

## **ANCILLARY RELIEF – PRIVATE FUNDING**

### **SCOPE OF THE NEW POWER**

With effect from 3 October 2005, the Funding Code criteria have been amended to add a new criterion applying to applications for Legal Representation in ancillary relief proceedings and other financial and miscellaneous proceedings falling under section 11.12 of the Code. This includes, for example, disputes between unmarried couples under the Trusts of Land and Appointment of Trustees Act 1996 and cases under the Inheritance (Provisions for Family and Dependants) Act 1975.

New criterion 11.12.7 provides:

#### Private Funding

Legal Representation may be refused if it appears reasonable in all the circumstances for proceedings to be funded privately, having regard to the financial circumstances of the client and the value of the assets in dispute.

This criterion does not apply to applications for General Family Help, but **does** apply to applications to **extend** a General Family Help certificate to cover Legal Representation, and to certain applications to extend the scope of Legal Representation certificates.

### **MIXED CASES**

The new criterion should only be applied where the scope of a certificate is being extended in relation to financial provision beyond what could be covered by General Family Help, ie: extended to cover a contested final hearing.

For example, if a certificate already covered Legal Representation for domestic violence and/or children proceedings, amendments to the certificate to include financial provision would usually impose General Family Help-type limitations (ie: the certificate would have been granted as General Family Help if it were covering financial provision only). In those circumstances, the new criterion is technically applicable but should not, as a matter of our discretion, be applied. The policy behind the new powers is not to apply them to financial cases that in substance are still at the General Family Help level.

However, a subsequent amendment to such a certificate to cover a contested final hearing for financial provision would be subject to the new criterion, subject to the transitional provisions below.

### **TRANSITIONAL PROVISIONS**

The transitional provisions of the Funding Code provide that the new criterion applies only to 'applications for Legal Representation made on or after 3 October 2005'.

The new criterion will apply to an application to amend an existing General Family Help certificate to cover Legal Representation, regardless of when the original certificate was first issued, provided the application to extend the certificate is made on or after 3 October 2005.

The transitional provisions also state that new criterion does not apply to levels of service granted before commencement. Therefore, if a Legal Representation certificate is in force as at 3 October 2005 (for example, a certificate granted as Legal Representation to cover domestic violence proceedings), the new criterion will not apply to applications to extend the scope of that certificate to cover financial provision. If Legal Representation is granted after 3 October, then any subsequent application in relation to financial provision will be subject to the new criterion.

## APPROACH TO THE NEW CRITERION

The new powers will be applied both to applications for new Legal Representation certificates in financial cases made under CLS APP3, but probably more frequently to applications using CLS APP8 to amend a family certificate to cover Legal Representation in family proceedings. Both these forms have been amended to capture information on the three crucial questions that determine how the new discretionary criterion is applied. The questions to consider are:

- (i) Whether there are existing capital assets, such as savings, which the client can reasonably use to cover the remaining legal costs of the case;
- (ii) Whether the client's disposable income is such that s/he can reasonably be expected to take out a loan to fund the remainder of the case; and
- (iii) Even where the client's disposable income suggests that s/he should be able to obtain finance, we should consider any evidence provided as to the actual availability of a loan, and may still grant Legal Representation if, in reality, private funding is not a viable option for the client.

## AVAILABLE CAPITAL ASSETS

This question is essentially concerned with cash and other readily-available assets, such as stocks and shares. We would never expect the client to sell their home to pay legal costs and should only take into account the possibility of borrowing against the security of a home or other property, where the client's disposable income would be sufficient to cover such a loan.

This power will be considered most often in relation to savings held in any bank or building society account. Note that the sole question is whether such assets are available to the client; it does not matter that the assets may be in joint names or are in issue in the proceedings, provided there is no legal restraint on their use to pay reasonable legal costs. Likewise, any penalty term attached to accessing funds, eg: loss of interest on a term deposit, does not automatically render the assets unavailable to the client. Savings that may have been disregarded under the SMOD rule or are under the £3,000 capital limit for Legal Representation can also be taken into account.

This issue is particularly relevant to Inheritance Act cases where the estate in dispute may well be an appropriate source for funding the legal costs.

Where assets are available and can be used, Legal Representation will generally be refused under the new criterion. In cases where the likely costs of the case are greater than the assets available, the assets available should first be used, but thereafter a further application for public funding can be made.

## BORROWING POTENTIAL OF THE CLIENT

The new criterion is discretionary and therefore should only be applied where private funding is a realistic and affordable alternative for the client. The most important question is therefore whether the client's disposable income is such that repayments to a loan could be supported. Funded clients in ancillary relief proceedings on average have higher disposable incomes than any other funded category, and many clients pay substantial monthly contributions, which will sometimes be greater than the monthly payments that would be due on a small loan.

As a starting point, we will consider refusal under the new criterion on this ground where clients are paying or would be paying contributions of £60 per month or more. This equates to a disposable income of £481 per month, as calculated under Regulations. At that level of income, research has shown that a typical £3,000 unsecured personal loan repaid over 5 years at an interest rate of approximately 6.5 – 7% would require monthly payments no higher than the level of contribution due under the Regulations.

In cases where a certificate is already in existence the client's current level of contribution should be declared on the APP form but can also readily be checked by the Commission on its CIS computer system. Where no certificate is in existence, means should be assessed in the usual way and no decision made on the new criterion until disposable income has been determined, refusal being considered where the disposable income exceeds £481 per month.

Where a certificate already exists covering domestic violence or children issues and the client is paying a substantial contribution, the application to fund ancillary relief may be refused under the new criterion. Under those circumstances, it is likely that the client would wish to discharge the certificate and fund any remaining domestic violence or children issues through the loan arrangement to avoid having to pay both interest on the loan and contributions under a certificate. It would be a matter for the client whether s/he asked for the existing certificate to be discharged. We should not, however, take into account existing contribution payments as a ground for concluding that private funding is not available to the client unless there is good reason for the certificate to continue in the particular circumstances.

## EVIDENCE OF AVAILABILITY OF LOAN

Where the disposable income of a client, as above, suggests that s/he ought to be in a position to obtain private funding, we must still take into account any evidence produced by the client to show that such funding for some reason is not available to the client. Even where the client's disposable income would support a loan, many clients are unable to obtain any form of affordable loan because of their poor credit rating. Note that we would not expect funded clients to explore tailor-made finance arrangements specifically set up to cover ancillary relief costs. Although such products exist they are generally limited to cases concerning disputes over very substantial assets.

Similarly, we would not expect a client to approach a wide range of lenders, some of whom may offer punitive interest rates. The client should instead make genuine attempts to secure borrowing from reputable high street bank and building society lenders, but where they contend that such borrowing is not available, evidence of this must be provided with the application form, specifying why any application for a loan was refused.

Where we are satisfied that private funding is not in reality available for the client on reasonable terms, Legal Representation may be granted, provided other means and merits criteria are satisfied.