

GUIDANCE ON FAMILY GRADUATED FEES

A large number of issues have been raised during the first year of the scheme's operation. Here we publish guidance on the most common. We have an ongoing discussion link with the Family Bar which has greatly assisted understanding of the scheme. The scheme is set out in the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001, Manual Volume 1B paragraph 294. The Commission's guidance on the scheme is set out in Section 10 of Manual Volume 1D.

1. Special Issue Payments

Where the hearing in function F2 or F3 comprises more than one hearing unit, should the % uplift for SIPs be based on the single hearing unit fee, or the fee for the whole hearing?

Leading Counsel's Advice to the Lord Chancellor confirms that the Commission is correct to calculate the payment on the single hearing unit. This is because Article 9(4) specifies that the SIP shall equate to the percentage of the single hearing unit fee applicable. This issue will be revisited in the planned review of the scheme.

Where more than one function F2 or F3 hearing takes place in a single set of proceedings, can SIPs be claimed for each hearing?

No. Article 9(7) provides that a SIP shall be made only in respect of one hearing where more than one hearing in function F2 or F3 occurs in a single set of proceedings. It is for counsel to specify in respect of which particular hearing payment should be made. However each special issue applicable may be claimed. This means that other special issue payments certified for that particular hearing may be claimed.

Why is there not an allowance for all SIPs in all categories?

There is no allowance for those special issues which are not appropriate in the type of proceedings. For example, in injunction cases under category 1, no relevant foreign element percentage is specified.

One set of SIPs per F2/F3 in the proceedings or per counsel?

Only one set of special issue payments may be made per F2/F3 in a single set of proceedings. A second special issue payment in those functions may not be claimed even where a second counsel acts within the same proceedings.

2. Calculation of F2/F3 hearing units

Does the calculation run from listing time or from the actual start of the case?

The calculation starts from the time of listing and ends at the conclusion of the hearing. The time spent is reduced by the court's lunch adjournment. No deduction is made for adjournments or the time spent in negotiations or other discussions during that time.

If counsel has to work later than 5pm, does that justify the extra half hearing fee?

No. The hearing itself must conclude after 5 p.m. to justify the extra half hearing fee.

3. **Local Bar/Travel Expenses**

How do solicitors know when they may instruct counsel from outside the local bar?

Local counsel should be used unless the local Bar contains an insufficient number of counsel to cover all the daily lists in the local courts or the local Bar does not have suitably specialist counsel available for the particular case. If local counsel decline the family graduated fee case they will be treated as not being available. In such circumstances counsel from outside the local Bar may be instructed, and they will be reimbursed for reasonable travel time and expenses.

4. **Conferences**

Selection – whose choice?

It is entirely counsel's decision which conference to claim the function F4 payment for. Counsel may choose to claim for the first conference held or wait to see whether a subsequent conference justifies more special issue payments or a special preparation claim.

What if other counsel are instructed subsequently?

The F4 payment may only be made once so, where counsel has claimed for that function, it is not possible for second or subsequent counsel to claim such payment. If it has not already been claimed, subsequently instructed counsel can make their own choice about claiming an F4 payment.

What if a conference was arranged but the client did not attend?

If a conference is arranged but does not take place because the client did not attend, there should be no claim for an F4.

5. **F5 main hearing**

If a directions hearing turns into a main hearing, should it be paid as an F5 even though not initially listed as a final hearing?

No. Article 2 provides that "*the main hearing*" means the hearing at which the substantive issues are listed to be determined and are considered by the court. If a case is originally listed as a directions hearing but turns into the main hearing where the case is disposed of, it is not possible to claim an F5 payment. In the circumstances above the hearing will have been listed for directions rather than as the main hearing.

6. **Early Settlement Payments**

Can a case be settled if the court has to determine the issue?

For a settlement supplement to be payable, Article 12 requires a settlement to take place which leads to the resolution of the set of proceedings. If the proceedings are determined by the court they cannot be settled by the discussions between counsel.

For example, in committal proceedings the court must always consider the breach of the order. An agreement to accept undertakings would not constitute settlement of the set of proceedings. This may be contrasted with the case where counsel agree between themselves the terms of a consent order, which the court then merely endorses by way of approving the settlement. In the committal example, the court determines the issues between the parties and, irrespective of the fact that certain issues may have been resolved, the proceedings are not settled by counsel.

Is the settlement supplement increased where there is more than one hearing unit?

No. Article 12 (1) confirms the settlement supplement is paid as a percentage of the base fee or hearing unit fee applicable to the function in which settlement takes place.

7. **Committal cases**

How are these paid?

Committal is an enforcement procedure on the breach of a court order. It is a function F2 falling within the same category as the substantive proceedings.

8. **Hague Convention Cases and the Local Bar**

Do specialist London counsel have to be used in all Hague Convention cases?

It would be usual for specialist counsel to be used in Hague Convention cases. The question of whether the local Bar is sufficiently specialised should be considered before instructing London counsel.

9. **Public Law Care Cases**

How are finding of fact hearings paid under the scheme?

Finding of fact hearings are generally payable as function F5 as they are usually part of the main hearing.

What about split hearings?

Split hearings are dependent on the outcome of the finding of fact hearing and are therefore a continuation of the main hearing. They are paid as secondary hearing units in function F5.

What about subsequent review or directions hearings?

On the making of a care order the court may decide to review the position in some months time. That subsequent review hearing is not a continuation of the main hearing but a review or a directions hearing and is therefore a function F3. It may make further directions or continue or vary the care order. None of these circumstances turn that later hearing into a continuation of the main hearing or a new main hearing. If the court gives directions for a contested trial of issues, the hearing at which those issues are listed for disposal may be a main hearing.

Multiple or out of sequence hearings

There may be some care cases that have multi purpose or 'out of sequence' hearings, e.g. a finding of fact hearing may be followed by a further directions hearing, which is followed by a resumption of the main hearing. What function each hearing falls into is a question of fact. It would be helpful if as much information is provided as possible when claiming payment. If the position is unclear the Regional Office may raise queries on the claim.

Threshold/disposal hearings: what are they and how they paid?

The threshold hearing determines whether the threshold factors for the making of a care order have been satisfied. If the case for a care order is not made out, the case will conclude at this point. If the threshold is met, the court will arrange a disposal hearing which will consider the nature and terms of any care order or other arrangement for the care of the child(ren).

What is the effect of the new Practice Direction on care cases and the impact of agreeing directions on payment under the scheme.

The new Practice Direction in High Court care cases places emphasis on agreeing directions before the case management conference.

If counsel agree directions sufficiently to avoid the case management conference the remuneration is a half hearing unit fee because the hearing does not take place. There is no additional remuneration for meeting prior to the case management conference to resolve issues that will arise at that hearing.

How are Child Abduction Act cases paid under the scheme?

Cases issued under the above Act are not category 2 cases as they do not come within the definition of public law children cases. They fall within “*all other family proceedings*” in category 4.

10. Long or Very High Cost Cases

Cases exceeding ten days?

The escape from the scheme for long cases provided by Article 4(3) only applies where cases actually exceed ten days, i.e. they must have run into an eleventh day.

If the case is subject to an individual high cost case contract, the family graduated fee scheme will apply, subject to the same escape rule for long cases.

11. Detailed Assessment by the Courts

In maximum fee cases, what obligation is there on counsel to provide a breakdown of time spent?

Counsel is requested to provide a full breakdown of the time spent in order that the maximum fee calculation can be undertaken in Family Proceedings Court (FPC) cases. This request will be made of counsel on receipt of the family graduated fee claim, rather than at a later date when the solicitor's claim is received.

Why include FGF payments in the solicitor's bill if the client has no financial interest?

All FGF payments are included in the final bill, even if the client has no financial interest, so that the court can exercise its discretion to consider whether sums paid to counsel are unreasonable or excessive. This also allows the court to consider whether costs should be deducted from the solicitors, eg. for over-reliance on counsel.

12. **Solicitors' Issues**

Impact of FGF on late claims.

The family graduated fees scheme should have no impact on the late claims treatment of the solicitor's bill. Non-receipt of counsel's fee note, or late claims by counsel or late payment by the Commission of the final FGF payment are good reasons for a delay in submission of the solicitor's bill. The solicitor will not be penalised for late submission

When should the Admin 5 be submitted – are we paid for checking claims?

Admin 5 must be submitted for any function that does not involve a hearing as well as those where a hearing is avoided. The form is not very clear on this and is in the process of amendment. Solicitors may claim in their bill of costs for completing the Admin 5.

Why can't solicitors negotiate counsel's fee in the magistrates court?

Counsel's fees in cases heard by the FPC were previously set by The Legal Aid in Family Proceedings (Remuneration) Regulations 1991. Under those regulations, counsel's fees were not prescribed for non-care cases. As no fee was stipulated in relation to non-care cases in the FPC, these were capable of agreement between the solicitor and counsel prior to the introduction of the family graduated fees scheme. Now that the amount is prescribed by statute, counsel is obliged to charge the statutory amount. In maximum fee cases, counsel will be paid the family graduated fee.

Should a detailed fee note be provided to the solicitors?

Counsel should supply sufficient information to the solicitor to facilitate the cost assessment at the conclusion of the case. Guidance on this issue will continue to develop.

13. **Scope of the certificate**

If a final order is made and then the case is re-listed for directions, is this still within scope and how should it be paid under the family graduated fee scheme?

Work done following a final hearing other than implementation work does not constitute new proceedings for the purposes of the family graduated fee scheme. However it will require an amendment to the certificate to be in scope. Article 15 provides that a further hearing will be paid at the appropriate function rate. It could be a further F3 but if it is a new main hearing it will be an F5. If it varies or substitutes an order or directs further work to be done it is an F3.

14. **Appeals falling within the Scheme**

How are the stages paid?

These count as new proceedings- see Article 15(2). The directions hearing will be an F3, and the substantive appeal hearing an F5. The result of the appeal hearing might be the ordering of a re-hearing which will be an F5 and a further F3 if there any directions in the interim.

15. **Commission's Assessment Limit**

Does the assessment limit of £1,000 include family graduated fees?

The assessment limit of £1,000 includes all counsel's fees, including those paid under the family graduated fees scheme (even if already assessed by the Commission).

16. **Inter partes costs**

If inter partes costs are awarded does counsel still claim at family graduated fee rates?

Counsel is entitled to claim market rates where an inter partes costs order has been made and is not restricted to payments of the family graduated fee.

17. **What if counsel does not have a copy of the funding certificate?**

Counsel's continuing duty to the fund includes bringing to the Commission's attention any matter which might affect the client's entitlement to funding or the terms of the certificate, whenever that matter may arise. In order to comply with that duty, counsel should ensure that solicitors provide a copy of the certificate. Counsel will also want to be satisfied that their work is within the terms of the certificate

18. **Special preparation**

Is advice on appeal remunerated as F1 in appeal proceedings or included within function F5 work?

Counsel's initial advice on appeal will generally form part of the work included within function F5. Where appeal proceedings are actually issued, any subsequent advice will then form part of the work within function F1 in the appeal proceedings. Any special preparation fee claimed for advice on appeal will fall within the relevant function.

19. **Incidental expenses**

If we can't claim travel expenses can we claim travel time?

Travel time will not be paid if travel expenses are not justified.

20. **Which Regional Office**

How does counsel know which Regional Office to submit his claim to?

Generally claims are submitted to the Regional Office from which the certificate was issued, which will be apparent from the face of the funding certificate. However, in relation to London and Reading, family graduated fee claims are processed by the South Eastern Regional Office and should be submitted directly to Brighton.

21. **Single set of proceedings?**

If counsel spends half a day on an injunction then half a day on an ancillary relief claim in the same case does this count as a single set of proceedings?

No. These would count as category 1 followed by category 4 proceedings and are paid as separate proceedings.

22. **Hearings.**

Does the hearing actually have to take place or can the court direct alternatives?

The Civil Procedure Rules and subsequent Practice Directions have encouraged judges to direct various methods of hearing. Judges may use video conferences or telephone conference calls to hold hearings, or alternatively may consider a hearing on paper without attendance. If such a hearing is directed and does take place, this counts as a hearing and should be paid at the full hearing unit rate.

23. **Injunction cases**

What is the main hearing?

The main hearing in category 1 (injunctions) is the "on notice" hearing

Is an adjournment of the return date an F5 or F2?

If the court has not considered the substantive issues and adjourns for the respondent to obtain legal advice or because papers have been incorrectly served, it is an F2. If the court considers the substantive issues and adjourns the hearing, it is an F5. It is a question of fact in each case.

24. **Does the solicitor need prior authority to instruct counsel in the FPC?**

The existing guidance on prior authorities in the magistrates court continues to apply. The solicitor may apply for prior authority. If it is not granted or is not applied for, the failure to obtain prior authority will usually mean the maximum fee principle is applied.

25. **Can the certification on the CLS CLAIM5 be amended or altered?**

Counsel should not amend or alter the certification on the claim form. If counsel completes the certification but indicates objection to the wording of the certification on the form, it will not be rejected.

26. **Transitional cases**

What happens if counsel acts for two clients: one certificate pre-dating the scheme and the other post-dating it? How is counsel paid?

In pre FGF cases, counsel acting for two clients would be advised to apportion the fees due between the clients. Under the FGF scheme counsel may only claim one fee for acting for two children in the same proceedings. In transitional cases, where one certificate pre-dates and the other one post-dates the scheme, counsel may legitimately claim under each remuneration regime. Counsel may therefore claim a fee under the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 for the work done under the certificate that predates the family graduated fee scheme and a separate family graduated fee for the work done under the certificate that falls within the scheme

27. **Court Bundle Payments**

Article 11 (1) (c) provides that the court bundle payment is paid as a special preparation fee in accordance with Article 16 where the court bundle comprises more than 700 pages. Article 11 does not allow a court bundle payment for the first 1-699 pages and an additional special preparation fee for the balance. Article 11 (1) (a)-(c) uses the phrase the "court bundle comprises" which means only one sub-paragraph can apply, depending on the number of pages. Hence, if the bundle is in excess of 700 pages, it can only be paid under 11 (1) (c).

The special preparation fee under Article 11(1)(c) is at the discretion of the Judge. Article 16 (3) ensures the special preparation fee for the court bundle is awarded for preparation in excess of the amount normally carried out. Article 16 (5) makes the Judge's decision final save as to a point of law.

Anyone seeking general advice on interpretation of the Funding Order can contact Ruth Symons at ruth.symons@legalservices.gov.uk or alternatively seek the views of the Family Law Bar Association at: Family Law Bar Association 1 King's Bench Walk DX : LDE 20 LONDON