

## Procedure for resolving financial disputes on relationship breakdown

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Does this note address what the financial outcome should be?

No. See the separate Fact sheet on working out what the financial settlement should be. This note deals with the process and procedure including the court based procedure for arriving at the financial settlement. It is directed at marital issues. The procedure for cohabitants is very different.

What is the fundamental requirement?

There must be full and frank disclosure of all relevant financial and other information on both sides before there can be any financial settlement on relationship breakdown. Without this, a lawyer cannot advise on the merits of any particular settlement. Without this, a court will not make a final financial order. If misleading, inadequate or incomplete disclosure is given, the financial settlement is at risk of being overturned and set aside with a high risk of the costs of doing so being paid by the party which has not given complete disclosure.

The disclosure extends to assets and resources worldwide, not just in England and Wales.

The disclosure extends to liabilities, debts and financial commitments.

The disclosure extends to changes in circumstances which are reasonably anticipated in the future, including the next 12 months. This includes resources which are likely to be received which may not yet have been received. It includes employment changes, other payments to be received or bonuses yet to be paid, future inheritances and similar.

The disclosure may need to be quite precise, especially if there will be a percentage division of any assets.

Corroborative documents may be needed.

How should this disclosure be given?

The conventional form is in a document known as a Form E. This is a long statement of financial circumstances, completed in the court process but invariably used in voluntary disclosure and in mediation. It requires a number of documents to be attached to it to corroborate. Apart from cases where there is a joint knowledge of the finances and perhaps other special circumstances, disclosure in Form E is the preferred fashion. A copy can be sent to you by us.

Do I have to commence court proceedings?

No. It is possible for the disclosure process to be undertaken voluntarily although we recommend strongly that this is through lawyers. The form E would be sworn in the normal way to verify its truthfulness. If there were any questions then still outstanding, which often arises, these would have to be answered fully. Voluntary disclosure occurs in a number of cases, but invariably where there is an existing level of trust, and often some mutual knowledge of the finances of the other spouse.

The disadvantage is that if it does not produce a settlement, it is then necessary to start the court based procedure and timetable from the very beginning. This can result in much longer delays in a settlement which many find understandably frustrating.

We recommend voluntary disclosure in a few, exceptional cases but invariably it is our experience that it is better to get on with the disclosure process through the court. It has the added advantage that if there are any differences of opinion between how much disclosure should be given and whether any particular additional disclosure should be made, the court is there to resolve it.

One of the benefits of mediation is that disclosure is given in a neutral environment. In traditional mediation, the first couple of mediation sessions are devoted to gathering disclosure through the use of form E. This document can then be used in the court based process if a settlement is not possible in mediation.

### Can I commence a freestanding application to resolve financial matters at court without a divorce or judicial separation?

No. The court only has power to deal with financial matters comprehensively and finally if there is existing divorce or judicial separation proceedings. This can be a frustrating difficulty for some who may not immediately seek divorce.

### How does the court based process begin?

It is started by an application in Form A. This is a very simple and short document to complete and notifies the court that a party is asking for financial matters to be resolved. Either the petitioner or the respondent to the divorce can apply at any stage after the divorce petition has been issued.

The court then fixes the first court appointment, known rather originally as the First Appointment, between 12 and 16 weeks from the date of filing Form A.

### When do I file the financial statement?

The form E must be filed and exchanged 5 weeks before the date of the First Appointment, i.e. between 7 and 11 weeks after the date of making the application to the court. This may seem a long time but in some cases all of this period is needed to gather the necessary information and obtain documents from third parties such as pension companies and mortgage companies to attach to the financial statement.

### What else happens before the First Appointment?

After the financial statement is received, each party considers it with their lawyer. In many cases, there are a few specific questions that still need answering arising from the disclosure that has been given. This is no criticism of either the form or the party completing it but simply often due to the complexity of financial affairs. These questions are put into a questionnaire and served on the other party.

It is also necessary to complete a Statement of Issues which sets out the primary issues in the case. This is an important document as it identifies where the couple may be apart, what issues need resolving and what areas may need further investigation and consideration. It is part of the policy of narrowing the issues to try to reach a settlement.

Finally a chronology of relevant dates also has to be filed at the court.

Before or at the first appointment and at all other court hearings on financial matters, each party must file at the court and exchange a document setting out the legal costs incurred to date. Of course you are entitled to see the document that your lawyer prepares and are entitled to see the document prepared by the lawyers for the other party. This is important in order to get a sense of the proportionality of the

costs and if they are materially different between the parties.

### What happens at the First Appointment?

Frankly, if it is a rather legal type of hearing! The court considers the questionnaires and has a duty to allow only those which it considers reasonable and proportionate. It considers when any valuations are needed. The court should, and some more pro active judges do, give indications on some of the issues that may be in dispute and try to narrow the issues.

The court sets the date for the Financial Dispute Resolution hearing (FDR), referred to below.

The hearing normally lasts about half an hour and will only last longer if there are complex issues.

If the court has been informed in advance and if both parties agree because disclosure has been satisfactorily given, it is possible to treat the hearing as a FDR, referred to in more detail below, in an attempt to settle the entire case there and then.

### Do I have to attend?

Yes. You must attend at all court hearings concerning financial matters. You can be excused attendance if you are abroad or there are other exceptional reasons, but leave of the court is required in advance. Please tell us if you think you may be in difficulties in attending, with reasons.

### What happens next?

Within a month or so, any questionnaires have to be answered. This can involve quite a considerable amount of work by the party answering them. Valuations are obtained where values are in dispute.

Once this process has been undertaken, the point should now be reached where there is satisfactory disclosure on both sides. It can sometimes be a difficult balancing act between knowing when to ask further questions and make more inquiries and when simply to accept that one has learned all that one is likely to be able to know. Proportionality is crucial. Experience and wisdom is valuable. Alas, hindsight is not available at this stage! The question is often whether spending more money (costs) and time on more investigations will reveal proportionately more assets.

Once the disclosure process is completed, lawyers are able to advise on appropriate terms of settlement. It is at this stage that offers of settlement are invariably made, if they have already not been made.

This may be in the form of letters passing between lawyers. It may include telephone conversations. It may certainly include roundtable meetings. A good number of cases settle at this point. See Fact sheet on the various out of court methods to resolve cases.

### What is the Financial Dispute Resolution hearing (FDR)?

This is a very important hearing for you. It is when you should expect the case to settle, if it has not settled by the time you reach this point.

It is a hearing almost unique in English law. The judge does not adjudicate or make findings or indeed make substantive orders other than by consent. The judge acts as a predictor. His job is to say to the parties what he believes would happen, on the available information, if the case were to go onto a final hearing. Of course the costs of going onto a final hearing are significantly greater, and therefore a primary purpose of the hearing is to save those costs being incurred.

The judge is aware of the offers of settlement which had been made on either side. The hearing is completely privileged which means that nothing said at the hearing can be referred to subsequently in other court proceedings. The judge dealing with the FDR hearing cannot subsequently deal with any other contested issues, because he is aware of the offers.

Invariably the lawyers for each party address the judge on the background, the financial and other circumstances and on the offers. Most good judges would have read the paperwork in advance. How the hearing then develops depends on the judge and the sort of offers. It is expected that judges will give an indication, often in relatively wide terms, of what may happen as far as the general structure of the settlement is concerned and regarding specific figures for outcome. Because there is much discretion as to what could be a fair outcome, judges at this stage invariably give a range of figures for an outcome.

A judge may certainly say if certain arguments or assertions are unlikely to succeed at the final hearing. He may say that he prefers the stance that one party has adopted on a particular aspect.

Although cases are listed for an hour, there is much flexibility and it is quite usual after the judge has given some initial indications for the case to adjourn for discussions outside of court, perhaps then returning to the judge for further guidance and assistance. You should expect to set aside the entire day for these discussions. It will be well worth it if you can settle. Normally you have to attend at least an hour before the hearing starts in order to negotiate and try to settle or at least narrow areas apart.

A very considerable number of cases settle at the FDR hearing, or within two weeks after the hearing when the settlement discussions have continued.

You should come to the hearing expecting to settle, and we would always hope and expect to settle our cases. There is a significant advantage in settlement documents being signed on the day whilst at court.

Equally you should be aware that a lot of pressure is often brought by judges and indeed by lawyers on parties to settle, including compromising on terms. You should prepare yourself accordingly. Some people find it is helpful to bring a friend along, even though that person cannot go into the court room itself. You should prepare in advance by thinking through what terms would be acceptable to you as a settlement if you were to settle on that day.

If the settlement is reached on the day of the FDR hearing and notified to the court, it is very difficult then to withdraw from the settlement a couple of days or weeks later. This is why it is so important to be prepared for the hearing itself and to settle.

It is a very difficult balance between the incredible benefits of settling, as far as saving costs, creating finality, concluding this aspect of the litigation and many other benefits, with the pressure that we appreciate is brought to settle on the day itself. Lawyers are keenly aware of the benefits of settling when both parties and their lawyers are all present together and have the assistance of the judge and can make a final order. Although a number of cases settle within about two weeks of the FDR itself, there is a very real concern that if the case does not settle at the FDR and is set down for a final hearing, it is difficult to regain quickly the momentum, enthusiasm and commitment to a settlement. After the FDR is over, it is very easy for everyone concerned to focus on preparing for the final hearing. A "final hearing" mentality can take over.

#### What happens if we settle at the FDR?

The court makes a note of the terms of the settlement. Lawyers draw up a consent order of the terms which will be signed by the parties and lodged at the court. If the terms are complex and more time is

needed on the drafting, this is done by the lawyers over the next couple of weeks and then lodged at the court.

### What happens if we do not settle?

If it is clear to the judge that the case is unlikely to settle, he will set the matter down for a final hearing. Unless the case is straightforward, this hearing is likely to last at least one day, probably longer. There are very long waiting lists for the final hearing and it is invariably at least six months later, probably longer.

There may well be sworn statements to be filed, perhaps regarding issues of contribution to the marriage and other distinctive aspects. There may be valuations. As the hearing approaches, there will be bundles of documents to be prepared for the court. These can be quite extensive if there has been a lot of disclosure. There will be a conference with your barrister to discuss further tactics and preparation for the final hearing.

In the weeks immediately leading up to the final hearing, invariably a considerable number of issues arise and often a lot of solicitors correspondence. You will be needed frequently over this period for instructions to be given.

As the hearing approaches, it is quite normal for attempts again to be made at a settlement. In our experience, settlements at this stage are not the best. They are driven more out of a fear of going to court, a fear of a particularly adverse outcome and sometimes by an inability of one party or both to continue to fund the case. These are least good reasons and least good times to settle a case. Often neither are satisfied with such settlements.

The costs running up to a final hearing are very high. The costs after the FDR and up to the conclusion of the final hearing are invariably more, perhaps by twice as much, as the costs from the very beginning of the application through to the FDR hearing. Most lawyers require their costs to be paid upfront about 3 weeks in advance for the final hearing.

Very few cases reach a final hearing. Very few cases need a final hearing. We do our best to settle cases for our clients without having a final hearing.

This is not the place for details of final hearings. You will be fully advised well in advance. We merely record our experience that the vast majority of people find it a horrid experience. Whereas family law tries to be conciliatory, constructive and children focused, this stops at the final hearing. It can appear in some ways like it is on the movies! As prospects of a friendly settlement no longer matter, the case is dealt with in a very aggressive, adversarial, competitive, tactical and polarising fashion. It is much more difficult to co-parent after a final hearing. Oral evidence is given but then subject to vigorous, detailed, highly exhaustive and highly exhausting cross examination. For most people, it is a totally new experience to have their word, which they may well believe honestly to be correct, doubted, denied and disputed so vociferously. Advocates are incredibly able and very few people come through cross examination unscathed and unwounded. Please avoid final hearings as much as possible. They are necessary in only a few cases. For some, the ends may justify the experience. Most who have been through such a hearing recommend others to settle! We do, wherever a reasonable settlement is possible.

It is not an unusual experience for both parties to find that the judge has made an order with which they are unhappy. This is the sheer nature of the adjudication process. The advantage of a settlement is that the parties can control what happens.

### What happens after the final hearing?

Often the judge will want a couple of days or a couple of weeks to consider carefully what the outcome should be and to write a judgment. The lawyers then draw up a final order based on the judgement which is lodged at the court.

### What happens if I do not like the final judgement?

It may be possible to appeal but there are narrow circumstances allowing an appeal.

If an appeal court simply considers that it would have made a different order but that the order made by the first instance judge was quite reasonable and within the bounds of what is permissible by law, the appeal will be unsuccessful, probably with a requirement to pay the costs.

An appeal will only be successful if the appeal court finds that the judgement of the first instance judge was so exceptional that no reasonable judge would have made it or that he was so far outside the boundaries of what is a reasonable outcome.

It is quite common for appeal courts to say that it would have made a quite different order itself if hearing the case but that the first instance judgment was not so wrong as to allow a successful appeal. Great care is needed before deciding to appeal.

### Is the outcome in financial proceedings public?

Not yet. Apart from hearings in the High Court and Court of Appeal, which are at risk of being made public through being reported, outcomes at County Court level are still confidential. Details of the outcome, and information disclosed in those proceedings, must not be revealed to anyone other than professional advisers.

However the law is changing and in the next couple of years it is quite likely that the outcome may be public, although with anonymity as to the specific details. This is a yet further reason to settle.

### I have heard enough! How do I settle without court proceedings?

There are various methods; mediation, directive mediation, lawyers' negotiation, collaborative law, arbitration. I strongly encourage all reasonable and cost effective attempts to settle without a final court hearing. Quite often, it is beneficial for proceedings to be commenced in order to obtain disclosure but just because there are court proceedings does not mean a case cannot settle. To the contrary, the court also encourages out of court settlements. Please discuss with me the best options for you to try and settle your case.

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