Guidance Note on Cohabitation Cases

Non-married cohabiting relationships continue to increase year on year, so advising clients embarking on cohabitation, those already living together wanting to understand their 'rights' and those whose cohabiting relationship has broken down, will continue to form an increasing part of the workload of family lawyers. Until cohabitation law reform has been introduced to protect unmarried couples, this guide aims to assist Resolution members, their conveyancing lawyer and private client colleagues to manage these cases effectively, in accordance with our Code of Practice.

This Guidance was reviewed in March 2026. The law or procedure may have changed since that time, and members should check the up-to-date position.

According to the latest figures available from the Office for National Statistics, there were 19-20 million families in the UK in 2024, an increase of more than 6% over the decade. While married or civil partner couple families are still the most common family type (increasing from 12.4 to 12.7 million families from 2013-2023), people cohabiting as a couple but not married or civil partnered has increased over the same period by nearly half a million and has nearly doubled since 2002. Cohabiting couple families now account for 18% of all families.

The myth of the 'common law marriage' persists, despite all the efforts of Resolution, family law practitioners, the Government's Advice Now campaign, and the Law Commission's Report in 2007, which clearly identified the lack of rights of cohabiting couples and pointed to the need for law reform. Further still, more recently, the House of Commons Women and Equalities Committee findings repeatedly demonstrated that a large proportion of the public still believe in 'common law marriage'.

Even when people realise that there is no such thing as common law marriage, they are often hazy about their actual legal status and ignorant about the steps which they could, or should, take to protect their legal position. The combination of an ill-informed public and the complexities of the law which generally apply to these cases, together with a relative lack of familiarity with the Civil Procedure Rules (CPR) rather than the Family Procedure Rules (FPR) for many family practitioners, means that these cases are often difficult to run.

This guidance note is aimed primarily at family lawyers but will be of assistance to their conveyancing lawyer colleagues, since negligence claims can so easily arise from failure to ask the relevant questions and advise properly at the point when a property is purchased. According to the Solicitors Regulation Authority negligence claims against property lawyers are disproportionately high. Private client and civil litigation lawyers may also find this guide of assistance as they also advise parties in similar circumstances.

Advice at the commencement of, or during, cohabitation

1. The likelihood is that a client who is about to move in with their partner, or purchase a property with them, will not understand the legal implications of either step and may have misconceptions about their rights. In order to fulfil your responsibility, as stated in the **Code of Practice**, to "help clients understand and manage the long-term financial and emotional consequences of decisions", you will need to explain at the outset that their legal position will be very different to that of a married person and that the applicable law, if there are no children, will be the law of property and the law of trusts.

2. In circumstances where there either are children or where there is an intention to have children in the future then detailed and careful advice needs to be provided as to the impact that children would have

both in respect of the law of trusts, particularly in relation to the purpose of the property, and children law and specifically **Schedule 1 to the Children Act 1989** ("Schedule 1"). Resolution's **Cohabitation Law and Practice Handbook** includes an analysis of the practical use of Schedule 1, along with a guide to preparing Schedule 1 orders.

3. Take detailed instructions on the following in order to understand what is intended and be able to warn your client of potential risks and pitfalls:

   - is the property going to be held in one person's sole name or in joint names? If in one person's sole name, is it intended that the other person will have, or be able to acquire, any interest in the property? If in joint names, as beneficial joint tenants or tenants in common in equal or unequal shares (you will need to explain in simple language what these terms mean)?
   - what, if any, contribution your client and their partner will each be making to the purchase and the extent to which this would impact the beneficial ownership, if any; what, if any, anticipated future financial contributions your client and their partner will each be making to the property and the extent to which this would impact the beneficial ownership, if any;
   - if they are purchasing a property with the aid of a mortgage, what the arrangements are for repayment of the mortgage and the payment of the outgoings and maintenance of the property;
   - whether any third parties, eg parents, grandparents, will be making any financial contribution to the property, and on what basis;
   - how will any repairs, renovation and improvement costs be dealt with?
   - what are the intended arrangements for the disposal of and occupation of the property in the event of the relationship breaking down?
   - what is intended to happen if the relationship breaks down and one partner moves out before the property is sold? Who pays the mortgage and other bills pending the sale?
   - what is intended to happen to the property if one partner dies?
   - what if one partner wants to 'buy out' the other's share? How will the property be valued and how will the valuer be chosen? How long should the remaining partner be given to raise the necessary funds?
   - what is intended to happen if your client and their partner have children and one stops working to look after them and can no longer contribute financially?

   When you know the answer to all these questions you should be in a position to advise your client about:

   - the legal consequences of taking the planned steps;
   - any rights that they may need to protect; and
   - any risks they may be running.

You will also be able to disabuse them of any notions they may have about acquiring a beneficial interest in someone else's property merely by living with that person. You should advise your client about the benefits of entering into both a declaration of trust and a cohabitation agreement, so that what has been agreed with their partner is clearly documented and enforceable if the relationship later breaks down. You should also advise your client to make a Will to reflect the new arrangements and advise about the difference in tax treatment between married and unmarried couples.

It is not uncommon for two people planning to live together, either one person moving into the property of the other or by buying a property jointly, to want an initial meeting with a solicitor together. If you refuse to see them together, there is a real risk that they will not take advice on the implications of cohabitation at all, because they will not want to instruct separate lawyers at the outset, so what should you do? If you feel comfortable doing so, you could agree to see them together for an initial meeting, but explain that you will only be able to give a general overview of the legal position and the options available to them, information but not detailed specific advice. It is important to bust the myth of the common law spouse at an early stage. You should also explain beforehand that if they then decide to proceed with a declaration of trust or cohabitation agreement they will each need their own solicitor to ensure that they are separately and independently advised. You will be able to act for one of them only if the other agrees, because you will only have given general, generic advice to both of them.

Declarations of trust

Resolution's recommendation is that cohabiting clients should complete a declaration of trust in all circumstances of property ownership.[1]

An interest in land cannot be created unless by deed (**Law of Property Act (LPA) 1925 s52(1)**) the exception being when an interest is created by trust (**LPA 1925 s53(2)**). However, it should be explained to your client that the best time to resolve who owns what is at the beginning of the cohabitation, rather than at the end of the relationship when their relationship may have broken down and, if they

1 Resolution's **Cohabitation Agreements** precedent 36.

cannot agree, they will be reliant on the court to decide who owns what and what was or was not agreed between them on the issue of ownership. A decision which will come after considerable sums have been expended on legal fees.

When joint owners purchase a property they have to complete a **TR1 form** which requires the purchasers to state whether they own the property on trust for themselves beneficially as joint tenants, as tenants in common in equal shares, or tenants in common in shares to be specified. This is a tick box exercise that can have a determinative impact. In October 2012, following the cases of *Stack v Dowden* **[2007] UKHL 17** and *Jones v Kernott* **[2011] UKSC 53**, HM Land Registry introduced a Jointly Owned Property Trust Registration **"JO" form** enabling joint owners to specify in more detail how the property should be owned. A fully completed TR1 and JO form will constitute strong evidence of ownership. However, as the Court of Appeal held in *Goodman v Gallant* **[1986] 1 FLR 513**, in a case where there is a declaration of trust that comprehensively declares the parties' beneficial interests in a property or its proceeds of sale, there is no room for the application of the doctrine of resulting, implied or constructive trusts (at 517 per Slade LJ).

Taking account of the Court of Appeal's ruling[2], you should formally advise all clients purchasing a property, or occupying a solely owned property, with a cohabitant to agree and execute a declaration of trust (preferably supported by a cohabitation agreement – see below).

The declaration of trust should set out:

- whether the beneficial interest in the property is held as tenants in common or joint tenants, and if tenants in common the parties' respective shares in the property;
- how the net proceeds should be divided in the event of sale;
- a definition of the net sale proceeds;
- how a payment by one party of a capital sum towards reduction of the mortgage should be dealt with;
- who will be responsible for the mortgage repayments in the event one party cannot meet their obligations and whether or not this will adjust the parties' equitable interests;
- details of any third party interests and how they are to be dealt with on sale of the property; and
- the impact, if any, of direct financial contributions towards the property.

Third party interests

Any contributions by a third party to the purchase price of a property, or outright gifts of money to your client or his/her partner and used toward the purchase price, should be identified. Full instructions should be taken as to whether the gifts or financial contributions are being made/have been made to the parties jointly or to one party alone, or if these are made on condition the parties remain together and should be returned in the event they separate. Clear instructions should be obtained as to whether or not the third party is gifting, loaning or purchasing an interest and appropriate documentation should be drafted. Advise clients to keep detailed records of gifts and whether or not they are returnable and the arrangements thereon should be recorded in a cohabitation agreement.[3]

Cohabitation agreements

Cohabitation agreements are strongly recommended in order to regulate the many issues that may arise as a result of a couple cohabiting. A cohabitation agreement should be in addition to a declaration of trust, not in place of one. A cohabitation agreement can deal with issues not suitable for inclusion in a declaration of trust such as the payment of living expenses, improvements to property, 'buy out' clauses, pre-owned property, the management, conduct and closing of joint bank accounts, house contents and pets.

When a cohabiting couple's relationship breaks down a properly drafted cohabitation agreement is widely enforceable with the courts yielding little power to vary the provisions of it[4]. To be enforceable the cohabitation agreement must be executed as a deed (**Law of Property (Miscellaneous Provisions) Act 1989 s1**(2)).

You are strongly recommended to consult Resolution's **Cohabitation Agreements** (available in a print and online version) when drafting a cohabitation agreement, as well as **Resolution's Cohabitation Law and Practice Handbook**. As explained in the introduction to Resolution's Cohabitation Agreements, it is essential that both parties have had (or have at least had the opportunity to obtain) independent legal advice before signing a cohabitation agreement and it is helpful to include in the cohabitation agreement a certificate by the parties' respective solicitors confirming that they have explained the effect of the agreement. A summary of the parties' respective financial positions should be appended to the agreement.

Resolution members are encouraged to educate their colleagues who practice in other areas of the law, such as conveyancing or wills, to be aware of the benefits

2 In the absence of mistake, duress or undue influence (when rectification or setting aside remedies are available) the parties will be bound by such a declaration – *Goodman v Gallant* **[1986] 2 WLR 236**.

3 Resolution's **Cohabitation Agreements** precedent 16 and footnotes 1-6.

4 See Resolution's **Guidance Note on Drafting Documents**.

for clients entering into both declarations of trust and cohabitation agreements. Consider preparing briefing notes for your colleagues (or for local firms that do not have family departments) pointing to the risks which flow from not putting such arrangements in place. Do not include unenforceable provisions within the agreement (those of a highly personal nature such as sexual arrangements) because including unenforceable provisions may cause the whole agreement to fail if it could be said that the couple did not intend to create legal relations as a result (*Sutton v Mishcon de Reya and another* **[2003] EWHC 3166 (Ch)**).

You should follow the **Code of Practice** at all times in the preparation of the agreement in dealing with your client, their partner, and/or their partner's lawyer.

Disputes can sometimes arise between a couple over particular issues which need to be agreed for the cohabitation agreement. While solicitor to solicitor negotiations may lead to a resolution, they can also by their nature increase tensions and conflict. You should consider referring your client to mediation or using collaborative law to resolve individual tricky issues, or even all the matters to be covered by the cohabitation agreement.

Cohabitation agreements and children

You should advise clients of the limited extent to which a cohabitation agreement can and should take into account what arrangements are to be made in respect of any children of the couple. While the use of family-based arrangements for child maintenance is now encouraged, it is not possible to oust the jurisdiction of the Child Maintenance Service. Nor is it possible to oust the court's jurisdiction to make an order for financial provision for a child under Schedule 1 of the Children Act 1989.

The agreement should not provide for arrangements such as whether a couple intend to have children or how, childcare, or their respective exercise of parental responsibility generally. Such provisions would be unenforceable and there is a risk that the inclusion of these would cause the entire agreement to fail if it could be said that the couple did not intend to create legal relations as a result. However, clients should be encouraged to give thought to the possible future events that may impact upon them and their relationship.

Clients should also be advised that it is not possible to build into a cohabitation agreement sufficient flexibility to take into account all potential future changes in circumstances that might affect financial provision for the benefit of children so any attempt to do so must come with a warning of the serious limitations of such an approach.

Non-court dispute resolution

You should discuss with your client including a provision in the cohabitation agreement requiring that resolution of any future dispute should first and foremost be attempted by means of non-court dispute resolution, such as collaborative law or mediation. Clients should be advised of the benefits of these methods, both in helping to minimise potential conflict and in keeping any dispute or issue between the couple private, given that court proceedings brought under the **Trusts of Land and Appointment of Trustees Act ("TOLATA") 1996** are heard in public. There are also likely to be costs implications from issuing these civil law proceedings without first considering NCDR (more on this is outlined under the "Prior to issuing proceedings" heading below).

There are a number of forms of NCDR which can be appropriate depending on the circumstances. Practitioners should also be aware that there are different civil and family models for mediation and one or the other may be more appropriate for the parties. Both the civil and family courts expect the parties to have considered NCDR and attempted NCDR unless there is a good reason not to.

Clients planning to marry

Clients should be advised that whilst a cohabitation agreement does not constitute a prenuptial agreement, it is not possible to preclude the court from taking into account the existence and content of a cohabitation agreement as one of the factors of the case if a cohabiting couple were subsequently to marry and then divorce.

You should check with your client whether they are planning to marry or enter into a civil partnership. If they are they should enter into a prenuptial/pre-civil partnership agreement rather than a cohabitation agreement due to the different and more extensive claims that will arise as a result on divorce. Clients should also be made aware of the different nature of claims made on the basis of beneficial interest and those made on the basis of a marriage. A cohabitation agreement or declaration of trust setting out the beneficial ownership of a property does not necessarily take into account the section 25 factors of the Matrimonial Causes Act 1973 and client's should be aware that if they marry a cohabitation agreement may be taken into account but is not binding or definitive.

Refer to Resolution's **Marital Agreements** as well as the **Guidance Note for Lawyers Preparing Pre- and Post-Marital Agreements** if a prenuptial/pre-civil partnership agreement is more appropriate for a particular client's circumstances. A cohabitation agreement or declaration of trust would rarely be the appropriate stand-alone document for married clients or clients intending to marry, except in conjunction with a marital agreement.

Duress and domestic abuse

You should always be aware of the possibility that a cohabitation agreement is being entered into under duress. You should consider whether there is any pressure being placed upon your client from their partner or any other third party such as family members. Clients should be advised that if an agreement is entered into where there

has been significant pressure, financial, emotional or otherwise, there is risk that the agreement would then not carry weight or be enforceable in any future dispute.

Bear in mind that, as with a prenuptial agreement, if a client takes legal advice and is advised not to sign the agreement but still does so, the fact that the agreement has been signed with the benefit of legal advice will increase the likelihood that it will be enforced. You should advise the client about this very clearly in writing and to protect yourself you should require the client to sign a disclaimer letter before the agreement is signed.

Resolution members are expected to be alert to the existence of domestic abuse throughout all their dealings with clients and should read **Resolution's Good Practice Guide on Domestic Abuse** and the **Information on screening for domestic abuse**.

Advice following the breakdown of the relationship

1. At the initial meeting with a client whose cohabiting relationship has broken down, as with the breakdown of a marriage, you should explore with the client whether the relationship has irretrievably broken down or whether there is a prospect of reconciliation. You should be ready to suggest therapists/counsellors who may be able to assist your client and their (former) partner and you can refer your client to the Resolution **"Find a law professional"** search function to help them locate a professional.

2. You should also be alert to the possibility of domestic abuse. The Resolution domestic abuse screening information, referred to above, is extremely helpful if domestic abuse is an issue, as is the Resolution **Guide to Good Practice on Domestic Abuse**. It may be appropriate to advise your client to apply for a protective order under the Family Law Act 1996.

3. If there are any children affected by the breakdown of the relationship you should refer your client to Resolution's **Parenting Through Separation Guide**. It is recommended that you spend time talking to your client about the potential impact on the children of the breakdown in their parents' relationship and sign-posting your client to local agencies who can provide additional support for them and the children, if it is needed.

4. If there are children of the relationship you should also consider with your client a referral to the **Child Maintenance Service** as well as the possibility of a claim under **Schedule 1 of the Children Act 1989** for financial provision for the benefit of the child or children.

5. Unless there is an urgent need to refer the issue of child support to the Child Maintenance Service or commence proceedings under Schedule 1 of the Children Act (for example, if no financial support at all is being provided or if an injunction is required to prevent dissipation of assets), advise your client of the benefits of resolving arrangements by agreement (including via NCDR) rather than litigation.

6. Prior to issuing any application under TOLATA in relation to property (usually the family home) or any ancillary application in respect of chattels, endowment policies etc. it is vital that a detailed proof of evidence is obtained from the client establishing the full history of the relationship with the aim of determining what the parties' intentions were in respect of the ownership of property. You should emphasise to the client that you need all of the facts, not just those the client may think are important or favourable to them, because claims under TOLATA depend heavily on evidence and the detail matters. Independent and documented evidence is often key in such cases and usually needs to be obtained and disclosed at the outset.

7. The content of the proof will vary from case to case but you should ensure that it addresses the following:

   - the history of the relationship including when the parties met, when they started living together, whether they were engaged (in which case potential claims under the Married Women's Property Act 1882 should be considered) and the history of ownership of properties, either jointly or in their respective sole names, during the relationship;

   - whether the client signed a declaration of trust, deed of surrender, cohabitation agreement or any other document relating to the property or to their relationship;

   - whether there was an oral agreement or mutual understanding between your client and their partner as to the ownership of the property. If so, what was the agreement or mutual understanding? Are there any witnesses who can corroborate this? Are there any written communications which refer to or record an agreement or mutual understanding (including text message, email or other electronic communication) between your client and their former partner?

   - what legal or other advice, if any, the client received at the time of the purchase of the property or commencement of cohabitation;

   - how the purchase of property was funded and what were the financial contributions of the parties both at the time of purchase and subsequently;

   - whether there is a mortgage secured against the property and, if so, in whose name(s) and who pays the mortgage payments;

   - who is responsible for payment of the utility bills at the property;

- whether there have been any renovations or other improvements carried out at the property and, if so, how they were funded and/or whether the work was completed by the parties themselves;

- whether an agreement or understanding could have been implied through the parties' respective financial contributions, such as contributions to the mortgage or any renovations, or otherwise through their conduct;

- whether there were any acts of detriment on the part of either party. For example, did either party sacrifice secure housing to live with the other.

8. Once this information has been obtained from the client you should outline the possible outcomes to the client's claim whilst ensuring that the client's expectations are properly managed. You should advise the client that whilst the presence of children is a factor considered by the court in an application under TOLATA 1996 unlike (usually) in family law, the children's welfare will not be the paramount consideration of the court. Consideration should be given as to whether concurrent proceedings under Schedule 1 to the Children Act 1989 would be appropriate.

9. The client must be given a clear warning of the costs consequences of commencing proceedings under TOLATA 1996 and importance of Part 36 offers, where the general principle under the CPR is that the unsuccessful party will be ordered to pay the costs of the successful party. Civil court fees for issuing a claim can be significant and there are costs implications for parties who fail to consider or engage in Alternative Dispute Resolution or take steps in line with the Pre-action Protocol. You should therefore discuss with the client the possibility of mediation or arbitration or other form of NCDR and confirm your advice in writing.

10. It is important that the client is provided with a detailed costs estimate for each stage of the proceedings (including counsel's fees) and that you consider with the client at the outset how the litigation will be funded. The client needs to ensure that they can fund the proceedings to their conclusion or risk having to pay the other party's costs to discontinue their claim if agreement cannot be reached to discontinue without adverse costs consequences. You should remember that alternative funding options may be available, beyond those you are familiar with, in relation to applications in family proceedings. For example, a conditional fee arrangement may be possible. Legal Aid is available **in limited circumstances** if the client can satisfy the domestic violence criteria with supporting evidence, as well as the means and merits tests. However, if the client obtained legal aid funding and then was successful in claiming/retaining any money or property, the statutory charge would bite allowing the Legal Aid Agency to recoup the fees paid. The client must be warned about this.

11. You should obtain office copy entries from HM Land Registry website to identify how the legal title to the property subject to the dispute is currently held. You should request a copy of the relevant **TR1** which may record a declaration of trust in respect of the property. There may also be an additional Land Registry Form (**JO form**) which is used to register a declaration of trust as to how the property is held by any joint owners.

12. You should seek the client's authority to obtain the original conveyancing file for the purchase which can be reviewed for contemporaneous evidence of intentions, advice given, payment of the deposit etc. The conveyancing file is of crucial importance and needs to be obtained at an early stage. In the event that the conveyancing solicitor was instructed jointly by the client and their (former) partner the conveyancing solicitor may insist upon the other partner's consent before releasing the file. Absent that consent, you should insist upon either inspection of the file or being sent a complete copy as your client is entitled to have this.

13. If the property is held by the client as a beneficial joint tenant you should consider with the client whether the tenancy should be severed, so that your client and their former partner then own the property in distinct shares, and the implications of doing so or not doing so. This is a technical point and therefore advice from Chancery counsel should be sought if you are in doubt. Advice should be given in particular in relation to the impact of severing a joint tenancy on inheritance.

14. You must consider promptly with the client whether it is necessary to protect the client's interest in the property, by an application to register a Restriction (**form RX1**) or a Notice (**form AN1** if agreed, **form UN1** if unilateral) with HM Land Registry (see **gov.uk/government/organisations/land-registry** for guidance on this). If the entry of the Restriction or Notice is disputed by your client's (former) partner this may trigger a referral to the First-tier Tribunal (Property Chamber) (Land Registration).

15. If the property is encumbered with a mortgage you should consider advising the client to contact the mortgage company to alert them to the fact that there is an ongoing dispute concerning the ownership of the property. This should prevent the client's former partner from drawing down on the existing mortgage facility if they had the ability to do so.

16. You will need to consider with the client the interim position, including payment of the mortgage and other expenses as well as continued occupation of the property and issues such as occupational rent. You will also need to consider the ongoing operation of any joint bank accounts (so that your client can protect themselves against their former partner from removing funds or incurring debt via an overdraft facility without consent) and any other joint policies or liabilities.

17. More importantly you should also enquire whether the client has made a Will which makes provision for their partner and, if so, consider with the client whether

that is still appropriate in light of the change of circumstances. You should also check with your client whether they have nominated their former partner to receive pension benefits or life insurance payouts so that your client can update these policies to reflect their wishes following the separation.

Prior to issuing proceedings

Financial claims on behalf of cohabitants and former cohabitants are technically challenging. They require knowledge and expertise outside the comfort zone of many family lawyers. If you are uncertain how to proceed, you should at the very least instruct specialist Chancery counsel. If the matter is outside of your area of expertise, consider a referral to another firm, particularly if the issues are especially complex.

1. It is very important to be aware that there is a pre-action protocol that outlines the steps you must take prior to the commencement of a TOLATA claim. All solicitors undertaking this work should familiarise themselves with the CPR **Practice Direction – Pre-action Conduct and Protocols**. There is no specific protocol for TOLATA cases but the general pre-action Protocol does apply. It is important for solicitors to check the most recent version which can be found on the **Ministry of Justice website**. The main aspects of the pre-action protocol are outlined below.

2. The pre-action letter: the claimant in TOLATA cases is required first to set out in a letter the full details of the claim before issuing a court application, in all claims except where the matter is urgent. This letter is known as the pre-action letter.

   The letter should cover the following:

   - concise details of the claim including a summary of the facts, the basis on which the claim is made, what the claimant wants from the other party and, if money, how the sum was calculated;
   - the pre-action letter should also refer to and consider disclosing any documents on which the claimant intends to rely;
   - the suggested reasonable timeframe for the potential respondent to respond to the pre-action letter, noting that the pre-action protocol suggests at least 14 days and no more than 3 months in a complex claim;
   - you should bear in mind Resolution's Good Practice Guides on **Communication** and **Correspondence** and **Working with Litigants in Person**; care should be taken to ensure that the tone of the letter is non-threatening and sets out facts in a non-aggressive manner. If addressed to a party who is not represented, the letter must also recommend that that party seeks legal advice.

   Preparation of a pre-action letter is likely to be a time-consuming process. It involves gathering together all the relevant evidence and evaluating it before setting out the client's claim and the basis for the claim. Given its importance to the case, and the time it will take to prepare, the pre-action letter will require a substantial financial commitment from the client in terms of legal costs. The need to do this detailed work at this stage must be clearly explained because it will inevitably front load costs. Practitioners should be aware that this pre-action letter is a document that will be seen and considered by the court in future litigation as the client's open case.

3. If you find yourself acting for the recipient of a pre-action letter, you should be aware of the time limits for the potential defendants to respond. Any documents on which the defendant intends to rely should be identified, and potentially disclosed, in the letter in response, as should any counter-claim.

4. **Pre-action disclosure:** The courts expect both parties to cooperate in the sharing of information and key documentation before issuing proceedings. Documents referred to in a pre-action letter or response to a pre-action letter which are not disclosed within that letter may be requested and should be disclosed.

5. **Proportionality:** as with the Family Proceedings Rules, solicitors are required to take steps which are reasonable and proportionate to the issues in the case.

6. **Settlement and NCDR:** the Practice Direction makes it plain that litigation should be a last resort. The full range of options for NCDR should be kept in mind. Solicitors should note that if proceedings are issued, the parties will be required by the court to provide evidence that NCDR has been considered. A party's silence in response to an invitation to participate in NCDR, or refusal to participate in NCDR, will likely lead to costs penalties being imposed. Ensure that clients are advised of this in writing prior to an application being issued.

7. **Early use of counsel:** Given that both parties' cases must be set out early on, in accordance with the pre-action protocol, it would be prudent to consider instructing counsel for preliminary advice at an early stage. Careful consideration should be given to the choice of counsel – family counsel may not suffice unless also experienced in TOLATA cases. It may be better to seek input from specialist Chancery counsel, unless there is a potential competing Schedule 1 claim which may need specialist family law advice. Counsel should also be instructed to draft or settle the pre-action letter and the particulars of claim in complex cases. The detail and recollection of discussions/events is important in TOLATA claims and therefore any facts set out in letters and pleadings must checked thoroughly with the client and cross checked with calendars, personal diaries and any available documents to ensure that avoidable errors do not creep in.

8. A cost/benefit analysis should be undertaken before proceedings are issued, but after pre-action disclosure has been made, which should include:

    - a detailed letter of advice to the client setting out the strengths and weaknesses in the case. Do remember that TOLATA cases can end up being all or nothing. The courts do not have the discretion in TOLATA cases which they have in financial remedy proceedings in divorce;

    - a detailed costs estimate so that your client understands at the outset how much the litigation may cost if the case goes all the way to trial. This costs estimate will need to be reviewed at each stage of the proceedings and updated if appropriate;

    - the cost estimate should include the cost of a costs draftsman or internal costs team preparing the costs budget as it is important to have specialised input in this complex area;

    - an explanation to your client of cost budgets, the role that they play in the court process and the judge's input into them, including that they are complex and a specialism in themselves for which a costs draftsman will need to be instructed, that they can only be estimated at the outset of the case, that there is a limited ability to revise them upwards during the case and that they may have a significant capping effect on costs that may be recovered. The client should be advised that even if they are successful in the litigation and achieve a costs order, they will not recover all of their costs against the losing party and will be liable to pay some of their own costs in any event. Failure to advise this in writing is likely to result in a complaint and a finding against you by the **Legal Ombudsman**.

9. You should carefully record all the time spent on the case in a manner that ensures that it may be recovered on assessment and consider taking advice from a costs draftsman /specialist costs lawyer on how most effectively to do that.

10. You must advise your client clearly that this is risky litigation; your client is likely to face a substantial costs order to pay for the other party, together with their own costs, if they are unsuccessful. There can also be cost consequences if they decline an offer that is better than the outcome at final hearing. Detailed attendance notes of advice given to the client in person and on the telephone, and a follow up of the advice in correspondence, are therefore essential.

11. Whether you act for the claimant or the defendant, you should consider with your client making an offer to settle at an early stage and keep that under continuous review both before the issue of and during proceedings. The costs protections offered by a Part 36 offer apply before as well as after the commencement of proceedings. Advice from specialist Counsel should be sought in relation to this if you are in doubt. Any offers made or received, including under Part 36, should be considered carefully, with the costs implications, if any, explained to the client in writing.

12. Only once you have complied with the pre-action protocol and undertaken a cost/benefit analysis, and if settlement does not seem possible, you should consider issuing a court application. Consideration should be given to whether it should be issued under CPR Part 7 or Part 8. This is a point on which the input of counsel should be sought.

13. Prior to issuing a TOLATA claim:

    - If there are children of the family, a potential claim under Children Act 1989, Schedule 1 should be considered with your client, including whether such an application may be filed in response to a TOLATA claim. If a Schedule 1 claim is made, the TOLATA case should be consolidated with the Schedule 1 claim, with consideration being given to issuing in (or if the matter is already issued, seeking a transfer to) the Family Division of the High Court. If child maintenance payments are in dispute, you must also ensure that your client obtains a maximum assessment from the Child Maintenance Service in order to qualify for top-up maintenance if he or she is the applicant under Schedule 1.

    - If your client was formerly engaged to his/her partner, you should also consider whether a claim can be brought under the Married Women's Property Act 1882 (as amended) and diarise and advise the client in writing of the three-year limitation period in which to bring a claim once the engagement is terminated. Consider also section 2 of the Law Reform (Miscellaneous Provisions) Act 1970 for the powers of the court in respect of such claims.

    - High profile clients, in particular, should be reminded that TOLATA cases are heard in public and therefore there is a real possibility of the case being reported in the media.

14. Following issuing proceedings, keep in mind that:

    - Judges will expect strict compliance with the CPR as well as the Practice Directions. Procedural deficiencies will not be tolerated. The court has power to stay proceedings or issue sanctions for failure to comply with the Practice Direction – Pre-application conduct and protocol. Beware of the options to strike out claims or defences and the use of Unless Orders. If in doubt, it is strongly recommended that you seek advice from specialist counsel.

    - Disclosure in civil cases is different to disclosure in financial remedy proceedings; solicitors should familiarise themselves with the case management procedures under the CPR.

- A Chancery FDR (known as “Ch FDR”) is now available as an alternative dispute resolution option in the Chancery Division for TOLATA cases involving relationship disputes (note that since 4 July 2017 the courts of the Chancery Division, along with the Commercial Court and the Technology and Construction Court, have been known as “The Business and Property Courts of England and Wales”).