

PART C – PRIVATE LAW

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

Domestic Violence

20.32 Domestic Abuse and Forced Marriage**A General Approach**

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

B Funding Criteria**Prospects of Success**

5. Legal Representation will be refused if the prospects of obtaining the order sought in the proceedings are poor (Criterion 11.10.2). Funding can therefore only be granted where prospects are at least “borderline” as defined in the Code. In relation to non-molestation

orders under Pt IV the issue is whether the court is likely to be satisfied that the respondent has molested the other party or a relevant child and that an order is considered necessary by the court for the protection of that party or child having regard to all the circumstances, including the need to secure the health and safety and wellbeing of the applicant, of another party to the proceedings or of any relevant child. The prospects of obtaining an order are likely to be poor if, for example:

- (a) the incidents complained of are of a trivial nature. However where there has been a history of incidents, the cumulative effect of those incidents may be taken into account; or
- (b) the conduct complained of is not likely to be repeated. If the conduct complained of took place more than three weeks prior to the application it will be necessary to set out in the application why it is considered that repetition is likely, for example if there has been a history of violent conduct.

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Cost Benefit

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

Warning Letter

7. An application may be refused to cover court proceedings if no warning letter has first been sent to the respondent. However this is not an absolute rule. Practitioners should demonstrate in the application that consideration has been given to whether a warning letter should be sent or if this might endanger the client. A warning letter may often be inappropriate for example if the applicant and respondent are still living under the same roof or if the threat to the applicant is serious and imminent or if receipt of a warning letter by the respondent may trigger further violence to the applicant or any relevant child before a protective order can be obtained. However in other cases a warning letter, which can be issued under the Legal Help scheme, will be the appropriate first step. In such circumstances if no warning letter has been sent and no consideration given to this Legal Representation may be refused under Criterion 5.4.4.

Involvement of the Police

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

Custody and Bail Conditions

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

Capacity of the Respondent

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

Respondents

11. Legal Representation to defend domestic abuse injunction proceedings and forced marriage protection orders will also be considered under s.11.10 of the Code. However, prospects of success and cost benefit criteria are unlikely to be satisfied by a respondent to non molestation proceedings or a forced marriage protection order only, unless there are very serious allegations which are denied wholly or substantially. An exception is where

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

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

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C Specific Proceeding Types

Occupation Orders

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

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Protection from Harassment Act 1997 and Other Injunctions

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

the same way as non-molestation orders under Pt IV of the Family Law Act 1996.

Enforcement Proceedings

16. Where a respondent is alleged to be in breach of an order or undertaking, Legal Representation may be applied for either for the issue of a warrant of arrest or to seek the respondent's committal. When considering prospects of success it is necessary to look at the seriousness of the applicant's allegations of breach and all the other circumstances, and consider the likely benefit to the client of obtaining a further order. Depending on the seriousness of the allegations a warning letter may be the appropriate course in some cases rather than a further application to court. It is also necessary to consider whether the allegations should be reported to the police so that they can be dealt with through criminal rather than civil proceedings. Following the implementation of s.42A of the Family Law Act 1996, breach of a non-molestation order is a criminal offence. In accordance with s.42A(3) of the Act, where a person is convicted of an offence then the same conduct is not punishable as a contempt of court. It is also unlikely that Legal Representation will be granted for committal proceedings if criminal proceedings have been instigated by the police. Where the police have been informed and no action is being taken information as to the reason(s) should be provided with any application for funding to apply for the issue of a warrant of arrest or committal.
17. When considering Legal Representation to defend committal proceedings, bearing in mind the significance of such an order for the client, Legal Representation will usually be justified where it is in the interests of justice for the client to be represented (see also 20.25.5).

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D Scope of Certificates

18. The Commission will not require proceedings under Pt IV Family Law Act 1996 to be commenced / conducted in any particular venue.
19. Where matrimonial proceedings are in existence or are to be commenced then any application under Pt IV may be made in those proceedings. Where there is an existing certificate capable of amendment to cover proceedings under Pt IV Family Law Act 1996 an application must be made for an amendment rather than for a fresh certificate.
20. Any certificate covering proceedings under Pt IV will cover obtaining a final order including, if appropriate, applying for a without notice order prior to that.
21. Any application for an extension, variation or discharge of an order will not be covered unless this is specified, either by an amendment to an existing certificate or by a new certificate.
22. Certificates may cover applying for a non-molestation order only, but can be expressed to cover non-molestation and / or occupation orders provided there is sufficient merit to justify each remedy sought.

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23. An occupation order may impose financial obligations. The scope of the certificate will extend to those aspects without the need for a specific amendment. Any recovery or preservation in proceedings under Pt IV Family Law Act 1996 is exempt from the operation of the statutory charge. It would, however, generally be reasonable to expect substantial ancillary issues to be adjourned for consideration in other more appropriate proceedings, e.g. ancillary to divorce / judicial separation.
24. Where an order made under Pt IV, including a power of arrest, is breached, cover for both the applicant and respondent extends to representation on the consideration of the breach by the court following exercise of the power of arrest. However, cover does not, without a specific amendment, extend to applying for the issue of a warrant of arrest (where a power of arrest has not been attached to the order) nor to representation for either party in contempt of court (committal) proceedings.
25. A respondent's certificate, which covers in respect of proceedings under Part IV or an application for committal representation on arrest, either following the exercise of a power of arrest or the execution of a warrant, will also extend to applying for bail and to representation on any adjourned hearing. Likewise, the applicant's certificate, once extended to cover the application for the issue of warrant / to commit, will cover representation as to bail at any adjourned hearing.

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26. A single certificate can cover family proceedings (as defined by para.2.2 of the Funding Code, including proceedings under Pt IV) and proceedings under the Trusts of Land and Appointment of Trustees Act 1996, or family proceedings and proceedings under the Protection from Harassment Act 1997 where the proceedings arise out of a family relationship. A single certificate can also cover proceedings under Pt IV and other family proceedings. A single application or an application for an amendment must be made rather than two separate applications or an application for a fresh certificate.
27. Proceedings under Pt IV will not be sufficiently related to proceedings under ss.31, 43, 44 or 45 Children Act 1989 for cover to be available under a non-means, non-merits tested certificate. If, however, the court makes an order of its own motion with a return date then no amendment is necessary to cover representation on the return date and on any adjournment.
28. Proceedings in relation to an exclusion requirement in emergency protection order proceedings or proceedings culminating in an interim care order are within the scope of a non-means, non-merits tested certificate covering the main proceedings. No specific amendment is required e.g. in the event of a power of arrest being exercised or a variation or discharge of the order being sought. An excluded person can apply in the usual way for a means and merits tested certificate to vary or discharge an exclusion requirement. Where a certificate is issued it covers, following exercise of the power of arrest, representation on the consideration of the breach by the court without the need for a specific amendment.

Private Law Children Cases
20.33 General Approach

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

Mediation

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

Cost benefit

5. Where the benefit to be obtained is not quantifiable in monetary terms it is necessary to look at the circumstances of the particular case in terms of what is likely to result. In cases regarding the welfare of children this must be in terms of a significant improvement in the arrangements for that child or children viewed objectively. This will not, however, justify the grant of representation to apply for a residence order which would have the effect of varying residence where the client is unlikely to obtain a residence order and the likely significant improvement would be in arrangements for contact. In those circumstances an application to be represented on an application for contact would be more appropriate. Also note that Family Help (Higher) will generally be the more appropriate initial level of service – negotiations and any First Hearing Dispute Resolution appointment can be used to resolve or narrow the issues and for Legal Representation to be justified the remaining issues must satisfy the cost benefit test. The

court's decision on any First Hearing Dispute Resolution appointment, outlining the issues, will be relevant to the funding of further contested proceedings and the relevant court order must be submitted with any application for Legal Representation. Issues of detail (e.g. frequency and extent of contact including whether staying contact should take place) rather than principle (e.g. no direct contact) are unlikely to justify a grant, in particular as a reasonable private paying client would be unlikely to continue contested proceedings but would rather seek to compromise the issue(s). The fact that the parties cannot agree does not of itself justify the grant or continuation of public funding.

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5. Legal Representation will not be granted unless the court is likely to intervene to make an order bearing in mind the no order principle in Children Act cases. In addition, Legal Representation will not be granted if in the particular circumstances of the individual case any order obtained is likely to be ineffective or incapable of successful enforcement (Criterion 11.11.5).
6. To justify the grant of Legal Representation the applicant must have a sufficient interest or a sufficiently separate interest to justify being a party or having separate representation (i.e. their interests do not coincide with those of another party or can be dealt with by way of evidence or otherwise) (Criteria 5.4.5 and 11.11.6).
7. An applicant who requires permission to take or to be joined in proceedings must indicate why they are likely to succeed in being joined and why they are the appropriate applicant for representation in the circumstances of the particular case (Criterion 5.4.5). Where the certificate is issued prior to that leave being applied for the certificate will extend to representation on the application for leave, although the scope of the certificate will not specifically state this.

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8. It is unlikely that Legal Representation will be granted where the application is uncontested unless where there are reasons why the court is likely to make an order and representation is justified in the particular circumstances, i.e. it involves a significant point of law or difficult issue of fact. Family Help (Higher) would be the more appropriate level of service to be used to obtain an agreed order. (Criterion 11.11.6).
9. If the issues are of insufficient gravity to warrant legal proceedings or could be dealt with by, for example, writing a letter, negotiations (including with the assistance of Family Help (Higher)) or involving the police or social services then Legal Representation is unlikely to be granted (Criteria 11.11.4, 5.4.3, and 11.11.6).
10. Legal Representation will not be justified to commence or continue if the issues in dispute do not justify this, although it may nonetheless be granted if the applicant is suffering from a material physical or mental disability such that it would be unreasonable to expect them to act in person (Criteria 5.4.5 and 11.11.6).

Applications by children (see also para.3D-013 regarding means assessment)

11. The fact that a child can make an application to the court will not of itself justify the grant of Legal Representation. The application for funding may be refused if it appears that the application is being made by the child rather than an appropriate adult in order to secure public funding (Criterion 5.4.2). An application for Legal Representation by a child to start proceedings must provide information to justify the reasons for this and the likelihood of leave of the court being granted, otherwise the application is likely to be refused. The reasons why any relevant adults have not taken proceedings should also be provided (in particular in relation to those with whom a child might live in the event of a residence order being made). Legal Representation would be unlikely to be granted to a child to apply for a residence order as opposed, in appropriate circumstances, for a contact order with siblings not in care (Criterion 5.4.2).
12. Where a funded client wishes to apply to the court for a child to be joined no specific amendment to the certificate will be required to cover the application. An amendment is also not needed if another party other than a child is added to the proceedings, although the usual reporting obligations apply (Procedures C43 and C44).
13. An application by a child to be joined in existing proceedings must justify the reasons for this and deal with the likelihood of leave being granted otherwise the application is likely to be refused. Regard must be had to the President's Direction of 5th April 2004 and CAF/CASS Practice Note and Guidance concerning the representation of children in proceedings which are not specified within the meaning of s.41 Children Act 1989. Separate representation may, for example, be justified where there are allegations of abuse which cannot be resolved with the help of a CAF/CASS officer or where the child has interests which are inconsistent with or cannot be represented by any of the adult parties. Consideration must also be given generally to the role and possible involvement of CAF/CASS or, in the appropriate cases, the Official Solicitor. CAF/CASS guidance to its Directors and Service Managers indicates allocation of joined children cases should be treated as a priority.

14. Where the interests of the child can be protected through the involvement of a CAF/CASS Children and Family Reporter then the court is unlikely to join the child and therefore this is relevant to an application for funding. Where, unusually, it is appropriate for CAF/CASS Legal (rather than the CAF/CASS local office) to deal with a case public funding will not be required. However, CAF/CASS Legal cannot deal with proceedings in the Family Proceedings Court. A CAF/CASS officer (at local office level) may, without any consent on the part of CAF/CASS, be appointed as a guardian ad litem under Family Proceedings Rules 2010 r.16.4. Where a child has already been joined but CAF/CASS Legal is not dealing with the case, funding will not normally be refused on the basis that party status is not justified. It should also be noted that a

child can be joined without the need for a Guardian under r.16.6 where the child is able to give instructions directly to the solicitor.

15. The President's Practice Direction and guidance ensure that cases will, where it is appropriate to join the child and appoint a guardian but not for CAFCASS Legal to deal with the case, be referred to the CAFCASS local office. If the court makes a CAFCASS appointment, the CAFCASS local office cannot decline to appoint a guardian. Providing guardian services is a core function of CAFCASS, although in very exceptional cases and after careful consideration the court may decide to appoint NYAS because it is a specialist agency. It should not be necessary for the solicitor to be appointed and act as guardian except in purely specialist cases for example, *Re A (Conjoined Twins: Medical Treatment)* [2001] 1 FLR 1. Given this, solicitors considering accepting appointment as guardian should ascertain the availability of funding prior to acceptance of appointment as this will not normally be appropriate or justified. In any event any certificate issued will not cover work or expenses incurred as guardian (rather than as solicitor).

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Scope of certificate – forum and generally

16. Unless there are particular or sufficient reasons to do otherwise, proceedings should be commenced in the family proceedings court where it has jurisdiction.
17. It may be appropriate to commence proceedings other than in the family proceedings court where:
 - a) other family proceedings are already pending in another court;
 - b) proceedings are imminent in the county court, e.g. divorce proceedings, and the proceedings should be heard together;
 - c) an order made by another court is to be varied, extended or discharged by that court;
 - d) the application to the court relates to a child in care and therefore has to be issued in the court which made the care order;
 - e) the position is covered by a Practice Direction;
 - f) an injunction ancillary to Children Act proceedings is sought;
 - g) the anticipated remedy sought is not available in the family proceedings court;
 - h) the proceedings are exceptionally grave or complex;
 - i) some novel or difficult point of law is involved.

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18. A condition may also be inserted that proceedings be commenced in the County Court (rather than the High Court), subject to any transfer by the court in accordance with the Allocation and Transfer of Proceedings Order 2008. In the event of such a transfer no amendment to the certificate is needed.
19. If no condition or forum for the conduct of the proceedings is included on a certificate the proceedings may, without specific amendment, be commenced and subsequently conducted in the court considered to be most appropriate, including in accordance

with any transfer directed by the court, for example from the County Court to the Family Proceedings Court.

20. A certificate will only cover representation on those s.8 orders which are specified on the certificate (rather than all s.8 orders) or which are made by the court of its own motion. If more than one s.8 order is sought information must be provided to justify the grant on all aspects as otherwise Legal Representation may be refused or partially refused. Injunction applications are only covered where specified.

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21. Only one substantive residence, contact or other s.8 order as specified is within the scope of the certificate. A specific amendment is needed to apply for any further application. Cover includes any review or further consideration of the matter by the court which, in the particular circumstances of the case, constitutes a restoration of the matter on the court's own motion – but not any fresh application made to the court in that context. The certificate can, however, be specifically amended to cover a further application to the court.
22. Certificates covering proceedings regarding the making, variation or discharge of a contact order also cover representation on contact activity directions, contact activity conditions, monitoring compliance and monitoring contact within s.11A to 11H Children Act 1989 without the need for a specific amendment. Representation on the making, revocation, amendment or breach of an enforcement order under s.11J and Sch.A1 or an application for compensation for financial loss under s.11O Children Act 1989 are not within the usual scope of a certificate and a specific amendment is required to take or defend the application for an enforcement order or compensation. The statutory charge applies in the usual way and any recovery is not exempt. Applications for amendment or initial cover are subject to Funding Code Criterion 11.11 (Private Law Children Cases).
23. Where the prospects of success are unclear at the time of the application for funding but are sufficient to justify the grant of certificated funding, Family Help (Higher) will be the appropriate level of service.

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20.34 Change of Name of Child of the Family

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

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

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

20.36 Special Guardianship Orders

1. Legal Representation may be refused where it appears that the applicant may, or should, have access to alternative funding. In particular where the application is in respect of a child who is looked after by the local authority and the local authority does not oppose the application, financial assistance should, if appropriate, be provided by the local authority under the Special Guardianship Regulations 2005 SI 2005 No.1109 and the Special Guardianship (Wales) Regulations 2005 SI 2005 No.1513.
2. A special guardianship order is a private law order and the principles in s.1 of the Children Act 1989 will apply as will the Funding Code criteria in 11.11. This includes the no order principle which will be taken into account when considering prospects of success. Regard will also be had to the report of the local authority prepared in accordance with s.14A of the Children Act 1989 when considering an application for funding. When considering an application for funding to oppose the making of a special guardianship order, the way in which the proposed respondent currently exercises their parental responsibility and how this will be affected by the making of an order will also be considered.
3. When making a special guardianship order the court must consider whether a contact order should be made. No separate amendment is required to the public funding certificate for this aspect of the proceedings. If public funding is refused to oppose an application for a special guardianship order, funding can nonetheless be granted to consider the issue of contact only, if this is justified in the

circumstances of the particular case. Details of the proposed contact position should be given in the application for funding.

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20.37 Enforcement of a Children Act section 8 Order / Non-Money Orders

1. Legal Representation to apply for the enforcement of a Children Act s.8 order (including representation for proceedings in the family proceedings court under s.63(3) Magistrates' Courts Act 1980) will only be granted where enforcement is appropriate and justified and likely to be successful (Criteria 11.11.5 and 11.11.6). The courts are increasingly willing to enforce existing contact orders and any application for funding to enforce a contact order must indicate the proposed method of enforcement, having regard to the availability of enforcement orders under s.11J Children Act 1989.
2. Section 11J Children Act 1989 sets out a number of specific requirements to be satisfied before an enforcement order can be made regarding a contact order, including absence of reasonable excuse on the part of the person failing to comply with the order and consideration of whether the likely effect of an order on that person is proportionate to the seriousness of the breach. These requirements will affect the prospects of success of the application for funding and to the court.
3. Legal Representation is unlikely to be granted to defend enforcement proceedings unless the breach is accepted or the defence has sufficient prospects of success or the circumstances of the case are so exceptional as to justify the grant and representation is likely to result in significant benefit to the client (Criterion 11.11.6). The use of Family Help (Lower) may be appropriate where the client has no legal defence but may need assistance in mitigation – however, a likelihood of committal will justify Legal Representation (see also para.20.25, sub-para.5).
4. Where the court is satisfied that an individual has failed to comply with a contact order and another person has suffered financial loss it may make a compensation order under s.11O Children Act 1989. Funding is unlikely to be granted to take proceedings unless the amount likely to be recovered meets the cost benefit criterion (Funding Code Criterion 11.11.6), having regard to the operation of the statutory charge. Funding is unlikely to be granted to defend proceedings having regard to the issues and costs involved as well as the need for representation (Funding Code Criterion 5.4.5).

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20.38 Family Law Act 1986

1. Sections 33 and 34 can be used in proceedings under s.8 Children Act 1989 to apply for an order to obtain information as to a child's whereabouts and to obtain the return of a child in accordance with an existing residence or contact order. Legal Representation is unlikely to be granted unless all the circumstances of the case justify legal proceedings and there is no other appropriate remedy including involving the police or social services (Criteria 5.4.3, 5.4.4 and 11.11.6). For example, where a child is believed to still be within

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

Financial and Other Proceedings

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

3C-468

20.39 General

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

Mediation

2. Mediation is an important stage in attempting to resolve financial and other disputes. Where required in accordance with the Code Procedures, the client must attend a meeting with a mediator to determine suitability for mediation or otherwise satisfy the requirement under Criterion 11.12.2 before funding will be granted. It will also be expected that, where possible, negotiation between the parties will have taken place.
3. In cases which are exempt from the requirement to be referred to a mediator, or where it is determined that mediation is unsuitable, an application for Family Help (Higher) rather than for Legal Representation will be appropriate in the first instance. An application for Legal Representation is likely to be granted only if it can be demonstrated that reasonable attempts to resolve the dispute without recourse to contested proceedings have been made by way of negotiation or otherwise under Criterion 11.12.4. An application for Family Help (Higher) will also be appropriate, for example, where disclosure of financial information is required.

4. One of the most important tasks within the scope of Family Help (Higher) is to ascertain not only the other side's financial position but also to put forward and consider any settlement proposals. When considering an application for Legal Representation, the Criteria for Legal Representation will be considered in the light of what is on offer to the client. In ancillary relief proceedings it is likely that this will be clear after the Financial Dispute Resolution hearing and at this point that the Criteria as to prospects of success and costs benefit for Legal Representation will be applied.

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Cost benefit

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

3C-470

Scope of certificates

7. Certificates to take or defend proceedings relating to finance or property will be limited short of the final hearing or trial, other than where they cover only periodical payments or transfer of tenancy or, in the case of the Trusts of Land and Appointment of Trustees Act 1996, an order for sale. An application for Legal Representation including following any grant of Family Help (Higher) will in effect constitute the solicitor's report that a contested final hearing cannot reasonably be avoided and is justified, having regard to the prospects of success (i.e. strength in terms of achieving the desired outcome), value of claim and property in dispute as well as attempts to define the issues between the parties and settle the matter. The solicitor will be able to report after any Financial Dispute Resolution (FDR) appointment.
8. It will not usually be necessary to make emergency applications to defend ancillary relief proceedings or applications for child and spousal maintenance given the length of time between issue of proceedings and the first appointment. Such applications are likely to be refused given the availability and scope of Family Help (Lower) or where the applicant could give undertakings, make payment or otherwise deal with any urgent steps in person (e.g. by agreement as to directions, an extension of time or an adjournment (Criterion 5.5.1)
9. Emergency applications for maintenance pending suit or ancillary relief generally (rather than as a pre-requisite to a s.37 or inherent jurisdiction application) are unlikely to be granted if the applicant can apply for or will be in receipt of income support or income based Jobseekers' Allowance or may have other resources to meet

immediate needs until a substantive application can be processed (Criterion 5.5.1).

3C-471

10. All certificates for Legal Representation in connection with maintenance, including ancillary relief in matrimonial proceedings, cover child maintenance only where the court rather than the Child Support Agency has jurisdiction or in other circumstances where this is specifically stated. In any event cover only extends to securing one substantive order. This does not prevent amendment of the certificate, subject to the applicable Criteria.
11. A certificate covering proceedings under the Married Women's Property Act can cover or be amended to cover any family proceedings including ancillary relief proceedings and a single certificate should be used.
12. Where leave of the court is required for the funded client to be joined in proceedings and a certificate is issued prior to leave being applied for, the certificate will extend to representation on the application for leave, although the scope of the certificate will not specifically state this. In addition, representation on an intervention by a third party does not require a specific amendment, although the usual reporting obligations apply (Procedures C43 and C44).

3C-472

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

General

1. Subject to any limitation or condition placed on it, a certificate will cover the steps usually necessary to prosecute or defend a suit. It will not, however, cover other applications in the proceedings, for example, for an injunction, ancillary relief or children unless expressly covered. No further steps in the main suit will be covered after the final decree unless the certificate is extended by amendment.
2. Unless the certificate is specifically amended it will not cover the taking or opposing, as appropriate, of the following steps:
 - (a) by the petitioner to file an answer to a separate cross-petition by the respondent or file a second petition;
 - (b) on the part of the respondent, file a separate cross-petition.
3. The certificate will not cover any further steps if the proceedings at any time become undefended. The client may then be assisted by Legal Help in the usual way. Any certificate will cover the decree proceedings so long only as the cause remains defended.
4. The certificate will be taken to cover proceedings under a second petition or separate cross-petition which have taken place after an order for consolidation with the previous proceedings but not otherwise.
5. Where Legal Representation has been granted a case should not continue to be dealt with on a contested basis without good reason. The certificate will be limited to obtaining counsel's opinion or the opinion of a solicitor with higher court advocacy rights before the matter proceeds to a contested trial. To justify an amendment it must be shown that the case cannot be dealt with on an undefended basis

without detriment to the proper interests of the parties or either of them (Criterion 11.12.6).

3C-473

20.41 Divorce, judicial separation and dissolution of civil partnership

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

3C-474

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

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

3C-475

20.42 Nullity

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

3C-476

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

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

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

1. The prospects of success must meet Criterion 11.12.5. In light of this the application for funding must be made during the marriage or engagement or within three years of decree absolute or termination of the agreement to marry. Where the prospects of success are borderline or unclear the application may satisfy the Criterion where the case concerns the preservation of the home of the client or his or her children. There is unlikely to be significant wider public interest given the requirement for the interest to be significant and the definition in the Code in para.2.4.
2. The likely costs of the proceedings must be justified. For example, a grant of Legal Representation will not be justified where the only dispute involves goods and furniture, the second hand resale value of

which is likely not to be significantly more than the likely costs of pursuing or defending a contested application.

3. In addition, Legal Representation will only be appropriate if the matter cannot reasonably be compromised or resolved other than by the proposed litigation, including within imminent divorce, judicial separation or other proceedings.

3C-477

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

1. Family Help (Higher) is likely to be the more appropriate initial level of certificated funding and this section should be read as applying to applications for Legal Representation including following on from Family Help (Higher).
2. Legal Representation will only be granted if a worthwhile order is likely to be made taking into account the length of any marriage / partnership and circumstances of the parties. Funding will not be granted where only a nominal order will be obtained unless there are exceptional circumstances or the issue of maintenance forms part of a larger set of issues which themselves justify the proceedings and likely costs, e.g. where both parties are unemployed but there are substantial capital assets justifying the grant of Legal Representation for ancillary relief. However, a grant of representation for a periodical payments order or transfer of tenancy will not of itself make it appropriate to grant for ancillary relief generally (Criterion 11.12.6). Similarly, a grant of Legal Representation to defend proceedings will not be made where it is not justified in the circumstances, e.g. where the client's liability for a nominal order is clear (Criterion 5.4.5).
3. There must be real and sufficient benefit to the client to justify the proceedings and likely costs except, for example, where the client is likely to be able to stop claiming benefits as a consequence of the making of a significant order or will not longer be claiming benefit by the time the order is made, perhaps because of a realistic prospect of taking up employment within say the next three months and would therefore benefit from the order (Criterion 11.12.6).

3C-478

4. If there are no larger issues sufficient to justify a grant to obtain a nominal order without adding to the likely costs, then an attempt should be made to agree a nominal order using Family Help (Lower). If that is unsuccessful the grant of Family Help (Higher) or Legal Representation will not normally be justified (Criteria 5.4.4 and 11.12.6).
5. There must be an indication that the opponent has the means to meet a substantive (as opposed to nominal) order. Where the means of the opponent are in doubt, Family Help (Higher) rather than Legal Representation may be granted limited to the obtaining of a status report in the first instance provided that sufficient information is available to justify this (Criterion 5.4.4).

6. If divorce or judicial separation proceedings are pending or imminent and it would be more appropriate for matters to be dealt with ancillary to those proceedings (once a petition has been issued) then Legal Representation in other financial proceedings is likely to be refused (Criterion 5.4.4).

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7. Legal Representation will not be granted for a periodical payments order for children where the Child Support Agency rather than the court has sole jurisdiction for child maintenance (Criteria 5.4.3 and 11.12.5). Where the court does have jurisdiction and Legal Representation has been granted for spousal maintenance it will also cover child maintenance although this will not be specifically stated.
8. Legal Representation to take or defend proceedings for agreed payments under section 6 of the Domestic Proceedings and Magistrates' Courts Act 1978 will not be granted unless the applicant needs representation because of a physical or mental disability which is such that it would be unreasonable to expect them to deal with the proceedings in person (Criteria 5.4.5 and 11.12.6).
9. In the absence of a client's material physical or mental disability justifying representation Legal Representation will not be granted for the client to be represented on first applications for child or spousal maintenance in the family proceedings court unless the issues disputed or the factual or legal issues are sufficient complex to make representation necessary (Criterion 11.12.6).

3C-480

20.46 Variation or Revocation of a Periodical Payments Order

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

considered on means assessment (reg.11(4) Community Legal Service (Financial) Regulations 2000).

3C-481

20.47 Registration / Enforcement of a Periodical Payments Order

1. Registration of an order is a simple procedure and therefore Legal Representation will not be granted to cover the making of an application alone (Criteria 5.4.4 and 11.12.6). Where the relevant order was itself obtained under an existing certificate, registration is treated as part of the obtaining of the order and therefore covered by the certificate without amendment.
2. If an order obtained under a certificate has been registered in the family proceedings court, enforcement proceedings in that court are outside the scope of the certificate. Enforcement action should normally take place in the family proceedings court and Legal Representation to take proceedings will be refused as it is the responsibility of the court to take enforcement proceedings at the request of the complainant (Criterion 11.12.6).
3. If enforcement in the County Court is appropriate (e.g. having regard to the particular method required) and a grant of Legal Representation is justified by the particular circumstances of the client or case and the benefit to be obtained (Criterion 11.12.6), the certificate will specify the method of enforcement and in any event will cover only one application for enforcement.
4. An application for Legal Representation which does not specify why registration in the family proceedings court is inappropriate (or unlikely to be granted) and enforcement in the County Court or High Court is appropriate, as well as stating the proposed method of enforcement, will be refused (Criterion 11.12.6).

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5. Where an order has been made for payment direct to a child enforcement proceedings can only be taken by that child acting by a litigation friend. A separate application for Legal Representation by the child is required to take enforcement proceedings.
6. Legal Representation will be refused to defend enforcement proceedings in the County Court or High Court in the absence of very exceptional circumstances, e.g. there is a substantial legal argument sufficient to justify the grant of representation (Criteria 5.4.4, 5.4.5 and 11.12.6). Family Help may, however, where justified be used to assist the client at a court hearing at such proceedings. Neither Legal Representation nor Family Help is available to respond to enforcement proceedings in the family proceedings court where there is a risk of imprisonment. Such proceedings fall within the extended definition of "criminal proceedings" in the Criminal Defence Service (General) Regulations 2001. They can be dealt with by family or crime suppliers who may apply for a criminal Representation Order in appropriate cases (see Family Specification para.10.79). Any existing certificate of representation cannot be amended to cover such proceedings.
7. Legal Representation is not available to pursue registration or enforcement of orders abroad (Criterion 4.2).

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

1. An emergency certificate may be issued to be represented as to ancillary relief, coupled with an application under the inherent jurisdiction and / or to prevent disposal of property or assets, but only where justified by the urgency and the circumstances of the case, including the value of the assets (Criterion 5.5.1).
2. There must be prospects of obtaining a substantial benefit from the order to justify Legal Representation. The resale value of any asset(s) to be protected must justify the likely costs of proceedings. In addition, taking proceedings to protect particular assets is not normally justified where there are other available assets which can be transferred or adjusted in adequate compensation (Criterion 11.12.6).
3. Legal Representation to take or defend proceedings will be refused unless the matter cannot be compromised, for example by way of an undertaking, and the circumstances of the case as well as the conduct of the client justify the grant of representation (Criteria 11.12.4 and 11.12.6).
4. A certificate will not cover proceedings under s.37 or the inherent jurisdiction unless this is expressly stated.

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

1. Family Help (Higher) is likely to be the more appropriate initial level of certificated funding and this section (paras 20.49 to 20.51) should be read as applying to applications for Legal Representation including following on from Family Help (Higher).
2. Legal Representation or Family Help (Higher) to take proceedings ancillary to divorce or judicial separation will only be granted if a petition has been issued, its issue is imminent or an undertaking to issue has been given. Similarly, a certificate to defend proceedings will not be granted until proceedings (including a petition containing prayers for ancillary relief) have been issued (Criterion 5.4.4).
3. Applications under Sch.1 Children Act 1989 can only be made by the parent or guardian of the child or by a person in whose favour a residence order is in force with respect to the child. An application cannot be made by the child themselves. Any applications for funding made on behalf of the child will therefore be refused for this reason. However, where the child has reached the age of 18 they should make the application in their own right where the requirements of Sch.1, para.2 are met (e.g. if they are receiving instruction at an educational establishment).
4. A single certificate should be used to cover proceedings under s.8 and Sch.1 Children Act 1989.

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

1. Litigating over the sale of a property with no, low or negative equity is very unlikely to be justified, unless exceptionally, having regard to the relative financial positions of the parties and all the circumstances, there is a very real prospect of achieving the sale of a property subject to a mortgage, from which the client would be released as a consequence of an order for sale, or in the circumstances of the particular case the client has a real prospect of preserving a home especially if there are children involved (Criterion 11.12.6).
2. The cost benefit test must be met. For example, Legal Representation will not be granted where the only dispute concerns goods and furniture, the second-hand resale value of which is likely not to be significantly more than the likely costs of pursuing or defending a contested application. In addition, funding will not be justified where any order obtained is unlikely to be successfully enforced e.g. because the only asset(s) of significant value are abroad (Criterion 11.12.6).
3. Legal Representation will be refused where the application to the court is unlikely to, or cannot, succeed, for example, because the only asset(s) of significant value are incapable of being assigned (such as some pensions and gratuities) Criterion 11.12.5).

4. Any ancillary relief order cannot bind creditors and the court has no powers under ss.23 and section 24 of the Matrimonial Causes Act 1973 to adjust debts between the parties. Legal Representation will therefore be refused to apply for an order relating to debts unless responsibility for them may be significantly adjusted by a court order (i.e. where there are other financial resources which can be used for their payment). The likely level of any lump sum order made for the payment of debts must justify the costs of proceedings generally having regard to the operation of the statutory charge and the respondent must have the means to meet the order forthwith or within a reasonable time (Criterion 11.12.6).
5. Legal Representation is only available for court proceedings and would therefore not be appropriate for the negotiation and preparation of a Deed of Separation (Criterion 5.4.4). Family Help (Lower) would be the appropriate level of funding.
6. Where Legal Representation is granted to resolve the distribution of capital assets it may, depending on the circumstances of the case, be appropriate to grant for ancillary relief generally including maintenance (on the basis that an order is likely to be obtained without increasing the likely costs).
7. Legal Representation will be refused to defend an application for capital distribution (or to cross-apply) unless the circumstances of the particular client or the issues in the case (e.g. the available financial resources, factual complexity or a point of law) justify the grant of representation applying the cost benefit test (Criterion 11.12.6).

20.51 Transfer of tenancy (see also paragraph 20.49)

1. The prospects of success must meet Criterion 11.12.5. Legal Representation must be justified as against the costs of proceedings having regard to all the circumstances, for example the length and terms of occupation, the availability of alternative housing and if relevant the “right to buy” provisions.
2. There must be a clear dispute which cannot be compromised. Where a court order is needed to negate an anti-alienation clause in a tenancy agreement or obtaining re-housing the grant of Legal Representation will depend on the circumstances of the applicant and the case but Legal Representation will not usually be justified where there is no dispute and an application to court is being made solely to confirm the transfer in a court order (Criteria 11.12.4, 11.12.6, 5.4.4 and 5.4.5).

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

1. The prospects of success must meet Criterion 11.12.5. Where the prospects are borderline or unclear Legal Representation may be granted where it concerns the preservation of the home of the client or his or her children or has a significant wider public interest. The latter is unlikely given the requirement for the interest to be significant and in the light of the definition at Funding Code para.2.4.
2. Legal Representation will not be granted where there is no, low or even negative equity unless in the particular circumstances of the case litigating would be justified, for example, because the client has a real prospect of preserving a home (especially if there are children involved) or a very real prospect of achieving the sale of a property subject to a mortgage, from which the applicant would be released as a consequence of an order for sale (Criterion 11.12.6).
3. Married couples will not be granted funding to make an application to court unless no divorce or judicial separation is intended and one of the parties wants a jointly owned property to be sold or seeks a declaration as to rights of occupation.
4. A single certificate can cover an application under the 1996 Act and also proceedings under the Children Act 1989 including Sch.1 – a single application should be made or any existing certificate amended. If possible and in accordance with *v. W (Joinder of Trusts of Land Act and Children Act Applications)* 2003] EWCA Civ 924 ; (2004) 2 FLR 321 such applications should be made together and considered by the court at the same time. Otherwise where such an application (including by way of an amendment) satisfies the Funding Code, any certificate is likely to be limited to obtain counsel’s opinion or the opinion of a solicitor with higher advocacy rights on the merits. This is to enable the appropriate jurisdiction to be clearly established.

20.53 Inheritance (Provision for Family and Dependants) Act 1975

1. 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.
2. In order to justify Legal Representation the proceedings must have sufficient prospects of success and be likely to result in a significant recovery. Therefore the application to court must be in time (or an application to leave to commence proceedings out of time is likely to be successful) and the client must be a qualifying dependant under s.1 of the Act or likely on the evidence available to satisfy the court that an order should be made. In addition, the size of the estate and likely award must justify the proceedings and likely costs (Criterion 11.12.5 and 11.12.6). In most cases Family Help (Higher) will be the most appropriate level of service to issue proceedings and negotiate an appropriate settlement.
3. In most cases it will be appropriate for the costs of defending the case to be met out of the assets of the estate. Where the costs of proceedings can be met from the estate Legal Representation to apply for an order is likely to be refused although a limited grant to seek a Beddoes order confirming this may be justified where no agreement on this issue can be reached (Criterion 5.4.2). Legal Representation is therefore likely to be refused to defend proceedings where the costs can be met without hardship being caused (having regard to the assets of the estate and resources of the beneficiaries) (Criteria 11.12.5 and 11.12.6). Where hardship would be caused, Legal Representation may be granted having regard to the prospects of success, issues, value of the claim, likely costs and attempts to compromise the case and subject to an appropriate contribution from the estate or the beneficiaries or both (Criteria 11.12.4, 11.12.5 and 11.12.6).
4. Certificates will cover all steps up to but excluding trial but including Counsel's opinion or the opinion of a solicitor with higher court advocacy rights, subject to any more restrictive limitation imposed in the particular case. This is to ensure that cases only proceed where a trial cannot be avoided and remains justified, having regard to the prospects of success, value of claim and property in dispute as well as attempts to define the issues between the parties and to settle the matter.

20.54 Child Support Act 1991 – section 20 and section 27

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

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

20.55 Section 20 – Parentage appeals

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

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

1. The applicant must have sufficient interest to take the proceedings (which can be used to establish parentage or not) and the evidence available (including any blood or DNA tests) and the personal benefit must justify any grant of representation (Criterion 11.11.5). If blood or DNA tests are not already available but Legal Representation is justified the certificate will be limited to obtaining them.
2. Establishing parentage alone may justify a grant but this will depend on the circumstances and usually the applicant will also wish to obtain contact or financial provision.
3. The evidence available (including any blood or DNA tests) and the personal benefit likely to be obtained must justify the grant of representation (Criterion 11.12.5). In addition, in cases involving the CSA / CMEC Legal Representation to take proceedings will be refused unless the Agency has declined to take proceedings itself (Criterion 11.12.6).
4. If the mother or alleged father is in receipt of income support or income based Jobseekers' Allowance then Legal Representation will be refused (Criterion 11.12.6) if the purpose of the proceedings is to establish parentage for the purposes of the Child Support Agency (the proceedings are classified as a Private Law Children Case for the purposes of the Funding Code). If the applicant mother is in receipt of working tax credit or disability working allowance Legal Representation may be granted but only if her reason(s) for wanting to take proceedings and the personal benefit to be obtained by her, are sufficient to justify the grant. A request by the Agency / Commission for her to take proceedings will be insufficient (Criterion 11.12.6).

20.57 Application under Human Fertilisation and Embryology Act 2008

1. Legal Representation is unlikely to be justified except in unusual circumstances. The parental order reporter (who is a CAF/CASS officer) will play an active role in the proceedings and as the agreement of the father and the woman who carried the child is required before any order is made it is unlikely that the grant of Legal Representation will be justified to make the application if the matter is unopposed (Criteria 5.4.4, 5.4.5 and 11.12.6).
2. If the order is opposed, s.54(6) (as to consent by the father and the woman who carried the child) will not be satisfied and an order will not be made. Legal Representation will therefore not normally be justified, unless the application to the court nonetheless has sufficient prospects of success (on the basis that the requirements of s.54(6) or 54(7) have been satisfied) (Criterion 11.12.5). The grant of representation may be justified when the applicant is asking the court to dispense with the consent required under s.54(6) on the basis that the person cannot be found or, to a lesser extent, is incapable of giving consent.
3. It is unlikely applications for Legal Representation will be made to oppose the making of the order as where there is no consent s.54(6) will not be met. It is possible, however, that a birth parent may maintain that although consent has been given it does not satisfy ss.54(6) and 54(7).
4. A birth parent will be a respondent to the application and a person with parental responsibility may wish to oppose the making of an order. Legal Representation will be refused to defend proceedings unless the client has sufficient prospects of success in opposing the order despite any consent (Criterion 11.12.5) or the grant of representation is justified in the particular and exceptional circumstances of the case (Criterion 11.12.5).
5. Section 54 proceedings will usually be commenced in the family proceedings court and can be transferred upwards in accordance with the Children Allocation and Transfer of Proceedings Order 2008. No condition as to forum will be included in any certificate issued.

20.58 Child Abduction and Custody Act 1985

1. Non-means, non-merits tested Legal Representation is available to an applicant who has applied under the Hague Convention or the European Convention to the central authority (the International Child Abduction and Contact Unit – part of the Official Solicitor's Office) pursuant to s.3(2) or s.14(2) of the Child Abduction and Custody Act 1985 i.e. an application made under the Convention by a person outside England and Wales for the return of or contact with an abducted child who has been brought to England and Wales. These applications can only be granted on production of a letter of instruction from the International Child Abduction and Contact Unit to the applicant's solicitor which must be submitted to the London Regional Office.

2. Legal Representation other than a non-means and non-merits tested certificate must not be granted to take such proceedings. An emergency application would not be appropriate. Note, however, that a certificate will not extend to representation on an appeal, whether interim or final, in the absence of an appropriate amendment and that Funding Code Criteria 11.11 (but no means test) would be applied to any such amendment application.

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3. Legal Representation, which otherwise falls to be determined under the private law children cases Criteria in s.11 of the Code, is only likely to be granted to take or defend proceedings under the Child Abduction and Custody Act 1985 where the client has sufficient prospects of success and the likely benefits justify the likely costs (Criteria 11.11.5 and 11.11.6). This means that:

- (a) the grant of Legal Representation to defend proceedings must be justified in all the circumstances of the case (given that there will be a breach of rights of custody in favour of the other party); and
- (b) the grant of Legal Representation to take proceedings, e.g. for a declaration to produce to a foreign court, will depend on the ultimate prospects of successful enforcement, having regard to all the circumstances of the case including the foreign country involved.

4. Furthermore, in a case to be determined under the private law children cases Criteria in s.11 Legal Representation may be refused in the absence of reasonable attempts at settlement or resolution (Criterion 11.11.4) but this will depend on all the circumstances of the case and may be inappropriate given that these cases are dealt with by the High Court in London usually within 24 hours of the service of proceedings.
5. Respondents to applications under the Child Abduction and Custody Act 1985 have to satisfy the prospects of success Criterion at 11.11.5. This requires prospects of success to be at least borderline. Funding cannot be granted if prospects of success are poor. However “success” does not necessarily mean ensuring that an order for the return of the child is not made. A successful outcome may involve an order for the return of the child but one made with safeguards dealing with, for example, housing and maintenance for the respondent while the welfare of the child is determined in the country of origin.

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6. It would be unusual for a respondent who was not the caring parent (the parent with whom the child was living in the country of origin) to meet the criteria for funding unless there was a strong defence under art.13 of the Act to prevent the return of the child.
7. Respondents to applications under the Act must also satisfy the cost benefit Criterion at 11.11.6 in order to obtain funding. This means that Legal Representation will be refused unless the likely benefits to be gained from the proceedings for the client justify the likely costs, such that a reasonable private paying client would be prepared to take or defend the proceedings in all the circumstances. If the prospects of success Criterion is met, the cost benefit Criterion is also likely to be satisfied in these cases.

8. The preparation of an application made to the Child Abduction Unit for transmission to another jurisdiction can be supported by way of Legal Help but funding is not available for proceedings outside the jurisdiction of England and Wales.

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20.59 Foreign Maintenance

NOTE: The Registration and Enforcement of Maintenance Orders Section (known as REMO) at the Office of the Official Solicitor may be able to assist with queries regarding registration and enforcement of foreign orders—their local call rate information number is 084 5345 5303, <http://www.officialsolicitor.gov.uk>.

1. Legal Representation will be refused for proceedings in a family proceedings court under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972 relating to a maintenance or lump sum order made by a court of a country outside the United Kingdom unless:
 - (a) the amount involved; and
 - (b) the likely benefit to be obtained, having regard to the means of the payer and likelihood of recovery;are sufficient to justify the grant (Criterion 11.12.6).
2. Non-means, non-merits tested Legal Representation is available for:
 - (a) an appeal to a magistrates' court against the registration of or the refusal to register a maintenance order made in a Hague Convention country pursuant to the Maintenance Orders (Reciprocal Enforcement) Act 1972; or
 - (b) an application for the registration of a judgment under EU Council Regulation (EC) No. 44/2001,but only where the applicant had complete or partial legal aid, other public funding or exemption from costs or expenses in the country in which the maintenance order was made or the judgment was given (Criterion 11.14). For this purpose a maintenance order includes a lump sum order.
3. Where the proceedings fall outside these special provisions Legal Representation is not available for proceedings within para.(a). Legal Representation is available for proceedings within para.(b) which will be in the High Court. Legal Representation will be refused unless:
 - (1) the prospects of success having regard to the means of the payer and the likelihood of recovery are sufficient to justify it (Criterion 11.12.5); and
 - (2) representation is justified in all the circumstances of the case (Criterion 11.12.6).

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20.60 Registration of European Parental Responsibility Orders

1. Regulation 3(1)(g) Community Legal Service (Financial) Regulations 2000 (as amended) includes Legal Representation for the registration and enforcement of a judgment under Council

Regulation (EC) No.2201/2003 (the “Brussels IIa” treaty) which therefore is available without reference to means if the applicant benefited from assistance with costs or expenses in the country where the judgment was given.

2. In this context parental responsibility extends to contact and residence orders, non-means tested funding covers the registration and enforcement of an order.
3. Applications for funding should be submitted using form CLSAPP3. A means assessment form or L17 is not needed but the reason for this should be made clear on the application form, e.g. by endorsing the form “Brussels II Treaty non-means application”. Generally the information provided by the Child Abduction and Contact Unit will be sufficient for a decision to be made.
4. Funding Code criteria 11.11 will apply but applications for registration are unlikely to be refused as mediation and attempts at settlement will not be appropriate; the prospects of success will not be poor and the cost benefit criterion will usually be satisfied. However, with regard to enforcement following registration these criteria may be appropriate.

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DOMESTIC VIOLENCE DESK TOP AID

Non-Molestation Order and Occupation Order – para.20.32

Applicant	<ul style="list-style-type: none"> ▪ Prospects of success must be better than poor. ▪ Is warning letter appropriate? ▪ Have police been notified and if so what action has been taken? ▪ Is Respondent subject to bail or custody conditions? ▪ Is emergency cover appropriate ie applicant or relevant child in imminent danger of significant harm? Was last incident within last 2 or 3 weeks?
Respondent	<ul style="list-style-type: none"> ▪ Legal Representation unlikely to be granted for non-molestation order only if matter could be dealt with by way of undertakings or unless very serious allegations which are denied wholly or substantially. ▪ Legal Representation unlikely for non-molestation order only unless inability to defend, e.g. mental incapacity or minority.
Grant of Funding: Wording	<ul style="list-style-type: none"> ▪ To be represented on an application for a non-molestation order (IJ012). ▪ If occupation order also justified: To be represented on an application for a non-molestation and occupation order (AA016).
Limitations – Emergency Certificate:	<ul style="list-style-type: none"> ▪ All certificates have an initial costs limitation of £1,500 (EGY2).
Applicant	<ul style="list-style-type: none"> ▪ As to an application under Pt IV Family Law Act 1996 limited to all steps necessary to apply for an interim order where application is made without notice to include representation on the return date (AA010).
Respondent	<ul style="list-style-type: none"> ▪ As to an application under Pt IV Family Law Act 1996 limited to all steps up to and including the hearing on [] (AA007).

Substantive Certificate: Applicant and Respondent	▪ As to proceedings under Pt IV Family Law Act 1996 limited to all steps up to and including obtaining and serving a final order and in the event of a breach leading to the exercise of a power of arrest, to representation on the consideration of the breach by the court (but excluding applying for a warrant of arrest, if not attached, and representation in contempt proceedings)(AA019).
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