

## **20. Children and Family**

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## PART A – GENERAL PRINCIPLES

### 20. Children and Family

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## 20.1 General Approach

1. Family is the dominant area of CLS funding accounting for 38% of New Matter Starts in Controlled Work and [83%] of new certificates issued in 2006/07. Children and Family Services cover a wide range of legal services many of which are a high priority for CLS funding, especially those concerning protection from violence and the welfare of children. Research has shown that many people with family problems often have related problems such as debt or housing. Effectively identifying and tackling that range of problems contributes directly to the avoidance of social exclusion.
2. The primary aim of funded Family Services is to help people resolve disputes concerning children and family relationships at the earliest opportunity and in the most appropriate way, where possible without litigation. This supports the statutory objectives of the CLS, as set out in section 4(4) of the Access to Justice Act 1999, and Public Service Agreement 3 of the Ministry of Justice – to reduce the proportion of disputes resolved by recourse to the courts. However, there are many family cases where contested proceedings are unavoidable and essential to protect children or adults from harm or where all other attempts at resolving disputes have failed. CLS funding is available for all such cases.
3. Funding of Family Services must be seen not in isolation but as part of the wider family justice system. CLS funding contributes to the government aims of avoiding adversarial resolution of family disputes in line with the aims set out in the Green Paper published in July 2004 on Parental Separation: Children’s Needs and Parents’ Responsibilities.
4. The LSC endorses the aims of the Law Society’s Family Law Protocol and expects practitioners undertaking family work to apply the Protocol and work in accordance with its aims in the cases to which it applies. The aims are:
  - (a) To encourage a constructive and conciliatory approach to the resolution of family disputes.
  - (b) To encourage the narrowing of the issues in dispute and the effective and timely resolution of disputes.
  - (c) To endeavour to minimise any risks to the parties and/or the children and to alert the client to treat safety as a primary concern.
  - (d) To have regard to the interests of the children and long-term family relationships.
  - (e) To endeavour to ensure that costs are not unreasonably incurred.
5. Under the reforms announced following the consultation in New Focus for Civil Legal Aid the cost protection provisions previously afforded to legal aid clients in family proceedings have been abolished in some of those proceedings under the Community Legal Service (Cost Protection)(Amendment) Regulations 2005. Practitioners will therefore need to be particularly aware of the need to advise their clients of the risk of an adverse order being made if they unreasonably refuse offers or otherwise behave unreasonably.

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## 20.2 Family Strategy

1. The LSC's strategy for the Community Legal Service 'Making Legal Rights a Reality' was published in March 2006 and set out the LSC's priorities for social welfare. In light of this the five year strategy for family legal aid was published in March 2007.
2. The strategy for 2007-2012 'Making Legal Rights a Reality for Children and Families: The Legal Services Commission's Strategy for Family legal Aid is in two volumes. The first sets out LSC priorities for the funding of family legal aid and provides a framework for policy decision making. It also sets out how the LSC will work with other parts of the family justice system. The second volume provides background and context for the strategy.
3. The strategy is aimed at achieving the vision for family legal aid.
  - To ensure clients have access to quality services;
  - To work with providers who provide quality, value for money and client focused services;
  - To deliver a sustainable legal aid scheme within the budget available .
4. In line with the aims set out in the strategy a 12 month pilot is to be launched in autumn 2007 to incorporate family legal advice into CLS Direct. The pilot will help establish what kind of family problems can be addressed over the telephone as well as monitoring demand for advice. In cases where it is not appropriate for clients to receive telephone advice CLS Direct will refer clients to face-to-face advisers.

## Scope of Family Work

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## 20.3 Definition of Family Proceedings

1. "Family Proceedings" is defined at section 2.2 of the Funding Code. The main purpose of the definition of family disputes and proceedings is to identify those cases which fall to be determined under the family Criteria in Section 11 of the Funding Code. It also identifies cases eligible for the levels of service under the Funding Code which are only available for family disputes or proceedings, that is, Family Help and Family Mediation. A subsidiary purpose is to define the precise extent of family work which can only be carried out as part of Licensed Work under the Commission's unified contract (see paragraph 20.21 below).

2. The definition of family proceedings has been widely drafted so as to extend to all proceedings which arise out family relationships, including proceedings in which the

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welfare of children is determined. The definition also extends to all proceedings under any one or more of nine specified statutes and under the inherent jurisdiction of the High Court in relation to children. Note that the definition includes all proceedings in these ten specified cases, whether or not they arise out of family relationships. The definition also extends to appeals from a refusal to issue a gender recognition certificate.

3. For example, a claim under the Inheritance (Provision for Family and Dependants) Act 1975 by a dependant who was not a member of the deceased's family would still be considered under section 11 of the Code. In practice, however, the overwhelming majority of cases brought under any of the statutes specified do arise out of family relationships.
4. Proceedings in which the welfare of children is determined other than in the ten specified cases are only included in the definition to the extent that they arise out of family relationships. This part of the definition does not apply to cases merely because the outcome may affect the welfare of a child. For example, a court which approves a proposed settlement of a personal injury claim on behalf of a minor will take into account the welfare of the child, but as the case does not arise out of a family relationship it does not thereby constitute family proceedings. Similarly education proceedings alleging that a local authority has failed in its duties towards a child are not family proceedings. This is because the proceedings cannot be said to arise out of any family relationship.
5. A family dispute is defined under the Funding Code in a similar way to family proceedings. It means a legal dispute arising out of a family relationship, including disputes concerning the welfare of children or which may give rise to family proceedings. This definition limits the scope of Family Mediation and Family Help, both of which are intended to assist in resolving family disputes whether or not they have yet given rise to proceedings.
6. Note that judicial review proceedings are specifically excluded from the definition of family proceedings under the Funding Code. All judicial review cases in relation to matters within the definition of family disputes or proceedings fall to be determined under Section 7 of the Code Criteria (Judicial Review).

## 20.4 Family Relationships

1. Using a descriptive definition of family proceedings allows a sensible approach to identifying cases with the character of family disputes which should be dealt with under Section 11 of the Code Criteria without having to list exhaustively all the many possible statutes or proceedings in the family sphere.
2. The concept of a “family relationship” in the Code should be given a wide and modern meaning. Family relationships include:
  - (a) marriage;
  - (b) heterosexual or same sex relationships between partners whether cohabiting or not;
  - (c) blood relations;
  - (d) step relations;
  - (e) adoption or long term care of children such that they can reasonably be regarded as part of a family.
3. Although the scope of family relationships under the Code is very wide, disputes or proceedings only come within the Family category if they “arise out of” family relationships. Thus the test in deciding whether proceedings come within section 11 of the Code is not whether the parties are family members, but whether the basis of the dispute or jurisdiction of the proceedings arises out of a family relationship, i.e. could the dispute have arisen or the proceedings been brought were it not for the family relationship?

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4. Thus, ancillary relief and other divorce proceedings, statutory or common law proceedings concerning the welfare of children, or disputes between unmarried couples under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 all arise out of family relationships. Injunction proceedings against former partners and partners of former partners are also family proceedings provided they arise out of the family relationship rather than, for example, a business dispute.
5. By contrast, there are many proceedings in which the parties to the case are family members, but the proceedings are not family proceedings under the Code. Thus proceedings arising out of a car accident caused by a driver which injures other members of his or her family who are passengers in the car will not count as family proceedings. Nor would a claim for possession by a landlord of premises let on a commercial basis to a family member or an application under section 14 Trusts of Land and Appointment of Trustees Act 1996 between family members in relation to a commercial agreement be classified as family proceedings. In these examples, the proceedings would arise irrespective of the family relationships involved.
6. The wider definitions of family proceedings and family relationships are also in line with the wider meaning of “family life” under Article 8 of the Human Rights Convention. Under Article 8 the existence of family life can depend simply on “the real existence in practice of close personal ties” (see *K v. UK* (1986) 50 DR 199 at 207).

7. Article 8 is relevant to many family disputes and proceedings, although many family cases concern competing claims to family life. To reflect this the Code criteria for public and private law children cases are more flexible than most other parts of the Code. It will therefore usually not be necessary for practitioners to separately specify Article 8 issues in support of most applications for funding in family cases. However, convention issues should be specified on the application form where they are particularly relevant to the individual case, for example where the Convention is being used to challenge or extend existing family law.

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## **20.5 Relationship with the Family Category/Specialist Quality Mark Definition**

1. All family disputes and proceedings under the Code will fall within the family category/Specialist Quality Mark category.
2. The definition of the family category is set out in the Specialist Quality Mark category definitions. The definition is very similar to that in the Funding Code and for the vast majority of cases will be identical. However, the category serves a slightly different purpose. It identifies all those cases which suppliers with a contract in the family category can deal with and therefore obtain the benefits of exercising devolved powers. By their nature, proceedings under any of the statutes listed in the category definition almost invariably arise out of family relationships as described above and thus come within section 11 of the Code.
3. The family category definition includes a much longer list of those matters and proceedings which are included in the category. This list is provided for the avoidance of doubt in order to assist in relation to the less common statutes and applications to court. It also serves to define accurately the boundary of the category, for example in relation to proceedings under the Protection from Harassment Act 1997.
4. The family category is potentially wider than the Funding Code definition of family disputes or proceedings in that it includes old statutes no longer in existence but in relation to which certificates under the Legal Aid Act 1988 may still be in force. Another example in which the category is wider than the Funding Code definition is that it includes proceedings for an anti-social behaviour order and sex offender order made in relation to a child under the Crime and Disorder Act 1998. These would not be classified as a family proceeding under the Funding Code, and indeed are ...

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prescribed as criminal proceedings under the Criminal Defence Service (General) Regulations 2001. Nevertheless, it is appropriate that family suppliers can undertake these cases as part of their contracted work. Representation in such cases is provided under a

criminal representation order as part of the Criminal Defence Service but authorised under the Unified Contract Civil Specification (see Rules 10.79, 10.80 and 10.81 – and further at paragraph 20.47.6 below).

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#### 20.6 Capacity

1. The general rule is that any application for funding will be made by an applicant of full age and capacity. Where an application relates to proceedings, the application for funding must be made by or on behalf of a client who is a party or proposed party to the proceedings (Procedures C3.2). Where it is appropriate for a child or patient to become a party to proceedings then any application for funding must be made on behalf of the child or patient by a person of full age and capacity who is or proposes to be the litigation friend (Procedures C9.1) although the Director may waive the requirements of C9.1 where it is desirable to do so.
2. However, the solicitor can sign and make an application for a child/minor client but only where the child/minor is entitled to begin, prosecute or defend proceedings without a litigation friend (i.e. in accordance with the Family Proceedings Rules 1991, r.9.2A). The solicitor must sign the application personally and should insert the firm's address as the correspondence address for the application—the solicitor is treated as the child/minor's agent including for the receipt of notices (Procedures C9).
3. Where an application is made by or on behalf of a child or a patient the application is likely to be refused if it is considered that it should more appropriately be made by a person who is of full age and capacity (Code Criterion 5.4.2).
4. An application for funding may not be made in respect of a client who is a professional children's guardian or parental order reporter acting as such in the proceedings (Procedures C3.3).
5. Where a professional guardian has been appointed for a child an application for Legal Representation for the child will not be refused under Criterion 5.4.2 (Alternative Funding) on the ground that the costs of appointing a solicitor for the child form part of the guardian's expenses. However, in the case of other public law children cases, funding may be refused where any other relevant Criteria are not satisfied.

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#### 20.7 Jurisdiction Issues

1. As a consequence of Brussels II bis (also known as Brussels IIa), applications for Legal Representation will be refused where jurisdiction lies outside England and Wales. The Commission will expect solicitors to consider the question of jurisdiction prior to the submission of any application.
2. Under Brussels IIa jurisdiction in relation to divorce is determined according to the country of residence of one or both spouses or according to their nationality. A court will

also have jurisdiction in children matters if the child is habitually resident in a member state. Where cases are brought in two member states the second court seized with the application waits for the first court to accept jurisdiction, then declines jurisdiction in favour of that court.

3. In accordance with s19 of the Access to Justice Act 1999 the Commission may not fund a service relating to law other than in England and Wales. Exceptions to this are where it is relevant for determining an issue in funded proceedings, for example by obtaining an opinion as to the validity of an overseas order or if directed by the Secretary of State.

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## Funded Family Services

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### 20.8 Funding Code Levels

1. The following levels of service in the Funding Code are available in Family cases and are funded as shown:

Level of Service	Funded as
Legal Help	Controlled Work
Family Mediation	Other Grant or Contract Work
Family Help (Lower)	Controlled Work
Family Help (Higher)	Licensed Work
Legal Representation	Licensed Work

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2. Prior to October 2007 further levels of service, Help with Mediation and General Family Help, were also available. They have been abolished. Work in support of mediation in private law matters will usually be carried out under Family Help (Lower).
3. The levels of service listed above are explained in more detail in the sections which follow and in the Family Specification. Broadly speaking Legal Help covers the initial meeting with the client and any follow-up advice. It also covers advice and assistance in divorce proceedings. Legal Help may also be used more broadly to diagnose and refer clients to a range of other services including family mediation. Help at Court is not available in family cases.

4. Cases which cannot be resolved under Legal Help may be referred to Family Mediation. Otherwise, Family Help (Lower) exists to provide more substantial advice, assistance and negotiation to resolve disputes. It may be used to secure the early resolution of a family dispute or to obtain a necessary consent order following settlement. Family Help (Lower) may also be used to provide legal support for cases going through Family Mediation.
5. Family Help (Higher) is appropriate when it becomes necessary to issue proceedings other than for the purpose of obtaining a consent order (or, in the case of a Respondent, proceedings have already been issued) with a view to securing the early resolution of a family dispute. Family Help (Higher) does not cover preparation for, or representation at, any final hearing. Legal Representation covers representation in all other contested Family proceedings.
6. Mediation in family cases will only be remunerated by way of Family Mediation funded by the Commission. A family mediator's fees are not recoverable as a disbursement (see also 2.5 Disbursements).

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## **20.9 Family Mediation**

1. Family Mediation is a separate level of service under the Funding Code, which authorises mediation of a family dispute and an assessment of whether mediation appears suitable to the dispute and the parties and all the circumstances (for the definition of a family dispute, see paragraph 5 of 20.3). Family Mediation is provided under the Family Mediation Specification which forms part of the Unified Contract – see section 20.21 below. Note that the mediator can engage with a child/children in a matter which concerns the child/children as part of the mediation (see para 28 below).
2. All Family Mediation requires an assessment of whether mediation is suitable to the dispute and the parties and all the circumstances. In the Funding Code Procedures this is referred to as an assessment meeting. This assessment will be carried out by a recognised mediator, (i.e. a mediator who is deemed competent by a regulatory body approved by the Legal Services Commission) and may only be provided if the Standard Criteria under Section 4 of the Funding Code are satisfied (Criterion 11.5.1). This includes a test for financial eligibility, which will be carried out by the mediator (Criterion 4.9 and Code Procedures D4.3).
3. Substantive mediation beyond an assessment meeting may only be provided where the mediator is satisfied that the mediation is suitable to the dispute and the parties and all the circumstances (Criterion 11.5.2 and Code Procedures D4.3). The mediator must in assessing suitability consider whether the costs of mediation are themselves justified in terms of cost benefit as part of considering whether mediation is suitable for the dispute, the parties and all the circumstances.
4. Family Mediation can be provided following a referral required under the Code Procedures (see below) or otherwise e.g. on a self-referral by the client(s) or a referral

from another organisation. All work carried out under Family Mediation is exempt from the statutory charge, whether or not mediation is successful and regardless of what other levels of service are provided to the client.

### **The Referral Process**

5. The solicitor or client should contact the mediation service to provide their full contact details and those of the second party (if known) and, where appropriate, the solicitor(s).
6. If the second party is willing to attend an assessment meeting and consider mediation, the mediation service must then arrange a meeting and notify the client and their solicitor and, where appropriate, the solicitor of the second party.
7. The mediation service should offer the client (applicant) and the second party a meeting within 15 working days from the date they were first contacted.
8. However, where it is not possible to arrange a joint assessment meeting, or where either one of the parties wants to attend a separate meeting, the mediation service should hold the second meeting within 20 working days from the date that they were first contacted. The second meeting can only be held outside this time period if the client agrees.
9. The mediation service should ensure that, however they contact the client and the second party, domestic abuse screening is carried out at or as soon as possible after the initial contact point (Procedures D5).
10. Clients (applicants) who fail to attend the assessment meeting arranged with the mediator without providing a good reason in advance will only be given a second appointment if it is reasonable to do so in the particular circumstances. Where the second party fails to attend the first arranged meeting, the mediation service should ...

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contact the client to ascertain if the client is willing for another meeting to be offered to the second party. If not, the mediation service will deem mediation unsuitable and will complete and sign the standard CLSAPP7 form as “mediation unsuitable”. If the second party fails to attend another arranged meeting, then the mediation service will deem mediation unsuitable and complete and sign the CLSAPP7 form “mediation unsuitable”.

11. In some cases, having considered the referral the mediator may consider that mediation is not suitable as the client has a reasonable fear of domestic abuse from a potential party to the mediation. In such cases the mediation service will complete and sign the CLS APP7 form confirming that mediation is unsuitable.

### **The Assessment Meeting**

12. Mediation services must always ensure that they inform the client and the second party that meetings can take place either together or separately. The decision whether to attend

the meeting together or separately must be left to the client and the second party. Where either party requests separate meetings, the service should offer separate meetings to both parties.

13. Where both the client and the second party attend the same meeting with a mediator, the mediator must ensure that they carry out domestic abuse screening interviews with each party separately prior to a meeting.

#### **Determination of suitability**

14. Where the mediation service has attempted to contact the second party to ascertain willingness and:
  - (a) the second party does not respond to a request to attend a meeting within 10 working days of the mediation service first being contacted; or
  - (b) the second party replies to a request, refusing to attend a meeting with a mediator; or
  - (c) the second party is willing and they have attended a meeting but the mediator decides that mediation is not suitable for the dispute, the parties and all the circumstances;

the mediator must complete and sign the CLSAPP7 form dealing with the assessment and either give or send it to the client, or send it direct to the solicitor. This is the case whether or not the first party has attended an assessment meeting, see also para 20.16.

15. Where the CLSAPP7 form is returned to the client because mediation is unsuitable, the mediation service should inform the client that they may consult with their solicitor and that an application can now be made for Family Help (Higher) or Legal Representation. The usual Criteria would apply to any such application.
16. If the mediator determines that mediation is suitable for the dispute, the parties and all the circumstances the client may have access to Family Mediation. The form dealing with the assessment requirement does not need to be completed unless mediation subsequently breaks down.

#### **Mediation during a certificate**

17. The requirement to attend on a mediator will be applied not just at the time of the initial application for a certificate but also when an amendment is to be applied for to cover additional proceedings, for example when an existing certificate covering ancillary relief is to be extended to cover residence or contact disputes.
18. In addition, Family Mediation can sometimes be effective during the life of certificate even if it was for some reason unsuitable at the outset. Rule C27.3 gives the Regional Office discretion to place a limitation on a family certificate restricting further work until the client has attended an assessment meeting with a mediator. This is most likely to be considered when representations about mediation are received from another party or when the office is informed that the publicly funded client has  
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refused an offer by the other side to mediate. As in non-family cases all refusals of offers to mediate must be notified to the Regional Office under Rule C43.2 (vi)(c) of the Procedures.

19. In these circumstances the office will consider placing a limitation on a certificate if there appears to be no good reason for refusing to attend an assessment meeting. Where the solicitor seeks to rely on a previous negative assessment of suitability, then a copy of the relevant form CLSAPP7 should be submitted together with an explanation as to why it is still reasonable to rely on it. If the case is assessed as suitable for mediation by the mediator than the Commission's approach in such cases will be similar to that in non-family proceedings as detailed in section 7.8 of this guidance.

#### **Where mediation breaks down**

20. Where mediation breaks down, the mediator must complete the CLSAPP7 form dealing with the assessment requirement. There may be circumstances where agreement is reached through mediation on some but not all of the issues in dispute. In these circumstances the mediator should complete the CLSAPP7 noting on the form that mediation has only broken down in respect of certain issues and list the outstanding issues that are still in dispute.
21. Any certificate that is subsequently issued should be limited to those issues which are still listed on the CLSAPP7 as in dispute. It will be up to the Regional Office to decide on the scope of any certificate issued on the basis of the information provided on the CLSAPP7 and in the application for funding.
22. Where mediation is suitable for some issues but not others e.g. for children issues but not financial ones, then it is appropriate for some elements of the case to continue to be mediated whilst other aspects of the case are dealt with through negotiations or, if it is unavoidable, in court proceedings.
23. The CLSAPP7 form should be returned to the client or sent direct to the solicitor by the mediation service. The mediator must inform the client that they should consult their solicitor and that an application for Family Help (Higher) or Legal Representation may now be made.

#### **Self referrals**

24. When a client who has not been referred by a solicitor but seeks Family Mediation him or herself sees a mediator for the first time, the mediator must consider whether to provide funded mediation and whether the client is or is likely to be subject to the requirement to attend an assessment meeting. This is so that if the client does subsequently apply for funding for representation the delay and expense of an assessment meeting at that point in

time can be avoided. If the mediator is in doubt he or she should work on the basis that an assessment will be required rather than not required.

25. The mediator may provide mediation if the mediator considers that to be appropriate in accordance with the Code Procedures and the Code of Practice (Code Procedures D4 and D5).
26. Where mediation is not appropriate, the mediator must complete the CLSAPP7 form dealing with the assessment requirement and recommend that the client consults a solicitor. If there is no material change in the circumstances of the parties or dispute, the form may then be submitted with a future application for funding for Family Help (Higher) or Legal Representation (made up to four calendar months from the date of the assessment) without the client being required to attend a further meeting with a mediator. A client seeking to rely on a previous voluntary attendance as an exemption from the requirement to attend an assessment meeting may only do so where they ...

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have voluntarily attended mediation with a mediator “recognised” by the Commission. Where a client has referred themselves to mediation but it has been to a mediator that is not recognised then the client will be required to attend a further meeting with a recognised mediator before they make an application for Family Help (Higher) of Legal Representation, subject to the usual exemptions.

27. Where clients attend a mediation service as a self referral it is sometimes the case that they may wish to mediate on a greater range of issues than are defined as Family Proceedings in the Funding Code. The mediator must consider whether the issues in dispute are covered by publicly funded family mediation e.g. publicly funded family mediation may not be available for mediation where the only issue in dispute is the potential homelessness of a child.
28. Mediators may, if appropriate, undertake direct consultation with a child but only in accordance with guidelines in their Code of Practice. Furthermore, there is nothing in the Funding Code that requires that a party to the mediation must be over 16 or 18 and if the mediator considers that mediation involving a child is appropriate then they may mediate with a child. However, a mediator should only mediate with a child where they have the necessary skills to do so as set out in their Code of Practice. 29. Mediation in family cases will only be remunerated by way of Family Mediation funded by the Commission. A family mediator’s fees are not recoverable as a disbursement (see also 2.5 Disbursements).

## 20.10 Legal Help

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1. Legal Help (also called Level 1 advice) is available in both family private law and family public law proceedings.
2. Public law matters are those for which advice may be provided in relation to proceedings or potential proceedings falling to be considered under sections 11.7, 11.8 and 11.9 of the Funding Code Criteria and will attract the Legal Help Family public law fee set out in Table 2(a) of Part B Payment Annex to the Unified Contract Specification.
3. Legal Help in public law cases will cover the initial meeting with the client and follow-up advice and assistance as appropriate including correspondence and liaising with the local authority. Legal Help also covers completing any necessary application for Legal Representation. Advice can be provided to clients both before and after a child protection conference. There will usually be more appropriate support to clients attending child protection conferences than attendance at those conferences where providers may only be able to take a limited note. However, there may be some exceptional circumstances where the attendance of the provider is necessary, not merely to provide support for the client but to enable proper legal advice to be given at the conference itself.
4. Private law matters are those which involve disputes between individuals. The Legal Help private payment rates in the Payment Annex apply to all work within the family category other than public law work.
5. The fee for Legal Help in private law matters is a single fee irrespective of the number of issues which the client presents. It covers the initial meeting with the client and any work immediately flowing from the meeting, such as a letter of advice following the meeting, making a telephone call on behalf of the client or writing to the other party on behalf of the client in order to move the case forward as well as referring the client to another organisation. It also covers general advice about the dispute and methods of dispute resolution such as mediation. Legal Help will also be appropriate for completing the application for Family Help (Higher) or Legal Representative where negotiation and work under Family Help (Lower) is not appropriate e.g. the other party has failed to respond to any correspondence.
6. There are some matters which can only be remunerated at Legal Help. These include where the primary issue is a change of name or advice about a will and where the issue relates to child support only and the Child Support Agency has jurisdiction. Where the only issue is advice on divorce this can also be remunerated at Legal Help although there is a separate fee when advising the petitioner in divorce proceedings and where proceedings are issued. This includes where acting for the petitioner in judicial separation proceedings or in an application for the dissolution of a civil partnership. See paragraph

10.55 of the Family Specification and guidance on “Significant Family Dispute” at 20.11 and 20.18 below.

7. Advice and assistance in relation to domestic violence is only available under Legal Help. In many cases an emergency application for Legal Representation will be most appropriate in these matters. However, in other cases where further work is required, for example, the client returns for advice after further incidents, these cases may become exceptional for the purposes of payment at Level 1 and be paid at hourly rates. Advice and assistance may also be appropriate under this level of service for a respondent in domestic violence proceedings for whom Legal Representation will not be granted under the appropriate criteria.
8. Apart from domestic violence cases the only other private law cases which can become exceptional at Level 1 are divorce only cases when advising the Petitioner or Respondent (see para 6 above) and child abduction cases as defined in the Family Specification (paragraph 10.62). The escape threshold is three times the standard fee calculated at Legal Help rates.

If a Family Dispute is resolved under Legal Help, the statutory charge does not arise. However, if the dispute proceeds to a certificate for Family Help (Higher) or Legal Representation and property is recovered or preserved, the costs of all earlier levels of service, including Legal Help, count towards the charge. Where the charge applies to Legal Help costs the actual cost to the Fund, which in most cases will be the standard fee, is used. See regulation 43(3) and (4) of the Community Legal Service (Financial) Regulations 2000, as amended.

### 3C-177

#### **20.11 Family Help (Lower)**

1. Family Help (Lower) (Level 2) is available in both private law cases and in public law cases where written notice has been given of potential proceedings under s31 Children Act 1989. Family Help (Lower) means Family Help which is limited to exclude issue or proceedings on representation in proceedings other than help in obtaining a consent order following settlement of a Family Dispute (Code Criterion 2.1).
2. In order for a private law case to progress to Family Help (Lower) the criteria set out in Criterion 11.3 of the Funding Code must be met. The case must therefore satisfy the cost benefit test and must be in relation to a significant family dispute. A significant family dispute is one which, if not resolved, may lead to family proceedings and for which legal advice and assistance is necessary to enable the client to resolve the issues. See further paragraph 10.55 of the Family Specification and 20.18 below.
3. In public law work Family Help (Lower) is available when advising a parent or person with parental responsibility for a child and where the local authority has given written notice of potential s31 care proceedings, including by the provision of an outline care plan as envisaged by the President’s Public Law Outline. This level of service is available

where the client requires advice and assistance with a view to avoiding proceedings or narrowing and resolving any issues with the local authority. Disbursements other than out of pocket expenses (for example, experts' fees) should not be incurred under this level of service. Any outstanding assessments would be undertaken by the local authority pre-proceedings or considered by the court in the context of proceedings. If written notice has already been received by the client from the local authority before the solicitor receives instructions then he or she will not require Legal Help and only Family Help (Lower) should be used.

4. Family Help (Lower) is controlled work and no application to the Commission is required. In private law cases the provider should complete the Legal Help CW1 with confirmation that the case meets the criteria required to move to Family Help (Lower) when the criteria are met. This will be when all work which can be carried out under Legal Help has been completed and then the matter can only progress by negotiation or other work under Family Help (Lower). In public law, where potential s31 cases meet the criteria, no means test is applied and form CW1PL should be completed and the notice from the local authority attached.
5. In private law cases a client may be granted Family Help (Lower) for both children and finance issues and may claim a separate standard fee for both. However, both matters must satisfy the cost benefit criteria for Family Help. A separate settlement fee for each matter is also available where the matter settles in accordance with paragraph 10.62 of the Family Specification. Family Help (Lower) allows the provision of advice and assistance in pre-proceedings work unless and until it has become clear that the matter cannot be resolved through negotiation without the issue of proceedings. However, although negotiations with the other parties may be appropriate, Collaborative Law will not be funded under any level of service.
6. Where a settlement fee is payable but settlement breaks down within 6 months of the date of settlement this must be reported by the supplier in accordance with paragraph 10.63 of the Family Specification and the settlement fee will be reclaimable. Another matter start may, however, be commenced if the conditions set out in paragraph 5.15 of the civil specification have been satisfied. This includes where at least 3 months have elapsed since the claim was submitted and there has been a material development or change to the client's instructions. In family cases if, for example, the settled arrangements as to contact broke down completely and the other party refused contact this would constitute a material development enabling a new matter start after 3 months. However, a change in the client's instructions as to timing of contact arrangements would not constitute a material development.
7. Applications to court under Family Help (Lower) can be made to obtain a necessary consent order following settlement of part or all of the dispute. Applying to the court must be justified on a private client basis. It will therefore be exceptional in relation to children issues (having regard to the no order principle) but more usual in money cases.

Attendance at court will not usually be necessary in these circumstances unless attendance has been ordered by the court or in other exceptional circumstances.

8. When a client is actually participating in Family Mediation or has successfully reached an agreement or settlement as a result of Family Mediation and is in need of legal assistance, this may be provided under Family Help (Lower). However, the mere fact that a mediation session takes place will not of itself justify the provision of Family Help (Lower) nor will the referral to mediation which can be carried out under Legal Help.
9. A solicitor may attend at one or more mediation session to advise their client during the mediation process. However, this should only be considered in exceptional circumstances such as where the client has particular cultural, health or complex legal issues, so as to justify the provision of legal advice at the mediation session itself. It is most important during mediation, that solicitors only advise their own client and do not directly or indirectly intervene in the mediation by discussing matters subject to the mediation with the other party or his or her solicitor. If the client requires non legal advice or support this is not covered by the Funding Code. The attendance of solicitors needs to be agreed by both parties and the mediator before the mediation can commence.
10. Conveyancing services are excluded from the scope of the Community Legal Service by paragraph 1(b) of Schedule 2 to the Access to Justice Act. However, the Lord Chancellor has directed that where it is necessary to provide conveyancing services to give effect to a court order in any funded proceedings or to an agreement reached to settle or avoid family proceedings, then the work to implement an agreement will come within scope. Family Help (Lower) will extend to work to implement an agreement or consent order including any necessary conveyancing work.
11. Where the case completes at Family Help (Lower) the statutory charge will not apply unless the costs in the case are exceptional and are claimed at an hourly rate. In these cases the charge will apply to costs above the exceptional case threshold i.e. actual costs incurred above 3x the standard fee. In such cases, as the matter is Controlled Work the charge will operate in favour of the provider. Where a case does not conclude at Family Help (Lower) but proceeds to Family Help (Higher) the charge will attach to all costs including those incurred at Legal Help and Family Help (Lower).

## **20.12 Family Help (Higher)**

### **General Considerations**

1. Family Help authorises help in relation to a family dispute including assistance in resolving that dispute through negotiation or otherwise. This includes the services covered by Legal Help or Legal Representation other than preparation for or representation at a contested final hearing or appeal (Funding Code paragraph 2.1). However, where a certificate is in force for General Family Help its scope and relationship with Legal Representation will remain unchanged. ...

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2. Family Help (Higher) requires an application to the Commission for a certificate before help can be provided, subject to the usual availability of devolved powers.
3. Applications for Family Help (Higher) must be made to the regional office on Form CLS APP3.
4. Where a certificate for General Family Help or Family Help (Higher) is in force, Legal Representation in family proceedings arising out of the same or a related family dispute may be sought by way of an application to amend the certificate to cover Legal Representation in those proceedings (Procedures C34.3). A separate, fresh certificate should not be applied for – see Procedures C35.6 regarding the use of a single certificate. If Legal Representation is granted, the existing General Family Help or Family Help (Higher) will be extended into Legal Representation.
5. A certificate for General Family Help or Family Help (Higher) will state on its face the extent of the family dispute to which the certificate relates. This serves to define the scope of work which can be done under the certificate in either case. If circumstances change so that further work is required outside the scope of the certificate, then an application for an amendment must be made to the Commission on Form CLS APP8.
6. A certificate of General Family Help or Family Help (Higher) will remain in force until it is discharged or revoked. However, completion of the work authorised should be reported to the regional office so that the certificate can be discharged (Procedures C43.2(iii)). Once all the work within the scope of the certificate has been completed, no further work can be done which properly should be conducted under a different level of service, unless an application for that different level of service has been granted.

### **Use of Family Help (Higher)**

7. (a) Family Help (Higher) is not available in Public Law Proceedings (Funding Code Criterion 11.4.5). However, it can be granted for any private law family dispute or proceedings. It is most appropriate to private law family disputes and proceedings which, if they were to go on to receive Legal Representation, would be considered under sections 11.11 or 11.12 of the Code Criteria. It is in these classes of case that Family Mediation (see paragraph 20.9) may be suitable (Criteria 11.4.1 and 11.4.2). Family Help (Higher) may therefore be refused and Legal Representation will generally be refused unless attempts have first been made to resolve the dispute without recourse to contested proceedings, through negotiations or otherwise (Criteria 11.11.4 and 11.12.4).  
(b) Family Help (Higher) may also be refused if it is more appropriate for the client to be assisted by way of Legal Help (Criterion 11.3.3) or Family Help (Lower). As Family Help (Lower) can cover all pre-proceedings work, Family Help (Higher) will only be

justified where it is necessary to issue proceedings (other than merely for a consent order), all other reasonable avenues having been pursued, or where proceedings are already in existence.

(c) Legal Representation would only be necessary if a First Hearing Dispute Resolution Appointment (FHDRA) (and any subsequent interim hearings) or Financial Dispute Resolution appointment is unsuccessful in resolving the issues and it is justified for the matter to proceed to a contested final hearing.

### **Emergency Proceedings**

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Under paragraph 10.65 of the Family Specification solicitors have a devolved power to grant Family Help (Higher) in urgent cases. This may be done where a devolved grant of Emergency Representation would be justified but the case is at a stage where Family Help (Higher) is a more appropriate level of service than Legal Representation. For example, this may apply where a solicitor is first contacted by a client who has an imminent hearing pending which is not the final hearing. The guidance on Emergency Representation in section 12 should be taken into account in decisions on granting emergency Family Help (Higher). The usual obligation to notify the regional office within 5 working days of the devolved decision applies.

### **Limitation on Family Help (Higher) Certificates**

9. Certificates will be limited both as to scope and costs. In children cases certificates will be limited to the issue of necessary proceedings and representation in the proceedings save in relation to or at a contested final hearing. In financial cases certificates will cover the issue of necessary proceedings up to and including the Financial Dispute Resolution hearing and/or obtaining a necessary consent order. The standard costs limitation will be £1,500. If there is more than one costs limitation then the £1,500 costs figure (or the highest costs limitation figure in the certificate) applies to all the costs incurred under the certificate (i.e. the whole case), even though it consists of more than one element (e.g. an injunction and children issues or financial and children issues). The majority of cases will be completed within this limit and it will only be extended where both the additional work and costs envisaged are justified and it would be appropriate to continue to use Family Help (Higher). If an increase is required and there is little likelihood of a complete resolution of the issue(s) other than by a contested final hearing, then it may be appropriate to apply for Legal Representation rather than continue to use Family Help (Higher).

## The Approach to Family Help (Higher) Certificates

10. The essence of Family Help (Higher) is to cover the resolution of a family dispute as early as possible within proceedings up to and including any Financial Dispute Resolution or First Hearing Dispute Resolution Appointment and including any necessary consent order. This approach reflects the Ancillary Relief Procedure and the emphasis on dispute resolution (including CAFCASS dispute resolution) in the President's Private Law Programme. Where, following negotiations, the Financial Dispute Resolution or any First Hearing Dispute Resolution appointment is unsuccessful and the matter is proceeding to a final hearing then an application for Legal Representation may be appropriate. See also paragraph 24 below.
11. All applications for Family Help (Higher) must be assessed for the suitability of mediation unless any of the exemptions apply (Procedures C29). The solicitor should consider whether Family Help (Higher) or Legal Representation is more appropriate to the particular case and whether any application for Family Help (Higher) is likely to be exempt from the requirement to assess suitability for mediation. See paragraph 20.16 onwards. Family Help (Higher) rather than Legal Representation will be the most appropriate level of service for applicants and respondents for cases not resolved using Legal Help, Family Mediation or Family Help (Lower). Where an emergency certificate of Legal Representation is justified (say for domestic violence injunction proceedings) the scope of the certificate in relation to other aspects will be limited to work within Family Help (Higher).  
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12. Where a client is in receipt of Family Help (Higher) and it is appropriate to apply for Legal Representation, this must be done by way of an application to amend the certificate to cover Legal Representation. A separate certificate of Legal Representation will not be issued – see Procedures C35.6. Where Legal Representation is applied for and Family Help (Higher) is considered the more appropriate level of service, then Family Help (Higher) will be granted and the application for Legal Representation treated as refused.
13. Family Help (Higher) can still be appropriate in cases where there has been a history of abuse or violence. In such cases direct mediation between the parties may not be suitable, but negotiation between lawyers, including the issue of proceedings, and, in children

cases, CAF/CASS dispute resolution may be an effective means of resolving the financial and children issues.

14. The statutory charge applies to Family Help (Higher).

#### **Criteria for Family Help (Higher)**

15. Family Help (Higher) will be refused if the case is one which must first be referred to a recognised mediator for a determination as to whether mediation is suitable to the dispute and the parties and all the circumstances (Criterion 11.4.1). For further details see 20.9 above.
16. Family Help (Higher) may be refused if mediation, supported if necessary by assistance under Family Help (Lower), is more appropriate to the case than Family Help (Higher) (Criterion 11.4.2). This will be the case where a referral has taken place and the mediator has determined that mediation is suitable. However, if circumstances change to the extent that the mediator reconsiders the position and determines that mediation is no longer suitable then an application for Family Help (Higher) will not be refused on this ground.
17. Family Help (Higher) may be refused if it is more appropriate for the client to be assisted by way of Legal Help (Criterion 11.3.3) or Family Help (Lower) (Criterion 11.4). Where Legal Help or Family Help (Lower) is available it should be used to identify the principal issues both by way of attendance on the client and if possible by contact and negotiations with the other party. If this has not been done in a case where the client qualifies for Legal Help the application for Family Help (Higher) should be refused under this Criterion.
18. It will only be appropriate to apply for Family Help (Higher) when sufficient work has been done at the Legal Help level or Family Help (Lower) and an application for Family Help (Higher) is the appropriate step. This will often be the case where negotiations have failed or where the other side has failed to 'engage' in response to attempts to negotiate including with the solicitor instructed by the client. An indication by the client alone that the other party will not negotiate will not suffice to justify the grant of Family Help (Higher).
19. Family Help (Higher) can only be provided where the cost benefit criterion is met (Criterion 11.3.2). The reasonable private client approach applies and funding will not be obtained unless, on the evidence available, the benefits to be gained from representation for the client justify the likely costs, such that a reasonable private paying client would be prepared to proceed in all the circumstances. Note that this is not the sufficient benefit test which applied previously and that it imports an objective element of reasonableness to the proportionality of the benefits and costs involved. For example, a contact dispute involving only handover arrangements, the frequency of non staying contact or opposing staying contact following on from unsupervised contact or a money dispute involving only the amount of maintenance would be ...

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unlikely to satisfy the criterion in the absence of special circumstances. Furthermore, reasonable attempts at settlement must be made, see the detailed guidance at paragraph 20.19 below.

20. The more work that is carried out under a Family Help (Higher) certificate, the more important it will be to consider carefully issues of prospects of a successful outcome for the client and the cost benefit. A certificate for Family Help will not be allowed to continue if the prospects of a successful outcome for the client are such that, if an application were made for Legal Representation, it would be refused. This is a particularly important issue if the other party has made proposals for settlement of the case (including at Financial Dispute Resolution or any First Hearing Dispute Resolution Appointment), in which case consideration must be given to the likelihood of the client being able to improve significantly on that offer either through further negotiation or through litigation.

### **Applications to Court**

- .. 21. Proceedings may be issued where it is necessary in order to obtain disclosure of information from another party, usually in relation to financial matters, with a view to early resolution of the matter. However, it is expected that in ancillary relief matters pre-application disclosure and negotiation will take place in appropriate cases in accordance with any pre-application protocol. A Family Help (Higher) certificate will not be justified in every ancillary relief case – it may be possible to negotiate and obtain a consent order using Family Help (Lower).
22. Where ancillary relief issues are in dispute, a Family Help (Higher) certificate will, without amendment and unless limited to negotiations only, allow the issue of proceedings up to and including disclosure of evidence and the Financial Dispute Resolution appointment. Making or defending an application for interim relief will also be covered under a Family Help (Higher) certificate provided it is justified in the circumstances of the particular case (in terms of prospects and therefore cost benefit) and it is heard at or before the Financial Dispute Resolution appointment. A limited amount of follow-up work arising from the Financial Dispute Resolution appointment is within scope without the need for an amendment, provided it is both justified and reasonable with a view to achieving a settlement of the matter. A specific amendment is, however, needed for any conveyancing and other implementation work.
23. A certificate for Family Help (Higher) cannot cover representation at a final contested hearing. Once it is clear, possibly following the Financial Dispute Resolution Appointment, that the matter cannot be resolved or fully resolved by negotiation and a contested final hearing is necessary, an application may be made to amend the certificate to cover Legal Representation. In children cases Family Help (Higher) will cover all steps

short of work in relation to or representation at a final contested  
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hearing. The usual scope includes representation at any finding of fact hearing and consideration of any CAFCASS report. In ancillary relief cases a limited amount of follow-up work arising from any Financial Dispute Resolution appointment is within scope without the need for an amendment, provided it is both justified and reasonable with a view to achieving a settlement of the matter.

24. Proceedings may also be issued under Family Help (Lower) solely to obtain a consent order following settlement of the dispute.

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### **20.13 Legal Representation**

1. Legal Representation (as defined in paragraph 2.1 of the Funding Code) covers representation in Family proceedings. The Funding Code divides Family proceedings into a range of different case types and applies different criteria to each. These criteria reflect the nature and priority of the subject area and, in many cases, the need to ensure that Legal Representation is indeed the most appropriate form of service.
2. All forms of Legal Representation in Family cases are funded as Licensed Work. Guidance on the procedures for granting Legal Representation is at section 20.21 below. Suppliers have devolved powers to grant emergency representation in Family and in Non Family cases. Guidance on emergency funding is at section 12 of the Funding Code guidance. Substantive grants of Legal Representation are otherwise made by the Commission's regional offices.
3. The definition of Family Help (Higher) (Funding Code paragraph 2.1) encourages early dispute resolution and covers the issue of proceedings. Where a case or issues within a case are not resolved using Family Help (Higher) then any grant of Legal Representation must be justified in the circumstances of the individual case having regard to the prospects of success and cost benefit. The dispute resolution process applied in the context of proceedings will be relevant in narrowing or resolving the issues and even where Family Help (Higher) has been granted it does not follow that Legal Representation will be granted to continue to deal with the proceedings or all the remaining issues in proceedings. This will only be the case where the prospects and issues justify continuing the proceedings, representation in the proceedings and the costs likely to be incurred. For example in a contact dispute the criterion is only likely to be met where the principle of contact (whether indirect or direct) is in issue as opposed to the extent of contact (i.e. the detailed arrangements, including the frequency and the handover arrangements). Funding Code Criterion 5.4.5 (the Need for Representation) specifically refers to Legal

Representation being refused where it appears unreasonable to fund representation in the light of the nature and complexity of the issues.

4. The table below lists the eight types of Family case which have their own Criteria for Legal Representation in the Code, specifies where the guidance specific to each type of case can be found (including guidance on the scope of each type of case) and lists the Merits Criteria which apply in each category. The standard Criteria in section 4 of the Funding Code, which apply to all levels of service, are not listed here but the standard Criteria for Legal Representation in section 5.4 of the General Funding Code are listed where

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they apply. The most significant Criteria are listed in bold (see also the table at 20.17 regarding Prospects of Success).

<b>Case Type – as defined in the Funding Code</b>	<b>Guidance</b>	<b>Merits Criteria</b>
Special Children Act Proceedings	20.26	Need for Representation 5.4.5
Related Proceedings	20.27	Need for Representation 5.4.5
Other Public Law Proceedings	20.28	<b>Alternative Funding 5.4.2</b> <b>Need for Representation 5.4.5</b> <b>Prospects of Success 11.9.2</b> Reasonableness 11.9.3
Domestic Violence Cases	20.32	Alternative Funding 5.4.2 Alternatives to Litigation 5.4.3 <b>Other Levels of Service 5.4.4</b> Need for Representation 5.4.5 <b>Prospects of Success 11.10.2</b> Cost Benefit 11.10.3
Private Law Children Cases	20.33 to 20.38	Alternative Funding 5.4.2 Alternatives to Litigation 5.4.3 <b>Other Levels of Service 5.4.4</b> Need for Representation 5.4.5 <b>Referral to Family Mediation 11.11.2 Suitability for Mediation 11.11.3 Attempts at Settlement 11.11.4 Prospects of Success 11.11.5</b>

		<b>Cost Benefit 11.11.6</b>
Financial Provision and Other Proceedings	20.38 to 20.58	Alternative Funding 5.4.2 Alternatives to Litigation 5.4.3 Other Levels of Service 5.4.4 The Need for Representation 5.4.5 <b>Referral to Family Mediation 11.12.2</b> <b>Suitability for Mediation 11.12.3</b> <b>Attempts at Settlement 11.12.4</b> <b>Prospects of Success 11.12.5</b> <b>Cost Benefit 11.12.6</b> <b>11.12.7 Availability of private funding</b>
Child Abduction Cases	20.59	None
Foreign Orders and Judgments	20.60	Legal Aid Abroad 11.14.2

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## Key Funding Criteria

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### **20.14 Alternative Sources of Funding (see also 20.20 regarding private funding and 3D-013 regarding the financial eligibility of children)**

1. Family Help (Higher) and Legal Representation may be refused if alternative funding is available to the client or if there are other persons or bodies, including those who might benefit from the proceedings, who can reasonably be expected to bring or fund the case (Criterion 5.4.2) but see para. 5 of 20.28 below regarding professional guardians in specified Children Act proceedings. In the area of public law children cases the most likely sources of alternative funding are local authorities in adoption proceedings and special guardianship applications but the application of criterion 5.4.2 is not restricted to these circumstances.
2. The Criterion refers not only to funding which is available but also to the existence of other persons or bodies who can reasonably be expected to bring or fund the case. In cases where alternative funding and/or parties are an issue Family Help (Higher) or Legal Representation is likely to be refused where no or insufficient information is given regarding the availability of funding and the reasonableness of other persons or bodies bringing or funding the case.
3. Legal Representation may be refused where only limited financial support is available to the client but it is nonetheless considered that there is a person or body, benefiting from

the proceedings or not, who/which can reasonably be expected to bring or fund the case. This is likely to be so if a local authority seeks to restrict its financial support to adoptive or foster parents.

4. Legal Representation is likely to be refused to adoptive or foster parents in adoption proceedings, in circumstances where the local authority places the child and does not oppose the adoption application. Such a refusal is justified as it is reasonable to expect the application for adoption to be funded by the local authority and this also applies to applications for special guardianship. The position is clarified by the Adoption Support Services (Local Authorities) (England) Regulations 2003, SI 2003/1348 Adoption Support Services (Local Authorities)(Wales) Regulations 2005, SI 2005/1512, and guidance on the regulations issued by the Department of Health. More generally where the local authority supports the application which would result or be likely to result in the local authority avoiding care proceedings or other action to ensure the welfare of the child, Legal Representation may be refused.
5. Legal Representation will not be refused (under criterion 5.4.2) on the basis that alternative funding is available to a child arising from the appointment of a professional guardian in specified Children Act proceedings (see W and Others and The Legal Services Commission (formerly The Legal Aid Board), CA, 20 July 2000).

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### **20.15 Over-Representation**

1. Criterion 5.4.5 allows for the refusal of Legal Representation if it appears unreasonable to fund representation, because it is not needed, for example in the light of the existence of other proceedings or the interests of other parties in the proceedings to which the application relates.
2. Legal Representation is likely to be refused on this ground where:
  - (a) it would be reasonable to expect the issue(s) to be sufficiently resolved in other proceedings already in existence, for example, if there are existing private law Children Act proceedings then proceedings under the inherent jurisdiction of the High Court may not be justified; or
  - (b) the interests of the client are such that they are likely to be adequately represented by the interests of another party or parties, for example, where the client's interest is the same or sufficiently similar to that of another party or parties and it would be unreasonable for them to be separately represented. This may arise where a client is seeking to be joined in proceedings under Part IV or V of the Children Act 1989, and it would be reasonable to expect their views to

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be adequately put to the court through evidence given on behalf of another party or otherwise. See also paragraph 20.33, sub paragraph 11 regarding the joinder of children in proceedings.

- (c) The test will also apply in Special Children Act proceedings, and when exercising their devolved powers to grant Legal Representation in these proceedings providers must consider whether separate representation is justified having regard to all the circumstances of the case known at the time of the application for funding. In most cases it will be appropriate for all the children who are the subject of such proceedings to be represented by the same solicitor. Providers should have regard to Rule 3 of the Solicitors Code of Conduct 2007 issued by the Solicitors' Regulation Authority in deciding whether the client requires separate representation, as well as paragraph 5.4 of the Good Practice in Child Care Cases issued by the Law Society. Providers should explain on the CLS APP5 why separate representation is justified (see also paragraph 20.26.15 below).

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### **20.16 Referral to Mediation**

1. In certain circumstances, the client must attend an assessment meeting with a mediator before an application can be made for Family Help (Higher) or for Legal Representation in family proceedings. The requirement to attend on a mediator is covered in Code Procedures C27 to 29. It applies to applications for Family Help (Higher) or Legal Representation in Family Proceedings, which are within the scope of Section 11.11. or 11.12 of the Criteria, other than proceedings under:
  - (a) Section 37 of the Matrimonial Causes Act 1973 (injunctions to prevent and orders to set aside disposal of property)
  - (b) the Inheritance (Provision for Family and Dependents) Act 1975It applies to funding applications whether by way of an amendment to an existing certificate to cover additional proceedings (for example, contact where there is an existing certificate covering ancillary relief) or a separate application for funding).
2. Section 11.11 and 11.12 of the Criteria cover private law family proceedings involving children, or financial provision as well as family proceedings not covered by any other Criterion in Section 11. The scope of the mediation requirement therefore covers the great majority of private law cases coming within the definition of Family Proceedings under the Code. This includes property disputes between unmarried couples under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. Note that although proceedings under the Inheritance (Provision for Family and Dependents) Act 1975 are exempt from the requirement to attend on a mediator there is nothing to prevent mediation taking place voluntarily in such cases or in any family proceedings where the mediator deems the case, the parties and all the circumstances suitable.

3. The scope of the requirement for Family Help (Higher) is the same as for Legal Representation. Therefore the requirement does not apply, for example, to an application for Family Help (Higher), which relates to proposed Inheritance Act proceedings. The requirement is that the client may be required to attend an assessment meeting, to assess whether mediation is suitable to the dispute and the parties and all the circumstances before the application can be granted, unless it appears to the Director or Authorised Solicitor that any of the exemptions apply (Procedures C27.2).
4. The exemptions are as follows (Procedures C29):
  - (a) where it is in the interests of justice that Legal Representation be granted as a matter of urgency and the Criteria for emergency representation are satisfied (whether or not any certificate is in fact granted as an emergency certificate). This exemption therefore applies to applications, which are made as emergencies but granted as full certificates because the applicant is passported financially. It does not apply where an emergency application is refused because the emergency criteria are not satisfied;
  - (b) where there is no mediator available to the client or any other party to the proceedings to hold the assessment meeting. Guidance, which is of general application, appears at paragraph 5 below. The Code allows for the possibility of guidance being issued in individual cases (see paragraph 5(h));
  - (c) where a mediator is satisfied that mediation is not suitable to the dispute because another party to the dispute is unwilling to attend an assessment meeting and consider mediation.

However if a client does not fall within any of the other exemptions and has indicated that they do not wish the mediation service to contact the second party ...

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(throughout this guidance a reference to the “second party” covers the second or other party to the dispute) to establish willingness, then they will be required to attend an assessment meeting with a mediator.

The willingness of the second party will be established by a mediation service attempting to contact them to ascertain whether they would be prepared to attend an assessment meeting. Contact should be attempted by two telephone calls and/or a written letter, depending on the contact details provided. This willingness test may be undertaken by mediators or by appropriately trained and qualified support staff employed by the mediation service.

This exemption does not prevent a client who, after seeing a solicitor, wishes to attend an assessment meeting to obtain further information regarding mediation and its potential benefits from doing so. If they choose to attend an assessment meeting the mediator will assess their suitability and if appropriate only then attempt to contact the second party.

It is likely that, where a second party is unwilling to attend an assessment meeting and consider mediation and the applicant for public funding is therefore exempt from having to attend the assessment meeting, the applicant will then issue proceedings. As a result of proceedings being issued it is possible that the second party will then apply for public funding to oppose the proceedings. If a court date is less than 6 weeks away then the second party will be exempt under the exemption at (d) below.

- (d) where family proceedings (i.e. the proceedings which form the subject matter of the application) are already in existence and the client is a respondent who has been notified of a court date within six weeks of the date of the notification;
  - (e) where allegations of domestic abuse have been made by the applicant against a potential party to the mediation which have resulted in either police investigations or the issue of civil proceedings for the protection of the applicant within the period of 12 months prior to the present application for funding. Details of the abuse and investigation or proceedings should be provided so as to justify the exemption. For these purposes a 'police investigation' will be when a report has been made to the police who have attended the relevant premises or interviewed any parties, whether or not any party has been arrested or charged.
  - (f) Otherwise where the mediator is satisfied that the client has a reasonable fear of domestic abuse from a potential party to the mediation and is therefore unwilling and in fear of participation in mediation with them, it is the responsibility of the mediator to assess whether this exemption applies. If the exemption applies then the mediator will complete the CLS APP7 confirming that the matter is not suitable for mediation. Where there has been domestic abuse in the past but the client is still willing to mediate then the mediation should proceed although the mediator will retain the right to refuse to conduct the mediation if there are significant concerns in regard to the safety of either party or the mediator/s.
5. For the purposes of availability of a mediator under paragraph 4(b) above, a mediator should be treated as not being available where:
- (a) due to any disability, inability or restriction on the client, (ex) partner or other party, he or she is unable to travel to see a mediator. Examples would be where the client, (ex) partner or other party is hospitalised or imprisoned;
  - (b) due to any relevant disability or inability of the client, (ex) partner or other party, mediation is unavailable, e.g. where one of the party's hearing is impaired and there are no mediators available with appropriate facilities;
  - (c) where the mediation service is required to undertake the willingness test and an assessment meeting, the availability exemption will apply where there is no mediator available to hold an assessment meeting within 15 working days of the ...

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date of first contact with the mediation service by the client or their solicitor. If the mediation service is not required to undertake the willingness test then this exemption will apply where there is no mediator available for a meeting within 10 working days after an appointment is sought.

The date of first contact refers to the date that the communication was received by the mediation service and not the date that it was sent by the solicitor or client. The availability exemption only applies where at least two approved mediation suppliers within the prescribed travelling distance have been contacted (see paragraph (d) below) or if there is only one approved mediation supplier, that t they have been contacted;

- (d) The client, the client's (ex) partner or the other party:
    - (i) lives abroad; or
    - (ii) lives further away from a mediation service than a 45 minute journey time (each way) by the fastest method of transport reasonably available to them;
  - (e) the mediation concerns financial issues and either the client or (ex) partner is bankrupt and cannot deal with their own financial affairs;
  - (f) the parties are in agreement and there are no issues to mediate on;
  - (g) the whereabouts of the second party are unknown, and reasonable attempts to locate them have been unsuccessful;
  - (h) there is any other reason accepted by the Regional Office why the client should not be referred to a mediation service. When requesting confirmation that the client may be exempted the solicitor must fax their Regional Office with form CLSAPP7 and details of the reason(s) for exemption. Where this is confirmed, a reference number will be issued (which will be specific to that individual case) which must be entered in the CLSAPP7.
6. Examples of circumstances which may justify an exception under section (h) above include that the only subject of the dispute is parentage (paternity), or the proceedings are nullity proceedings.
7. Subject to paragraph 8 below, where there has been a previous, negative assessment by a mediator of suitability of the parties and the dispute for mediation that assessment may be relied upon and submitted to the Regional Office together with a fresh form CLS APP7 (not completed by the mediator) when making an application for Family Help (Higher) or Legal Representation (including by way of an amendment but excluding Emergency Representation) but only where:
- (a) the application is in respect of the same dispute; and
  - (b) on the information available it appears to the applying solicitor that there has been no material change in the circumstances of the parties or dispute (except as to financial eligibility) so as to affect suitability for example the client or other party would now be able to, or is geographically near enough to attend on a mediator; and

- (c) the assessment was made within four calendar months of the application.
8. No fresh assessment of suitability is required where an application is made to amend an existing certificate of Family Help (Higher) to a certificate of Legal Representation in respect of the same dispute.

Solicitors should ensure that clients are made aware throughout the process that mediation may be available as an option to resolving their dispute. Research has shown that many clients benefit from mediation later on in the process even if it was unsuitable at the outset.

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### 20.17 Prospects of a Successful Outcome

1. Family cases are not about winning and losing, but are about obtaining a successful outcome for the client and any relevant children. Whereas many Non Family cases ...

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result in all or nothing results for one party or the other the aim of Family funding is to achieve results which are fair and acceptable to all parties where possible. It will often be possible to settle Family cases in a way which constitutes a successful or positive outcome for all parties – in particular through mediation, negotiation or in court conciliation/CAFCASS dispute resolution.

2. The prospects of success Criterion do not apply to Special Children Act proceedings or related proceedings. For other Public Law Children cases a prospects of success Criterion applies only if the client is making or supporting an application or appeal. If the client is only defending proceedings, for example the natural parent resisting an adoption order, no prospects of success Criterion applies but the case is still subject to the general requirement of reasonableness (Criterion 11.9.3).
3. In Private Law Children cases the prospects of success Criterion for Family Help (Higher) and Legal Representation is very important and will be strictly applied by the Commission's regional offices. When Family Help (Higher) or Legal Representation is refused because the case does not have sufficient prospects of success, that does not however mean that the client is left without a remedy. Often refusal will be on the basis that it is more appropriate for any further assistance to be given through services such as Legal Help or Family Help (Lower) which do not have contested court proceedings as their emphasis.
4. Where merits criteria apply the minimum prospects of success required are:
- ● 1      borderline or unclear for Public or Private Law Children cases and Domestic Violence i.e. Legal Representation will be refused where

prospects of success are poor. This approach reflects the priority given to these areas of work;

- ● 1 50% in Financial Provision and Other proceedings (except where the case has overwhelming importance to the client or a significant wider public interest, which in the family context will be very rare).  
Overwhelming importance is a stringent test and is more than merely of importance or significance to the client. Legal Representation must be refused for financial and other cases which have poor, borderline or unclear prospects of success.

5. A key issue is what should be regarded as a “successful outcome” in a Family case. As the definition of “prospects of success” in paragraph 2.3 of the Funding Code makes clear, guidance can give examples of what may constitute a successful outcome for different types of proceeding. Subject to the detailed guidance on individual specific case types set out later in this section, the following outcomes should be treated as successful for the main categories of Family case (see also the table at 20.13 regarding merits criteria for Legal Representation):

<b>Case Type</b>	<b>Successful Outcome</b>
Public Law Children cases	Obtaining the order sought or winning the appeal, or securing a settlement to similar effect.
Domestic Violence	Obtaining the order sought or securing an undertaking or other settlement which provides the applicant and/or other person with significant protection from harm.
Private Law Children cases	Obtaining what the client would regard as a significant improvement in the arrangements for the children.
Financial Provision and Other proceedings	Obtaining what the client would regard as a significant improvement in financial or other arrangements.

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6. In deciding what is a “significant improvement” all the client’s circumstances must be taken into account; what is significant for one client may not be so for another. The test must, however, be applied objectively so that one only considers the prospects of success of a change which can reasonably be considered to be a significant improvement on the current position.

7. The position of the other party in the proceedings will often be crucial in deciding whether an application has sufficient prospects of success to justify public funding. If the (potential) other party has refused to engage and makes no proposals in either a money or a children case it will usually not be difficult for the applicant to show that they have good prospects of improving on the current position. However, once the other party engages and makes proposals prospects of success must be considered in the light of what is on offer.
8. Both money and children disputes often raise a whole range of issues between the parties. A party will often make offers which are acceptable to the other party on some issues, but not on others. Before Legal Representation can be granted it is necessary to show, not merely that there are good prospects of success in relation to any one particular issue, but that there are sufficient prospects of success in securing a significant improvement in arrangements overall.
9. In cases involving children, for example, notice must be taken as to whether the court will give significant regard to the child's wishes (because of his or her age or understanding) and whether this will affect the likely outcome. It is helpful to consider prospects in the light of the checklist at section 1(3) Children Act 1989 as well as the current relevant case law in the particular subject area.

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#### **20.18 Cost Benefit**

1. Reference should be made to the General guidance on the types of cost/benefit criteria set out in Sections 4.5 – 4.9, pages 113 to 117 Volume 3 of the Funding Code Decision Making Guidance. Further guidance appears in the relevant sections of this Family Decision Making Guidance and is cross-referenced here. Note also that, in the usual way, the solicitor is required to report to the Director in certain circumstances once a certificate has been granted. These include the client declining to accept any offer to settle, an offer to mediate any issue in the proceedings and any other offer of settlement the solicitor considers may be reasonable as well as the issue of a certificate to the other party (Funding Code Procedure C43.2). The offer to settle or to mediate does not need to be reasonable to be reported – a report is mandatory and can be made by way of a letter. Such a report may lead to the certificate being limited as to scope and/or costs or to the issue of a show cause letter with a view to discharge. In this context the Commission accepts that in family cases it is not necessary to report every exchange in ongoing negotiations but once an offer has been made on all the issues between the parties (sufficient to constitute a settlement package to resolve the case) then this should, if declined, be reported with sufficient information to enable the regional office to review the continued funding of the case.
2. There are four cost/benefit tests applicable to the Family Category of work. Legal Help has a specific cost benefit test – the ‘sufficient benefit’ test. Family Help has a cost benefit

test by reference to a significant family dispute and a reasonable private paying client and, in addition, the various types of case are subject to different cost benefit tests. The four tests are as follows:-

#### **Sufficient Benefit Test**

3. There must be sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out.

#### **Significant Family Dispute**

4. The client must require ongoing help in relation to a significant Family dispute (see also paragraph 10.55 of the Family Specification). Family Help (Lower) may not be granted for those Family Disputes:
  - (i) Which do not require or involve more than one meeting with the Client, whether or not followed up by written or telephone advice;
  - (ii) Where the Client's primary concern is with processing a divorce, judicial separation or dissolution of a civil partnership and any associated property or children disputes do not satisfy the criteria for Family Help;
  - (iii) Where the dispute, if unresolved, would be unlikely to lead to family proceedings;
  - (iv) Where the primary issue is a change of name or advice about a will;
  - (v) Where the client requires only general advice about the dispute and methods of dispute resolution, such as Family Mediation; or
  - (vi) Where the issue relates to child support only and the Child Support Agency has jurisdiction.

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#### **Reasonableness – applicable to other Public Law Children Cases**

5. An application for Legal Representation may be refused if it appears unreasonable for funding to be granted, having regard to the importance of the case to the client and all other circumstances.

#### **Cost Benefit Criterion – applicable to Domestic Violence Cases**

6. Legal Representation will 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.

**Private Paying Client – applicable to Private Law Children Cases and Financial Provision and other Proceedings**

7. Legal Representation and Family Help will be refused, unless the likely benefits to be gained from the proceedings for the client justify the likely costs, such that a reasonable private paying client would be prepared to take or defend the proceedings in all the circumstances.
8. The chart below lists the levels of service with their specific test and the applicable test to each of the eight types of Family case under the Funding Code.

<b>LEVEL OF SERVICE</b>	<b>APPLICABLE TEST</b>
Legal Help	Sufficient Benefit test – Criterion 5.2.1
Family Help	Cost benefit (Private Paying Client) test – Criterion 11.3.2 and Significant Family Dispute – Criterion 11.3.1

<b>PROCEEDINGS</b>	<b>APPLICABLE TEST</b>
Special Children Act Proceedings	No applicable criteria
Related Proceedings (to Special Children Act)	No applicable criteria
Other Public Law Children Cases	Reasonableness – Criterion 11.9.3
Domestic Violence Cases	Proportionality test – Criterion 11.10.3
Private Law Children Cases	Private Paying Client – Criterion 11.11.6
Financial Provision and other Proceedings	Private Paying Client – Criterion 11.12.6
Child Abduction Non Means/Non Merits	No applicable criteria
Foreign Orders and Judgments	Legal Aid Abroad – Criterion 11.14.2

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**20.19 Attempts at Settlement**

1. This Criterion applies to applications for Family Help (Higher) and Legal Representation in Private Law Children cases and in Financial Provision or Other proceedings. The Criterion, which is set out at 11.4.4, 11.11.4 and 11.12.4 is in the following terms:

“Legal Representation may be refused unless reasonable attempts have been made to resolve the dispute without recourse to contested proceedings, through negotiation or otherwise.”

2. This Criterion reflects the approach that contested litigation in Family cases should be seen as a matter of last resort. Where Family Help (Higher) or Legal Representation is refused under this Criterion the usual recourse would be to progress negotiations further under Family Help (Lower).
3. The Criterion is discretionary. In particular Family Help (Higher) or Legal Representation will not be refused on the grounds of failure to attempt settlement if the client is genuinely and urgently in need of representation and that any delay will cause a significant risk of miscarriage of justice, or unreasonable hardship to the client, or irretrievable problems in handling the case, or there will be a risk to the life, liberty or physical safety of the client or his or her family or the roof over their heads. In such case a grant of emergency representation may be justified to obtain any essential interim order but any grant should be limited to obtaining the protection needed. Funding for the substantive proceedings should only be granted where reasonable attempts at settlement have been made and have been unsuccessful.
4. Attempts at settlement can take a range of different forms depending on the needs of the client and the case. Settlement attempts could include any combination of the following steps:
  - ● the client attempting to discuss the issues with the other party directly (this is unlikely to be appropriate if there is a history of abuse between the parties);
  - ● written proposals to the other party;
  - ● an offer to meet to discuss the issues, with or without legal representatives present;
  - ● an offer to resolve the issues through mediation;
  - ● Court based dispute resolution at the Financial Dispute Resolution or any First Hearing Dispute Resolution Appointment.
5. Before Family Help (Higher) or Legal Representation will be granted it will usually be necessary to show that the client’s legal representatives have made attempts to settle the dispute, regardless of any unsuccessful attempt(s) by the client in person. In many cases a letter from solicitors will produce a response when direct attempts by the client do not. The Law Society’s Family Law Protocol gives guidance on how solicitors should approach such correspondence so as to reduce the risk of the dispute becoming adversarial.

6. Once attempts at settlement have been made the other party must be allowed a reasonable time to respond and engage in a settlement process before Family Help (Higher) or Legal Representation can be granted. Whilst there can be no hard and fast rules, as a general guideline:

- ● a respondent should be given 21 days to respond to a solicitor's letter making settlement proposals or offering a meeting or mediation;

- ● where the respondent requests more time to consider an offer or settlement process an application will be refused unless the applicant demonstrates that it would not be reasonable to allow more time. Generally respondents must

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be given sufficient time to consider any proposals put forward and to obtain their own legal advice where appropriate. However, if there is good reason to believe that the respondent is simply seeking to delay matters and is not genuinely engaging in the process, a grant may be justified.

.7. Note also the obligations to report during the lifetime of a certificate – see paragraph 20.18, sub paragraph 1 above.

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#### **20.20 Private Funding in Ancillary Relief and Other Financial Cases**

##### **Scope of the Power**

1. With effect from 3 October 2005, the Funding Code criteria were amended to add a criterion, 11.12.7, applying to applications for Legal Representation in cases falling under section 11.12 of the Code. This includes ancillary relief proceedings as well as disputes between unmarried couples under the Trusts of Land and Appointment of Trustees Act 1996 and cases under the Inheritance (Provisions for Family and Dependents) Act 1975. It provides a discretionary refusal 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.

2. It does not apply to applications for Family Help (Higher), but does apply to applications to extend a General Family Help or Family Help (Higher) certificate to cover Legal Representation, and to certain applications to extend the scope of Legal Representation certificates.

### **Transitional Provisions**

3. The criterion applies to an application to amend an existing General Family Help or Family Help (Higher) 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. It does not apply to levels of service granted before 3 October 2005. Therefore, if a Legal Representation certificate was in force as at 3 October 2005 (for example, a certificate granted as Legal Representation to cover domestic violence proceedings), the criterion does not apply to applications to extend its scope.
4. However, if Legal Representation is granted after 3 October 2005, then any subsequent application in relation to financial provision will be subject to the criterion.

### **Mixed Cases**

5. The 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 Family Help (Higher), i.e. 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 Family Help (Higher) type limitations (i.e. the certificate would have been granted as Family Help (Higher) if it were covering financial provision only). In those circumstances, the criterion is technically applicable but should not, as a matter ...

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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 Family Help (Higher) level. However, a subsequent amendment to such a certificate to cover a contested final hearing for financial provision would be subject to the criterion subject to the transitional provisions above.

### **Approach to the Criterion**

6. The criterion applies 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. 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 – i.e. available capital assets;

- (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 – i.e. borrowing potential of the client; 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 – i.e. evidence of availability of loan.
7. In some courts an early final hearing may be listed after the Financial Dispute Resolution hearing. In cases where private funding may be an option, future funding arrangements should be investigated and discussed with the client urgently following the Financial Dispute Resolution hearing to avoid delay.

### **Available Capital Assets**

8. Question (i) is essentially concerned with cash and other readily available assets, such as stocks and shares. The client would never be expected to sell their home to pay legal costs and the possibility of borrowing against the security of a home or other property will only be taken into account 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, e.g. loss of interest on a term deposit, does not automatically render the assets unavailable to the client. This issue is particularly relevant to Inheritance Act cases where the estate in dispute may be an appropriate source for funding the legal costs.
9. 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 above £3,000 should first be used, but thereafter a further application for public funding can be made. This can be achieved in either of the following ways:
- (i) by the discharge of the certificate, with a further application for public funding when the available assets are exhausted; or
  - (ii) by the certificate remaining in force on condition that no further costs may be claimed under the certificate until the available assets have been applied towards the ongoing costs. In those circumstances we give authority under section 22(2)(b) of the Access to Justice Act 1999 for the solicitor to receive  
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payment out of those assets while the certificate is still in force, provided the work done continues to be charged at legal aid rates.

### **Borrowing Potential**

10. The 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.
11. As a starting point, refusal will be considered having regard to the borrowing potential of the client where clients are paying or would be paying contributions of £60 per month or more. This equates to a disposable income of £501 per month, as calculated under Financial Regulations. At that level of income, it is appropriate to investigate whether levels of contribution to public funding are comparable to interest payments on a loan sufficient to cover the private client legal costs of the remainder of the case.
12. 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 on the Commission's CIS computer system. Where no certificate is in existence, means should be assessed in the usual way and no decision made on the private funding criterion until disposable income has been determined, refusal being considered where the disposable income exceeds £481 per month.
13. 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 criterion. Under those circumstances, the client could 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. Existing contribution payments could be taken into account as a ground for concluding that private funding was not available to the client if there were good reason for the certificate to continue in the particular circumstances.
14. Where assessed contributions are £60 per month or higher, the client will not automatically be required to seek a private loan. The criterion is discretionary and all the circumstances of the case must be taken into account. For example, if the client has substantial financial commitments such as existing loan repayments, these would not usually be taken into account in calculating disposable income for legal aid purposes, but might well make it impractical for the client to secure further borrowing. Such information might therefore justify continuation of funding.

## Evidence of Availability of Loan

15. Where the disposable income of a client, as above, suggests that s/he ought to be in a position to obtain private funding, any evidence produced by the client to show that such funding for some reason is not available to the client must still be taken into account. 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. Funded clients would not be expected to explore tailor-made finance arrangements specifically set up to cover ancillary relief costs. Similarly, a client would not be expected to approach a wide range of lenders, some of whom may offer punitive interest rates. The client should instead make genuine attempts to secure ...

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borrowing from two or more reputable High Street bank and building society lenders either by telephone, internet or face to face. Details of such attempts should be given on the application form, specifying why any application for a loan was refused, if this is known.

16. Where private funding is not in reality available for the client, Legal Representation will be granted, provided other means and merits criteria are satisfied. Where private funding is offered but the client is unwilling to accept the terms of the offer, the grant of Legal Representation will be considered if the best available deal would result in interest payments that are significantly (i.e. 10% or more) higher than contributions due under the certificate.

## Administration

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### 20.21 Family Work Under the Unified Civil Contract

1. All work falling within the Funding Code definition of family disputes or proceedings which consists of Legal Representation, or Family Help (Higher) is defined as "Licensed Work" under the Funding Code. Licensed Work may only be carried out by persons authorised to supply such services under the unified contract with the Commission (Procedures A2(ii) and 4.1).
2. Thus Family Help (Higher) and Legal Representation in family proceedings can only be carried out by those with a unified contract with the Commission which licenses them in the family category.
3. Note that Family Mediation is "Other Grant or Contract Work" under the Funding Code, and therefore can only be carried out by approved suppliers with a specific contract with

the Commission for the provision of Family Mediation. Family Mediation is governed by the Family Mediation Specification, which is part of the Unified Contract and is therefore subject to the Unified Contract Standard Terms. However, the Family Mediation Specification is separate from the Civil Specification which governs Controlled and Licensed Work.. All Licensed Work under the Commission's unified contract including Family Help (Higher) and Legal Representation in family proceedings is governed by Part C of the Code Procedures. All applications for funding will be authorised by way of the grant of a certificate to carry out the work. The application for a certificate must specify the solicitor who is proposing to act for the client, and in the case of Licensed Work the solicitor must be a person permitted to provide the services under the terms of the unified civil contract (Procedures C4).

5. The effect of these rules is that only suppliers with a relevant contract from the Commission can provide funded services in relation to family disputes or proceedings. A contract which licenses a supplier to provide work in the family category will authorise the provision of Legal Help, Family Help and Legal Representation in relation to family disputes or proceedings.
6. In order to qualify for a civil contract to provide Licensed Work suppliers must either be a Specialist Quality Mark Supplier or have passed a preliminary audit in the family Specialist Quality Mark category and have applied to go on to the Commission's Bid Panel. Having a licence to carry out certificated work will not authorise the solicitor to provide Legal Help or Family Help (Lower) in relation to family disputes or proceedings unless the contract authorises matter starts for those levels of service, which count as Controlled Work under the contracts.
7. Any application for funding for a family dispute or proceeding which is made to a supplier without an appropriate contract which authorises the provision of those services will be refused (Criteria 4.6 and 4.7).

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**Devolved Powers8. Licensed Work in the Family category is subject to the following devolved powers:**

- (a) To grant Emergency Family Help or Emergency Representation – Guidance is at section 12 of the Funding Code guidance;
- (b) To grant Legal Representation in Special Children Act proceedings (as defined in section 2.2 of the Funding Code) – see paragraphs 10.32-10.35 of the Family Specification and 20.26 below;
- (c) to amend substantive certificates – this is a limited power to increase the limitation on a certificate for Legal Representation – see section 24.4 of the Code guidance. This power does not allow a certificate to be amended from General Family Help or Family Help (Higher) to Legal Representation. (Note that paragraph 24.4.4 of the

guidance specifies that only proceedings under certain statutes with the Family category are within the scope of this devolved power.)

**9. Most devolved powers are subject to the reporting requirements set out in the Funding Code Procedures, under which the relevant means and merits forms must be submitted to the regional office within five working days after exercising the devolved power. Application Forms**

10. The following application forms must be used when applying to the regional office:

CLS App3*	All applications for Family Help (Higher)/All applications for Legal Representation except for non means, non merits Special Children Act Proceedings.
CLS App5	Applications for non means, non merits tested Special Children Act Proceedings and Related Proceedings

\*Note that Form CLS App3 must be submitted together with CLS App7 where appropriate which covers the suitability of the case for Family Mediation in relation to applications for Family Help (Higher) and Legal Representation (see guidance at section 20.16).

11. At the conclusion of a case or part of a case forms CLS Claim1, CLS Claim 1a or CLS Claim2 should be submitted with the claim for assessment of costs or payment of costs following a detailed assessment. CLS Claim2 applies where costs are to be met in part or in full by another party. Note that because Family cases often have several different elements proceeding simultaneously or consecutively it will often be appropriate for more than one claim form to be submitted under a single certificate. Whenever a claim form is submitted, as well as all other essential information, the outcome of the case for the aspect of the case which has been concluded must be given. As a general rule a separate claim form may be submitted in the following circumstances:

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- (a) where a certificate covers any combination of Domestic Violence, Private Law Children proceedings and Financial proceedings, at the conclusion of each of those elements of the case; or
- (b) whenever the court has ordered a detailed assessment of costs.

## **20.22 Multiple Proceedings**

### **General**

1. It is often the case in family matters that there are different issues to be resolved at the same time. The question that arises is whether there should be one certificate to fund all proposed or actual family proceedings to resolve all matters arising out of that family relationship (and any related issues) or whether there should be separate certificates.

### **Proceedings**

2. In general everything proceeding through the court under a particular action number is treated as one set of proceedings. If former spouses are involved in proceedings under the Matrimonial Causes Act 1973 in relation to their assets and there is an application under the Children Act 1989, the court should assign the same case number to both aspects of the case. Under Rule 2.40 Family Proceedings Rules 1991 it is bound to do so if a “cause is pending”. For this purpose a cause is pending for a period of one year after the last hearing or judicial intervention in the cause.
3. The same set of proceedings also includes an appeal from a decision made on an application in the set of proceedings and enforcement action taken to implement orders made in the proceedings.

### **Form of Certificate**

4. The certificate will specify separately each application before the court even if these form part of the same set of proceedings. The funding tests will be applied to each application separately and different limitations may be attached to different applications that are funded.
5. By virtue of Code Procedure C35 it is possible for more than one set of family proceedings to be covered on one certificate. This may arise, for example, where ancillary relief under the Matrimonial Causes Act and/or Children Act proceedings follow injunction proceedings under the Family Law Act 1996. Where more than one set of private law family proceedings arise out of the same family relationship these proceedings must be contained on the same, single certificate unless the Director is satisfied that there are exceptional circumstances (Procedure C35.6). In this context a certificate relates to private law proceedings if it is issued under sections 11.4, 11.10, 11.11 or 11.12 of the Funding Code (i.e. Family Help (Higher), domestic violence cases, private law children cases or financial provision and other proceedings). This is because their outcome could be relevant to the conduct of other application(s) to the court, and it is appropriate for them to be covered by one certificate so that the case as a whole can be considered when looking at the Funding Code tests that apply to the case. In addition, relevant information is more readily available to enable the tests to be applied.

### **Separate Certificates for Means / Merits and Non-Means/ Non-Merits cases**

6. It is appropriate for a separate application for funding to be made for private law proceedings and for funding in respect of any Special Children Act Proceedings

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involving the same children, so that the public law part of the case which triggers the special funding arrangements attracting non-means and non-merits tested funding is kept separate. The same rule would apply to other applications for which special funding arrangements are in place – see paragraphs 20.59, 20.60 and 20.61.

### **Statutory Charge**

7. The statutory charge applies to property recovered or preserved in the proceedings, irrespective of how many certificates have been issued to cover the different aspects of the proceedings. This provides the funded client with clarity as to what aspects of his/ her case are potentially caught by the charge and focuses the client on the costs implications of their case. Furthermore, only one charge needs to be registered. If the court issues (or should have issued) the applications in the matrimonial proceedings, the costs of the whole dispute give rise to a charge on property recovered or preserved under the Matrimonial Causes Act 1973.
8. If there is a single certificate, but representation in separate proceedings (as opposed to a single set of proceedings) is authorised under it, the charge will not apply across proceedings unless they are settled as part of a package, heard together or consolidated or otherwise inextricably linked (*Hanlon v Law Society* [1981] AC 124. It will be necessary for costs to be carefully apportioned by the solicitor to the appropriate proceedings if they are separate.

3C-188

### **20.23 Repeat Applications**

1. Funding Code Procedure C35.1 provides that each certificate shall cover only one set of proceedings unless the certificate is for family proceedings or the Director considers that two or more sets of proceedings are so closely related that they should be covered under a single certificate. However, Procedure C35.6 provides that a client may only have one certificate relating to private law family proceedings in force at any time unless the certificates relate to different family relationships or the Director is satisfied there are exceptional circumstances (see paragraph 20.22, sub paragraph 5 above).
2. It is in the nature of some family proceedings that repeat applications might be made for funding, for example in private law children proceedings, where there is a change of

circumstances, a fresh issue needs to be resolved or enforcement proceedings are required. One certificate must be used to cover such repeat applications where they involve the same parties and concern the same child/ren even if the issues are different (e.g. contact difficulties arise where an ancillary relief certificate is in force) but not where the basis of funding is different so that the proceedings do not fall within private law family proceedings as defined at Funding Code procedure C35.6 (e.g. there is a means and merits tested certificate in force and non means, non merits tested cover is required or vice versa).

3. Whether an existing certificate can be amended or a previous certificate has come to an end and a fresh application is necessary, details of previous public funding and a succinct but complete history of the case must be provided with the application for further funding, including copies of previous court orders and, if available, any CAFCASS or expert reports, that have already been made and which are relevant to the new work envisaged, including in any court proceedings. Care should be taken to ensure that work done under any earlier legal aid certificate(s) is taken into consideration when applying the Funding Code criteria. The Regional Office will also have regard to the client's funding history as disclosed in the LSC computer system. Further funding may be refused if it appears unreasonable to grant funding in the light of the conduct of the client in connection with any proceedings (Funding Code criterion 4.10).

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4. Furthermore, the history of the case will be relevant to the cost benefit test for Family Help (Higher) (Funding Code criterion 11.3.2) and to the tests of prospects of success and cost benefit for Legal Representation in private law children cases (Funding Code criteria 11.11.5 and 11.11.6).
5. When considering prospects of success previous litigation between the parties concerning the same or similar issues will be taken into account. Funding may be refused where in all the circumstances the client's application or opposition has insufficient prospects of success.
6. When considering cost benefit it will be particularly important to consider the issues in dispute and the total costs that have already been incurred as well as future costs that are anticipated to be incurred to resolve the dispute overall. The benefit to be gained from the further proceedings will take into account what has been achieved so far, the distance between the respective positions of the parties and the likely outcome of the further proceedings. For example, funding is unlikely to be justified around frequency of contact or staying contact where these issues have previously been agreed or dealt with by the court and there is no change of circumstance sufficient to justify further court intervention such as likelihood of harm to the relevant child.
7. In private law children cases it may not be appropriate to apply to the Court for a further order in similar or identical terms to an existing order, if the difficulty lies with enforcement and it would be more appropriate for the court to deal with that issue.

8. Where there is a previous history in the case and there has been previous public funding consideration will be given to limiting the scope of any funding granted so as to focus on greater consideration of alternative dispute resolution. Applications for Family Help (Higher) or Legal Representation may be refused on the basis that mediation is more appropriate (Funding Code criteria 11.4.2 and 11.11.3). General Family Help (Higher) may, where granted, be limited if the other party will not engage, up to any First Hearing Dispute Resolution Appointment.

### 3C-189

#### **20.24 Conveyancing**

1. If the court order in question is not specific, the cost of conveyancing work necessary to give effect to the terms of a court order can be covered by the certificate. This applies equally to consent orders and work necessary to implement an order but will only be the case where the scope, including the limitation applied in the particular case, allows for such conveyancing and implementation work.
2. It is always necessary to interpret any relevant court order to ensure that any necessary amendment is obtained.
3. A specific amendment to the certificate in relation to conveyancing will only be justified where:
  - (a) the conveyancing is necessary and arises directly from a settlement which was itself reached with the benefit of public funding under a certificate; and
  - (b) it is reasonable for the work to be publicly funded.

This test is unlikely to be met if funds are available from the proceeds of sale or can be made available by borrowing or otherwise. An amendment to an existing certificate is unlikely to be justified solely to cover conveyancing work when the client had not been funded for ancillary relief. Note also that the certificate will, if amended, only extend to legitimate solicitor disbursements (e.g. search fees) as opposed to client expenses (e.g. estate agents' fees and stamp duty).

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### 3C-190

#### **20.25 Enforcement**

1. In the absence of appropriate cover an amendment is necessary. This will always be the case in relation to enforcement work which will not be covered in the absence of an amendment specifying the type of enforcement proceedings which are covered.
2. A certificate (or amendment) granted for the purpose of enforcing an order for ancillary relief or costs will specifically state the process (or processes) of enforcement to be adopted and will be regarded as covering one application for enforcement only for the process or processes specified. Certificates and amendments will not be granted where it

would be reasonable to expect the Child Support Agency to enforce (Criteria 5.4.3 and 11.12.5).

3. Legal representation is available for proceedings for or consequent upon the issue of a judgment summons in the county court. However, applications to take or defend such proceedings will only be granted where that is justified in all the circumstances of the particular case—of particular relevance to applications to take proceedings are the need for representation (Criterion 5.4.5) and cost benefit (Criterion 11.12.6). Although applications to take proceedings will be refused if the prospects of success criterion (Criterion 11.12.5) is not met, applications to defend/oppose proceedings will not be refused on that basis where there is a likelihood of loss of liberty.
4. In determining any application or amendment to take proceedings for committal relevant factors would include the extent of any alleged breach, the likely benefit to be obtained and the likelihood of success in the proceedings given all the facts and circumstances of the case (Criteria 11.10.2 and 11.10.3)—see also 20.18, sub paragraph 5 which gives the same guidance regarding domestic violence cases.
5. In determining any application to be represented in (i.e. defend/oppose) committal proceedings the likelihood of loss of liberty will suffice to meet the cost benefit criterion (Criterion 11.10.3) even where the breach is admitted.
6. A certificate issued to either an applicant for committal or a respondent to such an application extends to representation on the respondent's production before the court following the exercise of a power of arrest.
7. Asking for a penal notice to be endorsed on an order is within the scope of a certificate covering representation in the proceedings and no specific amendment to the certificate is therefore required to cover this step.

## **PART B – PUBLIC LAW PROCEEDINGS**

### **20. Children and Family**

#### **3C-191**

##### **20.26 Special Children Act Proceedings**

###### **General Approach**

1. Special Children Act proceedings are defined in section 2.2 of the Funding Code Criteria. They include proceedings under section 31 of the Children Act (for a care or supervision order), section 43 (a child assessment order), section 44 (an emergency protection order) and section 45 (extension to discharge of an emergency protection order).

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2. Because of the nature of these proceedings Legal Representation will be granted provided the relevant Criteria in section 4 of the Funding Code are satisfied. This means that

children, parents and those with parental responsibility (including delegated parental responsibility under s2(9) Children Act 1989) will be granted funding without reference to means, prospects of success or reasonableness. However, for applications made on or after 1 October 2007 criterion 5.4.5 (the Need for Representation) applies. This criterion ensures that parties are not unnecessarily separately represented – see paragraphs 13 to 15 below. The same will apply to a child brought before the court under section 25 of the 1989 Act (use of accommodation for restricting liberty i.e. a secure accommodation order) who is not, but wishes to be, represented before the court. However, full representation will not be necessary if the child is already represented in criminal proceedings to which the section 25 application relates as the criminal legal aid order will cover those section 25 proceedings. Delegated parental responsibility is not required to be in written form but it is reasonable to expect it to be evidenced by a past course of conduct on the part of the parent sufficient to confirm a delegation. Where the solicitor is applying on behalf of a person to whom parental responsibility has been delegated he or she must attach to the application written details of the delegation, its timing and specific past exercises of the delegation so that it can be confirmed that the delegation has not been put in place merely to secure non means, non merits tested funding. A local authority will not be treated as having delegated parental responsibility by placing a child. Where a sufficient explanation of the past delegation is not submitted the application will be refused as it will not fall within the definition of Special Children Act Proceedings and, as a consequence, a non means, non merits tested certificate cannot be issued.

3. Non means non merits test cover is not available to those who are applying to be or have been joined in such proceedings nor to other Children Act proceedings (see para 20.27 regarding related proceedings and other Children Act proceedings).

#### **Scope of certificate**

4. Usual steps involved in the conduct of the case will be covered by the certificate eg attendance at directions hearings. As well as the application for which the certificate is granted a certificate also covers representation as to:
  - a) an interim order including an application for directions under section 38(6) Children Act 1989;
  - b) applying for directions and their variation;
  - c) contact and the refusal of contact – on the making of an emergency protection or care order, but not subsequently;
  - d) an application for a search warrant under section 48 in emergency protection order cases;
  - e) the extension or discharge of an emergency protection order in emergency protection order cases;

- f) proceedings in relation to an exclusion requirement, e.g. in the event of a power of arrest being exercised or a variation or discharge of the order being sought by the excluded person; and
  - g) defending an appeal against an interim order.
5. However, the certificate will not include applications under section 91(14) to restrict further applications without leave nor, after the principal proceedings have been concluded, representation on applications for contact or refusal of contact.
6. Certificates in Special Children Act proceedings will not usually be limited in scope short of the final hearing in the substantive proceedings (e.g. for a care or supervision order). This reflects the absence of a merits test and an application for a fresh means and merits tested certificate would need to be made for any proceedings following a care or supervision order. The proceedings are governed by the Children (Allocation of Proceedings) Order 1991 and will not specify the court covered although they must contain a costs limitation. Representation is therefore permitted in all levels of court in accordance with the Order.
7. If non means, non merits proceedings are followed by private law proceedings or other proceedings outside the definition of Special Children Act Proceedings (including any further consideration of the public law case by the court or any appeal) the existing certificate will not be amended. A separate means and merits tested application will be required as both the Criteria in section 4 of the Code, the General Funding Code (except for Criteria 5.7 and 5.4.6) and the Family Criteria in section 11 of the Code will be applied. In addition the public law proceedings will be kept separate from any operation of the statutory charge. If emergency protection order  
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- proceedings are followed by an application for a care order) a separate non-means, non-merits tested certificate should be applied for. Where a subsequent application for a secure accommodation order is made the certificate may be amended to cover the second set of proceedings and no separate application for funding should be made (but see also paragraph 20.28, sub paragraph 3 below). No amendment will be required where a certificate for a care order has been issued and an application for a supervision order is made or vice versa.
8. Where proceedings are concluded with a different type of order, the certificate may also cover the proceedings (e.g. public law care proceedings are concluded with a private law section 8 residence order, applied for by another party or made on the court's own motion, or an application for a child assessment order is treated as an application for an emergency protection order). However, specific cover (either in the certificate or by amendment) will be needed to make (but not oppose) an application by an individual party for a section 8 order in care or supervision proceedings.

### **Amendment of certificates**

9. An application for amendment may be refused if the proceedings for which cover is sought are not sufficiently closely related to the proceedings in respect of which non means, non merits tested funding is available (in which case a separate application must be submitted), see also paragraph 20.27 below regarding related proceedings. A certificate also will not be amended to cover proceedings other than Special Children Act proceedings or related proceedings.
10. An amendment will be refused if it is for a change of solicitor which is not considered justified or which is sufficient to trigger the show cause procedure (Procedures C55.1) on the basis that the client is requiring the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the fund (Procedures C53.4). A certificate will also not be amended or a fresh certificate granted in circumstances where a child wishes to instruct a new solicitor direct unless the court has already considered this.
11. An existing certificate for Special Children Act Proceedings will not be amended to cover an appeal against a final order. An application should be made for a separate certificate so that the non means, non merits tested part of the proceedings is kept separate. Defending an appeal against an interim order is within the scope of an existing certificate but an amendment is required to appeal or cross appeal an interim order.

### **Form of applications**

12. Applications for Special Children Act Proceedings are made on a CLS APP5. Previous costs incurred for advice before the commencement of proceedings can be claimed under Legal Help and/or, in appropriate cases, Family Help (Lower) (see Family Specification para 10.29). If proceedings have been commenced before the solicitor receives instructions then he or she will not need to use Legal Help or Family Help (Lower) as cover will be immediate. Applications for Legal Representation cannot be made until proceedings have been issued.

### **Devolved Powers**

13. Unless otherwise notified by the Commission, the solicitor has the devolved power to grant Legal Representation in Special Children Act Proceedings (as defined at section 2.2 of the Funding Code) and related proceedings – see Family Specification paras 10.32 and 10.43. This devolved power replaces the previous deeming provision in relation to work done prior to the issue of a certificate. The solicitor must, of course, only exercise the devolved power when all relevant Funding Code Criteria are satisfied, including whether separate representation is justified (Funding Code Criterion 5.4.5).
14. The devolved power cannot be exercised if Legal Representation has previously been refused for or withdrawn from the client earlier in the same proceedings.

15. Where the solicitor grants Legal Representation the Regional Office must be notified within five working days of the decision to grant in accordance with Funding Code procedures Rule C17 and using CLS APP5 (see also paragraph 20.26, sub paragraph 1 above regarding delegated parental responsibility). The solicitor should explain, where it is relevant, why it is appropriate for the client to be separately represented. This is likely to be of relevance where parents or other parties with parental responsibility would appear to have the same interests in the proceedings and, in the case of a couple, they are not living separate and apart. If separate representation is to be justified on the basis of a known conflict of interests brief details of the conflict must be given. If a conflict is anticipated the solicitor should explain why having regard to the particular circumstances of the case. It is unlikely that children who are the subject of proceedings will be in conflict at the commencement of proceedings (see also paragraph 20.15 above).

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#### **Revocation or discharge of certificates**

16. A non means, non merits tested certificate can be:
- a) revoked or discharge on grounds of conduct (Procedures C53) including where the client has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Fund under C53.4, for example, if the client had unreasonably required more than one change of solicitor;
  - b) discharged on reasonableness (Criterion 15.3 and Procedures C53.4);
  - c) discharged under Criterion 15.5(i) (death of the client);
  - d) discharged under Criterion 15.5 (iv) (consent of the client); or
  - e) discharged under Criterion 15.5 (v) (all work completed).
17. Save in exceptional cases including where a party no longer needs representation (see *Merton London Borough Council v K; Re K (Care Representation: Public Funding [2005] 2 FLR 422)* the Commission does not envisage using the powers contained in C53.4 of the Procedures (requiring proceedings to be continued unreasonably) because of the nature of such cases and of the safeguards contained in the Children Act itself against repeated applications to the court. A certificate could, however, be subject to a scope limitation and related costs limitation.
- Furthermore, Funding Code criterion 5.4.5 applies to public law cases including Special Children Act Proceedings and a specific reporting obligation applies. This requires the solicitor to report to the Regional Director where he or she becomes aware that the client's interest in the proceedings is no longer sufficiently distinct from that of any other party to justify separate representation. If the solicitor fails to do so promptly the Commission has the right to reduce or disallow any costs which have thereby been unnecessarily incurred (see Family Specification 10.36).

Before a report is made the solicitor should consider, including with the other relevant solicitor(s), how the representation of the client should most reasonably proceed – including by an amendment of the certificate to show a change of solicitor.

18. A certificate may be discharged, following the show cause procedure, where the solicitor is without instructions. Despite the nature of the proceedings, there may be cases where it is unreasonable for the cover to continue, for example where the client has failed to engage over a period of time or has disappeared. It is reasonable to expect the solicitor to report where the client is not engaging, in particular later in the proceedings, including in relation to a threshold or final hearing, as the solicitor will not be able to conduct the case on behalf of the client in the absence of clear, continuing instructions.

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#### **20.27 Related Proceedings**

1. A client who has been granted Legal Representation in Special Children Act Proceedings may be granted Legal Representation in related proceedings. These are proceedings which are being heard together with the Special Children Act Proceedings or in which an order is being sought as an alternative to an order in the Special Children Act Proceedings (Criterion 11.8).
2. Proceedings will be “heard together” where they are dealt with together or immediately after the outcome of the principal proceedings as part of the same hearing, including any adjournment. An order will be “sought as an alternative” when it is intended to make an order under sections 31, 43, 44 or 45 unnecessary – this will extend to, for example, an application for a section 8 order in care or supervision proceedings but will not extend to, for example, a domestic violence injunction order or a financial order between parties.
3. Such related proceedings will not automatically be covered by the certificate. Specifically stated cover will be necessary to make an application in such proceedings or, where the application is made by a local authority, to oppose such proceedings (for example, to refuse contact or for a section 91(14) order). Specifically stated cover is not necessary to oppose an application by another individual who is a party to the proceedings.
4. Cover for related proceedings will be dealt with on a non means, non merits tested basis. However, if the proceedings are not related proceedings then cover for these proceedings cannot be included on the Special Children Act certificate. An application for a separate certificate would need to be made. A refusal of funding for related proceedings would not delay the issue of a certificate for Special Children Act proceedings which would be issued immediately.
5. Related proceedings extends to Legal Representation on an application for a placement order where that is dealt with together with the Special Children Act proceedings.

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## 20.28 Other Public Law Children Cases

1. Other public law children cases are defined in section 2.2 of the Funding Code Criteria. The definition of these proceedings excludes Special Children Act Proceedings and related proceedings. The fact that proceedings involve a local authority and concern the welfare of children will not, of itself justify the grant of Legal Representation. The Standard Criteria and General Funding Code (as varied by section 11 of the Code and including criterion 5.4.5) will apply. The proceedings include:
  - a) appeals (whether against interim or final orders) made in Special Children Act Proceedings;
  - b) representation for parties or potential parties to public law Children Act proceedings who do not come within the definition of Special Children Act proceedings in section 2.2 of the Funding Code – this includes a local authority application to extend a supervision order (which is made under Schedule 3 Children Act 1989);
  - c) other proceedings under Part IV or V of the Children Act 1989 (Care and Supervision and Protection of Children);
  - d) adoption proceedings (including applications for placement orders, unless in the particular circumstances they are related proceedings); and
  - e) proceedings under the inherent jurisdiction of the High Court in relation to children.
2. The definition also includes an application for a residence order which would, if successful, have the effect of discharging care order.
3. Applications for Legal Representation by parents to be represented in proceedings for secure accommodation orders may be refused on the basis that representation is ...

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unnecessary as representations will be made by both the local authority and on behalf of the child.

4. Applications for funding may be refused on the basis of the alternative funding criterion (Criterion 5.4.2 as applied by Criterion 11.9.1(i)), if representation is not necessary (Criterion 5.4.5, as applied by Criterion 11.9.1(ii)) or if it appears unreasonable for funding to be granted, having regard to the importance of the case to the client and all other circumstances (Criterion 11.9.3). The Court considered the test for deciding whether to grant party status to someone other than the parent grandparent or guardian in the case of *Re W (Care Proceedings) (Leave to apply)* [2005] 2 FLR 468 and held that the test was the same in both public and private law proceedings. It was necessary to make full enquiry having regard to articles 6 and 8 but ultimately the granting of leave was a matter of the court's discretion and further the test was the same whether or not the applicant was seeking or intending to seek a particular order. The Court found that as there was no difference between the aunt's case and a grandmother's case she could be a witness for

the grandmother who was a party to the proceedings. Note also that a certificate may be discharged, following the show cause procedure, where a party no longer needs representation (see *Merton London Borough Council v K; Re K (Care Representation: Public Funding* [2005] 2 FLR 422).

5. Any statutory requirement on a professional guardian appointed by the court to appoint a solicitor in certain specified Children Act proceedings (for which Legal Representation is available on a means and merits tested basis subject to the relevant Funding Code Criteria) does not of itself mean that the Funding Code Criteria are satisfied on an application for Legal Representation by the child. However, appropriate weight must be given to the judicial decision to appoint the guardian and the consequent obligation to appoint a solicitor so that a refusal will be justified only in exceptional circumstances. Certificates may, however, be limited as to scope and costs to reflect all the circumstances of the case including the involvement of a professional guardian (W and Others and The Legal Services Commission (formerly The Legal Aid Board), CA 20 July 2000).

### 3C-194

#### **20.29 Merits Tested Applications regarding Public Law Proceedings under the Children Act 1989, including Part IV and V appeals**

1. The merits criteria for appeals are set out in criteria 11.9 of the Funding Code. Cover for appeals, therefore, whether against interim or final orders, must satisfy the same criteria as other merits tested applications under the Children Act 1989. In addition, guidance on funding for appeals including appeals to the House of Lords is set out in section 24 of the Funding Code decision making guidance at paragraphs 3C-250 and 251. In particular, appeals to the Court of Appeal will generally be limited to the application for permission on the papers only. The issue for the regional office is the ultimate prospect of the appeal being successful, not merely the prospect of permission being granted.
2. Where the client is making or supporting (rather than opposing) an application or appeal Legal Representation will be refused if the prospects of the application or appeal being successful (in the sense of achieving the outcome desired by the client) are poor in that they are likely to fail. An application may also be refused if it is unreasonable for funding to be granted (criterion 11.9.3). In considering this regard must be had to the importance of the case to the client and all other circumstances including the issues at stake, the nature of the proceedings and relative positions of the parties having regard to the Human Rights Act 1998 and, where applicable, whether a reasonable private paying client would be advised to deal with the matter other than by way of making or supporting an application or an appeal. Clearly, the benefits likely to be obtained, the time appeal proceedings will take to be concluded and the likely costs involved are relevant factors. The availability of a local authority complaints procedure may also be relevant.
3. A certificate granted to make or support an application or appeal, including proceedings to discharge a care order (whether directly or indirectly) or for contact with a child in care

may, in the first instance, to be limited to consideration of the prospects of success. If so, they will be limited to a solicitor's report on the issues and prospects of success (but will not cover issuing proceedings) and if extended, will be limited thereafter to all steps short of the final hearing. This will ensure that cases which are unlikely to succeed are not pursued with the benefit of public funding so as ...

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to cause unnecessary expense to other parties and, importantly, unjustified disturbance of the current position.

4. Cover for appeals (whether against interim or final orders) must satisfy the same Criteria as other merits tested applications under the Children Act 1989.
5. In the case of discharging a care order (including by way of a Section 8 application) in order to justify the grant of Legal Representation the client would have to show prospects of succeeding in the particular circumstances of the case, having regard to all the circumstances including the time since the court last considered the issue, any recent developments and the availability of a local authority complaints or review procedure. However, there are cases where the purpose of the application is to refer the case back to the court for further consideration, in particular because an important element or elements of the care plan, have not been followed through. Local authorities are required to have an independent reviewing officer (IRO) who can seek to resolve the issue(s) with the local authority. If that fails the IRO can, as a last resort, refer the matter to CAFCASS Legal or CAFCASS Cymru who can take proceedings against the local authority on behalf of the child. Adults with sufficient interest (or children capable of giving instructions direct) can apply for funding in the usual way but will need to show that the case has been considered by the IRO and the issues not resolved before Legal Representation will be granted.

3C-195

### **20.30 Adoption/Placement Orders**

1. Where proceedings are brought in the High Court or County Court Legal Representation is unlikely to be granted where the application is uncontested (Criterion 5.4.5).
2. Legal Representation for an applicant to make or support an application or appeal is unlikely to be granted if the prospects of success are poor (Criterion 11.9.2). Although this forms the basis for a mandatory refusal, this is unlikely to apply to a natural parent opposing a freeing or a placement order or, where there has been no placement order, adoption proceedings. This is because as far as the birth parents are concerned once the freeing or placement order has been determined it is unlikely that they will have any further involvement, save possibly in relation to continuing contact. The nature of adoption proceedings and the desirability of a birth parent being represented may be

sufficient to satisfy the Criteria and justify the grant/continuation of representation to a parent, particularly having regard to the Human Rights Act 1998. Note, however, that once a placement order has been made a natural parent will require the leave of the court to oppose the making of an adoption order and that leave is unlikely to be granted unless the court is satisfied there has been a significant change in circumstances. Where the only issue is post adoption contact it should be noted that it is unusual for the court to make an order where the adopters are not in favour of contact.

3. Where the application for funding is made by a step-parent Legal Representation is unlikely to be granted unless in the particular circumstances the application to the court for an adoption order (rather than a special guardianship or residence order) is nonetheless likely to succeed (Criteria 5.4.5 and 11.9.2).
4. Where it appears that the applicant may have access to alternative funding then Legal Representation may be refused e.g. from a local authority. Legal Representation is likely to be refused where no information is given on this point. Where only limited financial support is available Legal Representation may still be refused if it is nonetheless considered reasonable for others to fund the proceedings.
5. Advice and assistance may be provided with regard to a parent or guardian's consent to placement or advance consent to adoption under Legal Help. If advance consent to adoption is given and a parent subsequently wishes to oppose the making of an adoption order, regard will be had to whether there has been a change of circumstances such that leave of the court is likely to be granted.
6. Where funding is sought to apply for an adoption order and the prospects of success are not entirely clear, the certificate is likely, if granted to be limited, in the first instance to obtaining Counsel's Opinion or the opinion of a solicitor with higher court advocacy rights on the prospects of success. Examples include applications with an ...

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immigration aspect and those where contact is likely to be sought after any adoption, but not agreed.

7. In the case of an application for an order, consideration must be given to the appropriate forum for the case. It is expected that proceedings will be commenced in the family proceedings court where it has jurisdiction and unless there is a particular reason to do otherwise. If there are insufficient reasons for commencing the proceedings in the County Court, as opposed to the family proceedings court (or the High Court as opposed to the County Court), then the application will be refused unless, in all the circumstances of the particular case, the grant of Legal Representation for proceedings in a lower court is available and justified. If so, the application would be granted to cover proceedings in the lower court (subject to a right of appeal against the partial refusal as to forum).

8. Legal Representation is likely to be granted to a child who is a party in proceedings. Note that the child will be a party in placement proceedings and can be joined adoption proceedings. He or she can, therefore, apply for funding in those proceedings in his or her own name (rather than through a CAFCASS guardian, as previously).
9. Subject to the inclusion of a more restrictive initial limitation, imposed having regard to the circumstances of the particular case, certificates (save those issued to a child) will require a solicitor's report or, if the solicitor so advises, Counsel's Opinion (or opinion from a solicitor with higher court advocacy rights) in the event of an unfavourable reporting officer or guardian's report. This will ensure there is an opportunity to review the case and re-apply the Funding Code (which may or may not lead to the show cause procedure being instituted).

### 3C-196

#### **20.31 Inherent Jurisdiction (Wardship) (see also child abduction below)**

1. Following the introduction of the Children Act 1989 wardship may now be unnecessary in many cases where the relief sought may be obtained under section 8 of the 1989 Act. An application for Legal Representation is, therefore, likely to be refused where any order in other proceedings for example under the 1989 Act, the Family Law Act 1986 or the Child Abduction and Custody Act 1985 would provide an appropriate remedy (Criterion 5.4.5 and/or 11.9.3). For example, the use of inherent jurisdiction for "seek and find" orders is seldom likely to be necessary in the light of the range of orders available under the Children Act 1989 and the Family Law Act 1986. Wardship proceedings will also not be appropriate where the relevant child is subject to a care order (Section 100 Children Act 1989) (Criterion 11.9.2).
2. Wardship may, however, still be appropriate in exceptional cases such as sterilisation of a person unable to give consent, other medical treatment issues or in an international abduction case where the provisions of the Child Abduction and Custody Act 1985 do not apply (Criterion 11.9.3).
3. In addition, the applicant must have sufficient interest to bring the proceedings and the issues must be sufficiently important for Legal Representation to be granted.
4. Legal proceedings must be likely to produce sufficient ultimate benefit to be warranted. The application must have sufficient prospects of obtaining an order but even where an order is likely to be obtained Legal Representation is unlikely to be granted if any such order is likely to be ineffective, for example, if the child is abroad and any order obtained cannot be enforced effectively for example, if there is no reciprocal judicial protocol (Criterion 11.9.2 and 11.9.3).
5. Solicitors should also consider whether the matter could be more appropriately dealt with in another way, for example, writing a letter, involving the social services or the police or possibly using Interpol or the port alert system (Criterion 11.9.3). Legal Representation is likely to be refused if more appropriate ways of dealing with the matter are available.

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6. Where an application is to defend wardship proceedings Legal Representation will be refused if the prospects of success are poor. Matters to be considered include whether the child's age is such that the court would have significant regard to his/her wishes and whether those wishes are opposed to the applicant for funding (Criterion 11.9.2). It must also be reasonable for Legal Representation to be granted in the particular circumstances of the case having regard to the issues, the benefit to be obtained and the need for the applicant to be separately represented (Criterion 5.4.5 and/or 11.9.3).

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## **PART C – PRIVATE LAW**

### **20. Children and Family**

Any references to Legal Representation apply equally to General Family Help unless the context otherwise requires.

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 12 to 18 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 ...

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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.

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### **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 ...

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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).

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## **20. Children and Family**

### **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 ...

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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.

## Private Law Children Cases

### 20. Children and Family

#### 3C-198

##### 20.33 General Approach

1. This section deals with applications for Legal Representation in private law children cases defined at paragraphs 11.11.1 and 2.2 in the Funding Code as proceedings concerning residence, contact and other private law issues concerning children (other than issues of financial provision). It extends to proceedings other than under the Children Act 1989 but excludes “other public law children cases” as defined in paragraph 2.2 of the Funding Code. The Criteria in 11.11 of the Funding Code apply.

##### Mediation

2. Mediation is an important stage in attempting to resolve disputes regarding children. Where required in accordance with the Code Procedures, the client must attend a meeting with a mediator or otherwise satisfy the requirement under Criterion 11.12.2 before funding by way of Family Help (Higher), Legal Representation will be granted.
3. Attempts must be made to resolve the dispute without recourse to contested proceedings, through negotiation or otherwise even where the case is exempt from the requirement to be referred to a mediator (Criterion 11.11.4). The extent to which this is reasonable will depend on all the circumstances of the case, including the previous history, the issue(s) and the current position between the parties. The applicant will be expected to make the same attempts at settlement as a reasonable private paying client in the same circumstances. An application for Family Help (Higher) to cover negotiations with the other party, and if necessary proceedings up to and including any First Hearing Dispute Resolution Appointment, rather than Legal Representation for court proceedings to a contested hearing will be the norm in the first instance i.e. unless detailed negotiations have already failed.

##### Cost benefit

4. Where the benefit to be obtained is not quantifiable in monetary terms it is necessary to look at the circumstances of the particular case in terms of what is likely to result. In cases regarding the welfare of children this must be in terms of a significant improvement in the arrangements for that child or children viewed objectively. This will not, however, justify the grant of representation to apply for a residence order which would have the effect of

varying residence where the client is unlikely to obtain a residence order and the likely significant improvement would be in arrangements for contact. In those circumstances an application to be represented on an application for contact would be more appropriate. Also note that Family Help (Higher) will generally be the more appropriate initial level of service – negotiations and any First Hearing Dispute Resolution appointment can be used to resolve or narrow the issues and for Legal Representation to be justified the remaining issues must satisfy the cost benefit test. The court’s decision on any First Hearing Dispute Resolution appointment, outlining the issues, will be relevant to the funding of further contested proceedings and the relevant court order must be submitted with any application for Legal Representation. Issues of detail (e.g. frequency and extent of contact including whether staying contact should take place) rather than principle (e.g. no direct contact) are unlikely to justify a grant, in particular as a reasonable private paying client would be unlikely to continue contested proceedings but would rather seek to compromise the issue(s). The

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fact that the parties cannot agree does not of itself justify the grant or continuation of public funding.

5. Legal Representation will not be granted unless the court is likely to intervene to make an order bearing in mind the no order principle in Children Act cases. In addition, Legal Representation will not be granted if in the particular circumstances of the individual case any order obtained is likely to be ineffective or incapable of successful enforcement (Criterion 11.11.5).
6. To justify the grant of Legal Representation the applicant must have a sufficient interest or a sufficiently separate interest to justify being a party or having separate representation (i.e. his or her interests do not coincide with those of another party or can be dealt with by way of evidence or otherwise) (Criteria 5.4.5 and 11.11.6).
7. An applicant who requires permission to take or to be joined in proceedings must indicate why he or she is likely to succeed in being joined and why he or she is the appropriate applicant for representation in the circumstances of the particular case (Criterion 5.4.5). Where the certificate is issued prior to that leave being applied for the certificate will extend to representation on the application for leave, although the scope of the certificate will not specifically state this.
8. It is unlikely that Legal Representation will be granted where the application is uncontested unless where there are reasons why the court is likely to make an order and representation is justified in the particular circumstances, i.e. it involves a significant point of law or difficult issue of fact. Family Help (Higher) would be the more appropriate level of service to be used to obtain an agreed order. (Criterion 11.11.6).

9. If the issues are of insufficient gravity to warrant legal proceedings or could be dealt with by, for example, writing a letter, negotiations (including with the assistance of Family Help (Higher)) or involving the police or social services then Legal Representation is unlikely to be granted (Criteria 11.11.4, 5.4.3, and 11.11.6).
10. Legal Representation will not be justified to commence or continue if the issues in dispute do not justify this, although it may nonetheless be granted if the applicant is suffering from a material physical or mental disability such that it would be unreasonable to expect him or her to act in person (Criteria 5.4.5 and 11.11.6).

**Applications by children (see also paragraph 3D-013 regarding means assessment)**

11. The fact that a child can make an application to the court will not of itself justify the grant of Legal Representation. The application for funding may be refused if it appears that the application is being made by the child rather than an appropriate adult in order to secure public funding (Criterion 5.4.2). An application for Legal Representation by a child to start proceedings must provide information to justify the reasons for this and the likelihood of leave of the court being granted, otherwise the application is likely to be refused. The reasons why any relevant adults have not taken proceedings should also be provided (in particular in relation to those with whom a child might live in the event of a residence order being made). Legal Representation would be unlikely to be granted to a child to apply for a residence order as opposed, in appropriate circumstances, for a contact order with siblings not in care (Criterion 5.4.2).
12. Where a funded client wishes to apply to the court for a child to be joined no specific amendment to the certificate will be required to cover the application. An amendment is also not needed if another party other than a child is added to the proceedings, although the usual reporting obligations apply (Procedures C43 and C44).
13. An application by a child to be joined in existing proceedings must justify the reasons for this and deal with the likelihood of leave being granted otherwise the application is likely to be refused. Regard must be had to the President's Direction of 5 April 2004 and CAFCASS Practice Note and Guidance concerning the representation of ...

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children in proceedings which are not specified within the meaning of section 41 Children Act 1989. Separate representation may, for example, be justified where there are allegations of abuse which cannot be resolved with the help of a CAFCASS officer or where the child has interests which are inconsistent with or cannot be represented by any of the adult parties. Consideration must also be given generally to the role and possible involvement of CAFCASS or, in the appropriate cases, the Official Solicitor. This should be ensured by the President's guidance of 25 February 2005 which currently requires

applications for the appointment of a guardian in private law cases to be decided by a circuit judge at a short directions hearing at which the local office of CAFCASS should attend to deal in particular with whether a guardian is needed (as opposed to a CAFCASS report) and the timetable for allocating the case to a guardian if one is appointed. CAFCASS guidance to its Directors and Service Managers indicates allocation should be treated as a priority. An exception is made for exceptional circumstances in which case a District Judge may appoint a guardian. Where a circuit judge appoints a guardian he should also consider whether to retain the case and whether to transfer it to the High Court on the basis of complexity. No amendment would be needed to the certificate in the event of a transfer unless, unusually, it specified the forum for the conduct of the proceedings as other than the High Court.

14. Where the interests of the child can be protected through the involvement of a CAFCASS Children and Family Reporter then the court is unlikely to join the child and therefore this is relevant to an application for funding. Where, unusually, it is appropriate for CAFCASS Legal (rather than the CAFCASS local office) to deal with a case public funding will not be required. However, CAFCASS Legal cannot deal with proceedings in the Family Proceedings Court. A CAFCASS officer (at local office level) may, without any consent on the part of CAFCASS, be appointed as a guardian ad litem under Family Proceedings Rules 1991 Rule 9.5. Where a child has already been joined but CAFCASS Legal is not dealing with the case, funding will not normally be refused on the basis that party status is not justified. It should also be noted that a child can be joined without the need for a Guardian under Rule 9(2A) where the child is able to give instructions directly to the solicitor.
15. The President's Practice Direction and guidance ensure that cases will, where it is appropriate to join the child and appoint a guardian but not for CAFCASS Legal to deal with the case, be referred to the CAFCASS local office. If the court makes a CAFCASS appointment, the CAFCASS local office cannot decline to appoint a guardian. Providing guardian services is a core function of CAFCASS, although in very exceptional cases and after careful consideration the court may decide to appoint NYAS because it is a specialist agency. It should not be necessary for the solicitor to be appointed and act as guardian except in purely specialist cases for example, *Re A (Conjoined Twins: Medical Treatment)* [2001] 1 FLR 1. Given this, solicitors considering accepting appointment as guardian should ascertain the availability of funding prior to acceptance of appointment as this will not normally be appropriate or justified. In any event any certificate issued will not cover work or expenses incurred as guardian (rather than as solicitor).

#### **Scope of certificate – forum and generally**

16. Unless there are particular or sufficient reasons to do otherwise, or if insufficient information has been given regarding jurisdiction, proceedings should be commenced in the family proceedings court where it has jurisdiction.

17. It may be appropriate to commence proceedings other than in the family proceedings court where:
  - a) other family proceedings are already pending in another court;
  - b) proceedings are imminent in the county court eg divorce proceedings, and the proceedings should be heard together;
  - c) an order made by another court is to be varied, extended or discharged by that court;
  - d) the application to the court relates to a child in care and therefore has to be issued in the court which made the care order;
  - e) the position is covered by a Practice Direction;
  - f) an injunction ancillary to Children Act proceedings is sought;
  - g) the anticipated remedy sought is not available in the family proceedings court;
  - h) the proceedings are exceptionally grave or complex;
  - i) some novel or difficult point of law is involved.
18. A condition may also be inserted that proceedings be commenced in the County Court (rather than the High Court), subject to any transfer by the court in accordance with the Children (Allocation of Proceedings) Order 1991. In the event of such a transfer no amendment to the certificate is needed.
19. If no condition or forum for the conduct of the proceedings is included on a certificate the proceedings may, without specific amendment, be commenced and subsequently conducted in the court considered to be most appropriate, including in accordance with any transfer directed by the court, for example from the County Court to the Family Proceedings Court.
20. A certificate will only cover representation on those section 8 orders which are specified on the certificate (rather than all section 8 orders) or which are made by the court of its own motion. If more than one section 8 order is sought information must be provided to justify the grant on all aspects as otherwise Legal Representation may be refused or partially refused. Injunction applications are only covered where specified.
21. Only one substantive residence, contact or other section 8 order as specified is within the scope of the certificate. A specific amendment is needed to apply for any further application. Cover includes any review or further consideration of the matter by the court which, in the particular circumstances of the case, constitutes a restoration of the matter on the court's own motion – but not any fresh application made to the court in that context. The certificate can, however, be specifically amended to cover a further application to the court.
22. Where the prospects of success are unclear at the time of the application for funding but are sufficient to justify the grant of certificated funding, General Family Help will be the appropriate level of service.

### **20.34 Change of Name of Child of the Family**

1. Family Help (Higher) will be the more appropriate initial level of service where any certificated grant of funding is justified.
2. Legal Representation will only be granted if the application to continue to take or defend proceedings shows sufficient prospects of success in obtaining or avoiding the order, for example, by reference to the benefit to the child and also having regard to the appropriate case law (Criterion 11.11.5). The reasons for the change will be relevant. For example, Legal Representation is unlikely to be granted for an application based solely on the fact that the child's surname is not the same as the mother's or siblings – the court will not permit a change based on possible embarrassment. Regard must also be had to cultural factors and to the significant importance the court will give to maintaining a link with the father.

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### **3C-200**

### **20.35 Applications for Leave for Temporary or Permanent Removal from the Jurisdiction**

1. Family Help (Higher) will be the more appropriate initial level of service where any certificated grant of funding is justified.
2. The order must be legally required for Legal Representation to be justified (Criteria 11.11.5) or must be justified in the particular circumstances of the case, for example, where there is a residence order in force and the removal is for more than one month or there is a real threat of permanent removal. The reasons for and the period of removal must justify the grant. Applications for permanent removal need to be justified to the court so that the prospects of success may be poor and making an unsuccessful application to the court for permanent removal from the jurisdiction may put existing arrangements at risk (so that a refusal of Legal Representation may be appropriate - Criterion 11.11.6).
3. The grant of Legal Representation is unlikely to be justified for a purely temporary removal, in particular a holiday, unless, exceptionally, the likely benefit to be obtained is sufficient to justify the proceedings and likely costs e.g. to enable contact with family members abroad, and in the particular circumstances it is reasonable for the application to the court to be publicly funded despite the fact that the client must obtain other funding for the removal itself (Criteria 5.4.2 and 11.11.6).

### **3C-200.1**

### **20.36 Special Guardianship Orders**

1. Legal Representation may be refused where it appears that the applicant may, or should, have access to alternative funding. In particular where the application is in respect of a child who is looked after by the local authority and the local authority does not oppose the application, financial assistance should, if appropriate, be provided by the local authority

under the Special Guardianship Regulations 2005 SI 2005/1109 and the Special Guardianship (Wales) Regulations 2005 SI 2005/1513.

2. A special guardianship order is a private law order and the principles in section 1 of the Children Act 1989 will apply as will the Funding Code criteria in 11.11. This includes the no order principle which will be taken into account when considering prospects of success. Regard will also be had to the report of the local authority prepared in accordance with section 14A of the Children Act 1989 when considering an application for funding. When considering an application for funding to oppose the making of a special guardianship order, the way in which the proposed respondent currently exercises his/her parental responsibility and how this will be affected by the making of an order will also be considered.

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3. When making a special guardianship order the court must consider whether a contact order should be made. No separate amendment is required to the public funding certificate for this aspect of the proceedings. If public funding is refused to oppose an application for a special guardianship order, funding can nonetheless be granted to consider the issue of contact only, if this is justified in the circumstances of the particular case. Details of the proposed contact position should be given in the application for funding.

3C-201

### **20.37 Enforcement of a Children Act Section 8 Order/Non-Money Orders**

1. Legal Representation to apply for the enforcement of a Children Act section 8 order (including representation for proceedings in the family proceedings court under section 63(3) Magistrates' Courts Act 1980) will only be granted where enforcement is appropriate and justified and likely to be successful (Criteria 11.11.5 and 11.11.6). The courts are increasingly willing to enforce existing contact orders – an application to seek a variation of the existing order rather than enforce it will need to be justified on the facts of the case.
2. Legal Representation is unlikely to be granted to defend enforcement proceedings unless the circumstances of the case are so exceptional as to justify the grant and representation is likely to result in significant benefit to the client (Criterion 11.11.6). The use of Family Help (Higher) may be more appropriate where the client has no legal defence but may need assistance in mitigation – however, a likelihood of committal will justify Legal Representation (see also paragraph 20.25, sub paragraph 5).

3C-202

### **20.38 Family Law Act 1986**

1. Sections 33 and 34 can be used in proceedings under section 8 Children Act 1989 to apply for an order to obtain information as to a child's whereabouts and to obtain the return of a

child in accordance with an existing residence or contact order. Legal Representation is unlikely to be granted unless all the circumstances of the case justify legal proceedings and there is no other appropriate remedy including involving the police or social services (Criteria 5.4.3, 5.4.4 and 11.11.6). For example, where a child is believed to still be within England and Wales a port alert can be put in place by the police if the object is solely to prevent an international abduction.

2. Where the child has already been removed from the jurisdiction Legal Representation is unlikely to be granted unless the circumstances of the particular case are such that an order made in England and Wales would be likely to lead to the return of the child, for example, by compelling information to be provided about the child and abductor by a third party (Criteria 11.11.5 and 11.11.6).
3. An emergency certificate should only be used to take proceedings to secure the return of a child to a custodial parent where the proceedings are themselves justified (for example, reasonable attempts to secure the child's return have been unsuccessful) and there is evidence of the child being at significant risk of harm serious enough to justify urgent action.

### **Financial and Other Proceedings**

*References to divorce, judicial separation or nullity should, where appropriate, also be read as referring to applications for the dissolution of a civil partnership or for financial provision following such dissolution.*

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**3C-203**

### **20.39 General**

1. The Code Criteria in 11.12 apply to ancillary relief proceedings following divorce and other family proceedings concerning financial provision. This includes applications under section 17 Married Women's Property Act 1882, section 14 Trusts of Land and Appointment of Trustees Act 1996, Civil Partnership Act 2004, Domestic Proceedings and Magistrates' Court Act 1978 and financial applications under the Children Act 1989. It also applies to all other family proceedings which are not specifically covered by the family section of the Code Criteria. Guidance relating to Funding Code criterion 11.12.7 applying to the availability of private funding in ancillary relief and other financial cases is found at paragraph 20.20.

### **Mediation**

2. Mediation is an important stage in attempting to resolve financial and other disputes. Where required in accordance with the Code Procedures, the client must attend a meeting with a mediator to determine suitability for mediation or otherwise satisfy the requirement

under Criterion 11.12.2 before funding will be granted. It will also be expected that, where possible, negotiation between the parties will have taken place.

3. In cases which are exempt from the requirement to be referred to a mediator, or where it is determined that mediation is unsuitable, an application for Family Help (Higher) rather than for Legal Representation will be appropriate in the first instance. An application for Legal Representation is likely to be granted only if it can be demonstrated that reasonable attempts to resolve the dispute without recourse to contested proceedings have been made by way of negotiation or otherwise under Criterion 11.12.4. An application for Family Help (Higher) will also be appropriate, for example, where disclosure of financial information is required.
4. One of the most important tasks within the scope of Family Help (Higher) is to ascertain not only the other side's financial position but also to put forward and consider any settlement proposals. When considering an application for Legal Representation, the Criteria for Legal Representation will be considered in the light of what is on offer to the client. In ancillary relief proceedings it is likely that this will be clear after the Financial Dispute Resolution hearing and at this point that the Criteria as to prospects of success and costs benefit for Legal Representation will be applied.

#### **Cost benefit**

5. Applications for Legal Representation considered under the Criteria in 11.12 will only be granted if the likely benefits to be gained from the proceedings for the client justify the likely costs, such that a reasonable private paying client would be prepared to take or defend the proceedings in all the circumstances (Criterion 11.12.6). This approach to cost benefit also applies to Family Help (Higher). General guidance on the private client approach is at paragraph 4.8.
6. Where the application concerns capital assets, the circumstances of the case, the prospects of success and the value of the relevant capital assets must justify the likely costs of the proceedings, having regard to the possible operation of the statutory charge (Criterion 11.12.6).

#### **Scope of certificates**

7. Certificates to take or defend proceedings relating to finance or property will be limited short of the final hearing or trial, other than where they cover only periodical payments or transfer of tenancy or, in the case of the Trusts of Land and ...

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Appointment of Trustees Act 1996, an order for sale. An application for Legal Representation including following any grant of Family Help (Higher) will in effect

constitute the solicitor's report that a contested final hearing cannot reasonably be avoided and is justified, having regard to the prospects of success (ie strength in terms of achieving the desired outcome), value of claim and property in dispute as well as attempts to define the issues between the parties and settle the matter. The solicitor will be able to report after any Financial Dispute Resolution (FDR) appointment.

8. It will not usually be necessary to make emergency applications to defend ancillary relief proceedings or applications for child and spousal maintenance given the length of time between issue of proceedings and the first appointment. Such applications are likely to be refused given the availability and scope of Family Help (Lower) or where the applicant could give undertakings, make payment or otherwise deal with any urgent steps in person (eg by agreement as to directions, an extension of time or an adjournment (Criterion 5.5.1).
9. Emergency applications for maintenance pending suit or ancillary relief generally (rather than as a pre-requisite to a section 37 or inherent jurisdiction application) are unlikely to be granted if the applicant can apply for or will be in receipt of income support or income based Jobseekers' Allowance or may have other resources to meet immediate needs until a substantive application can be processed (Criterion 5.5.1).
10. All certificates for Legal Representation in connection with maintenance, including ancillary relief in matrimonial proceedings, cover child maintenance only where the court rather than the Child Support Agency has jurisdiction or in other circumstances where this is specifically stated. In any event cover only extends to securing one substantive order. This does not prevent amendment of the certificate, subject to the applicable Criteria.
11. A certificate covering proceedings under the Married Women's Property Act can cover or be amended to cover any family proceedings including ancillary relief proceedings and a single certificate should be used.
12. Where leave of the court is required for the funded client to be joined in proceedings and a certificate is issued prior to leave being applied for, the certificate will extend to representation on the application for leave, although the scope of the certificate will not specifically state this. In addition, representation on an intervention by a third party does not require a specific amendment, although the usual reporting obligations apply (Procedures C43 and C44).

### 3C-204

#### **20.40 Divorce, judicial separation, nullity and dissolution of civil partnership**

##### **General**

1. Subject to any limitation or condition placed on it, a certificate will cover the steps usually necessary to prosecute or defend a suit. It will not, however, cover other applications in the proceedings, for example, for an injunction, ancillary relief or children unless expressly covered. No further steps in the main suit will be covered after the final decree unless the certificate is extended by amendment.

2. Unless the certificate is specifically amended it will not cover the taking or opposing, as appropriate, of the following steps:
  - a. by the petitioner to file an answer to a separate cross-petition by the respondent or file a second petition;

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- b. on the part of the respondent, file a separate cross-petition.
3. The certificate will not cover any further steps if the proceedings at any time become undefended. The client may then be assisted by Legal Help in the usual way. Any certificate will cover the decree proceedings so long only as the cause remains defended.
4. The certificate will be taken to cover proceedings under a second petition or separate cross-petition which have taken place after an order for consolidation with the previous proceedings but not otherwise.
5. Where Legal Representation has been granted a case should not continue to be dealt with on a contested basis without good reason. The certificate will be limited to obtaining counsel's opinion or the opinion of a solicitor with higher court advocacy rights before the matter proceeds to a contested trial. To justify an amendment it must be shown that the case cannot be dealt with on an undefended basis without detriment to the proper interests of the parties or either of them (Criterion 11.12.6).

**3C-205**

**20.41 Divorce, judicial separation and dissolution of civil partnership**

1. Uncontested proceedings will usually be dealt with under Legal Help. Legal Representation may be granted for uncontested proceedings if the client needs representation to proceed, for example by reason of the applicant's physical or mental incapacity (Criterion 5.4.5). The case must otherwise satisfy the Funding Code Criteria.
2. Where a petition has been directed to be heard in open court the circumstances of the particular case must justify representation and there must be sufficient prospects of obtaining or opposing the pronouncement of decree (Criteria 5.4.4, 5.4.5 and 11.12.6).
3. For Legal Representation to be granted it must be reasonable in all the circumstances to continue to prosecute a suit to which an answer has been filed as a contested suit. Where there have, for example, been offers of compromise which a reasonable private paying client would accept, having regard to the likely costs involved in proceedings with such a petition, the benefit to be obtained and the risk of litigation generally then Legal Representation would not be granted (Criterion 11.12.6).
4. Legal Representation will only be granted to defend a suit (without cross-praying in divorce or judicial separation proceedings) and where there is a substantial defence with sufficient prospects of success to meet Criterion 11.12.5 and there are substantial practical benefits to be gained by avoiding the decree. Objecting to the pronouncement of a decree in itself will not be sufficient (Criterion 11.12.6).

5. Legal Representation will not be granted in situations where:
  - a. the matter could reasonably be compromised by way of undefended cross-decrees or on the respondent's cross-petition; or
  - b. the matter could be dealt with by way of a two year or a five year separation petition (ie having regard to the period of separation and, where needed, likelihood of consent); or
  - c. the contents of the petition could be amended without prejudice to its prospects of success but so as to remove the contentious issues (Criterion 11.12.6).
6. If there is a cross-petition or answer in which irretrievable breakdown is admitted (but allegations in the petition are denied) and it is therefore accepted that the marriage or partnership has irretrievably broken down (or in the case of judicial separation, that the parties should be separated) the only issue will be whether the allegations in the petition are true. In these circumstances, it would rarely be justified for Legal Representation to be granted for a contested suit. There must be some substantial benefit to the client which outweighs the cost of cross-praying or continuing to prosecute the petition for Legal Representation to be granted. For example, the allegations are so serious and prejudicial that they significantly ...

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undermine the respondent's position in other issues such as residence, contact or financial provision. Even then, the matter must be incapable of compromise (Criterion 11.12.4).

**3C-206**

**20.42 Nullity**

1. Even where proceedings for nullity are undefended they will be heard in open court. However, Legal Representation (as opposed to assisting the client under Legal Help) will only be granted if this is justified in the particular case, having regard to the points of law, issues of fact or circumstances of the applicant (eg as to material disability).
2. Even where valid grounds are shown Legal Representation will not be granted to prosecute a suit unless divorce/dissolution is not appropriate and the time and costs involved in obtaining the necessary evidence and pursuing the proceedings to a conclusion do not make divorce/dissolution proceedings (e.g. on the grounds of 2 years separation with consent) a reasonable alternative (Criterion 11.12.6). For example, divorce would not be a reasonable alternative in a marriage void ab initio.
3. Legal Representation will not be granted to defend a suit or to cross-pray for divorce/dissolution or judicial separation unless there are reasonable prospects of avoiding the decree of nullity and of succeeding on the cross-petition and there are substantial and

real benefits to be gained (Criterion 11.12.6). Objection to the pronouncement of a decree on religious grounds is unlikely to suffice.

### 3C-207

#### **20.43 Section 10 Matrimonial Causes Act 1973 applications/Section 48 Civil Partnership Act 2004**

1. Legal Representation will not be granted to pursue an application for consideration of the respondent's financial position after the divorce/dissolution (e.g. in relation to loss of pension rights) unless there is a substantial and practical benefit to be obtained from any order and it is coupled with an application for ancillary relief (Criterion 11.12.6).

### 3C-208

#### **20.44 Section 17 Married Women's Property Act 1882 (as amended)**

1. The prospects of success must meet Criterion 11.12.5. In light of this the application for funding must be made during the marriage or engagement or within 3 years of decree absolute or termination of the agreement to marry. Where the prospects of success are borderline or unclear the application may satisfy the Criterion where the case concerns the preservation of the home of the client or his or her children. There is unlikely to be significant wider public interest given the requirement for the interest to be significant and the definition in the Code in paragraph 2.4.
2. The likely costs of the proceedings must be justified. For example, a grant of Legal Representation will not be justified where the only dispute involves goods and furniture, the second hand resale value of which is likely not to be significantly more than the likely costs of pursuing or defending a contested application.
3. In addition, Legal Representation will only be appropriate if the matter cannot reasonably be compromised or resolved other than by the proposed litigation, including within imminent divorce, judicial separation or other proceedings.

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### 3C-209

#### **20.45 First Orders for Child Maintenance and Spousal/Civil Partner Maintenance – including maintenance pending suit/outcome of dissolution and applications under the Domestic Proceedings and Magistrates' Courts Act 1978 or Children Act 1989**

1. Family Help (Higher) is likely to be the more appropriate initial level of certificated funding and this section should be read as applying to applications for Legal Representation including following on from Family Help (Higher).
2. Legal Representation will only be granted if a worthwhile order is likely to be made taking into account the length of any marriage/partnership and circumstances of the parties. Funding will not be granted where only a nominal order will be obtained unless there are exceptional circumstances or the issue of maintenance forms part of a larger set

of issues which themselves justify the proceedings and likely costs eg where both parties are unemployed but there are substantial capital assets justifying the grant of Legal Representation for ancillary relief. However, a grant of representation for a periodical payments order or transfer of tenancy will not of itself make it appropriate to grant for ancillary relief generally (Criterion 11.12.6). Similarly, a grant of Legal Representation to defend proceedings will not be made where it is not justified in the circumstances eg where the client's liability for a nominal order is clear (Criterion 5.4.5).

3. There must be real and sufficient benefit to the client to justify the proceedings and likely costs except, for example, where the client is likely to be able to stop claiming benefits as a consequence of the making of a significant order or will not longer be claiming benefit by the time the order is made, perhaps because of a realistic prospect of taking up employment within say the next three months and would therefore benefit from the order (Criterion 11.12.6).
4. If there are no larger issues sufficient to justify a grant to obtain a nominal order without adding to the likely costs, then an attempt should be made to agree a nominal order using Family Help (Lower). If that is unsuccessful the grant of Family Help (Higher) or Legal Representation will not normally be justified (Criteria 5.4.4 and 11.12.6).
5. There must be an indication that the opponent has the means to meet a substantive (as opposed to nominal) order. Where the means of the opponent are in doubt, Family Help (Higher) rather than Legal Representation may be granted limited to the obtaining of a status report in the first instance provided that sufficient information is available to justify this (Criterion 5.4.4).
6. If divorce or judicial separation proceedings are pending or imminent and it would be more appropriate for matters to be dealt with ancillary to those proceedings (once a petition has been issued) then Legal Representation in other financial proceedings is likely to be refused (Criterion 5.4.4).
7. Legal Representation will not be granted for a periodical payments order for children where the Child Support Agency rather than the court has sole jurisdiction for child maintenance (Criteria 5.4.3 and 11.12.5). Where the court does have jurisdiction and Legal Representation has been granted for spousal maintenance it will also cover child maintenance although this will not be specifically stated.
8. Legal Representation to take or defend proceedings for agreed payments under section 6 of the Domestic Proceedings and Magistrates' Courts Act 1978 will not be granted unless the applicant needs representation because of a physical or mental disability which is such that it would be unreasonable to expect him or her to deal with the proceedings in person (Criteria 5.4.5 and 11.12.6)
9. In the absence of a client's material physical or mental disability justifying representation Legal Representation will not be granted for the client to be represented on first applications for child or spousal maintenance in the family

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proceedings court unless the issues disputed or the factual or legal issues are sufficient complex to make representation necessary (Criterion 11.12.6).

### 3C-210

#### **20.46 Variation or Revocation of a Periodical Payments Order**

1. Family Help (Higher) is likely to be the more appropriate initial level of certificated funding and this section should be read as applying to applications for Legal Representation including following on from Family Help (Higher).
2. The circumstances of the particular applicant (due to eg a material physical or mental disability) or the case (due to eg complexity of the opponent's means or a significant point of law must justify the grant of representation (Criterion 5.4.4 and 5.4.5). The fact that the other party is legally represented, that revocation is sought to give the Child Support Agency jurisdiction or that a court has adjourned a hearing to enable an applicant to seek representation will not of itself justify the grant of representation. There must also be reasonable grounds for seeking a variation which is likely to produce a relevant and significant personal benefit sufficient to justify the costs of proceedings (eg due to a significant change in circumstances since the making of the order to be varied (Criterion 11.12.6).
3. Where there are proceedings in the County Court it must be unreasonable for the order to be registered and subsequently varied and enforced in the family proceedings court (Criteria 5.4.5 and 12.6).
4. Legal Representation to apply for a variation of a periodical payments order by a child over 16 is unlikely to be refused on the basis that the parent with residence should make an application to the court (Criteria 5.4.2). That parent's means (and indeed any other substantial support or resources) would, however, fall to be considered on means assessment (Regulation 11(4) Community Legal Service (Financial) Regulations 2000).

### 3C-211

#### **20.47 Registration/Enforcement of a Periodical Payments Order**

1. Registration of an order is a simple procedure and therefore Legal Representation will not be granted to cover the making of an application alone (Criteria 5.4.4 and 11.12.6). Where the relevant order was itself obtained under an existing certificate, registration is treated as part of the obtaining of the order and therefore covered by the certificate without amendment.
2. If an order obtained under a certificate has been registered in the family proceedings court, enforcement proceedings in that court are outside the scope of the certificate. Enforcement action should normally take place in the family proceedings court and Legal

Representation to take proceedings will be refused as it is the responsibility of the court to take enforcement proceedings at the request of the complainant (Criterion 11.12.6).

3. If enforcement in the County Court is appropriate (eg having regard to the particular method required) and a grant of Legal Representation is justified by the particular circumstances of the client or case and the benefit to be obtained (Criterion 11.12.6), the certificate will specify the method of enforcement and in any event will cover only one application for enforcement.
4. An application for Legal Representation which does not specify why registration in the family proceedings court is inappropriate (or unlikely to be granted) and enforcement in the County Court or High Court is appropriate, as well as stating the proposed method of enforcement, will be refused (Criterion 11.12.6).
5. Where an order has been made for payment direct to a child enforcement proceedings can only be taken by that child acting by a litigation friend. A separate application for Legal Representation by the child is required to take enforcement proceedings.

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6. Legal Representation will be refused to defend enforcement proceedings in the County Court or High Court in the absence of very exceptional circumstances eg there is a substantial legal argument sufficient to justify the grant of representation (Criteria 5.4.4,5.4.5 and 11.12.6). Family Help may, however, where justified be used to assist the client at a court hearing at such proceedings. Neither Legal Representation nor Family Help is available to respond to enforcement proceedings in the family proceedings court where there is a risk of imprisonment. Such proceedings fall within the extended definition of “criminal proceedings” in the Criminal Defence Service (General) Regulations 2001. They can be dealt with by family or crime suppliers who may apply for a criminal Representation Order in appropriate cases (see Family Specification para 10.79). Any existing certificate of representation cannot be amended to cover such proceedings.
7. Legal Representation is not available to pursue registration or enforcement of orders abroad (Criterion 4.2).

**3C-212**

**20.48 Section 37 Orders/Paragraph 74, Schedule 5 Orders/Orders under the Inherent Jurisdiction**

1. An emergency certificate may be issued to be represented as to ancillary relief, coupled with an application under the inherent jurisdiction and/or to prevent disposal of property or assets, but only where justified by the urgency and the circumstances of the case, including the value of the assets (Criterion 5.5.1).
2. There must be prospects of obtaining a substantial benefit from the order to justify Legal Representation. The resale value of any asset(s) to be protected must justify the likely

costs of proceedings. In addition, taking proceedings to protect particular assets is not normally justified where there are other available assets which can be transferred or adjusted in adequate compensation (Criterion 11.12.6).

3. Legal Representation to take or defend proceedings will be refused unless the matter cannot be compromised, for example by way of an undertaking, and the circumstances of the case as well as the conduct of the client justify the grant of representation (Criteria 11.12.4 and 11.12.6).
4. A certificate will not cover proceedings under section 37 or the inherent jurisdiction unless this is expressly stated.

### 3C-213

#### **20.49 Financial Matters Ancillary to Divorce/Judicial Separation, Nullity or Dissolution of Civil Partnership and financial applications under Schedule 1 Children Act 1989**

1. Family Help (Higher) is likely to be the more appropriate initial level of certificated funding and this section (paragraphs 20.49 to 20.51) should be read as applying to applications for Legal Representation including following on from Family Help (Higher).
2. Legal Representation or Family Help (Higher) to take proceedings ancillary to divorce or judicial separation will only be granted if a petition has been issued, its issue is imminent or an undertaking to issue has been given. Similarly, a certificate to defend proceedings will not be granted until proceedings (including a petition containing prayers for ancillary relief) have been issued (Criterion 5.4.4).
3. Applications under Schedule 1 Children Act 1989 can only be made by the parent or guardian of the child or by a person in whose favour a residence order is in force with respect to the child. An application cannot be made by the child themselves. Any applications for funding made on behalf of the child will therefore be refused for this reason. However, where the child has reached the age of 18 he or she should make the application in his own right where the requirements of Schedule 1, paragraph 2 are met (e.g. if he or she is receiving instruction at an educational establishment).

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4. A single certificate should be used to cover proceedings under section 8 and Schedule 1 Children Act 1989.

### 3C-214

#### **20.50 Lump Sum and Property Adjustment Orders (see also paragraph 20.49)**

1. Litigating over the sale of a property with no, low or negative equity is very unlikely to be justified, unless exceptionally, having regard to the relative financial positions of the parties and all the circumstances, there is a very real prospect of achieving the sale of a property subject to a mortgage, from which the client would be released as a consequence

- of an order for sale, or in the circumstances of the particular case the client has a real prospect of preserving a home especially if there are children involved (Criterion 11.12.6).
2. The cost benefit test must be met. For example, Legal Representation will not be granted where the only dispute concerns goods and furniture, the second-hand resale value of which is likely not to be significantly more than the likely costs of pursuing or defending a contested application. In addition, funding will not be justified where any order obtained is unlikely to be successfully enforced eg because the only asset(s) of significant value are abroad (Criterion 11.12.6).
  3. Legal Representation will be refused where the application to the court is unlikely to, or cannot, succeed, for example, because the only asset(s) of significant value are incapable of being assigned (such as some pensions and gratuities) Criterion 11.12.5).
  4. Any ancillary relief order cannot bind creditors and the court has no powers under section 23 and section 24 of the Matrimonial Causes Act 1973 to adjust debts between the parties. Legal Representation will therefore be refused to apply for an order relating to debts unless responsibility for them may be significantly adjusted by a court order (i.e. where there are other financial resources which can be used for their payment). The likely level of any lump sum order made for the payment of debts must justify the costs of proceedings generally having regard to the operation of the statutory charge and the respondent must have the means to meet the order forthwith or within a reasonable time (Criterion 11.12.6).
  5. Legal Representation is only available for court proceedings and would therefore not be appropriate for the negotiation and preparation of a Deed of Separation (Criterion 5.4.4). Family Help (Lower) would be the appropriate level of funding.
  6. Where Legal Representation is granted to resolve the distribution of capital assets it may, depending on the circumstances of the case, be appropriate to grant for ancillary relief generally including maintenance (on the basis that an order is likely to be obtained without increasing the likely costs).
  7. Legal Representation will be refused to defend an application for capital distribution (or to cross-apply) unless the circumstances of the particular client or the issues in the case (e.g. the available financial resources, factual complexity or a point of law) justify the grant of representation applying the cost benefit test (Criterion 11.12.6).

### 3C-215

#### **20.51 Transfer of tenancy (see also paragraph 20.49)**

1. The prospects of success must meet Criterion 11.12.5. Legal Representation must be justified as against the costs of proceedings having regard to all the circumstances, for example the length and terms of occupation, the availability of alternative housing and if relevant the “right to buy” provisions.
2. There must be a clear dispute which cannot be compromised. Where a court order is needed to negate an anti-alienation clause in a tenancy agreement or obtaining re-housing

the grant of Legal Representation will depend on the circumstances of the applicant and the case but Legal Representation will not usually be justified where ...

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there is no dispute and an application to court is being made solely to confirm the transfer in a court order (Criteria 11.12.4, 11.12.6, 5.4.4 and 5.4.5).

3C-216

**20.52 Section 14 Trusts of Land and Appointment of Trustees Act 1996/Declaration as to Trusts Affecting Property/Declaration as to Rights of Occupation**

1. The prospects of success must meet Criterion 11.12.5. Where the prospects are borderline or unclear Legal Representation may be granted where it concerns the preservation of the home of the client or his or her children or has a significant wider public interest. The latter is unlikely given the requirement for the interest to be significant and in the light of the definition at Funding Code paragraph 2.4.
2. Legal Representation will not be granted where there is no, low or even negative equity unless in the particular circumstances of the case litigating would be justified, for example, because the client has a real prospect of preserving a home (especially if there are children involved) or a very real prospect of achieving the sale of a property subject to a mortgage, from which the applicant would be released as a consequence of an order for sale (Criterion 11.12.6).
3. Married couples will not be granted funding to make an application to court unless no divorce or judicial separation is intended and one of the parties wants a jointly owned property to be sold or seeks a declaration as to rights of occupation.
4. A single certificate can cover an application under the 1996 Act and also proceedings under the Children Act 1989 including Schedule 1 – a single application should be made or any existing certificate amended. If possible and in accordance with *W v W* (2004) 2 FLR 321 such applications should be made together and considered by the court at the same time. Otherwise where such an application (including by way of an amendment) satisfies the Funding Code, any certificate is likely to be limited to obtain counsel's opinion or the opinion of a solicitor with higher advocacy rights on the merits. This is to enable the appropriate jurisdiction to be clearly established.

3C-217

**20.53 Inheritance (Provision for Family and Dependents) Act 1975**

1. Note that although proceedings under the Inheritance (Provision for Family and Dependents) Act 1975 are exempt from the requirement to attend on a mediator there is nothing to prevent mediation taking place voluntarily in such cases or in any family

proceedings where the mediator deems the case, the parties and all the circumstances suitable.

2. In order to justify Legal Representation the proceedings must have sufficient prospects of success and be likely to result in a significant recovery. Therefore the application to court must be in time (or an application to leave to commence proceedings out of time is likely to be successful) and the client must be a qualifying dependant under section 1 of the Act or likely on the evidence available to satisfy the court that an order should be made. In addition, the size of the estate and likely award must justify the proceedings and likely costs (Criterion 11.12.5 and 11.12.6). In most cases Family Help (Higher) will be the most appropriate level of service to issue proceedings and negotiate an appropriate settlement.
3. In most cases it will be appropriate for the costs of defending the case to be met out of the assets of the estate. Where the costs of proceedings can be met from the estate Legal Representation to apply for an order is likely to be refused although a limited grant to seek a Beddoes order confirming this may be justified where no agreement on this issue can be reached (Criterion 5.4.2). Legal Representation is therefore likely to be refused to defend proceedings where the costs can be met without hardship being caused (having regard to the assets of the estate and resources of the beneficiaries) (Criteria 11.12.5 and 11.12.6). Where hardship would be caused, Legal Representation may be granted ...

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having regard to the prospects of success, issues, value of the claim, likely costs and attempts to compromise the case and subject to an appropriate contribution from the estate or the beneficiaries or both (Criteria 11.12.4, 11.12.5 and 11.12.6).

4. Certificates will cover all steps up to but excluding trial but including Counsel's opinion or the opinion of a solicitor with higher court advocacy rights, subject to any more restrictive limitation imposed in the particular case. This is to ensure that cases only proceed where a trial cannot be avoided and remains justified, having regard to the prospects of success, value of claim and property in dispute as well as attempts to define the issues between the parties and to settle the matter.

### 3C-217.1

#### **20.54 Child Support Act 1991 – section 20 and section 27**

1. The alleged father must have co-operated with the obtaining of blood or DNA tests by the Child Support Agency bearing in mind that the Agency will offer DNA tests at a discounted rate whether or not the parent with care is in receipt of benefit and may itself meet the costs of testing (Criteria 11.12.4 and 11.12.6).

2. Even if the exceptional circumstances of the case justify the grant of Legal Representation it will be appropriate to limit the certificate to the obtaining of blood tests (including DNA) if such test results are not already available.

### 3C-217.2

#### **20.55 Section 20 – Parentage appeals**

1. An appeal to the court must be available ie parentage must be denied and the Child Support Officer have made (or declined to make) an assessment, the decision having been upheld on review (or an application for review refused). The Child Support Agency will always be the respondent and therefore Legal Representation will only be available to the appellant.
2. Factors to be taken into account when estimating the prospects of success under Criterion 11.12.5 are the existence of a previous adoption order or a court finding of paternity which the appellant will effectively be seeking to overturn, as well as the results of any blood or DNA test.

### 3C-217.3

### 3C-217.4

#### **20.56 Parentage declarations – including Section 27 Child Support Act 1991 and Section 55A Family Law Act 1986**

1. The applicant must have sufficient interest to take the proceedings (which can be used to establish parentage or not) and the evidence available (including any blood or DNA tests) and the personal benefit must justify any grant of representation  
...

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...

(Criterion 11.11.5). If blood or DNA tests are not already available but Legal Representation is justified the certificate will be limited to obtaining them.

2. Establishing parentage alone may justify a grant but this will depend on the circumstances and usually the applicant will also wish to obtain contact or financial provision.
3. The evidence available (including any blood or DNA tests) and the personal benefit likely to be obtained must justify the grant of representation (Criterion 11.12.5). In addition, in cases involving the Child Support Agency Legal Representation to take proceedings will be refused unless the Agency has declined to take proceedings itself (Criterion 11.12.6).
4. If the mother or alleged father is in receipt of income support or income based Jobseekers' Allowance then Legal Representation will be refused (Criterion 11.12.6) if the purpose of the proceedings is to establish parentage for the purposes of the Child Support Agency (the proceedings are classified as a Private Law Children Case for the purposes of the Funding Code). If the applicant mother is in receipt of working tax credit or disability

working allowance Legal Representation may be granted but only if her reason(s) for wanting to take proceedings and the personal benefit to be obtained by her, are sufficient to justify the grant. A request by the Agency for her to take proceedings will be insufficient (Criterion 11.12.6).

### 3C-217.5

#### **20.57 Section 30 Human Fertilisation and Embryology Act**

1. Legal Representation is unlikely to be justified except in unusual circumstances. The parental order reporter (who is a CAF/CASS officer) will play an active role in the proceedings and as the agreement of the father and the woman who carried the child is required before any order is made it is unlikely that the grant of Legal Representation will be justified to make the application if the matter is unopposed (Criteria 5.4.4, 5.4.5 and 11.12.6).
2. If the order is opposed, Section 30(5) (as to consent by the father and the woman who carried the child) will not be satisfied and an order will not be made. Legal Representation will therefore not normally be justified, unless the application to the court nonetheless has sufficient prospects of success (on the basis that the requirements of Section 30(5) or 30(6) have been satisfied) (Criterion 11.12.5). The grant of representation may be justified when the applicant is asking the court to dispense with the consent required under Section 30(5) on the basis that the person cannot be found or, to a lesser extent, is incapable of giving consent.
3. It is unlikely applications for Legal Representation will be made to oppose the making of the order as where there is no consent Section 30(5) will not be met. It is possible, however, that a birth parent may maintain that although consent has been given it does not satisfy Section 30(5) and 30(6).
4. A birth parent will be a respondent to the application and a person with parental responsibility may wish to oppose the making of an order. Legal Representation will be refused to defend proceedings unless the client has sufficient prospects of success in opposing the order despite any consent (Criterion 11.12.5) or the grant of representation is justified in the particular and exceptional circumstances of the case (Criterion 11.12.5).
5. Section 30 proceedings will be commenced in the family proceedings court and can be transferred upwards in accordance with the Children (Allocation of Proceedings) Order 1991 as amended. No condition as to forum will be included in any certificate issued.

### 3C-217.6

#### **20.58 Child Abduction and Custody Act 1985**

1. Non means, non merits tested Legal Representation is available to an applicant who has applied under the Hague Convention or the European Convention to the central authority (the International Child Abduction and Contact Unit – part of the Official Solicitor's

Office) pursuant to Section 3(2) or Section 14(2) of the Child Abduction and Custody Act 1985 i.e. an application made under the Convention by a person outside England and Wales for the return of or contact with an abducted child who has been brought to England and Wales. These applications can only be granted on production of a letter of instruction from the International Child Abduction and Contact Unit to the applicant's solicitor which must be submitted to the London Regional Office.

2. Legal Representation other than a non means and non merits tested certificate must not be granted to take such proceedings. An emergency application would not be appropriate. Note, however, that a certificate will not extend to representation on an appeal, whether interim or final, in the absence of an appropriate amendment and that ...

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...

Funding Code Criteria 11.11 (but no means test) would be applied to any such amendment application.

3. Legal Representation, which otherwise falls to be determined under the private law children cases Criteria in Section 11 of the Code, is only likely to be granted to take or defend proceedings under the Child Abduction and Custody Act 1985 where the client has sufficient prospects of success and the likely benefits justify the likely costs (Criteria 11.11.5 and 11.11.6). This means that:
  - (a) the grant of Legal Representation to defend proceedings must be justified in all the circumstances of the case (given that there will be a breach of rights of custody in favour of the other party); and
  - (b) the grant of Legal Representation to take proceedings, e.g. for a declaration to produce to a foreign court, will depend on the ultimate prospects of successful enforcement, having regard to all the circumstances of the case including the foreign country involved.
4. Furthermore, in a case to be determined under the private law children cases Criteria in Section 11 Legal Representation may be refused in the absence of reasonable attempts at settlement or resolution (Criterion 11.11.4) but this will depend on all the circumstances of the case and may be inappropriate given that these cases are dealt with by the High Court in London usually within 24 hours of the service of proceedings.
5. Respondents to applications under the Child Abduction and Custody Act 1985 have to satisfy the prospects of success Criterion at 11.11.5. This requires prospects of success to be at least borderline. Funding cannot be granted if prospects of success are poor. However "success" does not necessarily mean ensuring that an order for the return of the child is not made. A successful outcome may involve an order for the return of the child but one made with safeguards dealing with, for example, housing and maintenance for the respondent while the welfare of the child is determined in the country of origin.

6. It would be unusual for a respondent who was not the caring parent (the parent with whom the child was living in the country of origin) to meet the criteria for funding unless there was a strong defence under Article 13 of the Act to prevent the return of the child.
7. Respondents to applications under the Act must also satisfy the cost benefit Criterion at 11.11.6 in order to obtain funding. This means that Legal Representation will be refused unless the likely benefits to be gained from the proceedings for the client justify the likely costs, such that a reasonable private paying client would be prepared to take or defend the proceedings in all the circumstances. If the prospects of success Criterion is met, the cost benefit Criterion is also likely to be satisfied in these cases.
8. The preparation of an application made to the Child Abduction Unit for transmission to another jurisdiction can be supported by way of Legal Help but funding is not available for proceedings outside the jurisdiction of England and Wales.

### 3C-217.7

#### 20.59 Foreign Maintenance

*NOTE: The Registration and Enforcement of Maintenance Orders Section (known as REMO) at the Department for Constitutional Affairs may be able to assist with queries regarding registration and enforcement of foreign orders—their contact number is 020 7210 8340.*

1. Legal Representation will be refused for proceedings in a family proceedings court under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972 relating to a maintenance or lump sum order made by a court of a country outside the United Kingdom unless:
  - (a) the amount involved; and
  - Looseleaf Page Break (253) ---
  - (b) the likely benefit to be obtained, having regard to the means of the payer and likelihood of recovery; are sufficient to justify the grant (Criterion 11.12.6).
2. Non-means, non-merits tested Legal Representation is available for:
  - (a) an appeal to a magistrates' court against the registration of or the refusal to register a maintenance order made in a Hague Convention country pursuant to the Maintenance Orders (Reciprocal Enforcement) Act 1972; or
  - (b) an application for the registration of a judgment under EU Council Regulation (EC) No. 44/2001, but only where the applicant had complete or partial legal aid, other public funding or exemption from costs or expenses in the country in which the maintenance order was made or the judgment was given (Criterion 11.14). For this purpose a maintenance order includes a lump sum order.
3. Where the proceedings fall outside these special provisions Legal Representation is not available for proceedings within paragraph (a). Legal Representation is available for

proceedings within paragraph (b) which will be in the High Court. Legal Representation will be refused unless:

- (i) the prospects of success having regard to the means of the payer and the likelihood of recovery are sufficient to justify it (Criterion 11.12.5); and
- (ii) representation is justified in all the circumstances of the case (Criterion 11.12.6).

### 3C-217.8

#### **20.60 Registration of European Parental Responsibility Orders**

1. Regulation 3(1)(g) Community Legal Service (Financial) Regulations 2000 (as amended) includes Legal Representation for the registration and enforcement of a judgment under Council Regulation (EC) No 2201/2003 (the “Brussels IIa” treaty) which therefore is available without reference to means if the applicant benefited from assistance with costs or expenses in the country where the judgment was given.
2. In this context parental responsibility extends to contact and residence orders, non-means tested funding covers the registration and enforcement of an order.
3. Applications for funding should be submitted using form CLSAPP3. A means assessment form or L17 is not needed but the reason for this should be made clear on the application form, e.g. by endorsing the form “Brussels II Treaty non-means application”. Generally the information provided by the Child Abduction Unit will be sufficient for a decision to be made.
4. Funding Code criteria 11.11 will apply but applications for registration are unlikely to be refused as mediation and attempts at settlement will not be appropriate; the prospects of success will not be poor and the cost benefit criterion will usually be satisfied. However, with regard to enforcement following registration these criteria may be appropriate.

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3C-217.9

## **DOMESTIC VIOLENCE DESK TOP AID**

### **20. Children and Family**

#### **NON-MOLESTATION ORDER AND OCCUPATION ORDER – PARAGRAPH 20.32**

##### **Applicant**

- Prospects of success must be better than poor.
- Is warning letter appropriate?
- Have police been notified and if so what action has been taken?
- Is Respondent subject to bail or custody conditions?

- Is emergency cover appropriate ie applicant or relevant child in imminent danger of significant harm? Was last incident within last 2 or 3 weeks?
- Respondent**
- Legal Representation unlikely to be granted for non-molestation order only if matter could be dealt with by way of undertakings or unless very serious allegations which are denied wholly or substantially.
  - Legal Representation unlikely for non-molestation order only unless inability to defend, e.g. mental incapacity or minority.
- Grant of Funding:**
- To be represented on an application for a non-molestation order (IJ012).
- Wording**
- If occupation order also justified: To be represented on an application for a non-molestation and occupation order (AA016).
- Limitations –  
Emergency  
Certificate:**
- All certificates have an initial costs limitation of £1,500 (EGY2).
- Applicant**
- As to an application under Part IV Family Law Act 1996 limited to all steps necessary to apply for an interim order where application is made without notice to include representation on the return date (AA010).
- Respondent:**
- As to an application under Part IV Family Law Act 1996 limited to all steps up to and including the hearing on [ ] (AA007).
- Substantive  
Certificate –  
Applicant and  
Respondent:**
- As to proceedings under Part IV Family Law Act 1996 limited to all steps up to and including obtaining and serving a final order and in the event of a breach leading to the exercise of a power of arrest, to representation on the consideration of the breach by the court (but excluding applying for a warrant of arrest, if not attached, and representation in contempt proceedings)(AA019).

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