

Legal Services Commission Manual, Volume 1 Part D

5.6 Joint Instructions and Apportionment Generally (see also para 5.7 below)

1. Parties should use a single expert jointly instructed where this is appropriate to the circumstances of the case (including in particular in ancillary relief applications). If the funded client unreasonably refuses to do so, then this should be reported by the supplier as incurring an unjustifiable expense to the Fund (Funding Code procedures C.44).
2. Disbursements should be appropriately apportioned between parties (whether publicly funded or not) where that is reasonable, e.g. where only one report is to be obtained for the use of the court (possibly following joint instruction), with or without the leave of the court. This may be equally as between the number of parties (but see para 5.8 below regarding public law Children Act cases).

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3. However, the existence of public funding cannot affect the exercise of the discretion of the court (section 22(4) of the Access to Justice Act 1999). It is therefore both inappropriate and unreasonable to transfer the responsibility for an expenditure to a publicly funded party having regard to their publicly funded status. This is particularly relevant in private law Children Act proceedings, including contact proceedings, where only one of the adult parties or only the child may be publicly funded. Suppliers should not agree liability or apportionments which place or transfer financial liability on the funded client(s) on the basis that they are in receipt of public funding and the court will need to have regard to section 22(4) as against the particular circumstances and expenditure. Suppliers must take care not to accept that funded clients will, through their certificates, bear costs and expenses unless this would be appropriate in the case of a private paying client. It must also be remembered that a prior authority from the LSC is the only way that the ultimate costs assessor can be bound as to both the principle and amount of any costs or disbursements.

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5.7 Residential assessments; treatment, therapy and training and related expenses; risk assessments and contact activities

1. It is not the role of the Community Legal Service Fund to meet the costs of, or expenses relating to residential assessments or treatment, therapy, training or other interventions of an educative or rehabilitative nature (see Funding Code paragraph 1.3).
2. Funding Code Criterion 1.3 is widely drafted. It provides that costs of, or expenses **relating to** the residential assessment of a child or treatment, therapy or training or other interventions of an educative or rehabilitative nature may not be charged as disbursements and extends to costs or expenses of work undertaken with a view to, or to support, excluded work.

3. A residential assessment is defined as any assessment of a child, whether under section 38(6) of the Children Act 1989 or otherwise, in which the child, alone or with others, is assessed, on a residential basis, at any location other than his or her normal residence. It also includes an assessment or viability assessment, whether residential or not, preparatory to or with a view to the possibility of a residential assessment (Funding Code paragraph 2.4). This definition is wide and excludes initial assessments or pre-assessments however they are described (the term viability assessment is sometimes used) and whether residential or not where they are preparatory to or with a view to a residential assessment. This paragraph of the Funding Code reverses the decision in *The London Borough of Lambeth v S and C and V and J and the Legal Services Commission [2005] EWHC 776 (Fam)*.
4. These exclusions are clearly not confined to the costs and expenses of such interventions. Any accommodation or other expenses, including subsistence and travelling expenses relating to these items cannot therefore be charged as disbursements and must also be excluded from any application made by the conducting solicitor for prior authority (or for any increase in the costs limitation applicable to the certificate of public funding). This applies to all cases including public and private law Children Act cases.
5. Where it is not clear whether such costs or expenses are excluded in a case where this appears to be relevant, an application for prior authority or an amendment to the costs limitation will be refused for further information or confirmation.
6. Suppliers should, in relevant cases, draw the attention of the judiciary to the extent of the availability of public funding as a court order cannot be followed by the Commission where excluded work would, as a consequence, be remunerated out of the Fund. Suppliers should not reach any agreement which anticipates, or may lead to, excluded costs or expenses being met by a funded client, nor which would transfer liability for payment of an expense on the basis that a particular party is publicly funded. It should also be noted that careful consideration needs to be given by suppliers to what constitutes a legitimate disbursement which can legally and reasonably be expected to be met out of the Community Legal Service Fund – for example the costs of an assessment which could not be directed by the court under S38(6) or otherwise agreed by the parties would not be met. The parties cannot bind the ultimate costs assessor.
7. The Funding Code amendments which exclude all residential assessments from the scope of funding apply to any disbursements incurred on or after 1 October 2007, regardless of when the certificate was issued (see preamble to the Funding Code Criteria).
8. In addition certain costs and expenses in the Family Category of law constitute irrecoverable disbursements. These are:

- a) costs or expenses of risk assessments within section 16A Children Act 1989 and undertaken by Cafcass officers or Welsh family proceedings officers, including assessments of the risk of harm to a child in connection with domestic abuse to the child or another person; and
 - b) costs of or expenses relating to any activity to promote contact with a child directed by the court under Section 11A to 11G Children Act 1989. This includes all programmes, consideration of suitability under Section 11E and other work to or with a view to establishing, maintaining or improving contact with a child or, by addressing violent behaviour, to or with a view to enabling or facilitating contact with a child insofar as such costs or expenses are not recoverable under Funding Code paragraph 1.3 (see Funding Code Decision Making Guidance paragraph 2.5). Funding for assessments under Funding Code Criterion 11.4.1 as to whether mediation is suitable to the dispute and the parties and all the circumstances is not affected by this exclusion.
9. The exclusion of risk assessments does not extend to specialist assessments of risk which require professional expertise (not of a social work nature) which is beyond that held by Cafcass officers/Welsh family proceedings officers. Such assessments, for example from a psychologist or a psychiatrist, required to inform the decision of the court may be based on some observation of contact, supervised or not.
10. However, the purpose of the report must be to express an expert opinion on risk and/or safety of contact in principle rather than any assessment of supervised contact itself or suitability for a domestic violence perpetrator programme. Any contact centre costs or fees must be met elsewhere and not included as part of the costs of the expert assessment. The work undertaken must also be within the scope of funding more generally – and not be excluded within paragraph 1.3(i) and/or (ii) as well as being proportionate. Costs will be subject to cost assessment in the usual way and any claim (or application for prior authority) must include an appropriate breakdown of the work done (or which is proposed to be done), the relevant area(s) of expertise/qualifications and the rates applied.
11. As a consequence no prior authority will be granted for costs or expenses of this excluded work and no payment can be made from the Community Legal Service Fund for them. This is so even where they have been directed by the court to be borne by the funded client. Instead, a system of financial subsidy for clients based on means and hardship will be operated, independently of the Commission, in respect of contact activities commissioned by the Department for Children, Schools and Families or the Welsh Assembly Government.

5.9 Child contact centre fees, charges and costs

1. Child contact centre fees, charges and costs are not an allowable disbursement (paragraph 2.5, sub paragraph 3, of the Funding Code decision making guidance). Contact centre fees are a client expense and not recoverable in any event. Supervised contact involves professional supervision and/or observation of the contact having regard to safety issues and/or contact reintroduction. Supported contact is contact taking place at a specified, neutral venue without any professional supervision although there may be contact centre staff present. Previously, the costs of an assessment of supervised contact or other professional assessment of contact could in certain exceptional circumstances and, subject to the exclusions in paragraph 1.3 of the Funding Code, be met by the Fund on behalf of a funded client. However, this is no longer appropriate in relation to orders or directions made on or after 6 April 2009 requiring an assessment of contact, including contact re-introduction or any report based, in whole or in part, on an observation or observations of contact with a child/children.
2. In respect of family proceedings in which the welfare of children is or may be in question, it is a function of Cafcass and Cafcass Cymru to provide information, advice and other support for the children and their families. Therefore contact centre fees, charges and costs and the costs of or expenses relating to any assessment or report (including on contact at a contact centre) based, in whole or part, on an observation or observations of contact with a child/children cannot be charged as disbursements recoverable from the Community Legal Service Fund in accordance with paragraph 1 above. This extends to any referral fee for supported contact.
3. In addition Cafcass and Cafcass Cymru are responsible for responding to the court's imposition of a 'contact monitoring requirement'. This monitoring is undertaken by Cafcass or Cafcass Cymru and therefore no issue of charging/payment arises. It is therefore not necessary or reasonable for the limited Community Legal Service Fund to be diverted to provide, fund or support such services. Cafcass and Cafcass Cymru are the only bodies to whom this responsibility falls which, in addition, is subject to the jurisdiction and consideration of the court.
4. The following guidance continues to apply to cases, orders and directions which do not fall within paragraphs 1 above - that is to orders or directions made before 6 April 2009. In exceptional circumstances the costs of an assessment of supervised contact (but not supported contact) or other professional assessment of contact may exceptionally be met by the funded client (through the Fund), provided the cost is appropriately apportioned having regard to section 22(4) Access to Justice Act 1999 (see paragraph 5.6 above) and:
 - (a) Cafcass cannot reasonably be expected to assist through a report or other support;

- (b) Contact sessions are reasonable both in number and extent, and court has ordered an assessment report of the contact to be submitted to assist in the final determination of an application pending before the court; and
- (c) Any charges for or expenses relating to treatment, therapy, training or educative or rehabilitative work with the child or family are not included as they cannot be funded in accordance with Funding Code paragraph 1.3.

The following points should be noted:

- (d) following an assessment of suitability and where it is necessary and in the child's interest, Cafcass can be directed to supervise contact, including outside normal working hours. It is reasonable to expect this to be the first port of call – enabling Cafcass to have a continuing, seamless role in assessing suitability, facilitating, supervising and assessing contact in cases where it already has an involvement.
- (e) It should not be necessary and will usually be inappropriate to involve third parties in facilitating (i.e. setting up) contact arrangements, for example around contact re-introduction. All such cases should be referred to Cafcass.