

Legal Services Commission Manual

Volume 3, Part C, Decision Making Guidance

Domestic Violence

3C-197

20.32 Domestic Violence and Abuse

A General Approach

1. Domestic violence proceedings are a priority area for the Lord Chancellor and the Commission. This is reflected in the Criteria at section 11.10 of the Funding Code which allow such cases to be funded more widely than most other family and non-family areas.
2. The Code Criteria in section 11.10 are not limited to any particular definition of domestic violence or abuse but instead cover all applications to fund legal representation in family proceedings seeking an injunction, a committal order or other orders for the protection of a person from harm (other than public law children proceedings). Funding is not limited just to persons who have suffered actual physical violence. The following guidance explains how the Criteria at section 11.10 will be applied to most types of proceeding, including applications for non-molestation orders under Part IV of the Family Law Act 1996. Guidance specific to other types of proceeding is set out at paragraphs 13 to 17 below.
3. When forms are submitted to the regional office to grant Legal Representation or when a grant of emergency representation by the supplier under devolved powers is reported to the regional office the issues set out below should be specifically addressed on the form to avoid unnecessary refusal of applications. Note that emergency cover should only be granted to take injunction proceedings where the applicant or relevant child is in imminent danger of significant harm. Significant harm is imminent if there is a real risk that it will occur before a substantive application can be processed and the matter brought before the court.
4. There is a discretion to waive the financial eligibility limits for the benefit of domestic violence victims seeking protection from the court from harm. The waiver extends eligibility by allowing the upper income limit, the gross income cap and the disposable capital limit to be waived. However any contribution from income and/or capital will not be waived. The Commission will, unless there are exceptional circumstances, exercise the discretion and suppliers can assume this when considering an application under devolved powers.

B Funding Criteria

Prospects of Success

5. Legal Representation will be refused if the prospects of obtaining the order sought in the proceedings are poor (Criterion 11.10.2). Funding can therefore only be granted where prospects are at least “borderline” as defined in the Code. In relation to non-molestation orders under Part IV the issue is whether the court is likely to be satisfied that the respondent has molested the other party or a relevant child and that an order is considered necessary by the court for the protection of that party or child having regard to all the circumstances, including the need to secure the health and safety and wellbeing of the applicant, of another party to the proceedings or of any relevant child. The prospects of obtaining an order are likely to be poor if, for example:
 - (a) the incidents complained of are of a trivial nature. However where there has been a history of incidents, the cumulative effect of those incidents may be taken into account, or;
 - (b) the conduct complained of is not likely to be repeated. If the conduct complained of took place more than three weeks prior to the application it will be necessary to set out in the application why it is considered that repetition is likely, for example if there has been a history of violent conduct.

Cost Benefit

6. Legal Representation will also be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of obtaining the order sought and all other circumstances (Criterion 11.10.3). Although cost benefit must always be considered it is unlikely to be the sole decisive refusal ground in domestic violence proceedings. Where the incidents complained of are serious and the other considerations set out in this guidance are satisfied so that an order of the court is required to protect the client, it will usually not be difficult to show that the benefits of that protection will justify the costs of the application. The Code Criterion is deliberately expressed in wider terms than the private client test cost benefit criterion which applies to all other private law family proceedings.

Warning Letter

7. An application may be refused to cover court proceedings if no warning letter has first been sent to the respondent. However this is not an absolute rule. Practitioners should demonstrate that consideration has been given to whether a warning letter might endanger the client. A warning letter may be inappropriate for example if the applicant and respondent are still living under the same roof or if the threat to the applicant is serious and imminent or if receipt of a warning letter by the respondent may trigger further violence to the applicant or any relevant child before a protective

order can be obtained. However in most other cases a warning letter, which can be issued under the Legal Help scheme, will be the appropriate first step. In such circumstances if no warning letter has been sent Legal Representation may be refused under Criterion 5.4.4.

Involvement of the Police

8. Domestic violence is a crime. Where the incidents complained of constitute an assault or other crime against the applicant the police should normally be notified and given an opportunity to deal with the respondent. If no attempt has been made to involve the police it may be appropriate to refuse Legal Representation under Criteria 5.4.3 or 5.4.4. However there may be good reason not to pursue criminal proceedings, for example where this might jeopardise the long term financial or other interests of the family. If so, or if there is reason to believe that the police will not be able to assist or if they are contacted but have failed to respond or to provide adequate assistance to protect the applicant and any relevant children, then a grant of Legal Representation may be appropriate.

Custody and Bail Conditions

9. If the proposed respondent is subject to a criminal investigation or proceedings and has been remanded in custody or is subject to bail conditions, it will not generally be appropriate to commence separate civil proceedings for an injunction (Code Criterion 5.4.5). Again, this is not an absolute rule. The extent of protection afforded to the applicant from the criminal proceedings must be considered in each case. If a prosecution and the protection of bail conditions are likely to finish shortly but the incidents complained of are continuing or are likely to continue then a grant of Legal Representation may be justified. However where there is a successful prosecution under the Protection from Harassment Act 1997 a restraining order under that Act is likely to continue. In such cases or where bail conditions or a remand in custody are likely to remain in force for some time it may not be necessary to grant Legal Representation for a civil injunction.

Capacity of the Respondent

10. Legal Representation is unlikely to be granted if any order obtained is unlikely to be enforceable on account of the mental incapacity or age of the respondent. See generally *Re: H* (respondent under 18: power of arrest CA [2001] 1FLR 641). An order may be obtained/enforced against an older minor. *Re: H* involved a 17 year old. Note however that Legal Representation is unlikely to be granted on the basis that even though an order is likely to be unenforceable there may be peripheral benefits to the client (such as encouraging future involvement by the police).

Respondents

11. Legal Representation to defend domestic violence injunction proceedings will also be considered under section 11.10 of the Code. However, prospects of success and cost benefit criteria are unlikely

to be satisfied by a respondent to non molestation proceedings only, unless there are very serious allegations which are denied wholly or substantially. An exception is where there is any question of inability to defend for example because of mental incapacity or age, in which case a grant is likely to be justified. When considering cost benefit, the impact on the client of the order sought will always be taken into account, including any impact on contact or other related family proceedings. However in all cases the client will still need to demonstrate at least borderline prospects of wholly or substantially rebutting the allegations made.

12. In cases where the allegations are less serious or are admitted to a significant extent the main issue may well be whether the respondent should give an undertaking to the court and what form that undertaking should take. Legal Representation is unlikely to be granted in such cases but see paragraph 20.10 regarding the use of Legal Help (which can escape the application of a standard fee).

C Specific Proceeding Types

Occupation Orders

13. Occupation orders under Part IV of the Family Law Act 1996 also come under section 11.10 of the Code. Paragraphs 1 to 11 above are also applicable where appropriate to occupation orders. Legal Representation will only be granted where there are at least borderline prospects of obtaining an order. This involves considering whether the parties and property qualify to be covered by an order and whether an order is likely to be considered necessary by the court having regard to all the circumstances of the case including the “greater harm” test. Legal Representation is most likely to be granted where the applicant is in a refuge or other temporary accommodation having recently been excluded from a property, or where there is otherwise a significant likelihood of risk in remaining in or returning to the property without the protection of an order. Legal Representation is likely to be refused if the respondent has already left voluntarily and does not appear likely to return.
14. Legal Representation may also be granted to defend or set aside an occupation order where a respondent has at least borderline prospects of successfully doing so. Legal Representation is likely to be granted if, unusually, there has been a without notice order made, the respondent has had no opportunity to contest the issues and it would be unreasonable for the order to stand. Legal Representation is less likely to be justified if the respondent is already out of occupation of the property and has no good reason to return, unless there are other issues in the proceedings sufficient to justify the grant of representation (e.g. the order will have a significant impact on section 8 proceedings).

Protection from Harassment Act 1997 and Other Injunctions

15. Proceedings under the Protection from Harassment Act 1997 and injunctions based on common law assault or trespass may also come within section 11.10 of the Code, but only when the behaviour complained of arises out of a family relationship (this is a wide concept as explained in section 20.4 of this guidance). If within the definition of family proceedings such cases will be considered in the same way as non-molestation orders under Part IV of the Family Law Act 1996.

Enforcement Proceedings

16. Where a respondent is alleged to be in breach of an order or undertaking, Legal Representation may be applied for either for the issue of a warrant of arrest or to seek the respondent's committal. When considering prospects of success it is necessary to look at the seriousness of the applicant's allegations of breach and all the other circumstances, and consider the likely benefit to the client of obtaining a further order. Depending on the seriousness of the allegations a warning letter may be the appropriate course in some cases rather than a further application to court. It is also necessary to consider whether the allegations should be reported to the police so that they can be dealt with through criminal rather than civil proceedings. Following the implementation of s42A of the Family Law Act 1996, breach of a non-molestation order is a criminal offence. In accordance with s42A(3) of the Act, where a person is convicted of an offence then the same conduct is not punishable as a contempt of court. It is also unlikely that Legal Representation will be granted for committal proceedings if criminal proceedings have been instigated by the police. Where the police have been informed and no action is being taken information as to the reason(s) should be provided with any application for funding to apply for the issue of a warrant of arrest or committal.
17. When considering Legal Representation to defend committal proceedings, bearing in mind the significance of such an order for the client, Legal Representation will usually be justified where it is in the interests of justice for the client to be represented (see also 20.25.5).

D Scope of Certificates

18. The Commission will not require proceedings under Part IV Family Law Act 1996 to be commenced/conducted in any particular venue.
19. Where matrimonial proceedings are in existence or are to be commenced then any application under Part IV may be made in those proceedings. Where there is an existing certificate capable of amendment to cover proceedings under Part IV Family Law Act 1996 an application must be made for an amendment rather than for a fresh certificate.
20. Any certificate covering proceedings under Part IV will cover obtaining a final order including, if appropriate, applying for a without notice order prior to that.

21. Any application for an extension, variation or discharge of an order will not be covered unless this is specified, either by an amendment to an existing certificate or by a new certificate.
22. Certificates may cover applying for a non-molestation order only, but can be expressed to cover non-molestation and/or occupation orders provided there is sufficient merit to justify each remedy sought.
23. An occupation order may impose financial obligations. The scope of the certificate will extend to those aspects without the need for a specific amendment. Any recovery or preservation in proceedings under Part IV Family Law Act 1996 is exempt from the operation of the statutory charge. It would, however, generally be reasonable to expect substantial ancillary issues to be adjourned for consideration in other more appropriate proceedings, e.g. ancillary to divorce/judicial separation.
24. Where an order made under Part IV, including a power of arrest, is breached, cover for both the applicant and respondent extends to representation on the consideration of the breach by the court following exercise of the power of arrest. However, cover does not, without a specific amendment, extend to applying for the issue of a warrant of arrest (where a power of arrest has not been attached to the order) nor to representation for either party in contempt of court (committal) proceedings.
25. A respondent's certificate, which covers in respect of proceedings under Part IV or an application for committal representation on arrest, either following the exercise of a power of arrest or the execution of a warrant, will also extend to applying for bail and to representation on any adjourned hearing. Likewise, the applicant's certificate, once extended to cover the application for the issue of warrant/to commit, will cover representation as to bail at any adjourned hearing.
26. A single certificate can cover family proceedings (as defined by paragraph 2.2 of the Funding Code, including proceedings under Part IV) and proceedings under the Trusts of Land and Appointment of Trustees Act 1996, or family proceedings and proceedings under the Protection from Harassment Act 1997 where the proceedings arise out of a family relationship. A single certificate can also cover proceedings under Part IV and other family proceedings. A single application or an application for an amendment must be made rather than two separate applications or an application for a fresh certificate.
27. Proceedings under Part IV will not be sufficiently related to proceedings under Sections 31, 43, 44 or 45 Children Act 1989 for cover to be available under a non-means, non-merits tested certificate. If, however, the court makes an order of its own motion with a return date then no amendment is necessary to cover representation on the return date and on any adjournment.

28. Proceedings in relation to an exclusion requirement in emergency protection order proceedings or proceedings culminating in an interim care order are within the scope of a non-means, non-merits tested certificate covering the main proceedings. No specific amendment is required e.g. in the event of a power of arrest being exercised or a variation or discharge of the order being sought. An excluded person can apply in the usual way for a means and merits tested certificate to vary or discharge an exclusion requirement. Where a certificate is issued it covers, following exercise of the power of arrest, representation on the consideration of the breach by the court without the need for a specific amendment.