keep trying to reach an agreement during court proceedings. The letter also explains many of the benefits of reaching an agreement outside the court process and gives information in relation to some methods of NCDR.



The recent changes to FPR Part 3 and Part 28 are already having an impact. On 24 May 2024 Mr Nicholas Allen KC (sitting as a Deputy High Court Judge) handed down judgment in *NA v LA* after hearing the return date of non-molestation and occupation orders made ex parte under the **Family Law Act 1996** and an interim order for the preservation of property under FPR 20.2(1)(c). After those urgent/interim issues had been resolved by agreement the judge described the case as a paradigm example for the court to exercise its new powers and directed, pursuant to FPR 3.4(2), that the Form A be stayed and the Form C timetable should not be processed. The judge also directed, pursuant to FPR 3.4(3), that the parties should inform the court by way of a joint letter in six weeks' time what engagement there has been with NCDR, whether any of the issues have been resolved and what their respective proposals are for the way forward.

The overarching aim of these changes is to encourage not only parties but also legal representatives to try to settle cases without court proceedings. Any perceptions that may have once existed that obtaining information about NCDR is a tick-box exercise without any repercussions must be dispelled. There is now a requirement on legal representatives to provide copies of the PAP and explain its meaning/implications before court proceedings are started, to make parties aware that if they have not attempted at least one form of NCDR before starting court proceedings the court may decline to commence or suspend the Form C court timetable, and to tell their clients of the duty to provide honest disclosure and the possible consequences of providing false information.

It is hoped the revised PAP – in addition to the recent FPR changes and new letters from the President – will prompt a sea change in the approach to NCDR in the months and years to come. As Gwyneth Knowles J observed in *X v Y* [2024] EWHC 538, at [4], those involved in family proceedings must 'understand the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings' and 'at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable'.

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Michael Allum

Michael.Allum@iflg.uk.com

The International Family Law Group LLP

www.iflg.uk.com



Rhys Taylor
rtaylor@36family.co.uk
36 Group
<https://36group.co.uk>
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