

CIS – Corporate Information System

The Legal Aid Board is developing a new computerised information system which will improve the way we deliver our services to all our customers. Since 1989, the Legal Aid Board has achieved significant quality and efficiency improvements by successfully managing existing information systems. However, we are too reliant on paper-based systems and many of our forms, documents and letters lack clarity and can be difficult to read.

A mainframe computer which was installed in the 1960s supports our manual systems. It has been upgraded but no longer adequately meets the changing needs of the Board and the legal profession. The computer is not nationally accessible by all area offices and is gradually becoming inconsistent, and therefore unreliable, with unacceptably slow response times. We also have to address the major date configuration problems as we approach 2000 AD.

Equally we recognise the need to improve the payment and collection of monies permitting more effective control of Legal Aid Fund expenditure, as well as needing systems capable of underpinning future Legal Aid reform.

To resolve these difficulties, the Board embarked on a series of fundamental internal changes, also taking the opportunity to re-engineer business processing methods. One of the key challenges, to improve quality and efficiency of services, is being supported by the implementation of a bespoke computer system – the Legal Aid Board Corporate Information System (CIS). Having sought the views of the profession during design and development, CIS is currently being rigorously tested, a lengthy exercise crucial to the success of the project.

CIS is a nationally accessible system providing our employees with up-to-the-minute, on-screen information to support enquiries and decision making and to improve application and claim processing capabilities.

Your clients will be given a unique reference number which allows us to create links between any new or previous application, be it a criminal,

civil or legal advice and assistance application. This will improve fund expenditure control and will reduce the need for caseworkers to retrieve paper files in order to deal with more detailed enquiries.

New forms have been designed to provide us with more relevant information in a more structured way. Some existing forms have been amalgamated and others are being withdrawn altogether. Ultimately this will speed up decision making and allow us to create more informative reports: for example, franchised firms will receive more detailed monitoring reports. The forms are white with black text and can be easily photocopied. Each form will be supported by checklist guidance.

The majority of outgoing documents and letters will be computer generated and have been simplified which should make it easier for your clients to understand legal aid.

Because the computer system is more flexible, we will be able to make improvements to our existing service, such as being able to easily change your client's contribution payment date if necessary. We will also be offering the option of collecting contributions by direct debit for those applicants who might prefer this service.

As you may be aware, the introduction of a business project of this size and complexity requires careful planning. Therefore, to minimise risk and disruption as much as possible, a phased implementation (by area office) will be adopted. Only when we have tested CIS to our complete satisfaction will a date for the first phase be announced. Prior to implementation we will provide training and guidance particularly for firms who do a high volume of legal aid work.

To further improve our services we are exploring doing more business by fax machine and telephone as well as supplying forms on computer diskettes or CD-ROMs. The CIS system will form the basis for these proposed developments.

More detailed information about the CIS implementation will be published in the near future, providing you with updates of our progress and how you and your clients will be affected.

PERSONAL INJURY PRACTITIONERS

Access to

Health Records Act 1990

(AHRA)

Focus No. 17 (March 1997) included an article encouraging solicitors needing copies of clients' health records to apply for them under AHRA where practicable, as the (maximum) fee under AHRA is an access fee of only £10.00 plus the cost of copying and postage.

The article said that the next edition of Focus would carry the response of the NHS Executive to the Board's suggestion that they should recommend a realistic figure of only a few pence per page for copying because all administrative costs i.e. retrieval, collation and examination, are covered by the (maximum) £10.00 access fee.

The reply (from the Department of Health rather than the NHS Executive) did not arrive in time for Focus No. 18. However, it has now arrived (dated 15 April 1997 ref. CFD/60).

The Department of Health's view is that they can not make such a recommendation as AHRA requires the precise cost of making a copy to be charged and this will vary from Trust to Trust or Health Authority.

However, the good news is that, the Department of Health state in that letter that they agree with the analysis of the legislation set out in the Focus article. They state in their letter, "retrieval, collation and examination are therefore covered by the £10.00 application fee for access".

This should help to see an end to the very high charges which some Trust and Health Authorities have been making for providing copies of health records.

The Board is writing to the Department of Health to ask them to circulate their letter to Trust and Health Authorities so that they are aware of the position. Save money and apply for copies of health records under the AHRA whenever practicable. If you encounter difficulties, refer to the Department of Health's letter.

Emergency Legal Aid UPDATE

FROM 1 APRIL, the Board introduced new procedures for considering applications for emergency legal aid. These were outlined in issue 17 of FOCUS.

Early experience has shown the vast majority of applications comply with our requirements and therefore progress smoothly with decisions being faxed back in the same working day. However, a small number of solicitors remain unclear on the procedures for faxed applications. For example, one or two solicitors have assumed that the emergency application form CLA3 is now redundant, and others have assumed that forms CLA3/4 should be faxed to the area office. Neither of these is correct.

The procedure in dealing with emergency applications is:

1. Applications will only be accepted by telephone in the most urgent cases, where work needs to be undertaken within the next few hours and there is not time to access a fax machine.
2. Where a situation is so urgent that work must be undertaken before the next working day (3pm to 3pm for this purpose) and you wish to make a fax application you must use the fax emergency forms FEA1 and FEA1a.
3. You should not fax substantive applications with FEA forms (including form CLA3). If the application is granted, substantive application forms including form CLA3 should be sent through the post/DX to be received in the area office within 5 working days of the emergency application.

NB There have been occasions where solicitors have faxed us very lengthy enclosures. This level of detail is unnecessary. Decisions can be given from the information provided on the fax forms FEA1 and FEA1a.

4. A decision on a faxed emergency application will be faxed back to you within one working day.
5. There should be no need to telephone the area office to obtain a decision. Faxed applications will be progressed as quickly as possible. Applications can be dealt with more quickly if all relevant information is given on the appropriate fax application form and solicitors do not chase faxed applications with a telephone call.

Any queries regarding the new procedures should be directed to your local area office.

FOCUS Mailing list

FOCUS is sent to all legal aid account holders.
Address labels are provided
by the master index section at
85 Gray's Inn Road, London WC1X 8AA.
Please send any change of address details
directly to the master index section.
Help us to help you by keeping us up to date.

• **MATRIMONIAL** •
• **FAMILY** •
• **GUIDANCE REVISION** •

June 1997



Introduction

From 1 June 1997 the Board's area offices, as well as franchisees, will be applying revised guidance in relation to matrimonial/family cases. The introduction of this guidance follows extensive consultation with practitioner groups, both general and specialist, as well as cascade training in the area offices. The external consultees included The Law Society, Solicitors Family Law Association and the Bar Council.

The guidance, which relates both to ABWOR and civil legal aid, will be applied to initial applications and subsequent amendments.

The complete guidance is being published through an update to the Board's Guidance: Exercise of Devolved Powers, which is being issued to franchisees. Extracts of the main points appear below for the use of non franchised firms, who will need to be aware of the new guidance, which will be applied from the implementation date.

The guidance does not detract from the application of the merits test but represents an enhancement of the guidance previously contained in the Guidance: Exercise of Devolved Powers, which is intended to assist caseworkers and practitioners in the application of the test to particular types of cases.

The guidance gives an indication of when applications are likely to be granted/refused, as well as indicating factors which fall to be considered in relation to particular types of cases in applying the merits test and the form of limitation likely to be used. Applications will be expected to address the issues raised by the guidance otherwise they are likely to be refused in the absence of further information.

Key points

Particular points to note are that:-

- Some certificates will bear a limitation to ensure that the merits of the case are further considered before proceedings are issued (in particular where the discharge of a care order is contemplated) and others will require the solicitor to define the issues and/or work towards a negotiated settlement (where the issues are not entirely clear but the merits test is nonetheless satisfied or alternatively the matter appears capable of resolution).
- Ancillary relief certificates and those in respect of finances/property (save those in respect of only periodical payments and/or a transfer of tenancy) will require the solicitor to report to the area office on form CLA30 (application for amendment) before proceeding to a final, contested hearing. This will not preclude the exchange of evidence and negotiations as to settlement (which may conclude in a consent order). It will, however, require that the need for a final, contested hearing is actively considered by the solicitor and that this is confirmed to the area office, 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 to settle the matter. Franchisees will have a new devolved power to amend certificates in these particular circumstances.

- In some cases Counsel's opinion will continue to be required before a final contested hearing (eg defended matrimonial proceedings, Inheritance Act proceedings and where the area office particularly requires this) but in others the solicitor may report to the area office to seek an amendment to increase the steps covered, without involving Counsel. In more complex cases, the solicitor will have the option of involving Counsel within a limitation covering a solicitor's report or Counsel's opinion.
- In cases involving children issues (i.e. as to the care/upbringing of children but not financial matters) it will generally be reasonable to expect a possible compromise to have been explored unless the circumstances make that inappropriate (e.g. urgency/risk of harm, history, issues).
- The position in relation to some certificate wordings/limitations has been amended/clarified. Practitioners should consider certificates received to check their scope in the usual way. In particular, certificates:
 - will cover child maintenance to the extent that the Child Support Agency does not have jurisdiction.
 - will include registration of any periodical payments order obtained.
 - will exclude an application under Section 37 Matrimonial Causes Act 1973 and/or the inherent jurisdiction unless specifically stated.
- Certificates will be limited so that, even where a final hearing is covered, the cover of the certificate will extend to the conveyancing/implementation work necessary to give effect to the terms of any final order obtained.
- Practitioners will recall that the Board's guidance on injunctions was reviewed and revised, effective from 12 August 1996 (see Focus 16, September 1996). In the light of that recent review, only a single substantive change has been made in the area of injunctions (referring to the possibility of a grant despite ongoing bail conditions). That change is reproduced below.

Franchisees

Franchisees will apply the same guidance as area offices in exercising their devolved powers. They will, however, also have a new devolved power to amend a certificate relating to ancillary relief, finances or property, so that the matter can proceed to a final, contested hearing.

This summary does not seek to deal with the position of franchisees in detail, given the full guidance which is contained in the Guidance: Exercise of Devolved Powers.

Summary

The extracts of the guidance which appear below use the references contained in the guidance itself.

Further copies of this supplement can be obtained from the Board's Press & Publications Section at Legal Aid Head Office, 85 Gray's Inn Road, London, WC1X 8AA (DX No 328) – telephone: 0171 813 1000 Ext.8676. Any comments on the guidance should be made to the Legal Department at the same address.

Summary

CIVIL LEGAL AID/ABWOR

Note:

The civil legal aid merits test as to both legal merits and reasonableness must be applied in all merits tested cases – see Note for Guidance 7 Legal Aid Handbook which deals with the general application of the test.

Any limitation or condition appropriate to the particular case must be applied.

1. DIVORCE AND JUDICIAL SEPARATION

1.1 Legal aid is likely to be granted:

- (a) to be represented in an uncontested divorce/judicial separation suit as either Petitioner or Respondent if it is impracticable for the applicant to proceed without representation. 'Impracticable' means that it is not practicable to proceed without representation by reason of the applicant's physical or mental incapacity. The incapacity must be the cause of the inability to proceed and the case must satisfy the merits test having regard to the prospects of success and reasonableness of the grant;
- (b) to be represented on the hearing of a petition directed to be heard in open court if the circumstances of the particular case justify representation and there are reasonable prospects of obtaining or opposing the pronouncement of a decree;
- (c) to continue to prosecute a suit to which an Answer has been filed if it is reasonable in all the circumstances for the matter to proceed as a contested suit;

[It would not be reasonable to grant legal aid to a petitioner if there have been offers of compromise which a reasonable fee paying client would accept, having regard to the likely costs involved in proceeding with such a petition, the benefit to be obtained and the risk of litigation generally.

Cross-reference: – 1.2 and 1.3 below.]

- (d) to defend a suit and to cross-pray for divorce/judicial separation where the cause remains defended. [It would not, however, be reasonable to grant legal aid unless:
 - there is some substantial benefit to be gained (e.g. allegations are so serious and prejudicial so as to significantly undermine the respondent's position in other issues such as residence/contact/financial provision) and
 - the matter is incapable of compromise.

Cross-reference: paras 1.2 and 1.3 below].

- (e) to defend a suit (without cross-praying) where there is a substantial defence with reasonable prospects of success and there are substantial practical benefits to be gained by avoiding the decree (objection to the pronouncement of a decree is unlikely to suffice).

1.2 Legal aid is unlikely to be granted where:

- (a) the matter could reasonably be compromised by way of undefended cross-decrees or on the respondents cross-petition; or
- (b) the matter could reasonably be dealt with by way of a two/five year separation petition (i.e. in terms of the length of the period of separation and any 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.

- 1.3 If there is to be a cross petition or there is an Answer admitting irretrievable breakdown (but denying the allegations in the petition) and it is therefore accepted that the marriage has irretrievably broken down (or, in the case of judicial separation, that the parties should be separated), i.e. where the only question in issue is whether or not the allegations in the petition are true, it would rarely be reasonable for legal aid to be granted for a contested suit. It is for the solicitor to satisfy the area office that the lack of cost effectiveness in cross-praying or continuing to prosecute the petition is outweighed by the likely benefit to the applicant.

Cross-reference: 1.1 (d) above.

- 1.4 Legally aided cases should not be dealt with on a contested basis without good reason. Certificates, whether to prosecute or defend divorce/judicial separation proceedings, will be limited so as to exclude trial of a defended suit. The effect of this is that an application for an amendment must be made before a case proceeds to trial.

- 1.5 Before a certificate is amended to cover representation in a defended suit the area office must be satisfied that, without detriment to the proper interests of the parties or either of them, the case cannot be dealt with on an undefended basis. The solicitor applying for an amendment should confirm that a defended case cannot be avoided, setting out the reasons and the state of settlement negotiations. Counsel's opinion should also be obtained in accordance with the usual limitation.

2. NULLITY

2.1 Legal aid is likely to be granted:

- (a) to prosecute a suit where valid grounds are shown, it is demonstrated that divorce 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 proceedings (e.g. on the grounds of two years' separation with consent) a reasonable alternative.

Example: divorce would not be a reasonable alternative in a marriage void ab initio;

- (b) to defend a suit where there is a substantial defence with reasonable prospects of success and there are substantial practical benefits to be gained by avoiding the decree (objection to the pronouncement of a decree is unlikely to suffice);
- (c) to defend a suit and/or cross-pray for divorce/judicial separation where there are

reasonable prospects of avoiding the decree of nullity and of succeeding on the cross petition. There must, however, also be substantial and real benefits to be gained. Objection to the pronouncement of a decree on religious grounds is unlikely to suffice.

- 2.2 Where the proceedings are undefended they will be heard in open court but legal aid is only likely to be granted if representation is justified in the particular case, having regard to the points of law, issues of fact and/or circumstances of the applicant (e.g. as to a material disability) in the case.
- 2.3 Certificates whether to prosecute or defend nullity proceedings will usually be limited so that an application for an amendment must be made before a case is tried on a defended basis.
- 2.4 Before a certificate is amended the area office must be satisfied that, without detriment to the proper interests of the parties or either of them, the case cannot be dealt with as an undefended suit. The solicitor applying for an amendment should confirm that a defended case cannot be avoided, setting out the reasons and the state of settlement negotiations. Counsel's opinion should also be obtained in accordance with the usual limitation.

3. FINANCIAL PROVISION

Cross-reference: Section 4 below for matters ancillary to divorce/judicial separation or nullity

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

3.1.1 Legal aid is likely to be granted:

- (a) where the circumstances of the case, the prospects of success and value of the relevant capital assets justify the grant of representation, taking account of the likely costs of proceedings, having regard to the possible operation of the statutory charge.

Example: it would not be reasonable to grant legal aid where the only dispute involves goods and furniture, the secondhand resale value of which is likely not to be significantly more than the likely legal aid costs of pursuing/defending a contested application.

- (b) where reasonable attempts at compromise have been made and failed (indicated in the statement or supporting documents).
- (c) unless the matter could more appropriately be compromised or resolved within imminent divorce, judicial separation or other proceedings or
- (d) unless the applicant was never engaged/married to the opponent.

- 3.1.2 Certificates whether to take or defend proceedings will be limited to ensure that before a case proceeds to a final contested hearing, the solicitor must report as soon as practicable to the area office confirming that this cannot reasonably be avoided and remains justified, having regard to the prospects of success (ie 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 to settle the matter. Where the issues between the parties are not clear or appear capable of being minimised or resolved the certificate will be limited in the first instance to allow the issues to be defined and to cover a negotiated settlement.

- 3.1.3 A certificate covering proceedings under the Married Women's Property Act cannot cover or be amended to cover any family proceedings including ancillary relief proceedings (as they are not themselves family proceedings).

Cross-reference: see also 4.1.15.

3.2 The Trusts of Land and Appointment of Trustees Act 1996/Declaration as to Trusts Affecting Property/Declaration as to Rights of Occupation.

- 3.2.1 Legal aid is likely to be granted to unmarried couples to make an application to the court under Section 14 but only where:

- (a) the application has reasonable prospects of success having regard to the Section 15 statutory criteria including the welfare of relevant minors and the interests of secured creditors and
- (b) reasonable attempts at compromise have been made and failed (indicated in the statement or supporting documents) and
- (c) the circumstances of the case, the prospects of success and value of the relevant capital assets justify the grant of representation taking account of the likely costs of proceedings, having regard to the possible operation of the statutory charge and
- (d) in the case of the possible sale of a property with no, low or negative equity, litigating would be justified in the particular circumstances (e.g. there is 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) or
- (e) there is no, low or even negative equity but nonetheless, in the circumstances of the particular case, the applicant has a real prospect of preserving a home (especially if there are children involved).

- 3.2.2 It is unlikely that an application under the 1996 Act would be made for married couples as the Matrimonial Causes Act 1973 provides more appropriate relief.

- 3.2.3 Legal aid is unlikely to be granted to married couples to make an application to the Court unless:

- (a) no divorce or judicial separation is intended and
- (b) one of the parties wants a jointly owned property to be sold or seeks a declaration as to rights of occupation and
- (c) the application has reasonable prospects of success having regard to the Section 15 statutory criteria including the welfare of relevant minors and the interests of secured creditors and
- (d) reasonable attempts at compromise have been made and failed (indicated in the statement/supporting documents) and

- (e) the circumstances of the case, the prospects of success and value of the relevant capital assets justify the grant of representation taking account of the likely costs of proceedings, having regard to the possible operation of the statutory charge and
- (f) in the case of the possible sale of a property with low, no or negative equity, litigating would be justified in the particular circumstances (e.g. there is a very real prospect of achieving the sale of a property subject to a mortgage, and liability from which the applicant would be freed as a consequence of an order for sale) or
- (g) there is no, low or even negative equity but nonetheless, in the circumstances of the particular case, the applicant has a real prospect of preserving a home (especially if there are children involved).

3.2.4 Legal aid is likely to be granted to oppose an application for an order:

- (a) where the defence has reasonable prospects of success and
- (b) reasonable attempts at compromise have been made and failed (indicated in the statement or supporting documents) and
- (c) the value of both the claim and property/likeness of successful recovery justify the likely costs of the proceedings, having regard to the possible operation of the statutory charge or
- (d) there is no, low or even negative equity but nonetheless, in the circumstances of the particular case, litigating would be justified eg because the applicant 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, and liability from which the applicant would be freed as a consequence of an order for sale.

3.2.5 Certificates whether to take or defend proceedings which are/will be in respect of an application other than an order for sale will be limited to ensure that before a case proceeds to a final contested hearing the solicitor must report to the area office confirming that this cannot reasonably 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. In any case (whether involving an order for sale or not) where the issues between the parties are not clear or appear capable of being minimised or resolved, the certificate will be limited in the first instance to allow the issues to be defined and to cover a negotiated settlement.

3.2.6 A single certificate cannot cover an application to the court under the 1996 Act and proceedings under the Children Act 1989. Where separate applications are made, which otherwise satisfy the merits test, they are likely to be granted for Counsel's opinion to be obtained on the merits including as to the appropriate application(s) to be made to the court. If one certificate has already been granted, then the second application is likely to be granted on this limited basis so as to enable the appropriate jurisdiction to be clearly established.

4. MATTERS ANCILLARY TO DIVORCE/JUDICIAL SEPARATION OR NULLITY AND FINANCIAL APPLICATIONS UNDER SCHEDULE 1 CHILDREN ACT 1989

Notes:

An emergency application to defend ancillary relief proceedings is likely to be refused where the applicant can give undertakings, make payment or otherwise deal with any urgent steps in person (e.g. by agreement as to directions, an extension of time/adjournment or by filing an affidavit/statement). The existence of proceedings requiring urgent action will not of itself suffice to justify the grant of an emergency certificate.

Cross-reference: see also para. 4.5.4.

Legal aid to take proceedings ancillary to divorce/judicial separation will not be granted until a petition has been issued, an undertaking to issue has been given or its issue is imminent. Legal aid/ABWOR to defend proceedings will not be granted until proceedings (including a petition containing prayers for ancillary relief) have actually been commenced or are so imminent that there is a strong probability they will be commenced.

4.1 Child Maintenance and Spousal Maintenance – first orders – including maintenance pending suit and applications under the Domestic Proceedings and Magistrates' Courts Act 1978 or Children Act 1989

Cross-reference: para. 4.8 below regarding variations.

4.1.1 Legal aid/ABWOR will only be granted where the application is likely to succeed in that a worthwhile order is likely to be made having regard to the length of any marriage and circumstances of the parties.

4.1.2 Legal aid/ABWOR will only be granted where there is an indication that the opponent has the means to meet a substantive (as opposed to nominal) order (but see cross-reference below).

Cross-reference: para.4.1.5 and 4.1.6(a) below.

4.1.3 Where the means of the opponent are in doubt, legal aid may be granted limited to the obtaining of a status report in the first instance provided that sufficient information is available to justify this.

4.1.4 Legal aid is likely to be granted to apply for an order where only a nominal order will be obtained but only if the issue of maintenance forms part of a larger set of issues which themselves justify the proceedings and likely costs and therefore the grant of legal aid.
Example: where both parties are unemployed but there are substantial capital assets justifying the grant of legal aid for ancillary relief.

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 the legal advice and assistance scheme, if appropriate. If that is unsuccessful the grant of legal aid is unlikely to be justified.

4.1.5 Legal aid/ABWOR will only be granted to apply for a periodical payments order for children where the Court rather than the Child Support Agency has jurisdiction

for child maintenance. Where the Court has jurisdiction and the application for legal aid/ABWOR is granted in respect of spousal maintenance it will also cover child maintenance although this will not be specifically stated.

4.1.6 Legal aid/ABWOR is likely to be granted to apply for an order:

- (a) unless the only benefit to be obtained from the proceedings is a nominal periodical payments order and there are no exceptional circumstances which would justify incurring the costs of the proceedings rather than seeking a substantive order at a later time. In the case of legal aid, a grant to obtain a periodical payments order or transfer of tenancy will not of itself make it appropriate to grant for ancillary relief generally.

Cross-reference: contrast with 4.1.4 above.

- (b) where there will be a real and sufficient benefit to the applicant to justify the proceedings and likely costs (eg the applicant is likely to be able to stop claiming benefit as a consequence of the making of a significant order or the applicant will no longer be claiming benefit by the time any order is made, for example because of a realistic prospect of taking up employment within say the next three months) and therefore would benefit from the order.

4.1.7 Legal aid/ABWOR is likely to be granted to defend proceedings unless the grant of representation is not justified in the circumstances of the particular case e.g. because the applicant's liability for a nominal order is clear. **Cross-reference:** see also 4.1.11 regarding proceedings in the family proceedings court.

4.1.8 An emergency application in respect of maintenance pending suit or to apply for ancillary relief generally (rather than as a pre-requisite to a Section 37/inherent jurisdiction application) is likely to be refused because the applicant can apply for or will be in receipt of income support/income based Jobseeker's Allowance or may have other resources to meet immediate needs until a substantive application is processed.

4.1.9 An emergency application to defend ancillary relief proceedings is likely to be refused where the applicant can give undertakings, make payment or otherwise deal with any urgent steps in person (e.g. by agreement as to directions, an extension of time/adjournment or by filing an affidavit/statement). The existence of proceedings requiring urgent action will not of itself suffice to justify the grant of an emergency certificate.

4.1.10 ABWOR is likely to be refused where divorce/judicial separation proceedings are pending or are imminent, in which case it would be more appropriate for all matters to be dealt with ancillary to those proceedings (once a petition has been issued or its issue is so imminent that there is a strong probability it will be issued).

4.1.11 Legal aid/ABWOR is likely to be granted to apply for/be represented (i.e. defend) first applications for child maintenance and/or spousal maintenance in the family

proceedings court unless (in the absence of an applicant's material physical or mental disability justifying representation):

- (a) the issue(s) disputed are not sufficiently complex to make representation necessary or
- (b) the factual or legal complexity of the case do not justify the grant of representation.

4.1.12 ABWOR is likely to be refused to take or defend proceedings for agreed payments under section 6 of the Domestic Proceedings and Magistrates' Courts Act 1978 unless the applicant for ABWOR needs representation because of a physical or mental disability which is such that it would be unreasonable to expect him/her to deal with the proceedings in person.

4.1.13 Certificates covering maintenance (and/or a transfer of tenancy) only will not generally be limited to require a solicitor's report prior to a final contested hearing (contrast paras. 4.2.4 and 4.3.4).

4.1.14 A certificate covering ancillary relief proceedings cannot cover or be amended to cover proceedings under the Married Women's Property Act 1882 (unless they are brought within the ancillary relief proceedings themselves rather than as separate proceedings).

4.2 Lump Sum and Property Adjustment Orders

4.2.1 Legal aid is likely to be granted:

- (a) where the circumstances of the case, the prospects of success and value of the relevant capital assets justify the grant of representation taking account of the likely costs of proceedings, having regard to the possible operation of the statutory charge. 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 applicant would be released as a consequence of an order for sale) or there is no, low or even negative equity but nonetheless, in the circumstances of the particular case, the applicant has a real prospect of preserving a home especially if there are children involved.
- (b) unless the only dispute concerns goods and furniture, the secondhand resale value of which is likely not to be significantly more than the likely legal aid costs of pursuing/defending a contested application or
- (c) unless any order likely to be obtained will be unlikely to be successfully enforced e.g. because the only asset(s) of significant value are abroad or
- (d) unless the application to the court is unlikely to, or cannot, succeed e.g. because the only asset(s) of significant value are incapable of being assigned (such as forces pensions and gratuities).

4.2.2 If legal aid is granted to resolve the distribution of

capital assets then, depending on the circumstances of the case, it may 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 – see cross-reference, below).

Cross-reference: para 4.1.4 and contrast 4.1.6(a) above).

4.2.3. Legal aid is likely to be granted to defend an application for capital distribution (or cross-apply) because the circumstances of the particular applicant and/or the issues in the case (e.g. as to factual complexity or a point of law) will normally justify the grant of representation.

4.2.4. Certificates/approvals whether to take or defend proceedings will be limited to ensure that before a case proceeds to a final contested hearing the solicitor must report as soon as practicable to the area office confirming that this cannot reasonably be avoided and remains 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 to settle the matter. In cases which are subject to the Ancillary Relief Pilot Procedure the solicitor will be able to report after any Financial Dispute Resolution (FDR) appointment. Furthermore, where the issues between the parties are not clear or alternatively appear capable of being minimised or resolved the certificate will be limited in the first instance to allow the issues to be defined and to cover negotiations as to settlement followed by a solicitor's report.

4.3 Debts Liability

4.3.1. An ancillary relief order cannot bind creditors and the court has no powers under Sections 23 and 24 of the Matrimonial Causes Act 1973 to adjust debts between parties. Legal aid is therefore only likely to be granted to apply for an order relating to debts if responsibility for them is likely to be significantly adjusted by a court order (i.e. where there are other financial resources which can be used for that purpose).

4.3.2. The likely level of any lump sum order made for this purpose 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.

4.3.3. Legal aid is likely to be granted to defend an application because the circumstances of the particular applicant and/or the issues in the case (e.g. as to factual complexity or a significant point of law) and the available financial resources will normally justify the grant of representation.

4.3.4. Certificates/approvals whether to take or defend proceedings will be limited to ensure that before a case proceeds to a final contested hearing the solicitor must report as soon as practicable to the area office confirming that this cannot reasonably be avoided and remains 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 to settle the matter. In cases which are subject to the Ancillary Relief Pilot Procedure the solicitor will be in a position to report after any Financial Dispute Resolution (FDR) appointment. Where the issues between the parties are not clear or appear capable of being minimised or resolved the certificate will be limited in the first instance to allow the issues to be defined and to cover a negotiated settlement.

4.4 Consent Orders

4.4.1. Legal aid is only available for court proceedings and would not, therefore, be granted only for the negotiation and the preparation of a Deed of Separation.

4.4.2. Legal aid is likely to be granted to negotiate and/or prepare a consent order where there are substantial issues to be resolved and the grant of representation is justified in the circumstances of the particular case (but only where appropriate proceedings have been or could be issued).

4.4.3. Certificates will be limited to allow the issues to be defined and to cover a negotiated settlement (including concluding proceedings by consent).

4.5 Section 37 Orders/Orders under the Inherent Jurisdiction

4.5.1. Legal aid is likely to be granted for the purpose of seeking an avoidance of disposition order or an order under the inherent jurisdiction if there are reasonable prospects of obtaining substantial benefit from the order. The resale value of any asset(s) to be protected must justify the likely costs of proceedings.

4.5.2. Proceedings (and therefore the grant of legal aid) are not normally justified where there are other available assets which can be transferred/adjusted in adequate compensation.

4.5.3. Legal aid is unlikely to be granted to take/defend such proceedings unless there is an indication in the statement or supporting documents that the matter cannot be compromised (e.g. by way of an undertaking) and the circumstances of the case as well as the conduct of the applicant justify the grant of representation.

4.5.4. 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 where the urgency and all the circumstances of the case, including the value of the assets, justify this.

4.5.5. An emergency application to defend ancillary relief proceedings including under Section 37 is likely to be refused where the applicant can give undertakings, make payment or otherwise deal with any urgent steps in person (e.g. by agreement as to directions, an extension of time/adjourning or by filing an affidavit/statement).

The existence of proceedings requiring urgent action will not of itself suffice to justify the grant of an emergency certificate.

- 4.5.6 A certificate will not cover proceedings under Section 37 and/or the inherent jurisdiction unless this is expressly stated.

4.6 Transfer of Tenancy

(see also 4.1.13 regarding limitations)

- 4.6.1 Legal aid is likely to be granted to take/defend proceedings where:

- (a) retaining the tenancy justifies the costs of proceedings in all the circumstances of the case (having regard to e.g. the length/terms of occupation, the availability of alternative housing and, if relevant, the "right to buy" provisions); and
- (b) there is a clear dispute which cannot be compromised and
- (c) there is a reasonable prospect of obtaining/avoiding an order.

- 4.6.2 The need to obtain a court order to negate an anti-alienation clause in a tenancy agreement or to obtain re-housing will not of itself justify the grant of legal aid. This will depend on the circumstances of the applicant and the case but legal aid is unlikely to be granted in the absence of a dispute.

4.7 Section 10 Matrimonial Causes Act 1973 applications

- 4.7.1 Legal aid is only likely to be granted to pursue an application for consideration of the respondent's financial position after the divorce, if there is a reasonable prospect of obtaining a substantial and practical benefit from the order and it is coupled with an application for ancillary relief.

- 4.7.2 Legal aid is only likely to be granted to defend an application under Section 10 where all the circumstances of the case satisfy the merits and reasonableness tests. It is likely that the statutory tests would be met in respect of the subsequent ancillary relief proceedings.

4.8 Variation or Revocation of a Periodical Payments Order

- 4.8.1 Where the Child Support Agency does not have jurisdiction, legal aid/ABWOR is likely to be granted to apply to vary a periodical payments order if:

- (a) in the case of legal aid for proceedings in the County Court, it can be shown that it would be unreasonable for the order to be registered and subsequently varied and enforced in the family proceedings court and/or an application for registration would not be granted and
- (b) there are reasonable grounds for seeking a variation which is likely to produce a 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) and

- (c) the circumstances of the particular applicant (due to e.g. a material physical or mental disability) and/or the case (due to e.g. complexity of the opponent's means) or a significant point of law justify the grant of representation. 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 may not of itself justify the grant of representation.

- 4.8.2 Legal aid/ABWOR is unlikely to be granted to defend an application to vary a periodical payments order unless:

- (a) the matter cannot be compromised despite reasonable attempts and
- (b) the circumstances of the particular applicant (due to e.g. a material physical or mental disability) and/or the case (due to e.g. complexity of the opponent's means or a significant point of law) justify the grant of representation. 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 may not of itself justify the grant of representation.

4.9 Registration/Enforcement of a Periodical Payments Order

- 4.9.1 Even where the Child Support Agency does not have jurisdiction, legal aid is unlikely to be granted to cover the making of an application for registration of an order alone as registration is a simple procedure which does not involve a court hearing. Registration is, where the relevant order was itself obtained under an existing legal aid certificate, treated as part of the obtaining of the order rather than part of the enforcement process.

- 4.9.2 Once an order which may have been obtained under a certificate has been registered in the family proceedings court, enforcement proceedings in that court would be outside the scope of the certificate. Enforcement action should normally be taken in the family proceedings court and legal aid/ABWOR would be refused as it is the responsibility of the court to take enforcement proceedings at the request of the complainant.

- 4.9.3 If enforcement in the County Court is appropriate (e.g. having regard to the particular method required) and the grant of representation is justified by the particular circumstances of the applicant and/or case and the benefit to be obtained, the certificate will specify the method of enforcement and in any event will cover only one application for enforcement.

- 4.9.4 An application for legal aid 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 the proposed method of enforcement is likely to be refused.

- 4.9.5 Where an order has been made for payment direct to a child enforcement proceedings can only be taken by that child acting by next friend or guardian ad litem. A separate legal aid application by the child is required to take enforcement proceedings but not to register an order in the family proceedings court (although see cross-reference below).

Cross-reference: see para. 4.9.1 above regarding registration.

- 4.9.6 Legal aid is not available for proceedings in a County Court for, or consequent on, the issue of a judgment summons.

- 4.9.7 Legal aid/ABWOR is unlikely to be granted to defend enforcement proceedings in the absence of very exceptional circumstances e.g. the applicant is facing a real rather than theoretical possibility of imprisonment or there is a substantial argument on remission of arrears sufficient to justify the grant of representation.

- 4.9.8 Legal aid/ABWOR is not available to pursue registration/enforcement of orders abroad but see cross-reference below.
Cross-reference: see para.6 below for foreign orders.

5. WARDSHIP – ADOPTION – CHILD ABDUCTION AND CHILDREN ACT 1989

5.1 Wardship/Inherent Jurisdiction (see also Child Abduction para 5.3)

Cross-reference: see also Child Abduction para 5.3

- 5.1.1 Legal aid is likely to be granted to take proceedings:

- (a) unless an order(s) under the Children Act 1989, the Family Law Act 1986 or Child Abduction and Custody Act 1985 will provide an adequate remedy. The continued use of wardship/inherent jurisdiction (including for “seek and find” orders) is seldom necessary in the light of the orders available under the Children Act 1989 and the Family Law Act 1986;
- (b) where the exceptional circumstances of the case justify the use of the Court’s jurisdiction (e.g. sterilisation of the mentally handicapped, medical treatment issues);
- (c) unless the applicant has insufficient interest to bring the proceedings or insufficient prospects of success (either in obtaining appropriate orders or because in the circumstances of the particular case any order obtained is likely to be ineffective, possibly because the child is abroad);
- (d) unless the issues in the case are not sufficiently important or are unlikely to produce sufficient benefit to warrant legal proceedings;
- (e) unless the particular case could appropriately be dealt with in another way e.g. writing a letter, involving the social services or the police or possibly using Interpol or the port alert system;
- (f) unless a child is subject to a care order (section 100 Children Act 1989).

- 5.1.2 Legal aid is likely to be granted to defend a wardship application unless:

- (a) the court would have significant regard to the child’s wishes because of his/her age and/or understanding and they are opposed to those of the applicant or
- (b) the defence stands insufficient prospects of success or
- (c) it would be unreasonable for legal aid to be granted in the particular circumstances, having regard to e.g. the issues in the case, the benefit to be obtained or the need for the applicant to be separately represented.

5.2 Adoption/Freeing for Adoption

- 5.2.1 Legal aid/ABWOR is not available for uncontested proceedings in the family proceedings court.

- 5.2.2 Legal aid/ABWOR is unlikely to be granted:

- (a) for proceedings in the County or High Court, if the application is uncontested.
- (b) unless the applicant has reasonable prospects of success in taking/defending the proceedings. The outcome of freeing proceedings will be relevant. The nature of the proceedings and the desirability of a parent being represented will not of themselves be sufficient to satisfy the merits test and justify the grant/continuation of representation to a parent on a fully contested basis (as opposed to e.g. seeking residence or continued contact if the applicant does not have reasonable prospects of success and would not be advised to continue to fully pursue/oppose the proceedings having regard to the interests of the child). In such circumstances a limited certificate enabling the parent to be advised on the procedure and evidence or covering continued contact may be appropriate.

In the case of applicants for an adoption order, where the prospects of success are not entirely clear the certificate is likely, if granted, to be limited in the first instance to obtaining Counsel’s opinion on the merits.

Examples: include applications involving unmarried couples, applications with an immigration aspect and those where contact is likely to be sought after any adoption.

- (c) where a step-parent applies, unless in the particular circumstances the application to the court for an adoption order (rather than a residence order) is nonetheless likely to succeed.
- (d) if it appears that the applicant has access to alternative funding sufficient to make the grant of legal aid/ABWOR unnecessary e.g. from a local authority. This may apply to foster parents supported by a local authority and guardians ad litem who may be joined as parties in County Court proceedings (where the child is not a party). Where no information is given on this point, legal aid/ABWOR is likely to be refused. Legal aid/ABWOR may still be granted where only limited financial support is available.
- (e) unless there is sufficient justification in the

circumstances of the particular case to justify legal representation. An application by the guardian ad litem in County Court proceedings (where the child cannot be a party and the guardian has been joined as a party) or the consenting parent in step parent adoptions is likely to be refused unless legal representation is justified in the particular circumstances of the case.

5.2.3 Legal aid is likely to be granted to the child who is a party in High Court proceedings (but who will not be a party in the County Court or family proceedings court).

5.2.4 In the case of an applicant for an order, consideration must be given to the appropriate forum for the case. The solicitor will be expected to commence proceedings in the family proceedings court where it has jurisdiction and unless there is a particular reason to do otherwise. If there are insufficient reasons for commencing the proceedings in the County Court as opposed to the family proceedings court (or the High Court as opposed to the County Court) then the area office will refuse the application unless, in all the circumstances of the particular case, the grant of legal aid for proceedings in a lower court is available and justified. If so the case will be dealt with as a partial refusal and the application granted to cover proceedings in that lower court (subject to a right of appeal to the Area Committee).

5.2.5 Subject to the inclusion of a more restrictive initial limitation, imposed having regard to all the circumstances of the particular case (see cross-reference below), certificates (save those issued to a child or guardian ad litem) will require a solicitor's report or, if the solicitor so advises, Counsel's opinion in the event of an unfavourable court welfare officer's/guardian ad litem's report. This will ensure that the area office has an opportunity to review the case and re-apply the merits test (which may or may not lead to the show cause procedure being instituted).

Cross-reference: see para. 5.2.2(b) above

5.3 Child Abduction

Cross-reference: see also Wardship/Inherent Jurisdiction para. 5.1

5.3.1 Child Abduction and Custody Act 1985

5.3.1.1 Non means, non merits tested civil legal aid is available to an applicant who has applied under the Hague Convention or the European Convention to the central authority (the Lord Chancellor's Child Abduction Unit – part of the Official Solicitor's Office) pursuant to Section 3(2) or Section 14(2) of the Child Abduction and Custody Act 1985 for the return of/contact with an abducted child. These applications can only be dealt with by the London area office on production of a letter of instruction from the Child Abduction Unit to the applicant's solicitor. A means and merits tested application (including an application for an emergency certificate) must not be granted to take such proceedings, in view of the availability of non means, non merits tested civil legal aid.

5.3.1.2 Legal aid, which is otherwise available on the usual means and merits tested basis, is only likely to be granted to take/defend proceedings under the Child Abduction and Custody Act 1985 where the applicant stands reasonable prospects of success and it is reasonable in all the circumstances for legal aid to be granted. This means that:

- (a) the grant of legal aid 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 aid 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.

5.3.2. Family Law Act 1986

5.3.2.1 Sections 33 and 34 can be used in proceedings under Section 8 Children Act 1989 to apply for an order to obtain information as to a child's whereabouts and to obtain the return of a child in accordance with an existing residence or contact order.

5.3.2.2 Civil legal aid is likely to be granted to an applicant for such an order where:

- (a) all the circumstances of the case justify legal proceedings and
- (b) no other remedy would be appropriate, including involving the police or social services.

5.3.2.3 Civil legal aid is unlikely to be granted to an applicant for such an order where the child is believed to still be within England and Wales but an international abduction is feared. A port alert can be put in place by the police if they are satisfied that:

- (a) there is a real and imminent danger of the child being removed (i.e. within the next 24-48 hours) and
- (b) the child is under 16,
- (c) a ward of court or,
- (d) in the case of a child 16 or over who is not a ward, there a residence order or an order restricting or restraining removal from the jurisdiction.

5.3.2.4 Civil legal aid is unlikely to be granted where the child has already been removed from the jurisdiction 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 (e.g. by compelling information to be provided about the child and abductor by a third party).

5.3.2.5 An emergency certificate should only be issued to take proceedings to secure the return of a child to a custodial parent where:

- (a) proceedings are themselves justified (i.e. attempts to secure the child's return have been unsuccessful) and

- (b) there is evidence of the child being at significant risk of harm serious enough to justify urgent action.

5.4 Children Act 1989 (Means and merits tested applications) – freestanding and in other proceedings.

Notes:

- (a) *This section applies to both civil legal aid and ABWOR generally but see para. 5.4.20 and 5.4.21 regarding ABWOR*
 - (b) *Emergency certificates must not be granted where non means, non merits tested civil legal aid is available under Section 15(3C) Legal Aid Act 1988.*
 - (c) *On a means tested only Children Act application within section 15(3E) Legal Aid Act 1988 legal aid will be granted where the applicant qualifies financially.*
 - (d) *Civil legal aid is not available to local authorities, or to any body acting in a representative, fiduciary or official capacity or to a guardian ad litem for proceedings under the Children Act 1989 and must be refused.*
 - (e) *Any requirement on a guardian ad litem to instruct a solicitor does not of itself satisfy the civil legal aid merits test (see para 5.4.2(e) below).*
 - (f) *See section 4 for financial orders and para. 7.6 for orders having the effect of injunctions.*
 - (g) *Where leave is required to take/be joined in proceedings and the application is granted the certificate will cover that application although that is not expressly stated by the certificate wording.*
- (i) unless the court would give significant regard to the child's opposing wishes (because of his/her age and/or understanding);
 - (j) unless the issues disputed between the parties do not justify the grant of representation (although legal aid/ABWOR may be granted if the applicant is suffering from a material physical or mental disability such that it would be unreasonable to expect him/her to act in person).
 - (k) unless any order obtained is likely to be ineffective or incapable of successful enforcement.

5.4.2 Legal aid/ABWOR will only be granted to those applicants and for those applications to the court which are justified in the particular circumstances of the case:

- (a) An applicant who requires leave to take or to be joined in proceedings must indicate why he or she is likely to succeed in being joined and why he or she is the appropriate litigant/applicant for representation.
- (b) The fact that a child can make an application to the court will not of itself justify the grant of legal aid as an application may only be being made by the child rather than an appropriate adult to secure legal aid funding (in which case the application is likely to be refused).
- (c) An application by a child to apply to the court is likely to be refused in the absence of information justifying the particular reasons for this and the likelihood of the leave of the court being granted, as well as in relation to the apparent failure of relevant adults to take proceedings (in particular those with whom the child would live in the event of a residence order being made).

Example: It is unlikely that legal aid would be granted to a child to apply for a residence order (in contrast with say, in appropriate circumstances, a contact order with siblings not in care).

- (d) Even where the leave of the court is not required an application is likely to be refused where the interests of the applicant do not justify representation. This includes where any benefit would be to a third party whose interests coincide with those of the applicant (e.g. a parent supporting a residence order in favour of grandparents)

Cross-reference: see para.5.4.1(c) above.

- (e) The requirement on a guardian ad litem to appoint a solicitor in certain specified public law cases (for which legal aid is available on a means and merits tested basis) does not of itself mean that the civil legal aid merits test is satisfied on an application for legal aid by the child. If the solicitor is instructed by the guardian ad litem legal aid is only likely to be granted where, having regard to the particular circumstances, legal representation under a legal aid certificate is justified eg due to the matter being opposed or involving a significant point of law.

5.4.1 On a merits tested application legal aid/ABWOR is likely to be granted:

- (a) unless the court is unlikely to intervene to make an order;
- (b) unless the applicant has no reasonable prospects of success in taking/defending the proceedings (including, where applicable, in the light of the check list at section 1(3) Children Act 1989);
- (c) unless the applicant has an insufficient interest or an insufficiently separate interest to justify being a party/having separate representation (because his/her interests coincide with those of another party/parties and/or can be dealt with by way of evidence);
- (d) unless there is no indication in the statement or supporting documents of an attempt to compromise the issue(s) between the parties or such an attempt would be clearly unreasonable in the particular circumstances;
- (e) unless the application is uncontested, although legal aid is likely to be granted where there are reasons why the court is likely to make an order and representation is justified in the circumstances of the particular case (i.e. it involves a significant point of law or difficult issues of fact);
- (f) unless the issue(s) disputed between the parties are of insufficient gravity to warrant legal proceedings;
- (g) unless the issue(s) could appropriately be dealt with in another way e.g. writing a letter, involving the police or social services or by negotiation;
- (h) unless there is insufficient benefit to the applicant to justify the grant of representation;

5.4.3 Where more than one order, e.g. under Section 8, is sought, information sufficient to justify the grant on all aspects must be provided as otherwise legal aid/ABWOR is likely to be refused or partially refused (in

respect of those aspects which do not appear justified). A certificate will only cover representation (either taking or defending) on those section 8 orders which are specified (rather than all possible section 8 orders) or which are made by the court of its own motion. Injunction applications are only covered where specified.

- 5.4.4 In relation to reasonable prospects of success (i.e. in terms of achieving the desired outcome), regard should be had to the relevant case law as against the circumstances of the particular case.

Example: the failure to pay maintenance will not of itself lead to the refusal of an application for parental responsibility (as the court's decision will be based on the degree of commitment which the father has shown towards the child, the degree of attachment between the father and the child and the father's reasons for applying for the order).

It must also be remembered that in the case of discharging a care order (including by way of a Section 8 application) the applicant would have to show reasonable prospects of succeeding in the particular circumstances of the case, having regard to developments since the court last considered the issue. Equally an application for contact with a child in care will be unlikely to justify the grant of representation unless there has been a relevant and significant change of circumstances since the court last considered the issue.

- 5.4.5 In cases where the prospects of success are uncertain at the time of the application, but suffice to justify the grant of representation, certificates will be limited so that a final hearing is not covered without a report from the solicitor. Certificates which cover making an application for contact with a child in care, for the discharge of a care order or for a residence order in respect of a child in care will be limited in the first instance to a solicitor's report on the issues and prospects of success (but will not cover issuing proceedings) and, if extended, will be limited thereafter to all steps short of the final hearing.

- 5.4.6 A legal aid certificate covering proceedings under the Married Women's Property Act 1882 cannot cover or be amended to cover any family proceedings (including Children Act proceedings) as they are not themselves family proceedings.

- 5.4.7 Legal aid certificates issued on a non-means, non-merits tested or means tested only basis can cover proceedings relating to an application for an order under Sections 31, 43, 44 or 45 from the issue of the certificate or by subsequent amendment. Substantive certificates (as opposed to emergency certificates in means tested only cases) will not be limited as the merits test does not apply.

- 5.4.8 A related matter is one where an order is to be sought at the same time as, and as an alternative to, the order under Sections 31, 43, 44 or 45. Applying for a Section 8 order in care or supervision proceedings will be sufficiently closely related to the care or supervision proceedings for cover to be available under a non-means, non-merits tested or means tested only certificate but specifically stated cover will be necessary (either in

the certificate or an amendment) to make (but not to oppose) such an application. Where a Section 8 order is being applied for by the legal aid applicant in care or supervision proceedings, then applying for a parental responsibility order can also be covered.

- 5.4.9 Where proceedings are not sufficiently closely related then a separate means and merits tested application will need to be made.

Example: ancillary matters between individuals and applications for injunctions would require a separate means and merits tested application for another certificate.

- 5.4.10 If the area office does not consider that the additional proceedings attract non-means, non-merits tested or means tested only legal aid it will decline to include the proceedings in the certificate either at the outset or on an application for an amendment. There is a right of appeal to the area committee and a certificate would be issued immediately (or on receipt of a means assessment, where applicable) for the Section 31, 43 or 45 proceedings.

- 5.4.11 Consideration must be given to the appropriate forum and relevant conditions inserted in the civil legal aid certificate if appropriate. The solicitor for an applicant for an order will be expected to commence proceedings in the family proceedings court where it has jurisdiction and unless there is a particular and sufficient reason to do otherwise.

- 5.4.12 If there are insufficient reasons shown for commencing the proceedings in the County Court as opposed to the family proceedings court (or the High Court as opposed to the County Court) then the area office will refuse the application unless, in all the circumstances of the particular case, the grant of legal aid for proceedings in a lower court is available and justified. If so the case will be dealt with as a partial refusal and the application granted to cover proceedings in that lower court (subject to a right of appeal to the Area Committee). ABWOR approvals can only cover proceedings in the family proceedings court in any event.

- 5.4.13 If no or inadequate information is given regarding jurisdiction then any legal aid certificate issued will bear a condition that the proceedings must be commenced in the family proceedings court, although they may be transferred in accordance with the Children (Allocation of Proceedings) Order 1991.

- 5.4.14 In the event of a transfer (either horizontal or vertical) in accordance with the Order no specific amendment is required to the legal aid certificate. Applying for the transfer of proceedings is considered to constitute a normal step and therefore be within the scope of the certificate.

- 5.4.15 Certificates may also be issued containing a condition that proceedings be commenced in the County Court, again subject to transfer in accordance with the Children (Allocation of Proceedings) Order 1991.

- 5.4.16 If no condition is included in a certificate issued by the

area office, the solicitor may commence the proceedings as he considers appropriate and may also continue to act without reference to the area office following a horizontal or vertical transfer.

5.4.17 The insertion of a condition may be appealed to the Area Committee but where a means assessment is available a certificate (or offer) will, despite the possibility of an appeal, be issued immediately (to avoid delay).

5.4.18 Examples of where it would be appropriate to commence proceedings other than in the family proceedings court include those where:

- (a) other family proceedings are already pending in another court;
- (b) an order made by another court is to be varied, extended or discharged by that court;
- (c) the position is covered by a Practice Direction eg of 22 February 1993 [1993] 1 All ER 820 which makes it clear that applications by children for leave in respect of Section 8 orders should be issued in the High Court unless there are other existing related proceedings (including divorce proceedings where a decree absolute has been made), in which case the application should be issued in those proceedings and transferred to the High Court;
- (d) an injunction ancillary to Children Act proceedings is sought;
- (e) 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;
- (f) the anticipated remedy sought is not available in the family proceedings court (e.g. a lump sum in excess of £1,000 or a transfer of property);
- (g) the proceedings are exceptionally grave or complex;
- (h) some novel or difficult point of law is involved.

5.4.19 Enforcement of a Children Act Section 8 Order/non money orders.

5.4.20 Legal aid is likely to be granted to apply for the enforcement of a Children Act Section 8 order, but only where enforcement is appropriate/justified and likely to be successful. Civil legal aid/ABWOR is available for proceedings in the family proceedings court under Section 63(3) Magistrates' Courts Act 1980 but is only likely to be granted where those enforcement proceedings (as opposed to seeking a variation/further directions) would be appropriate.

5.4.21 Legal aid is unlikely to be granted to defend enforcement proceedings unless the circumstances of the case are so exceptional as to justify the grant of representation and such representation is likely to result in significant benefit for the applicant.

5.4.22 The Relationship between ABWOR and Civil Legal Aid

5.4.23 ABWOR, where available, is likely to be granted/refused in the same circumstances as civil legal aid but it is only available where the Children Act 1989 directly replaces a

previous legal remedy for which ABWOR was itself available. In cases of doubt as to the availability of ABWOR and in those Children Act cases which may be transferred up out of the family proceedings court it is preferable to apply for civil legal aid.

5.4.24 Where both ABWOR and civil legal aid are available, e.g. for proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978 and an order under the Children Act is to be sought in those proceedings, civil legal aid may be applied for. The area offices will not, however, seek to refuse applications for ABWOR on the basis that civil legal aid should be applied for.

5.4.25 Where both civil legal and ABWOR are available, ABWOR will generally be the choice because it is simpler. However, there are different eligibility and contribution regimes for civil legal aid and ABWOR, and the Board will not force a client to apply for ABWOR if that would lead to higher contributions than civil legal aid.

5.5 Change of Name of Child of the Family

5.5.1 Legal aid is likely to be refused unless:

- (a) the application to take/defend proceedings shows reasonable prospects of success in obtaining/avoiding an order (eg by reference to the benefit to the child) and
- (b) reasonable attempts at compromise have been made and failed (indicated in the statement or supporting documents).

5.5.2 Where legal aid is granted the proceedings will be taken in the court which made any earlier relevant order.

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

5.6.1 Legal aid is likely to be refused unless:

- (a) an order is required or is justified in the particular circumstances of the case (ie where a residence order is in force, the removal is to be for one month or more or there is a real threat of permanent removal sufficient to justify the making of a prohibited steps order); and
- (b) the applicant to take/defend proceedings shows reasonable prospects of success in obtaining/avoiding an order; and
- (c) reasonable attempts to compromise the matter have been made and failed (indicated in the statement or supporting documents) and
- (d) the reasons for and period of removal justify both the proceedings and the grant of representation. Making an unsuccessful application to the court for permanent removal from the jurisdiction may put existing arrangements at risk. The grant of legal aid is unlikely to be justified for a purely temporary removal, in particular on holiday, unless the benefit to be obtained is sufficient to justify the proceedings e.g. to enable contact with family members abroad.

- 5.6.2 Where legal aid is granted the proceedings will be taken in the court which made any earlier relevant order.

6. FOREIGN MAINTENANCE

- 6.1 Legal aid/ABWOR is likely to be granted 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 but only where:-

- (a) the amount involved and
- (b) likely benefit to be obtained, having regard to the means of the payer and likelihood of recovery, are sufficient to justify the grant of representation in cases within Part I of the 1972 Act.

- 6.2 Non-means, non-merits tested civil legal aid (but not ABWOR) 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 Section 4 of the Civil Jurisdiction and Judgments Act 1982
- but only where the applicant had complete or partial legal aid or exemption from costs or expenses in the country in which the maintenance order was made or the judgment was given. For this purpose a maintenance order includes a lump sum order but where the proceedings fall outside these special provisions neither civil legal aid nor ABWOR is available for proceedings in para. (a) although civil legal aid is available for proceedings in para.(b) which will be in the High Court. Legal aid is only likely to be granted where:

- (a) the prospects of success having regard to the means of the payer and the likelihood of recovery are sufficient to justify it and
- (b) representation is justified in all the circumstances of the case.

7. INJUNCTIONS AND PROTECTION ORDERS

(In this section amended text is shown in bold)

7.1 Domestic Proceedings and Magistrates' Courts Act 1978

- 7.1.2 Legal aid/ABWOR to take proceedings is unlikely to be granted:

- (a) if divorce/judicial separation proceedings are pending or imminent as it would be more appropriate to deal with the injunction within ancillary proceedings;
- (b) if the only incidents complained of are of a trivial nature;
- (c) if it is children alone who need protection but such children are not children of the family;
- (d) if the other party is under an existing obligation not to molest, for example, is subject**

to bail conditions, or is remanded in custody. However, where a criminal prosecution is likely to be finalised shortly but incidents are continuing or are likely to continue and the protection of bail conditions would cease, the grant of an emergency certificate may be justified. This contrasts with an ongoing prosecution where the protection of bail conditions is likely to continue;

- (e) if any order obtained is likely to be unenforceable on account of the mental incapacity or minority of the respondent;

7.2 Non-Molestation Injunction Ancillary to Divorce/Judicial Separation/Nullity

- 7.2.2 Legal aid to take proceedings is unlikely to be granted:

- (a) if on the facts the conduct complained of is not likely to be repeated;
- (b) if the other party is under an existing obligation not to molest, for example, is subject to bail conditions, or is remanded in custody. However, where a criminal prosecution is likely to be finalised shortly but incidents are continuing or are likely to continue and the protection of bail conditions would cease, the grant of an emergency certificate may be justified. This contrasts with an ongoing prosecution where the protection of bail conditions is likely to continue;**
- (c) if any order obtained is likely to be unenforceable on account of the mental incapacity or minority of the respondent.

Note:

Emergency legal aid should only be granted to take proceedings for an injunction where the applicant is in imminent danger of significant harm. Significant harm is imminent if there is a real risk that it will occur before the substantive application can be processed and the matter brought before the Court.

7.4 Domestic Violence and Matrimonial Proceedings Act 1976 (see also Children Act 1989 para 5.3)

- 7.4.2 Legal aid to take proceedings is unlikely to be granted;

- (a) if on the facts the conduct complained of is not likely to be repeated;
- (b) if the other party is under an existing obligation not to molest, for example, is subject to bail conditions, or is remanded in custody. However, where a criminal prosecution is likely to be finalised shortly but incidents are continuing or are likely to continue and the protection of bail conditions would cease the grant of an emergency certificate may be justified. This contrasts with an ongoing prosecution where the protection of bail conditions is likely to continue;**
- (c) if any order obtained is likely to be unenforceable on account of the mental incapacity or minority of the respondent;

- (d) to a cohabitant (rather than a spouse) applicant if the only conduct complained of has occurred since the parties ceased living together.

Note:

Emergency legal aid should only be granted to take proceedings for an injunction where the applicant 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.

7.5 Injunctions Ancillary to a Trespass/Assault Action

7.5.2 Legal aid to take proceedings is unlikely to be granted:

- (a) if on the facts the conduct complained of is not likely to be repeated;
- (b) if the other party is under an existing obligation not to molest, for example, is subject to bail conditions, or is remanded in custody. However, a case where a criminal prosecution is likely to be finalised shortly but where incidents are continuing or are likely to continue and the protection of bail conditions will cease may justify the grant of an emergency certificate. This contrasts with an ongoing prosecution where the protection of bail conditions is likely to continue;**
- (c) if any order obtained is likely to be unenforceable on account of the mental incapacity or minority of the respondent.

7.6 Children Act 1989 – Orders Having the Effect of Injunctions

7.6.1 Legal aid/ABWOR will be refused to apply for a section 8 order or variation of a section 8 order which would have the effect of dealing with rights of occupation (i.e. an exclusion order). This is because such an application will not succeed although it may be possible to seek an order under the court's inherent jurisdiction.

7.6.2 Legal aid/ABWOR is likely to be granted to apply for a section 8 order or variation of a section 8 order which would have the effect of prohibiting contact with a child/children where the application is likely to succeed and there is no other appropriate remedy available. but only if

- (i) a warning letter has first been sent (or the circumstances are such that this would not be appropriate), and
- (ii) the police have been notified and have failed to provide adequate assistance (or the circumstances are such that going to the police first would not be appropriate)

and a fee paying client of moderate means would apply to the court for an order.

7.6.3 An order providing for "no contact" may be made against someone who controls contact and wishes to allow it (eg a mother) and a prohibited steps order

prohibiting contact may be made against some other person who would otherwise seek it (eg a third party).

8. CHILD SUPPORT ACT 1991

8.1 Section 20 parentage appeals

8.1.1 Legal aid is likely to be granted:

- (a) only where an appeal to the court is available, that is to say where:
- (i) parentage is denied; and
- (ii) the Child Support Officer makes (or declines to make) an assessment, the decision having been upheld on review (or an application for review refused) and
- (b) where the appeal is likely to succeed. Factors to be taken into account when estimating the chances of success include the existence of a previous adoption order or a court finding of paternity which the appellant will effectively be seeking to overturn and the results of any blood/DNA tests.

8.1.2 Legal aid is likely to be refused to an alleged father unless he has co-operated with the obtaining of blood/DNA tests by the Child Support Agency, bearing in mind that the Agency will offer DNA tests at a discounted rate whether or not the parent with care is in receipt of benefit and may itself meet the costs of testing.

8.1.3 Legal aid may only be granted to an appellant – the Child Support Agency is the respondent.

8.1.4 Even if the exceptional circumstances of the case indicate the appeal is likely to succeed it will usually be appropriate to limit the certificate to the obtaining of blood tests (including DNA) if such test results are not already available but see cross-reference below.

Cross-reference: see para. 8.1.2.

8.2 Section 27 parentage declarations

8.2.1 Legal aid is likely to be granted to take proceedings where:

- (a) the Child Support Agency has been sufficiently involved to satisfy the requirements of Section 27(1); and
- (b) the evidence available (including any blood/DNA tests) and the personal benefit likely to be obtained justify the grant of representation; and
- (c) the Agency has declined to take proceedings itself.

8.2.2 Legal aid is only likely to be granted to oppose proceedings if the prospects of success justify the grant of representation having regard to the evidence. (including any blood/DNA tests obtained by the Child Support Agency or otherwise). Legal aid is unlikely to be granted to an alleged father unless he has co-operated with the obtaining of blood/DNA tests by the Child Support Agency, bearing in mind that the Agency will offer DNA tests at a discounted rate whether or not the parent with care is in receipt of benefit and may itself meet the costs of testing.

- 8.2.3 If blood/DNA tests are not already available but it is nonetheless justified for legal aid to be granted it will usually be appropriate to limit the certificate (whether to apply for an order or oppose proceedings) to obtaining them.
- 8.2.4 Legal aid is unlikely to be granted if the mother and/or the alleged father is in receipt of income support/ income based Jobseeker's Allowance.
- 8.2.5 Legal aid may be granted if the applicant mother is in receipt of family credit/disability working allowance 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 of legal aid. A request by the Agency for her to take proceedings will be insufficient to justify the grant of legal aid.

9. INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

- 9.1 Legal aid is only likely to be granted to apply for an order where the proceedings stand a reasonable prospect of success, and are likely to result in a significant recovery that is where:
- (a) the application to the court will be in time (or an application for leave to commence proceedings out of time is likely to be successful); and
 - (b) the applicant is a qualifying dependant under Section 1 of the Act or is likely on the evidence available to satisfy the court that an order should be made; and
 - (c) the size of the estate/likely award is sufficient to justify the proceedings and likely costs.
- 9.2 Legal aid is unlikely to be granted to defend proceedings where the costs can be met without hardship being caused (having regard to the assets of the estate and the resources of the beneficiaries). 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 hardship would be caused, legal aid 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 and/or beneficiaries.
- 9.3 Certificates will cover all steps up to but excluding trial[†] but including Counsel's opinion, subject to any more restrictive limitation imposed in the particular case. This is to ensure that 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.

10. SECTION 30 HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990

- 10.1 ABWOR is not available. Although civil legal aid is available it is unlikely that the merits test will be satisfied in the absence of unusual circumstances which justify the grant of legal aid.
- 10.2 Given the active role of the guardian ad litem in the proceedings and the fact that the agreement of the father and the woman who carried the child is required before an order may be made, it is unlikely that the grant of civil legal aid will be justified to make the application if the matter is unopposed.
- 10.3 Where the making of an order is opposed, section 30(5) (as to consent by the father and the woman who carried the child) will not be satisfied and an order will not be made. The grant of legal aid to make the application would therefore not be normally justified, unless the application to the court nonetheless stands a reasonable prospect of success (on the basis that the requirements of Section 30(5) or 30(6) have been satisfied).
- 10.4 The grant of legal aid may be justified where the applicant is asking the court to dispense with the consent required under Section 30(5) on the basis that the person cannot be found or, to a lesser extent, is incapable of giving consent.
- 10.5 Applications for legal aid may be made by respondents wishing to oppose the making of an order but this is unlikely as, where there is no consent, Section 30(5) will not be met. It is, however, possible that a birth parent may maintain that, although consent has been given, it does not satisfy the particular requirements of Section 30(5) or 30(6). Birth parents and anyone who has parental responsibility will be a respondent to the application and a person with parental responsibility may wish to oppose the making of an order.
- 10.6 Civil legal aid is unlikely to be granted to defend proceedings unless;
- (a) the applicant stands reasonable prospects of success in opposing the order despite any consent and/or
 - (b) the grant of representation is justified in the particular and exceptional circumstances of the case.
- 10.7 Section 30 proceedings are dealt with like Children Act care proceedings for the purposes of forum. This means that proceedings will be commenced in the family proceedings court and can be transferred upwards in accordance with the Children (Allocation of Proceedings) Order 1991 as amended. No condition as to forum will therefore be included in any civil legal aid certificate issued.

CRIMINAL STANDARD FEES – COMMITTAL PROCEEDINGS

IN FOCUS 18 we highlighted a change to criminal standard fees arising from the amended committal procedure introduced by the Criminal Procedure and Investigations Act 1996. This change will only affect criminal investigations which commence under the new Act i.e. those which begin on or after 1 April 1997.

It is anticipated that the Board will continue to receive claims for payment for committal proceedings under previous arrangements for some time to come. All S.6(1) committal proceedings conducted under the new procedure will attract a Category 3 standard fee. S.6(1) committals under the previous arrangements will continue to attract a non-standard fee.

When submitting a claim for payment for a new S.6(1) committal, solicitors should manually amend Forms CRIM 13 or 14 to make it clear that the claim relates to proceedings commenced under the Criminal Procedure and Investigations Act 1996. If a Category 3 standard fee is claimed, the Category

3 "Type of Case" box should be amended to simply read "committal".

Area offices have been instructed not to reject forms amended in this way. New forms will be introduced when existing stocks have been exhausted.

If a non-standard fee is claimed for a S.6(1) committal conducted under the previous provisions, form CRIM 14 should be completed making it clear that the claim is under the old arrangements.

The Board recognises that solicitors will continue to be required to attend S.6(1) committals. The fact that a case proceeded as a S.6(1) committal will therefore be an acceptable reason for attendance.

The guidance at paragraph 18-25 of the current edition of the Legal Aid Handbook (1996/97) will continue to apply. If a solicitor has attended a S.6(2) committal, the reason for attendance should be set out in accordance with the guidance.

Regulation 101(1)(a) payments on account of disbursements

The material prepared for FOCUS 18 (pg.1) on Regulation 101 requires clarification.

In FOCUS 18 it states:

"solicitors may apply for a payment on account under Regulation 101 even after a certificate has been discharged. This confirms existing practice."

The regulation will only affect applications for payments on account of disbursements under Regulation 101(1)(a).

Legal Aid Publicity Leaflets 97/98

The leaflets entitled:

- *How to get free and low-cost legal help*
- *A practical guide to legal aid*
- *Criminal legal aid at the police station and in court*

are available from:

Legal Aid Publicity Distribution
PO Box 447
Croydon CR9 1WU

Additional copies of Focus can be obtained from the
Press and Publications Office, Legal Aid Head Office,
85 Gray's Inn Road, London WC1X 8AA.

Any comments about Focus should be sent to
Caroline O'Dwyer at the same address.

