

20. Children and Family

PART A – GENERAL PRINCIPLES

20.1 General Approach

1. Family is the dominant area of CLS funding accounting for 32 per cent of New Matter Starts in Controlled Work and 82 per cent of new certificates issued in 2008 / 09. 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.
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. 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.
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.

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20.2 Community Legal Advice

1. Community Legal Advice is a telephone helpline that provides legal advice to eligible clients on a range of issues. Family advice is available over the telephone through providers that have a Family CLA contract. Clients call a central number to an operator service and first speak to an operator who will assess the caller's needs. The operator can then choose to:
 - Connect the caller to a legal adviser to provide telephone advice;
 - Provide details of local, quality-approved face-to-face advisers;
 - Direct callers to other advice providers;
 - Send out leaflets; and

- Provide access to advice and information in over 170 different languages through the three-way telephone interpreting service, currently provided by Language Line.
2. Family legal advisors provide telephone advice on any family disputes as defined in the Funding Code. The most common issues they deal with are divorce and contact issues. If a case progresses a client may choose to have face-to-face advice and they will then be provided with the details of local solicitors. If a provider takes on a client who has had telephone advice the telephone provider will transfer the client file in the usual way. The costs of the telephone advice must be noted on the file because telephone advice is not paid under fixed fees but on hourly rates that vary between CLA providers. This information will be required in the event that the statutory charge applies.
 3. Where a client has telephone advice and then wishes to issue proceedings the telephone advisor can continue to represent the client if this is what the client chooses. Once a case proceeds to proceedings then work is no longer done under the Family CLA contract but under the 2007 Civil Contract.

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Scope of Family Work

20.3 Definition of Family Proceedings

1. “Family Proceedings” is defined at s.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 s.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 2007 Civil Contract (see para.20.21 below).
2. The definition of family proceedings has been widely drafted so as to extend to all proceedings which arise out of family relationships, including proceedings in which the 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 Dependents) Act 1975 by a dependant who was not a member of the deceased’s family would still be considered under s.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

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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 s.7 of the Code Criteria (Judicial Review).

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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 s.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 and civil partnerships;
 - (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 s.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?
4. Thus, ancillary relief and other divorce proceedings, statutory or common law proceedings concerning the welfare of children, or disputes between unmarried couples under s.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.

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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 s.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 art.8 of the Human Rights Convention. Under art.8 the existence of family life can depend simply on “the real existence in practice of close personal ties” (see *K v. United Kingdom* (1986) 50 D.R. 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 art.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 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 s.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 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 2007 Civil Contract Family Specification (see rr.10.166, 10.167 and 10.168 and further at para.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 2010 Rule 16). 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 s.19 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

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	Contract Work
Family Help (Lower)	Controlled Work
Family Help (Higher)	Licensed Work
Legal Representation	Licensed Work

2. 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. Details of the fees payable under the fee schemes and when these can be claimed are contained in the annexes to the Costs Assessment guidance. 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.

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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) but are remunerated directly under the mediator's contract with the Commission.

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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 para.5 of 20.3). Family Mediation is provided under the Family Mediation Specification which forms part of the 2010 Standard Civil Contract – see s.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 s.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). Provided at least one of the parties is financially eligible the costs of both parties' assessment meeting(s) will be met (even though one of the parties is not eligible). This is because both parties need to be assessed for the suitability of Mediation. These arrangements also apply in a case involving the welfare of children where the Cafcass / Cafcass Cymru officer is of the view that mediation should be considered or the court adjourns a case for mediation to be considered or makes a contact activity direction (under s.11A Children Act 1989) or contact activity condition (under s.11C Children Act 1989) requiring information about mediation to be provided to one or both of the parties in the context of ongoing proceedings relating to contact.

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3. For those who are financially eligible all mediation sessions themselves will be funded. In cases where one party is publicly funded, then the LSC will pay a fee for that client and the mediation

service will agree a separate payment with the private paying client. Substantive publicly funded Family 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. Family Mediation is also non-contributory.

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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. In cases where either or both parties is / are subject to a contact activity direction / condition, a failure to attend the mediation assessment meeting in accordance with the terms of the contact activity direction / condition will be reported to Cafcass and then to the court.
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.

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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) (not subject to a contact activity direction / condition – see above) 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 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.

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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.

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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.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.

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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 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 r.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 s.7.8 of this guidance.

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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 for themselves 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 they 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 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) or 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 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 s.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 Dependants) Act 1975

It 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 s.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 s.14 of the Trusts of Land and Appointment of Trustees Act 1996. Note that although proceedings under the Inheritance (Provision for Family and Dependants) 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 para.5 below. The Code allows for the possibility of guidance being issued in individual cases (see para.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.

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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 (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 six weeks away then the second party will be exempt under the exemption at (d) below.

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- (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.

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5. For the purposes of availability of a mediator under para.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, they are 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 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 para.(d) below) or if there is only one approved mediation supplier, that 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.

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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 para.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 CLSAPP7 (not completed by the mediator) when making an application for Family Help (Higher) or Legal Representation (including by way of 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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20.11 Legal Help

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 ss.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 Pt B Payment Annex to the 2007 Civil 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 Table 3(a) of the Payment Annex apply to all work within the family category other than public law work. Further guidance as to what work is covered under each fee is contained in the annexes to the Costs Assessment Guidance.
5. 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 the costs are the actual cost to the Fund, which in most cases will be the standard fee, is used. See reg.43(3) and (4) of the Community Legal Service (Financial) Regulations 2000, as amended.

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20.12 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 by a Local Authority of potential proceedings under s.31 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). Although there are specific criteria in the Family Specification as to when a Level 2 fee may be claimed it should be remembered that this is in addition to the criteria set out in para.11.3 of the Funding Code i.e. the cost benefit criteria must still be met.
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 para.10.58 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 s.31 care proceedings, including by the provision of a written summary of its

particular concerns, 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 and is non-means tested. 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.

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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). However, although negotiations with the other parties may be appropriate, Collaborative Law will not be funded under any level of service. In public law, where potential s.31 cases meet the criteria, no means test is applied and form CW1PL should be completed and the notice from the local authority attached.
5. 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.
6. 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.

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7. 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.

8. Conveyancing services are excluded from the scope of the Community Legal Service by para.1(b) of Sch.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.
9. 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 three times 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).

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20.13 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 para.2.1).
2. Family Help (Higher) (Level 3 under the private law fee schemes) 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 Family Help (Higher) (or General Family Help) 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 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 Family Help (Higher) will remain in force until it is discharged or revoked. However, completion of the work authorised

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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.

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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 ss.11.11 or 11.12 of the Code Criteria. It is in these classes of case that Family Mediation (see para.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.

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Emergency Proceedings

- 8. Under para.10.68 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 s.12 should be taken into account in decisions on granting emergency Family Help (Higher). The usual obligation to notify the regional office within five working days of the devolved decision

applies. Note that devolved powers may be used to grant Family Help (Higher) and if the Commission considers that the appropriate level of service should have been Family Help (Higher) then the certificate will be limited to Family Help (Higher) and no fee for Legal Representation may be claimed unless the certificate is subsequently extended to that level.

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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 and the limitation covers any standard fee as well as advocacy costs and disbursements at this level of service. 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).

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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 para.23 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 para.20.10 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).

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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, CAFCASS dispute resolution may be an effective means of resolving the financial and children issues.
14. The statutory charge applies to Family Help (Higher). In these cases, the actual cost to the Fund, which in many cases will be the standard fee unless the case becomes exceptional is used. The charge will in these cases attach to all costs including those incurred at Controlled Work level.

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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.

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

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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 and this will be carried out at Family Help (Lower). 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.

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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 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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20.14 Legal Representation

1. Legal Representation (as defined in para.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 s.20.21 below. Suppliers have devolved powers to grant emergency representation in Family and in Non Family cases. Guidance on emergency funding is at s.12 of the Funding Code guidance. Substantive grants of Legal Representation are otherwise made by the Commission's regional offices.

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3. The definition of Family Help (Higher) (Funding Code para.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 overleaf 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 s.4 of the Funding Code, which apply to all levels of service, are not listed here but the standard Criteria for Legal Representation in s.5.4 of the General Funding Code are listed where they apply. The most significant Criteria are listed in bold (see also the table at 20.17 regarding Prospects of Success).

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Case type – as defined in the Funding Code	Guidance	Merits criteria
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	Alternative Funding 5.4.2 Need for Representation 5.4.5 Prospects of Success 11.9.2 Reasonableness 11.9.3
Domestic Violence Cases	20.32	Alternative Funding 5.4.5 Alternatives to Litigation 5.4.3 Other Levels of Service 5.4.4 Need for Representation 5.4.5 Prospects of Success 11.10.2 Cost Benefit 11.10.3

Case type – as defined in the Funding Code	Guidance	Merits criteria
Private Law Children Cases	20.33 to 20.38	Alternative Funding 5.4.2 Alternatives to Litigation 5.4.3 Other Levels of Service 5.4.4 Need for Representation 5.4.5 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 Cost Benefit 11.10.4
Financial Provision and Other Proceedings	20.39 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 Referral to Family Mediation 11.12.2 Suitability for Mediation 11.12.3 Attempts at Settlement 11.12.4 Prospects of Success 11.12.5 Cost Benefit 11.12.6 Availability of private funding 11.12.7
Child Abduction Cases	20.58	None but see Funding Code criterion 11.13
Foreign Orders and Judgments	20.59	Legal Aid Abroad 11.14.2

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Key Funding Criteria

20.15 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.

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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, S.I. 2003 No.1348 Adoption Support Services (Local Authorities)(Wales) Regulations 2005, S.I.2005 No.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, 20th July 2000).

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20.16 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 Pt IV or V of the Children Act 1989, and it would be reasonable to expect their views to be adequately put to the court through evidence given on

behalf of another party or otherwise. See also para.20.33, sub-para.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 r.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 para.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 para.20.26.15 below).

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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 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:
 - borderline or unclear for Public or Private Law Children cases and Domestic Violence i.e. Legal Representation will

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

- 50 per cent 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 para.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):

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Case type	Successful outcome
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 their age or understanding) and whether this will affect the likely outcome. It is helpful to consider prospects in the light of the checklist at s.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 ss.4.5-4.9, Vol.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:

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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 para.10.58 of the Family Specification). Family Help (Lower) may only be granted for those Family Disputes:
 - (a) Which involve more than taking instructions from and advising the Client, and providing any follow up written or telephone advice; and
 - (b) Where the provider is involved in substantive negotiations with a third party (either by conducting the negotiations themselves or by advice and assistance in support of mediation); and
 - (c) Where the dispute, if unresolved, would be likely to lead to family proceedings; and
 - (d) Which do not primarily concern processing a divorce, nullity, judicial separation or dissolution of a civil partnership; and(e) Which do not primarily concern advice about a will, change of name or issues relating to child support.

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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 charts below list 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.

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Level of service	Applicable test
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

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Proceedings	Applicable test
Special Children Act Proceedings	No applicable criteria
Related Proceedings (to Special Children Act)	The proceedings must fall within the definition of related proceedings. The criteria applicable to the particular proceedings will apply
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

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.

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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.

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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) a respondent should be given 21 days to respond to a solicitor's letter making settlement proposals or offering a meeting or mediation;
 - (b) 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 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 para.20.18, sub-para.1 above.

20.20 Private Funding in Ancillary Relief and Other Financial Cases

Scope of the Power

1. With effect from 3rd 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 s.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 Dependants) 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 3rd October 2005. It does not apply to levels of service granted before 3rd October 2005. Therefore, if a Legal Representation certificate was in force as at 3rd 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 3rd 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 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.

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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:
 - (a) 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;
 - (b) Whether the client’s disposable income is such that they can reasonably be expected to take out a loan to fund the remainder of the case – i.e. borrowing potential of the client; and
 - (c) Even where the client’s disposable income suggests that they 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.

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Available Capital Assets

8. Question (a) 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:

- (a) by the discharge of the certificate, with a further application for public funding when the available assets are exhausted; or
- (b) 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 s.22(2)(b) of the Access to Justice Act 1999 for the solicitor to receive payment out of those assets while the certificate is still in force, provided the work done continues to be charged at legal aid rates.

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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 £513 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.

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- 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 they 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.

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Evidence of Availability of Loan

15. Where the disposable income of a client, as above, suggests that they 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 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 per cent or more) higher than contributions due under the certificate.

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Administration

20.21 Family Work Under the 2007 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 2007 Civil 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 2007 Civil 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 2010 Standard Civil Contract and is therefore subject to the 2010 Standard Civil Contract Standard Terms. However, the Family Mediation Specification is separate from the Civil Specification which governs Controlled and Licensed Work.

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4. All Licensed Work under the Commission's 2007 Civil contract including Family Help (Higher) and Legal Representation in family proceedings is governed by Pt 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 2007 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).

Devolved Powers

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8. 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 s.12 of the Funding Code guidance;
 - (b) To grant Legal Representation in Special Children Act proceedings (as defined in s.2.2 of the Funding Code) – see paras 10.39 – 10.42 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 s.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 para.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.

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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 s.20.10).

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:
 - (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.
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 ss.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 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 20.58, 20.59 and 20.60.

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 their 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] A.C. 124; [1980] 2 W.L.R. 756 HL.. It will be necessary for costs to be carefully apportioned by the solicitor to the appropriate proceedings if they are separate.

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 para.20.22, sub-para.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 / CAFCASS Cymru 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).
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). Family Help (Higher) may, where granted, be limited if the

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other party will not engage, up to any First Hearing Dispute Resolution Appointment.

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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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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.

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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-para.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.