

**AN EXPLANATION OF THE CHANGES
TO THE FAMILY GRADUATED FEE SCHEME THAT WILL BE EFFECTIVE FROM
28 FEBRUARY 2005**

1 *Introduction*

Following the implementation of the original scheme, on 1 May 2001 the Lord Chancellor committed himself to a review of the scheme after its first 18 months. Since that time the Department of Constitutional Affairs, the Legal Services Commission and the Family Law Bar Association have been collating data and discussing how the structure of this scheme should change.

Following consultation with the professions, the agreed changes to the scheme will be implemented with effect from **28 February 2005**. This explanatory document is a brief summary of the changes. All relevant information regarding the scheme is contained on the Commission's website- see section 6 below..

2 *Existing Certificates*

All work done under certificates issued on or after 1 May 2001 will continue to be paid under the original Family Graduated Fee Scheme, as set out in the Community Legal Service Funding (Counsel in Family Proceedings) Order 2001 ("the Funding Order"). The Funding Order was amended in November 2003 to implement the changes consequential to the introduction of the Protocol for Judicial Case Management for care proceedings issued on or after 1 November 2003. For existing cases the remuneration rates and structure of the scheme remain unchanged except for the provision on submission of claims – see 4 below.

3 *New Cases*

The revised scheme will ***only apply to new certificates issued or amendments made to add new proceedings to an existing certificate on or after 28 February 2005.*** Articles 3 to 18 of the amended Funding Order apply to all new certificates and the new proceedings added to existing certificates.

4 All Cases

Article 17 of the amended Funding Order applies to all cases where either the certificate was discharged or revoked, or a final hearing under Function F5 conducted on or after 28 February 2005.

5 Which Scheme ?

The two payment schemes will be running simultaneously for some time to come. Counsel should, in order to be aware of the exact nature of the payments to be made, identify the date the certificate was granted or amended so that claims can be made correctly either under the original scheme or the revised scheme. Incorrect claims will be rejected and may result in delayed payment

6 Accessing Information

General information on the scheme can be accessed from the Commission's website at www.legalservices.gov.uk following the route Community Legal Services (CLS)/decision-making/CLS funded work. The website has background information on the scheme including the original guidance, statutory instruments, advice on how to identify the correct regional office, and the earlier briefing pack explaining the November 2003 changes.

The Commission's briefing pack on the review changes will be sent to the barrister recipients of previous briefing notes and additionally to any person who responded to the previous articles in Focus, saying they would like copies of the pack when available. If you seek further copies, please contact Sue Terry/Ruth Symons at sue.terry@legalservices.gov.uk / ruth.symons@legalservices.gov.uk. Or by calling Sue Terry on 0207 759 XXXX

7 Scope

The overall scope of the scheme remains unchanged following the amendments to the revised scheme. It continues to cover all family work (falling within the Funding Code's definition of family work) except those cases specifically excluded by the November 2003 amendments, namely the Inheritance Act and Trust for Land Act proceedings.

8 The Structural Changes

Committal Proceedings in Category 1

Committal hearings within category 1 family injunction proceedings are currently paid, as an enforcement process, under Function F2. The revised scheme specifically provides for a new Function F3 to be created for the payment of committal hearings.

Enforcement Proceedings and Contested Injunctions within Category 4

The particular difficulties involved with enforcement or contested injunctions within ancillary relief proceedings will now be remunerated by an additional payment.

Conferences and Written Work

In the original scheme conferences (F4) and written work (F1) were limited to one per set of proceedings. For cases falling within the revised scheme, the number of conferences and advices that are able to be claimed for each set of proceedings rises to a maximum of two.

Special Issue Payments

Under the original scheme there were seven generic special issue payments available across all four categories. The wording of the scheme restricted the ability to claim special issue payments in Functions F2 and F3. The Commission's Costs Appeals Committee has since clarified (POP CLA31) that each of the seven special issue payments is claimable once during the course of a single set of proceedings in Functions F2 and F3.

Within the revised scheme there are now ten potential special issue payments, but these are category specific so that payment is only available for those special issue payments that are most relevant in each category – see below.

Category 1 – Family Injunctions	Category 2 – Public Law Children
Litigant in Person – 10% More than one Expert- 10%	More than two parties- 40% Client difficulty in giving instructions etc- 25% Parents/allegations against others- 25% More than one Expert- 15% Foreign-25% Conduct-20%
Category 3 – Private Law Children	Category 4 – Other including Ancillary Relief
Litigant in Person-30% More than two parties-30% Client difficulty in giving instructions etc- 25% More than one Expert-50% Foreign-30% Conduct-50%	Litigant in Person –25% More than two parties-10% Analysis of accounts – 50% Expert- 25% (note: definition of expert has changed in this category to one or more) Foreign- 25% Assets-25% Conduct-50%

The restrictions on special issue payments have been lifted so that whenever a special issue payment has been verified, irrespective of function, they will be paid and the calculation is based on the multiple of any hearing units.

The three new special issue payments relate to :

- (i) **Parents/allegations against others** – the representation of a parent or others within public law Children Act proceedings who are the subject of allegations. *This special issue payment is automatic for those representing parents but subject to the substance and relevance test for those acting for others.*
- (ii) **Client difficulty in giving instructions or understanding advice** – this special issue payment is available in both public law Children Act and private law Children Act cases to reflect the additional work required in the representation of clients who have difficulty giving instructions or understanding advice either because they are suffering from a diagnosed

mental disorder or have significant impairment of intelligence or social functioning. *This is an automatic special issue payment but verification should be after the production of a medical report to the Court prior to verification.*

- (iii) **Analysis of Accounts** - in ancillary relief proceedings the additional work necessary for considering the accounts in complex financial situations is remunerated by this new special issue payment. This will usually be business accounts but also includes accounts relating to trusts and investments.

NB: In Category 4 the definition of experts has been changed to one or more experts to recognise the fact that in ancillary relief proceedings there are rarely more than one expert used. For the avoidance of doubt a valuation of the matrimonial home is not an expert's report.

9 Assessment Issues

Work in the Family Proceedings Court

In cases within the Family Proceedings Court where no prior authority has been granted, it is always open on assessment for the assessor to concede that prior authority would have been reasonable given the complexity of the case requiring use of both solicitor and counsel.

The payment of the fixed family graduated fee has occasioned hardship to solicitors where counsel is instructed in the magistrates' court for cases where prior authority is unlikely to be granted and the maximum fee principle applied.

The Bar Council and the Law Society have agreed that in the Family Proceedings Court, where counsel has a prior authority or would get a prior authority on assessment, the family graduated fee should be payable, but in all other circumstances, counsel should be paid what the solicitor would receive in payment for the work done. This would be the time spent calculated at the solicitor's hourly

rate under the Legal Aid in Family Proceedings (Remuneration) Regulations 1991, including any enhancement applicable to the advocacy or other work undertaken by counsel.

The Funding Order now reflects this agreement and it applies to all new cases under the revised scheme. The CLS CLAIM 5 has been amended to allow counsel to claim either the family graduated fee (in circumstances where prior authority has been granted or counsel believes it should be granted on assessment) or alternatively the time spent, using a breakdown of the time at the solicitor's hourly rate, for cases where prior authority has not or is unlikely to be granted. Space has been provided on the CLS Claim 5 and counsel may use this to either set out grounds for prior authority or enhancement.

Submission of Final Claims

The time limit for counsel under the original scheme was three months from discharge or revocation whilst solicitors have remained subject to the requirement of the Civil Procedures Rules, that detailed assessment should be commenced within three months of the final hearing or the order concluding proceedings. The Commission's own late claim provisions for legal aid only costs mirror that three-month requirement.

In order to improve the interaction between solicitors and counsel in the submission of final claims, the Funding Order now requires counsel to submit the final claim for work done within two months of the date of the final hearing or within two months of revocation or discharge, if that happens earlier. This new time limit is immediately effective and will apply to claims arising either from final hearings concluding, or discharge/revocation certificates issued on or after 28 February 2005.

Queries

Any queries on the revised scheme and how it will operate in practice can be addressed to Ruth Symons at ruth.symons@legalservices.gov.uk.