

# Chapter 2: Funding Family Law Proceedings

Outline	2.1	Introduction	2.3	Summary
	2.2	Private funding		



## Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 1 Understand the requirements for the termination of a marriage

## 2.1 Introduction

The legal adviser must ascertain how the client is to finance any family proceedings. Some clients will meet the costs themselves (although ultimately they may seek an order for all or part of the costs to be paid by the other party). Many firms have helpful arrangements for divorce clients, for example, providing fixed-fee quotes or allowing payment in instalments. Other clients will qualify for assistance from the state, known as “public funding”.

Prior to April 2000, public funding was provided through the legal aid scheme administered by the Legal Aid Board. This scheme/documentation may still be encountered in older case files.

The **Access to Justice Act 1999 (AJA 1999)** introduced fundamental reforms to the provision of publicly funded legal services, and the Legal Services Commission (LSC) replaced the Legal Aid Board in April 2000. Funding for civil cases is through the Community Legal Service (CLS) Fund and services are provided at various defined “levels”. Firms must hold a contract from the LSC in order to be able to take on clients.

In July 2006, Lord Carter reviewed the procurement of legal aid – the way in which the Government “buys” legal aid services from the legal profession. This was called the “**Carter Review**” by many. There has also been a Government consultation paper, *Legal Aid: a sustainable future*. The delivery of legal services by family practitioners would be greatly affected by the proposals made by Lord Carter. The reports proposed very significant changes to the way in which the Government buys and pays for legal aid services. The **Community Legal Service Funding Order 2007** replaces the **Community Legal Service (Funding) Order 2000** and sets out the remuneration rates payable in funded cases.

On 1 October 2007, the levels of funding were restructured so that there are now four main levels of funding. Changes are made to both the name and scope of each type of funding. The main feature of the change to how family lawyers are paid is that many cases will attract a fixed fee rather than hourly rates.

Public funding is subject to wide-ranging potential changes. There are plans to slash £350 m per year from the public funding budget. If the current proposals are implemented, public funding would be lost for most clients seeking advice and representation for divorce, financial relief and in private children matters, but exceptions will be made where domestic violence, forced marriage or child

abduction is involved, as well as other areas protected by law. These proposals have been subject to public consultation, now closed. There is no current indication of when changes will be made.

Kenneth Clarke, the Minister for Justice, stated that the UK's legal aid system was now one of the most expensive in the world, costing £2 bn a year, and needed to make a "substantial contribution" to savings at the Ministry of Justice. In a statement to MPs, Mr Clarke stated: "It cannot be right that the taxpayer is footing the bill for unnecessary court cases which would never have even reached the courtroom door were it not for the fact that somebody else was paying. I propose to introduce a more targeted civil and family scheme which will discourage people from resorting to lawyers whenever they face a problem, and instead encourage them to consider more suitable methods of dispute resolution. Legal aid will still routinely be available in civil and family cases where people's life or liberty is at stake, or where they are at risk of serious physical harm, or immediate loss of their home."

The consultation closed in February 2011 and further information can be found on the Ministry of Justice website: [www.justice.gov.uk](http://www.justice.gov.uk) .

### 2.1.1 Private family law

The current system covers all aspects of private family law work including divorce, financial proceedings, domestic violence, child abduction and orders sought under **s8 Children Act 1989**. There are various levels of assistance available. These new fees cover all private law work under the family category (although some types of case may be partially excluded). If further work were required, it would be paid under hourly rates. Some of the fees are national and others regional. The applicable fee is determined according to the location of the solicitor's office.

To be eligible for public funding the client must pass both a **merits and means** test. The means test looks at the client's financial position. A client on certain benefits (e.g. income support) will automatically qualify for public funding. If not in receipt of such benefits, the client's income and capital will be assessed to see if it is below set limits. These limits are set annually. The merits test asks if there is "sufficient benefit" to the client to be allowed legal advice. The test sometimes used looks at whether a person of moderate means would have paid for the advice and is designed to ensure that advice is not given on non-legal or trivial matters.

The Ministry of Justice has announced changes in order to tighten rules for civil legal aid and to ensure that funds are targeted more effectively. The changes will mean that before legal aid is granted in matrimonial proceedings or a child contact dispute, the other party to the case will be given an opportunity to provide evidence if the applicant is financially ineligible for legal aid.

In future the LSC will contact the other party to the case and check the applicant's eligibility before granting legal aid. This requirement will not be applied to domestic violence cases, or other emergency applications. The introduction of all the new conditions is expected to deliver savings to the legal aid budget of approximately £6 m per year.

**(1) Level 1 – legal help**

This covers cases which complete after the first meeting with the client and includes the follow-up letters to the client and third party. For example, a client may have an initial enquiry about a problem, receive some advice and then require no further assistance. It also covers:

- writing a letter of advice following the client meeting;
- telephone calls on behalf of the client; or
- writing to the other party on behalf of the client to progress the case.

There is a new “stand-alone” fee, which applies to matrimonial and civil partnership proceedings. Level 1 will cover an undefended divorce and the fixed fee is £159.

Level 1 also covers cases where the client requires advice to initiate proceedings.

If a client has significant children or finance issues that must be dealt with, this may justify a higher level of assistance with a correspondingly higher fee.

**(2) Exceptional cases at Level 1**

There are some types of case that may attract a higher fee under Level 1. Examples of these include:

- domestic violence (with no children or finance issues, which would otherwise move the case to Level 2);
- child abduction cases.

**(3) Level 2 – family help (lower) – children**

This covers the provision of ongoing assistance with a significant dispute. The LSC defines a “significant” or “serious” dispute as being one which, if unresolved, would result in family proceedings and which requires a further meeting with the client.

This level includes all work up to the issue of proceedings in children cases. If it is necessary to attend the directions hearing or conciliation hearing, this is paid at hourly rates rather than as a fixed fee.

In children cases, a settlement fee can be claimed in addition as long as the parties reach an agreement as to their mutual rights and obligations.

**(4) Level 2 – family help (lower) – finance**

This covers all work including the issue of proceedings and all work required to obtain a consent order. In finance cases the settlement fee may be claimed if a consent order is granted (or other binding agreement is reached).

**(5) Level 2 – family help (lower) – children and finance**

Where a case involves substantial children and finance issues both the children and finance fees may be claimed.

Again there are some exceptional cases at this level if a certain level of fees is reached.

**(6) Level 3 – family help (higher)**

The LSC has postponed the introduction of standard fees for work under representation certificates (see below) in private family law and will be conducting further consultation. Until a revised scheme is devised, this work will continue to be funded under traditional legal representation certificates.

This is licensed work, either granted on application by the LSC (depending upon means and merits) or granted under powers devolved by the LSC to the solicitor. It covers representation in proceedings (except a consent order) and it is still being paid at an hourly rate.

**(7) Level 4 – legal representation**

This level covers representation in proceedings and is granted by the LSC. It is still being paid at an hourly rate.

**2.1.2 The statutory charge (in private family law cases)**

The charge arises from the principle that public funding is a loan and not a gift.

When the costs paid out of public funds exceed any costs paid by the other side (the other side may have been ordered to pay the winning client's costs) or paid by way of contribution by the client, there will be a "deficit" owing to the fund. The LSC is obliged to recover this deficit from **money or property recovered or preserved** in the proceedings. In order to do this, the LSC will have a charge (called the statutory charge as it arises under **AJA 1999**) on any such property recovered or preserved.

**Example**

As a result of ancillary relief proceedings for financial remedies against her husband, Angharad recovers a lump sum of £20,000. Her legal costs (funded under a certificate) amount to £2,000. She does not recover any costs from her husband. The LSC is entitled to recover the £2,000 out of the sum awarded (i.e. out of the £20,000).

There are some exemptions (e.g. maintenance). In some circumstances (e.g. where the property is the matrimonial home) the charge can be postponed.

**(1) Level 1**

The statutory charge will not apply to cases completing at Level 1.

**(2) Level 2**

The statutory charge will not apply to standard fee cases completing at this level. Where a case has costs three times over the standard fee, the statutory charge will apply.

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