



Legal Aid  
Agency

## The Statutory Charge Manual

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## Contents

<b>1. Introduction</b>	<b>1</b>
1.1 What this manual sets out to achieve	1
<b>2. General Principles Of The Statutory Charge</b>	<b>2</b>
2.1 What is the statutory charge?	2
2.2 Basic elements of the statutory charge	6
2.3 The legally aided individual's financial obligations	6
<b>3. Has Property been Recovered or Preserved for the Individual in the legally aided dispute - and is this Property exempt from the Statutory Charge?</b>	<b>11</b>
3.1 Meaning of "property"	11
3.2 Possession as property	12
3.3 Recovery and preservation ( <i>Hanlon v. Law Society</i> [1981] AC 124)	15
3.4 The requirement that the property was "in issue" in the legally aided dispute	15
3.5 Interlocutory orders, freezing orders, and money paid into court	17
3.6 Property in issue in matrimonial proceedings	18
3.7 Substitutions, compromises or settlements: <i>Van Hoom v. Law Society</i> [1984] 3 All ER 136	19
3.8 Recovery before the certificate was granted and after it has been withdrawn (including revocation)	21
3.9 Recovery or preservation has to be "in any proceedings or in any compromise or settlement of any dispute in connection with which the services were provided." (from the wording of section 10(7) AJA 1999)	23
3.10 Recovery must be for the Individual ( <u>LAA 1988 cases only</u> )	27
3.11 Recovery or preservation by trustees and representatives	30
3.12 EXEMPTIONS from the Statutory Charge	31
3.13 Pensions earmarking or sharing and the statutory charge	35
<b>4. Valuing property recovered or preserved</b>	<b>36</b>

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4.1	General	36
4.2	Disputes over Valuations	37
4.3	Valuing assets other than land (houses and flats)	38
4.4	Land, including houses, flats and the home	41
4.5	Setting off gains and losses	44
<b>5.</b>	<b>Calculating the Statutory Charge</b>	<b>47</b>
5.1	General approach	47
5.2	Costs of detailed assessment by the court	53
5.3	Appeals against detailed assessment	54
5.4	Costs recovered in the proceedings	54
5.5	Setting off costs	56
5.6	Recovery in part of the proceedings	58
5.7	More than one certificate in the same proceedings	58
5.8	Certificate discharged or revoked	59
5.9	More than one set of proceedings on the same certificate	59
5.10	More than one defendant in one set of proceedings	59
<b>6.</b>	<b>Enforcement of the Statutory Charge</b>	<b>61</b>
6.1	General principles	61
6.2	Providers' duties	61
6.3	Procedure on recovery or preservation	64
6.4	Payments to the Lord Chancellor	65
6.5	Enforcement of statutory charge over land	67
6.6	Enforcement of statutory charge on other property	67
6.7	Costs of enforcement action	68
<b>7.</b>	<b>Postponing Enforcement of the Statutory Charge</b>	<b>70</b>
7.1	Postponed enforcement over the home itself	70
7.2	Postponed enforcement over money to buy a home	72
7.3	The terms of the order or agreement	73

7.4	‘Or his dependants’	74
7.5	The Power to Review A Postponed Statutory Charge	75
7.6	Payment of interest	76
7.7	Securing the statutory charge	79
7.8	The requirement of adequate or appropriate security	80
<b>8.</b>	<b>The Process Of Registering The Statutory Charge</b>	<b>82</b>
8.1	Introduction to Land Registration	82
8.2	The Difference between Statutory and Contractual charges	84
8.3	Beneficial interests/rights to the proceeds of sale: Mesher Orders	85
8.4	Protection Of The Charge By Registration On Land	86
<b>9.</b>	<b>How To Register The Charge In Particular Circumstances</b>	<b>88</b>
9.1	Who should Register the Charge	88
9.2	Interest Agreements	88
9.3	Property to be transferred to the legally aided individual, solely or with a new partner	88
9.4	Statutory Charge on Registered Property: Legally aided individual is living in the property which was recovered or preserved in the proceedings and on which the charge arises and is the sole owner of that property:	89
9.5	Contractual Charge on Registered Property: Legally aided individual buys a new home (with money recovered or preserved or on the sale of the property recovered or preserved) or owns the property jointly:	89
9.6	Sub-Charge on Registered Land: The legally aided individual has recovered or preserved a legal charge over registered land, usually with the legal and beneficial interest being transferred to the opponent.	90
9.7	Restrictions on Registered Land: The legally aided individual has recovered or preserved an interest in land other than a registered charge or legal title or when the legally aided individual is one of two registered proprietors and the other refuses to sign a contractual charge	92
9.8	The property subject to the charge is unregistered land and the legally aided individual is the sole owner	93
9.9	Voluntary Charges – (registered by <b>Recovery Services</b> in circs where a costs or judgment debtor owes the Lord Chancellor money,	

---

	and offers a charge against his property to avoid enforcement action which might result in a charging order being made against him)	94
9.10	Caution Against First Registration on Unregistered Land: The property subject to the charge is unregistered land and the legally aided individual is either one of two joint owners or is not the owner but is entitled to a share in the proceeds of sale	94
9.11	Delays between recovery/preservation and purchase	95
9.12	Substitutions	95
9.13	Dealings with registered charges	97
<b>10.</b>	<b>Disputes concerning the statutory charge</b>	<b>99</b>
10.1	General Disputes over the Charge	99
10.2	Redemption of the charge	102
<b>11.</b>	<b>Authorities</b>	<b>108</b>
	<b>List.</b>	<b>108</b>

# 1. Introduction

## 1.1 What this manual sets out to achieve

1. The statutory charge manual is designed to give guidance to caseworkers in the Legal Aid Agency who deal with finance and make decisions on statutory charge matters. It is not a textbook, nor is it supposed to be a definitive statement on the law and regulations. It is supposed to illustrate the general principles which arise in cases concerning the statutory charge and to give guidance on resolving cases using those principles.
2. In summary, the best way of resolving a question concerning whether or not the statutory charge arises in any given case is to look at the case in question and analyse the facts of that case carefully. If the legal principles as set out in the regulations and case law are applied carefully to those facts, the correct statutory charge decision should follow.
3. Since 1 April 2010 there has been no automatic right of review (for legally aided individuals and providers) of statutory charge decisions by the Central Legal Team. In novel or complex cases, caseworkers in Regional Offices are able to refer to the Central Legal Team based in Petty France for advice and guidance; the Central Legal Team will not liaise directly with legally aided individuals or providers, any correspondence and documentation from the individual or provider should come through the Regional Office. A member of the Central Legal Team will review the charge decision within 21 working days of receipt of all relevant information (which might be the regional office file, or the provider's file, or both).
4. This manual takes into account the changes to land law brought about by the Land Registration Act 2002 and reflects regulatory changes to the operation of the statutory charge since the legal aid reforms to civil legal services in April 2013. [See the Legal Aid Sentencing and Punishment of Offenders Act (Consequential, Transitional and Savings provisions) Regulations 2013 for details as to which statutory charge provisions apply in relation to a legally aided case].

### References and definitions in this manual

5. The Statutory charge is calculated in accordance with the Legal Aid, Sentencing and Punishment of Offenders Act 2012 [**“the Act”**] and the Civil Legal Aid (Statutory Charge) Regulations 2013. References to regulation numbers within this guidance will be to those regulations unless otherwise stated.
6. The following abbreviations to are used within the guidance:
  - Legal Aid, Sentencing and Punishment of Offenders Act 2012 **“the Act”**
  - The Civil Legal Aid (Statutory Charge) Regulations 2013 **“the Regulations”**.

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- The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 “**the Financial Regulations**”
  - The Civil Legal Aid (Procedure) Regulations 2012 “**the Procedure Regulations**”
  - The Access to Justice Act 1999 “**the AJA 1999**”
  - The CLS (Financial) Regulations 2000 “**the CLS Financial Regulations**”
  - The CLS (Costs) Regulations 2000 “**the CLS Costs Regulations**”
  - The Legal Aid Act 1988 “**the LAA 1988**”
  - The Civil Legal Aid (General) Regulations 1989 “**the General Regulations 1989**”
  - The Legal Aid Act 1974 “**the LAA 1974**”
  - “**Recovered**” means “recovered or preserved.”
7. Reference is made to the **Lord Chancellor** throughout this guidance as ownership of, and financial interests relating to the statutory charge is in favour of the Lord Chancellor (except where it is in favour of the provider); however decisions on statutory charge matters are for the most part in practice made by caseworkers within the **Legal Aid Agency’s regional offices** applying the procedures for dealing with this work.

## 2. General Principles of the Statutory Charge

### 2.1 What is the statutory charge?

1. The statutory charge is designed to:
  - (a) put legally aided individuals as far as possible in the same position as successful non-legally aided individuals (who are responsible at the end of their cases to pay their own legal costs if their opponent in the litigation does not, or is unable, to pay them). The statutory charge converts legal aid from a *grant* into a *loan*. (See *Davies v. Eli Lilly & Co* [1987] 3 All ER 94 at 97 to 98).
  - (b) ensure that legally aided individuals contribute towards the cost of funding their cases so far as they are able; and
  - (c) deter legally aided individuals from running up costs unreasonably by giving them a financial interest in how much money is being spent.



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2. For about as long as there has been a solicitors' profession, solicitors have had a charge for any unpaid fees over any property they recover or preserve for their client. This is known as the "solicitor's charge". Section 73 of the Solicitors' Act 1974 provides: "Any court where a solicitor has been employed to prosecute or defend any suit, matter or proceeding may ... declare the solicitor entitled to a charge on any property recovered or preserved through his instrumentality for his taxed costs ..."
  3. The law that creates the statutory charge is based on the solicitor's charge. The principle behind the solicitor's charge is that it is fair for solicitors to be able to take their costs out of any property their clients recover or preserve because of the services provided.
  4. A "charge" is a legal security for an obligation – usually for an obligation to pay money (a debt). The person who has the charge ("the chargee") is legally entitled to enforce the charge – or to sue the person who owes money under the charge – in order to have the debt paid. A statutory charge is so called because it arises by virtue of a statute (an Act of Parliament). The statutes which concern the Legal Aid Agency and form the basis of this manual are the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act") if the application for legal aid was made on or after 1 April 2013; and for older cases, the Access to Justice Act 1999 ("the AJA 1999"), the Legal Aid Act 1988 ("LAA 1988") or Legal Aid Act 1974 ("LAA 1974").

**2.2 The statutory provisions: section 25 of the Act, section 10(7) of the AJA 1999 and section 16(6) of the LAA 1988.**

1. S25 of the Act, where legal aid was granted after 1 April 2013 provides:

**25(1)** *Where civil legal services are made available to an individual under this Part, the amounts described in subsection (2) are to constitute a first charge on—*

*(a) any property recovered or preserved by the individual in proceedings, or in any compromise or settlement of a dispute, in connection with which the services were provided (whether the property is recovered or preserved for the individual or another person), and*

*(b) any costs payable to the individual by another person in connection with such proceedings or such a dispute.*

**(2)** *Those amounts are—*

*(a) amounts expended by the Lord Chancellor in securing the provision of the services (except to the extent that they are recovered by other means), and*

*(b) other amounts payable by the individual in connection with the services under section 23 or 24.*

**Note:** express provision for recovery of costs payable to the individual via the statutory charge (s25(1)(b)) is made in respect of applications made on or after 1 April 2013, although in principle the charge has always attached to costs as money or property recovered by the legally aided individual.

2. S10(7) of the AJA 1999 where legal aid was granted before 1 April 2013 and after 1 April 2000 provides:

**10(7)** Except so far as regulations otherwise provide, where services have been funded by the Commission for an individual as part of the Community Legal Service—

(a) sums expended by the Commission in funding the services (except to the extent that they are recovered under section 11), and

(b) other sums payable by the individual by virtue of regulations under this section,

shall constitute a first charge on any property recovered or preserved by him (whether for himself or any other person) in any proceedings or in any compromise or settlement of any dispute in connection with which the services were provided.

**S16(6) and (7) of the LAA 1988** where legal aid was granted before 1 April 2000 and after 3 April 1989 provide:

**16(6)** *Except so far as regulations otherwise provide—*

*(a) any sums remaining unpaid on account of a person's contribution in respect of the sums payable by the Board in respect of any proceedings; and*

*(b) a sum equal to any deficiency by reason of his total contribution being less than the net liability of the Board on his account,*

*shall be a first charge for the benefit of the Board on any property which is recovered or preserved for him in the proceedings.*

**(7)** *For the purposes of subsection (6) above it is immaterial what the nature of the property is and where it is situated and the property within the charge includes the rights of a person under any compromise or settlement arrived at to avoid the proceedings or bring them to an end and any sums recovered by virtue of an order for costs made in his favour in the proceedings (not being sums payable to the Commission under subsection (5) above).*

**S9(6)** of the **LAA 1974** applies where the case concluded and the legal aid certificate was discharged before 3 April 1989. Certificate which were issued under the LAA 1974 which were still live after 3 April 1989 are treated as though they were issued under the LAA 1988.

3. The Act (and both the AJA 1999 and the LAA 1988 which came before) provide that in certain circumstances the Lord Chancellor is entitled to a first charge over property **recovered or preserved** for a legally aided individual in civil proceedings. The statutory charge ensures that recovered or preserved property is used first to repay the cost of providing civil legal services to the individual.
4. “**Recovery**” is where the client succeeds in claiming ownership of someone else’s property, or obtaining possession of property to which the title was not in issue (e.g. evicting squatters), or in compelling the sale and distribution of proceeds of sale. At the end of the dispute there is a gain for the legally aided individual.
5. “**Preservation**” is where the legally aided individual succeeds in fending off a claim by someone else to his or her property or to possession of his or her property, i.e. at the end of the dispute the legally aided individual keeps all or part of what he or she regards as his or her own. If the individual keeps only part, he or she may be worse off at the end of the dispute than at the start, but the statutory charge will still attach to the property which he or she has kept (*Till v. Till* [1974] 1 All ER 1094). Even where there is no dispute as to the title to property there may be a preservation of property where someone else’s claim to possession is defeated (*Curling v. Law Society* [1985] 1 All ER 705) or where the legally aided individual avoids an order for sale of the property (*Parkes v. Legal Aid Board* [1996] 4 All ER 271).

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6. **Legal Persons:** Schedule 3 paragraph 7 of the Act which deals with legal aid for legal persons confirms that references to an individual in S.25 of the Act include a legal person to whom civil legal services are made available; the same approach is taken for references to a legally aided 'individual' in this guidance. For the avoidance of doubt, the following guidance is therefore applicable to individuals or legal persons to whom civil legal services have been made available under Part 1 of the Act (unless otherwise stated).

### 2.3 Basic elements of the statutory charge

1. The basic requirements for the statutory charge to apply are as follows:
  - (a) Sums must be spent by the Lord Chancellor in securing the provision of civil legal services for the individual<sup>1</sup>;
  - (b) property must have been *recovered or preserved* for the legally aided individual in the dispute (and / or for applications made on or after 1 April, a costs order is payable to the individual in connection with the dispute);
  - (c) regulations must not make the recovered property *exempt* from the charge.
2. In considering whether the statutory charge arises, you should look at the facts: what happened in the case? In most cases, the answer will be apparent from reading the application for legal aid and looking at the final order that was made in the case. Sometimes you may have to distinguish between the reality of a situation and the legal labels which the parties apply to a given set of facts. For examples of this approach see *Manley v. Law Society* [1981] 1All ER 401, *Stewart v. Law Society* [1987] 1 FLR 222 and *Watkinson v. Legal Aid Board* [1991] 2All ER 953.
3. Solicitors' costs and counsel's fees are **not** paid out of the statutory charge. The solicitor and counsel must therefore claim payment from the Legal Aid Agency even though the client may bear the ultimate cost, other than to the extent that the solicitor accepts costs recovered from another party to the proceedings as payment for the case.

### 2.4 The legally aided individual's financial obligations

1. The statutory charge is just one of the ways in which a legally aided individual may be liable for legal costs. Other obligations are set out below together with the way in which they relate to the statutory charge.

#### Contributions

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<sup>1</sup> Except to the extent that the sums are recovered by other means. For older cases under the AJA 1999, sums must have been expended by the Commission in funding services and under the LAA 1988, there must have been a *net deficiency* on the client's account with the Commission

2. Legally aided individuals may be liable to pay a contribution towards the costs of civil legal services, based upon a financial determination of their income and capital. The amounts payable from income and capital respectively are calculated in accordance with Regulation 44(2)(b) and (3)(b) of the Financial Regulations<sup>2</sup>. Contributions from income are payable monthly for the duration of the certificate, and those from capital are payable up front as a lump sum, upon acceptance of the condition set out in Regulation 36 of the Procedure Regulations: see Regulation 44(4) and (5) of the Financial Regulations<sup>3</sup>.
3. Any contribution actually paid will reduce the amount the individual owes the Lord Chancellor and therefore the amount of the statutory charge.

### Further Determinations

4. The regional office can make a further determination (i.e. **reassess**) the individual's eligibility for civil legal services and liability to contribute towards the costs of legal aid if the individual's financial circumstances change (see Regulation 20 of the Financial Regulations)<sup>4</sup>. If a client comes into a capital sum which was not in issue in the proceedings (see also 2.5 below) the regional office may call for a contribution to cover the costs of the proceedings and/or withdraw the legal aid certificate.

#### Example:

*The legally aided individual gets an asset from the other side during proceedings. At the end of the case, there is a dispute as to whether the asset was in issue in the proceedings and therefore whether the statutory charge arises. If the charge does not arise, the finance caseworker will refer the case to the relevant means assessment team for a further determination to be completed using form FINMEANS1 (and confirm the position to the provider). The regional office must make a further determination of the individual's means if his or her capital appears to have increased by the sum set out in Regulation 20 of the Financial regulations (i.e. by more than £750) at the time the asset was acquired, and may call for a retrospective contribution to cover the costs incurred under the certificate prior to the certificate being withdrawn (however see paragraph 5 below). The legally aided client may therefore have to pay for the full costs of the civil legal services whether or not the statutory charge arises.*

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<sup>2</sup> For Legal Persons see Regulations 29(2) and (3) of the Legal Aid (Financial Resources and Payment for Services)(Legal Persons) Regulations 2013.

<sup>3</sup> Regulation 29(4) and (5) of the Legal Aid (Financial Resources and Payment for Services)(Legal Persons) Regulations 2013 applies to legal persons.

<sup>4</sup> For Legal Persons see Regulations 17 of the Legal Aid (Financial Resources and Payment for Services)(Legal Persons) Regulations 2013.

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5. Where a client recovers property which is *exempt* from the statutory charge (Regulation 5) the certificate should not be referred for a further determination on the basis of the exempt capital, as it would not be appropriate to use our powers to call for a retrospective contribution to defeat the policy objective of Regulation 5, namely that the legally aided client should get the exempt property free of the statutory charge. However, if the client (or their partner) holds other live certificates (i.e. for proceedings that are not *connected* to the case) it **would** be appropriate to refer the case to the means assessment team (using form FINMEANS 1) to carry out a further determination of those other certificates; this will allow for the remaining certificates to be withdrawn if capital (or income) exceeds the upper financial limit or for contributions to be reviewed if the certificate is to continue.

### Revocation

6. When a legal aid certificate is **revoked**, the previously legally aided individual is for most purposes treated as if he or she has never had legal aid in relation to that certificate (Regulation 42(2) of the Procedure Regulations<sup>5</sup><sup>6</sup>). The Lord Chancellor is then entitled to recover from the client all the costs paid out under the certificate, regardless of whether the claim is successful or the statutory charge applies under Regulation 47(a) of the Financial Regulations<sup>7</sup> (for AJA 1999 and LAA1988 cases see Regulation 41(a) CLS Financial Regulations and Funding Code Procedure r.51.3, or Regulation 86 of the General Regulations 1989 respectively).
7. The statutory charge can arise after revocation. Taking the costs out of any property recovered or preserved is likely to be the easiest way for the Lord Chancellor to recover the cost of the service provided under any revoked certificate.

### Liability to the other side for their costs

8. The court may order the legally aided individual to pay damages or costs to the other side. The liability for **costs** is limited to the amount the court considers reasonable under section 26 of the Act<sup>8</sup>.

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<sup>5</sup> Rule C51 of the Funding Code Procedures, AJA 1999.

<sup>6</sup> Regulation 74(2) of the General Regulations 1989 for cases under LAA 1988.

<sup>7</sup> For legal person, see Regulation 32 Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

<sup>8</sup> Section 11 of the AJA 1999 or section 17 of the LAA 1988.

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9. This liability, although separate from the liability of the legally aided individual under the statutory charge, can affect the position in that mutual orders for costs and damages may be set off against each other, even in a legal aid case (see section 16(8) of the LAA 1988 and *Lockley v. National Blood Transfusion Service* [1992] 2 All ER 509 CA) and *Burkett v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342. This can reduce the net recovery of damages or costs by the legally aided client. But the other side cannot set off a claim in different proceedings against costs it has to pay in the funded case: see *Legal Services Commission v. Transatlantic Securities* ChD (19 May 2000) (unreported).

## 2.5 The "Subject Matter of the Dispute"

1. When the regional office calculates the individual's disposable capital for the purposes of the financial determination, the value of the 'subject matter of the dispute' (SMOD) in respect of which the application is made is disregarded: see Regulation 38 of the Financial Regulations<sup>9</sup>. The total amount to be disregarded under this rule is limited to a maximum of £100,000 of the individual's interests in such assets.
2. If legally aided individuals defend a claim to a valuable asset in their possession, the SMOD disregard of up to £100,000 will apply to that asset. If the individual's share of the asset exceeds £100,000, the excess will be included in the financial determination. [Where SMOD includes interests of the individual in their main dwelling property and other assets, the SMOD disregard will be applied to the main dwelling first<sup>10</sup>]. The SMOD exemption complements the statutory charge: if the property is *not* SMOD, then it should be taken into account in full in the financial determination (subject to any other disregards provided for within the regulations); if it *is* SMOD and the client recovers or preserves it, then the statutory charge will arise.

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<sup>9</sup> See Regulation 26 of the Legal Aid (Financial Resources and Payment for Services) Regulations 2013 for legal persons.

<sup>10</sup> This guidance on main dwellings does not apply to a financial determination for legal persons.



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3. If the legally aided individual ends up with something of value at the end of the action, but contends that the asset was not in issue in the proceedings, the regional office will ask how the asset was presented when the individual provided the statement of means in support of the application for legal aid. If the legally aided individual put forward the asset as being the subject matter of the dispute, then that is strong evidence that it was in fact in issue in the proceedings. Alternatively, if from the facts, it was never in issue and was wrongly regarded as being the subject matter of the dispute, the statutory charge will not arise. In cases where an asset has been wrongly claimed as SMOD at the outset of the case, the regional office should carry out an amended or further determination of the individual's means (under Regulation 19 or Regulation 20 of the financial regulations respectively) which now includes this asset and where appropriate (i.e. disposable capital exceeds £3000 and any previous contribution paid by the client does not cover the full costs of civil legal services) will call for a retrospective capital contribution prior to withdrawing the certificate.



### 3. Has Property been Recovered or Preserved for the Individual (or anyone else) in the legally aided dispute - and is this Property exempt from the Statutory Charge?

#### 3.1 Meaning of "property"

1. S25 of the Act<sup>11</sup> creates a charge regardless of the nature of the property recovered or preserved or where it is situated. Therefore, the statutory charge can attach to anything of value including (but not limited to)
  - money, objects, intangible and financial assets,
  - stocks and shares, cheques and bills of exchange, insurance policies,
  - debts owed to the client,
  - real property, which means land or an interest in land, including leases, land or property abroad,
  - a life interest in capital which includes a right to interest (the statutory charge attaches to the interest as it accrues),
  - the surrender of a life interest in a property for a cash sum (the statutory charge attaches to the cash sum).

#### Some Exceptions

2. Payments to the client under section 5 of the Inheritance (Provision for Family and Dependants) Act 1975 or Part IV Family Law Act 1996 which are to be spent on the repair and maintenance of a property or the discharge of rent, mortgage or other outgoings are **not** treated by the Legal Aid Agency as recovered property, whether they are made to the client or to a third party. The statutory charge does not attach to such payments. A court may make an order providing for such payments under section 40(1)(a) of the Family Law Act 1996 if it has made an occupation order under ss33, 35 or 36 of the Act. This is because s40(3) provides that an order under s40 ceases to have any effect when the occupation order to which it relates ceases to have effect.

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<sup>11</sup> S10(7) of the AJA 1999 and s16(6) and (7) of the LAA 1988.

3. Recovery or preservation of a **life interest in a home** will **not** usually attract the statutory charge. In cases under the Inheritance (Provision for Family and Dependents) Act 1975 clients may recover, either by way of a court order or as a result of a compromise, a life interest in a home. In these cases clients will not, by virtue of the life interest, own any equity in the property and will not normally be able to sell their interest, which will lapse on their death. There is therefore usually nothing to which the statutory charge can attach. However, obtaining a right to occupy for life a property in which the client does own equity will constitute a recovery or preservation of that equity (see Paragraph 3.2 paragraph 6 below).
4. For similar reasons, if a client recovers a lump sum of money from her opponent which is to be used to buy a property, but the opponent has the right under the order to repayment of that amount in full at a trigger event in the future, i.e., the youngest child reaching 18, then the client is treated not as recovering property for the purpose of the charge, as ultimately, the property returns to her opponent.

### 3.2 Possession as property

1. The statutory charge can apply to the **possession** of property which is in issue, even if the client has not recovered or preserved title to, or ownership of, that property.

#### Recovery of possession (*Curling v. Law Society* [1985] 1 All ER 705)

2. The statutory charge arises if, as a result of the proceedings, the client unlocks their interest in property. In *Curling v. Law Society* [1985] 1 All ER 705 the husband and wife agreed that the wife was entitled to a half-share of the matrimonial home. The wife sought an order for immediate sale but the husband wished to postpone the sale by way of an order allowing him to remain living there under what is known in ancillary relief proceedings as a "*Mesher order*"<sup>12</sup>, until the children were old enough to leave home.
3. Eventually the parties agreed that the husband would buy out the wife, paying out a sum equivalent to half of the value of the house. The wife therefore had succeeded in unlocking her interest in the property. The judge hearing the case found that the wife had 'achieved an immediate or at any rate an accelerated right to her share in the proceeds of sale'. The Court of Appeal agreed and held that the recovery of possession of this sum amounted to "property recovered" and the statutory charge applied.
4. In the *Curling* judgment, Mr Justice Neil stated at page 711b-d

*"It is true that the sum of £15,000 merely represented her agreed share of the proceeds of sale (or indeed perhaps rather less than her full share), but the fact that a party to legal proceedings recovers in the proceedings that to which he or she in law is already entitled cannot by itself prevent the attachment of the statutory charge.*

<sup>12</sup> From the case *Mesher v. Mesher and Hall* (1973) [1980] 1 All ER 126.

*The question is where the party's right to recover the property has been in issue in the proceedings and for this purpose I can see no reason to limit the relevant issue to that of ownership alone.*

*The judge took the view that the wife recovered the £15,000 in the proceedings because she achieved an immediate or at any rate an accelerated right to her share of the proceeds of sale. He referred to the mention made by Lord Simon in Hanlon's case of both ownership and possession.*

*I agree with the judge. In my opinion the recovery of possession of property may constitute the recovery of property within s9(6)<sup>13</sup>, just as the defeat of a claim by another party to a possessory interest in property may constitute the preservation of property."*

5. Lord Justice Oliver stated at page 715d:

*"Where, even though the title may not be in issue, the proceedings are necessary in order to reduce it into or restore it into the possession of the owner, it seems to me that, quite literally, the property has been 'recovered'. For instance, a landlord seeking to forfeit a lease or a landowner seeking to evict a squatter who claims no title but merely refuses to move is pursuing property the title to which is not in issue. But I find it unarguable that the property reduced to possession by the judgment has not been 'recovered' by the proceedings."*

### **Preservation of Possession (*Parkes v. Legal Aid Board* [1996] 4 All ER 271)**

6. The charge arises if, as a result of the proceedings, the legally aided individual prevents property from being sold. The decision of the Court of Appeal in *Parkes v. Legal Aid Board* [1996] 4 All ER 271 demonstrates that the statutory charge applies in all cases where possession is either recovered or preserved.
7. Miss Parkes, lived in a jointly owned property. She succeeded in defeating an application for immediate sale of the property by her ex-cohabitee under s30 of the Law of Property Act 1925 (now s14 of the Trusts of Land and Appointment of Trustees Act 1996). There was no dispute as to the size of the parties' shares in the property.
8. Giving judgment in the Court of Appeal, Lord Justice Waite held that the principle of *Curling* applied equally to recovery or preservation and that the charge attached to Miss Parkes' share in the property. She had *preserved* her right of occupation by *avoiding the order for sale* and she had *recovered* an *exclusive* right to possession.

<sup>13</sup> S9(7) of the Legal Aid Act 1974 was the equivalent of s10(7) of the AJA 1999 and s16(6) of the 1988 Act.

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9. In these cases the property to which the statutory charge attaches is the avoidance of a sale so that the legally aided individual has possession of property for a substantial period of time, or that the legally aided individual obtains the benefit of being able to dispose of the property themselves.

**Examples:**

*A legally aided husband has remained in the former matrimonial home after the break-up of the marriage. His wife brings an application for sale of the property, the husband opposes. The court orders a sale, deferred for three months to allow the husband to raise a mortgage to buy out the wife. The husband cannot be said to have avoided an immediate sale merely because of the three-month delay. **He will not have preserved possession within the proceedings, even if he succeeds in raising the mortgage.***

*This is to be contrasted with the situation where the legally aided individual defends possession proceedings brought by the building society which has a mortgage on the individual's home. The building society alleges arrears of mortgage repayments and seeks possession of the property. The parties settle the proceedings on the basis that the building society will withdraw its claim for possession if the individual pays the alleged arrears. The individual has accordingly preserved the property within the proceedings, whether or not he or she subsequently has to sell the property to comply with the terms of the order. As a result of successfully preventing an order for sale the individual is able to conduct the sale himself or herself.*

10. The statutory charge can arise whatever the nature of the property the possession of which was in issue. Although *Curling and Parkes* were concerned with the equity in the home, the same principle would apply to any other asset, such as money in a specific bank account which was in dispute.
11. On a side note here, there is an important principle hidden in paragraph 10. If an individual is sued in a claim for damages arising, say, out of an assault, the claimant may claim damages in excess of £15,000 for injuries. If the legally aided defendant defends the claim and is successful, perhaps on the grounds that the claimant's injuries were caused by an entirely different incident, the legally aided individual cannot and should not be treated as having preserved £15,000 if the claim against that individual was made in general terms. If, on the other hand, a particular bank account, or asset is pointed at by the claimant, then it could be said that by resisting the claim that asset is preserved, no matter how weak the claim turned out to be.

12. Where possession is recovered or preserved the **value** of the property subject to the statutory charge is the whole value of the property recovered or preserved, and not the value to the legally aided individual of obtaining possession early or in preserving exclusive possession. See the judgment of Oliver LJ in *Curling v. Law Society* at 715f: "*It seems to me entirely inappropriate and irrelevant in such a case to seek to assess the increment to the plaintiff of the value of his interest. He has, quite literally, recovered (ie got into his hands) property which he would not have in his hands if it had not been for the proceedings.*"
13. Under s40(1)(d) and (e) of the Family Law Act 1996 the court may make an order granting possession or use of house contents. As with occupation orders, these will not usually attract the statutory charge, as they will give possession on an interim basis only - but again a subsequent agreement may make this possession permanent and thus attract the charge at that point.

### 3.3 Recovery and preservation (*Hanlon v. Law Society* [1981] AC 124)

1. In order for the statutory charge to apply property must have been *recovered or preserved* for the legally aided individual in the proceedings. Property is "recovered" if the individual succeeds in claiming property so that there is a gain for that individual (see *Hanlon v. Law Society* [1981] AC 124 at 180G). Property is "preserved" if the individual successfully fends off a claim by someone else to the property so that the individual keeps all or part of what he or she regard as his or her own.
2. The description of a party to the proceedings is not determinative. In some cases a claimant may preserve property; in other cases a defendant may recover property. In either case the statutory charge will arise.
3. The statutory charge may arise even if the legally aided individual is only **partially** successful. For example:
  - (a) An individual seeking an outright transfer of property may recover only a part of the beneficial interest in that property or a share in the proceeds of sale of the property. The statutory charge applies to whatever is recovered.
  - (b) An individual defending property may lose part of it but manage to hold on to part of what was being claimed. Even if he or she ends up worse off than he or she was before the proceedings began, the statutory charge still attaches to that part of the property preserved (see *Till v. Till* [1974] 1 All ER 1096).

### 3.4 The requirement that the property was "in issue or dispute" in the legally aided dispute

1. The statutory charge only arises if the property recovered or preserved was
  - (a) in issue in the dispute; or

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- (b) obtained under any compromise or settlement arrived at to avoid proceedings or to bring them to an end (a 'substitution').
2. To be "in issue" the property must have been the subject of the dispute for which funding was granted. The leading guidance on this is in *Hanlon*. Lord Simon said at page 180G:

*"Property has been recovered or preserved if it has been in issue in the proceedings: recovered by the claimant if it has been the subject of a successful claim, preserved by the respondent if the claim fails. In either case it is question of fact, not of theoretical 'risk'. What has been in issue is to be collected as a matter of fact from the pleadings, evidence, judgment and/or order. I can see no reason for extending the words to items of property, the ownership or possession of which has never been questioned."*

3. If the legally aided individual's solicitor says the property was not in issue, the regional office will look at the evidence on its own file namely,
- the application for legal aid;
  - any pleadings, witness statements or affidavits;
  - the final order or agreement;
  - the CIV Admin1 Form.

If the question remains disputed then the regional office can ask the solicitor to send their file on loan and look at correspondence setting out rival claims, in particular the first letters between the parties which often show the initial stance, any open or "without prejudice" offers, and particularly in matrimonial cases, the concluding paragraphs of each side's witness statements.

4. In general, property must have been in dispute after the legal aid certificate was issued. If the parties were agreed, for instance through successful mediation, on all points before the grant of legal aid and the regional office granted legal aid simply to allow solicitors to draft a consent order, then no property was in dispute at that point (and the financial determination should have included the individual's assets on that basis). If despite an early agreement, legal aid has been necessary to enforce the agreement because the legally aided individual's opponent does not comply with it, then the statutory charge will attach to property recovered as a result.
5. The following points should be borne in mind in deciding whether the evidence shows that property is in issue:



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- (a) **property can be put in issue at any time.** It is necessary to look at what the worst result would have been for the individual and see if the individual has improved upon it. For example, if an opponent during proceedings claims to be entitled to certain property not previously in issue, but then abandons the claim, the property would have been preserved and the statutory charge would apply;
  - (b) **if one side claims certain property and the other is silent** as to that claim this does not necessarily mean the property was not in issue. The property is in issue unless the facts show that the other side accepts the legally aided individual's claim;
  - (c) **there must be some positive evidence of a dispute.** If neither side has claimed a particular item of property, the fact that neither conceded ownership from the start does not put it at issue. The courts are unlikely to uphold a decision by the Legal Aid Agency based on a view that property was at issue if there is no evidence of either side ever having made a claim to it;
  - (d) **the fact that a party's assets in general are at risk as a result of litigation does not mean they are in issue.** If a defendant successfully defends a damages claim (for personal injury, for example), the statutory charge does not arise even if the claimant only brought the claim because he or she knew the defendant had certain assets. However, the statutory charge can arise if a particular asset of the defendant is specifically identified and claimed in the action (a sum of money in a particular bank account, for example), the statutory charge would apply if it was preserved;
  - (e) **a party may put property in issue regardless of the strength of its claim to that property.** Therefore a contention by the legally aided individual at the end of the matter that the other side's claim or defence had no merit does not mean that the property was not in issue. Legal aid was sought to defend or prosecute the legally aided individual's claim. This argument is often raised in possession claims which turn out to be meritless. However, in such cases, the statement accompanying the application for legal aid invariably says that the individual is facing possession proceedings and risks losing his or her home, or forfeiture proceedings which have the same risks. It would be wrong for the Legal Aid Agency to prejudge the case and to refuse legal aid on the basis that the opponent's claim has no merit and could never succeed. Therefore, if the individual requires legal aid to resist the matter, it is not open to him or her to say that because the case they defended could never have succeeded the charge cannot therefore arise.
  - (f) **if the legally aided individual's opponent does not take active steps to resist a claim or application,** but makes it necessary for the legally aided individual to invoke the powers of the court, the property the individual gets or is able to dispose of is subject to the statutory charge.

### 3.5 Interim orders, freezing orders, and money paid into court

1. Sometimes assets which are not directly in issue in the proceedings are nevertheless affected by injunctions or other orders made by the court during proceedings (interim orders).
2. An **asset freezing injunction or order** is an order which prevents someone who owes money from dealing, selling, hiding, or removing their assets from the jurisdiction to defeat the court's powers. If the court makes a freezing order before legal aid is granted and money cannot be released to pay for the proceedings, the regional office may disregard the assets frozen by the order in the financial determination on the basis that they are not 'disposable'.
3. If the court unfreezes the assets and the legally aided individual therefore gets the use of them back, the statutory charge may not attach to those assets. In general a freezing injunction does not in itself put property in issue for the purposes of the charge. *McKay v. Legal Aid Board* CA 23 January 1997 (unreported) suggests that property which is the subject of an interlocutory order may nevertheless not have been in issue in the proceedings. Where assets are unfrozen during proceedings, the regional office may make a further determination of the client's means under regulation 20 of the Financial Regulations<sup>14</sup>. The reassessment may well lead to a contribution and/or withdrawal of the certificate. If the regional office argues that despite *McKay*, the statutory charge applies, the unfrozen sums may be paid to the Lord Chancellor to await the outcome of the proceedings, while the certificate continues in force. However, if the proceedings directly concern the freezing or restraint of assets, such as in proceedings under the Proceeds of Crime Act, the statutory charge will apply to any money or property the client succeeds in releasing from the freezing/restraint order.
4. The statutory charge will attach if the frozen assets were in issue in the proceedings regardless of the effect of the freezing order, or if the injunction was lifted because the opponent conceded that the legally aided client is entitled to keep them.
5. If a legally aided individual's **opponent pays money into court** during a case, and the individual either accepts that money in settlement or wins the case and gets an order that the money be paid out, the individual has recovered property and the statutory charge attaches to that money.
6. If a **legally aided individual pays money into court**, and is then allowed to take the money back at the end of the case, the statutory charge will not generally apply to that money. The mere fact that it was an identifiable sum standing in court does not mean it was in issue in the proceedings: *McKay v. Legal Aid Board* CA (1997) (Unreported).

### 3.6 Property in issue in matrimonial proceedings

1. In matrimonial cases there may be a number of matrimonial assets for example:

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<sup>14</sup> Or Regulation 17 of the Legal Aid (Financial Resources and Payment for Services) (Legal Persons) Regulations 2013.



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- the former matrimonial home,
  - endowment policies,
  - money in savings accounts.

By simply issuing an application for ancillary relief the client or their former spouse does not put all those assets in issue. The regional office will need to look at which particular assets were in fact in dispute.

**Example:**

*The solicitor acting for the legally aided wife reports at the end of the case that the matrimonial home, which was formerly in joint names, has been transferred into the wife's sole name. The regional office will presume that the wife has recovered 50% of the net equity in the property. The burden would normally be on the solicitor to challenge this presumption, by, for example, providing evidence to show that wife's entitlement to the whole house was conceded before issue of the legal aid certificate. Otherwise, if the 50% share of the net equity which the wife has recovered is sufficient to cover the cost of the civil legal services, the regional office would not need to look into the question of whether the wife's own 50% share was challenged.*

*If, on the other hand, there remains a net deficiency to legal aid (i.e. costs of civil legal services), the regional office would have to raise the question whether the wife's share of the property was under attack in the proceedings and if necessary call for the solicitor's files.*

**3.7 Substitutions, compromises or settlements: *Van Hoorn v. Law Society* [1984] 3 All ER 136**

1. S25(1)(a) of the Act<sup>15</sup> provides that the statutory charge attaches to property recovered or preserved "**in any compromise or settlement of any dispute**"; this applies whether or not that property was in issue in the proceedings. This rule ensures that the statutory charge cannot be avoided where, under a compromise, the client receives something in substitution for the property in issue in the proceedings.
2. The statutory charge also attaches to property recovered or preserved if there was a compromise or settlement before proceedings are commenced: see *Van Hoorn v. the Law Society* [1984] 3 All ER 136 at 139h-i where Balcombe J (as he then was) said,

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<sup>15</sup> S10(7) of the 1999 Act and S16(7) of the 1988 Act.

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*"...I can see no reason, simply as a matter of the language used, for limiting the 'rights under any compromise' in sub-s (7)<sup>16</sup> to rights in property which has been in issue in the proceedings. Indeed, if a compromise is made 'to avoid' proceedings i.e. is made after legal aid had been granted, but before proceedings have been commenced, it may not be possible, using the tests propounded by Lord Simon and Lord Scarman in Hanlon v. Law Society, to determine what property would have been in issue had the proceedings been commenced. Yet sub-s (7) clearly includes rights under a compromise arrived at to avoid the proceedings as being within the charge for the benefit of the legal aid fund.*

*I find some support for the conclusion to which I have come in the judgment of Lord Denning MR in Hanlon v. Law Society [1981]AC 124 at 149 in the Court of Appeal. Lord Denning MR considered the underlying policy behind the Legal Aid Act 1974:*

*"On the one hand there is this broad social policy: no one should be hindered by lack of means from bringing his case before the courts, or contesting that of his opponent. On the other hand, there is a limit to the money to be gotten out of the taxpayers."*

3. In *Legal Aid Board v. Hardiman* CH 1996 (Unreported), the husband and wife (who were both legally aided) reached an agreement as to the disposal of the proceeds of sale of the former matrimonial home between themselves part-way through the proceedings. This agreement (which was evidenced by a trust deed) left the wife's right to continue with her ancillary relief application open. Although there was no order concluding the proceedings the court held that the agreement between the parties had **effectively** brought the proceedings to an end.

In *Legal Aid Board v Morgan and Others* [2000] 3 All ER 974 (ChD) the judge treated section 16(7) of the LAA 1988 as extending the charge to property substituted in a settlement for other property in issue in the proceedings. But at 981d-h (paras 28-29) Neuberger J said:

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<sup>16</sup> S9(7) of the Legal Aid Act 1974.

*“While one can easily see why it is appropriate to extend the charge to substitutions, it is hard to discern any justification in extending the charge to assets which, while included in the overall agreed terms, are really extraneous, or no more than incidental to the issues in the proceedings in respect of which legal aid had been granted. If this approach is correct, then, where a legally-aided person settles an action, and the board contends that it is entitled to a charge over property which is recovered or preserved by the legally aided person as part of the settlement, a two-stage process may be involved. The first stage is the same as the process involved in a case which goes to judgment, namely to consider whether the property concerned was in issue in the proceedings. If it was, then no further inquiry is needed: subject to any special factors, the board has a charge over it. If the property concerned was not in issue in the proceedings, then one moves to the second stage: the board will nonetheless be entitled to a charge over it if it can fairly be said that the property concerned was effectively recovered or preserved by the claimant in substitution for property (or even, I believe, rights) in issue in the proceedings. In most cases, I believe that this second stage will be relatively easy, and, at least in general it should not raise any greater difficulties than the first stage. In some cases, however, more detailed investigation may be required. However, a risk or a more detailed investigation of the facts surrounding a settlement seems to me to be inherent in what is envisaged by the relevant part of s 16(7) in any event. In a case which goes to judgment, one would normally not expect to look further than the 'pleadings, evidence, judgment and/or order' as Lord Simon said. However, where the parties have settled the action, then, as I see it, irrespective of how widely one construes the relevant words of s 16(7), it may in some cases be necessary to consider matters more widely.*

*Thus one may have to investigate whether, at the same time the parties entered into the consent order, they also agreed other terms, not included or even referred to in the order which conferred benefits on a legally-aided party, which included property being recovered or preserved by them.”*

4. In order to settle the proceedings, the legally aided individuals agreed to pay their opponent bank a sum of money. So that they could raise the necessary credit, their opponent, agreed to release mortgages on their land. The parties recorded the release of the mortgages from the land in two consent orders resolving the proceedings. The court decided that the release of the mortgages was an "inevitable by-product of the settlement". In the court's view, the existence of the mortgages was neither in issue in the proceedings nor brought in to substitute for property which was in issue in the proceedings, and so the statutory charge did not arise.

### **3.8 Recovery before the certificate was granted or after it has been withdrawn (including revocations)**

1. The mere fact that a client has received an offer of money or property before a determination that he or she qualifies for civil legal services does not mean that there was an agreement in respect of that money or property.

**Examples:**

*A client is offered £5,000 compensation for being wrongly detained by the police, but decides to apply for legal aid and pursues proceedings, and ultimately recovers £6,000. The statutory charge attaches to the full £6,000 recovered in the proceedings and not simply the £1000 over and above what the client could have accepted initially.*

*In the example above, the client instead obtained a legal aid certificate initially to seek counsel's opinion on the offer of £5,000. Counsel's opinion is that the offer should be accepted. The statutory charge still attaches to the £5,000 because this was still in issue when legal aid was obtained.*

2. If there is an order or agreement, and the client gets a legal aid certificate to enforce it, because the opponent refuses to comply with it, or seeks to vary it, then the statutory charge will arise.
3. Where a legal aid certificate has been withdrawn (this therefore includes **revocations**), the statutory charge applies to any property recovered or preserved as a result of the client "continuing to pursue the relevant dispute or take, defend or be a party to the relevant proceedings" regulation 10(2)<sup>17</sup>. This is so even if the proceedings were never actually issued under the certificate.

**Example:**

*The legally aided client obtains a limited legal aid certificate for a proposed clinical negligence claim against an NHS trust. The certificate is withdrawn after an unfavourable medical report and counsel's opinion are obtained. However the client continues to write to the hospital on his own behalf and eventually, the trust pays him or her £1,000 in full and final settlement.*

*The statutory charge will apply to that £1,000 and the costs incurred under the certificate will have to be taken out of it because of regulation 10(2).*

4. Where a legal aid certificate has been withdrawn owing to the death or bankruptcy of the legally aided client, the statutory charge applies to property recovered or preserved by the personal representative, the trustee in bankruptcy or the Official Receiver: see regulation 10(2).

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<sup>17</sup> Regulation 49(1) of the CLS Financial Regulations (for funding under AJA 1999); Regulation 85 of the General Regulations 1989 (for legal aid under the LAA 1988).

5. Where property has been recovered or preserved after the certificate has been withdrawn in a part of the proceedings which would *not* have been covered by the certificate had it remained in force, the statutory charge *will apply*. The proceedings to which the certificate related should be construed as the entirety of the proceedings, not just the part covered by the certificate.

**Example:**

*The claimant has a certificate to sue the defendant for damages for negligence and loses at trial. His certificate is withdrawn. He then appeals the verdict successfully in the Court of Appeal without legal aid and recovers damages. The statutory charge will arise for the costs incurred under his certificate even though the certificate would not have covered the appeal without being amended. The point here is that the claimant wouldn't have been in the position to be able to appeal to the Court of Appeal if he had not had legal aid in the first instance proceedings.*

**3.9 Recovery or preservation has to be “in any proceedings, or in any compromise or settlement of any dispute in connection with which the services were provided...” (from the wording of section 25(1) of the Act**

1. The statutory charge applies to property recovered or preserved *in the dispute* in connection with which civil legal services was granted or in a settlement to avoid proceedings or to bring a dispute to an end. It is not necessary for proceedings to be issued if there is a dispute which is resolved under the threat of proceedings.
2. "Proceedings" is not defined in the Act. In general everything proceeding through the court under a particular claim number should be treated as one set of proceedings.
3. Often, county courts allocate different case numbers to different aspects of a family case e.g. where former spouses are involved in proceedings under the Matrimonial Causes Act 1973 concerning their assets, and there is an application concerning the children of the family under the Children Act 1989, the court may assign different case numbers to both aspects of the dispute. This does not prevent the statutory charge being calculated by reference to all of the costs incurred under the certificate/s, as the costs of the whole dispute give rise to a charge on any property recovered or preserved under the Matrimonial Causes Act. The sensible test to adopt is that the whole dispute arises out of the relationship breakdown, and so all of the costs associated with dispute attach as a charge to property recovered in those family proceedings.
4. Where the court assigns a new claim number in the proceedings merely for administrative reasons, (for example because a case is transferred from one court to another or there are enforcement proceedings), the costs of the whole dispute will give rise to a charge on any property recovered or preserved.

**Separate sets of proceedings**

5. Where the legally aided individual is involved in two sets of proceedings which have a factual connection (i.e. an inquest and then a subsequent claim for damages), the costs of funding the civil legal services of both proceedings can be charged against the property recovered or preserved in the damages claim. In a family case, the costs of funding all aspects of the dispute arising out of the relationship breakdown can be charged against property recovered or preserved in the dispute.
6. When claimants bring separate proceedings against separate defendants or the same defendant, it sometimes happens that a settlement of one action will effectively bring about the end of the other action. If property is recovered in action A as part of a settlement also arrived at to avoid or bring to an end the proceedings in action B, the costs in both sets of proceedings will be charged against the recovery in action A. This is because there has been a **global settlement** which has ended both actions and any recovery in either action will amount to property recovered to bring both sets of proceedings to an end.
7. If the legally aided individual eventually recovers or preserves property as a result of separate proceedings or negotiations with a trustee in bankruptcy or the executors of an estate, the costs in the earlier proceedings may count towards the statutory charge. If the proceedings or negotiations were primarily concerned with enforcing the original order, then the recovery was in the same proceedings, and would form part of the statutory charge. If there are entirely separate proceedings to obtain property which would not merely amount to enforcement of an earlier order, the earlier costs would not form part of the statutory charge in the later proceedings.

### Examples:

*Where a husband becomes bankrupt shortly after an order is made transferring property to his wife in divorce, the property may vest in the trustee in bankruptcy and the court has powers to go back and unscramble the situation. The second set of proceedings may amount to an enforcement of the outcome of the first set; or may be a freestanding attack on the client's former husband's property.*

*Death of one party. Where one party dies before implementing an order there may be difficulties in enforcing the order against the estate and further proceedings may be necessary. The costs of the later proceedings following the death may be effectively enforcement proceedings or may be a wholly different attempt to recover part of the deceased's property.*



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*The legally aided claimant obtains a judgment for £6,000 against the defendant. Before the money is paid the defendant enters into a voluntary arrangement with his creditors. The legally aided individual's solicitor takes part in the negotiations on behalf of the individual and as a result of the voluntary arrangement each creditor receives 50% of his debt. The legally aided individual will therefore get £3,000. Even though the individual may argue that this money was received as the result of the negotiations the fact that any money was received at all was a result of the judgment. The recovery will be taken to have been in the proceedings and the £3,000 will be subject to the statutory charge.*

*In Cavaliere v Legal Services Commission [2003] EWHC 323 (QB), the statutory charge arose on monies recovered in an (non-legally aided) action against a firm of professional indemnity insurers of a company which had gone into liquidation, the client having previously obtained a judgement against the insured company with the help of legal aid. The claimant had argued that the action was a separate claim against a third party (the insurers) and therefore the statutory charge could not arise in respect of the monies expended in the previous case. Leveson J (as he then was) held that the judgement obtained in the legally aided proceedings was an essential prerequisite of the threatened direct cause of action against the Insurers. With the benefit of that judgment, the claimant then successfully claimed upon the company's professional indemnity; the chose in action, which was the judgment, was impressed by a first charge in favour of the Commission in relation to the costs incurred in pursuing the action against the company and obtaining the judgment in the first place. Leveson J (as he then was) said that it was difficult to see a more appropriate case in which to apply the doctrine of constructive trust.*

*However, in the case of Cassidy (Administratrix of the Estate of Paul Nevitt deceased) v Stephenson, Legal Services Commission [2009] EWHC 1562 QB where the Commission had granted a funding certificate to enable a claimant to bring a clinical negligence action and, through the negligence of the acting solicitors, the claim was served out of time, the Commission could not impose a statutory charge over funds received by the claimant in a settlement of a professional negligence claim against the solicitors. His Honour Judge Holman distinguished this case from Cavaliere where the claimant obtained payment from a third party in substitution for a company and in direct diminution of the judgment debt. In the instant case the cause of action against the acting solicitors accrued when the period for service expired rather than from the judgement provided by His Honour Judge Stewart QC who had merely crystallised the loss. It was held that the judgement therefore did not constitute a chose in action; it conferred no valuable right on the claimant. The defendants to the clinical negligence claim assumed no liability to the claimant, so there was no question of any payment by the acting solicitor being in substitution for, or going to reduce the liability of, those defendants.*

## **Enforcement Proceedings**

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8. Any enforcement action taken or defended under the legal aid certificate is an additional step in obtaining the ultimate recovery of money. The legally aided individual's costs of both the main action and the enforcement proceedings should count towards the charge on any property recovered by them.
  9. If a legally aided defendant unsuccessfully opposes a general damages claim and has judgment entered against him or her, no specific property was in issue in the action. If the claimant then tries to enforce the judgment against a particular asset, for instance by a charging order on the defendant's house or garnishee proceedings against his or her bank account, and the defendant fends off the claims on his or her property, the statutory charge will arise.

### **Recovery superseded by later events**

10. Sometimes an order or agreement providing for recovery or preservation is never implemented, because
  - (a) the parties subsequently agree, formally or informally, to deal with the property in some different way, or because
  - (b) a superseding event prevents the order taking effect or unscrambles what has previously been agreed.
11. Regional offices in the first instance look at the order or agreement to see what has been recovered or preserved. If the client or their solicitor claims that there has been some superseding agreement or event, so that property is not recovered or preserved, regional offices first consider whether there has been an attempt to evade the statutory charge. If an arrangement has been made with that intention, it will be disregarded and the statutory charge will arise under the original order: regulation 22(4)<sup>18</sup>. This regulation provides that all acts which defeat or operate to defeat the charge are void as against the Legal Aid Agency.
12. If the legally aided individual, through no fault of his or her own, is prevented from recovering or preserving the property then the statutory charge does not arise. But if the individual is responsible for the situation, it would be wrong to allow him or her to benefit from it.
13. Note, however, that recovery and preservation may operate very differently in this type of situation. For the client to have recovered property in the proceedings the final order will usually have had to be implemented. A supervening event may make that impossible, even given the Lord Chancellor's powers to enforce an order in the client's favour.

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<sup>18</sup> For older cases refer to Regulation 52(4) of the CLS Financial Regulations; Regulation 95(4) of the General Regulations 1989.



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14. Preservation, on the other hand will usually have occurred automatically at the conclusion of the proceedings by virtue of the opponent having been unsuccessful in his or her attack on the client's property. In that case, once the charge has attached by operation of statute, any further dealings with the property take effect subject to the charge.

### 3.10 Recovery must be for the Individual (LAA 1988 cases only)

1. Under the LAA 1988, the charge only applies to the legally aided individual when property is recovered or preserved "for him" in the proceedings. He must have benefited from the proceedings. The Act (and AJA 1999) is differently worded in this respect: the charge arises on 'any property recovered or preserved by the individual...(whether the property is recovered or preserved for the individual or another person)...'. But in 1988 cases it will still sometimes be necessary to decide whether the property is really recovered or preserved for the legally aided individual.
2. In most cases the final order or agreement provides for the property or damages to be paid to the legally aided individual. But if the order or agreement on its face provides for someone other than the individual to benefit, the statutory charge may still arise.
3. The general approach in all such cases is to look at the reality of what has happened and to see whether the legally aided individual has benefited even though the order is nominally in favour of another. Property recovered for the individual's benefit is recovered "for him" - see *Manley v. Law Society* [1981] 1 All ER 401. The general principle is that the courts will look to the reality of a transaction rather than the label which the party has attached to it. If *in reality* property is recovered or preserved for the legally aided individual, the statutory charge arises.
4. In *Manley*, the action was settled with the defendant paying £40,000 to the legally aided individual's solicitors to be held on trust to pay his creditors. In holding that the charge applied Lord Denning MR said, "*The court should always look for the truth of the transaction. It should not let itself be deceived by the stratagems of lawyers, or accountants. To my mind, once we pull aside the curtain of words, and the supposed rights, the truth is that this £40,000 was to be used to pay off David Manley's debts at his request. It is, therefore, the subject of the statutory charge in favour of the legal aid fund*".
5. In deciding whether the statutory charge applies in a case where there is a scheme that purports to avoid it, there is no need to show any bad faith or dishonesty on the part of the legally aided individual or his or her advisers. It is the terms of the settlement and whether it operates to defeat the statutory charge that are relevant in deciding whether the reality of the arrangement is that the individual has recovered or preserved property – or that the settlement is void under regulation 95(4) of the General Regulations 1989.

#### Payments out to creditors

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6. The statutory charge is a **first charge** which should take precedence over the claims of unsecured creditors in relation to any property recovered or preserved.
  7. *Manley v. Law Society* [1981] 1 All ER 401 is authority for the rule that property ordered to be paid directly to a creditor or other third party for the benefit of the legally aided individual is nevertheless property recovered "for the funded client" i.e. for the individual. The statutory charge would apply if the order was for the money to go to the legally aided individual who then repaid the creditor and cannot be avoided by framing the order so as to miss out the individual when in reality he or she will benefit financially. But note:
    - (a) in order for payment of the legally aided individual's debt to attract the statutory charge, the money used to pay it must have itself been in issue in some way - usually because the opponent did not agree to payment of the individual's debt from the contested assets (such as from the proceeds of sale of the former matrimonial home).
    - (b) if the debt is a joint one between the parties, for instance in a matrimonial case, the regional office will take into account the fact that the legally aided individual may only have been responsible for paying half the debt in any event - it may in effect have only been the question of who would pay the individual's half of the debt that was in issue between the parties.

### Contributions from parents to property

8. It is common, particularly in matrimonial cases, for the parent or parents of a party to have contributed money to buy the party's home. Normally this is treated as an unsecured loan, so that the parent is an ordinary unsecured creditor. Therefore any payment under the order to the parent of money which would have attracted the statutory charge if paid to the legally aided individual will still attract the charge.
9. There may however be situations where the parent's money has given the parent a *beneficial interest* in the matrimonial home. The beneficial interest may be recorded in a formal agreement such as a charge or a trust deed. If so, and provided the written document is genuine and not contrived in order to prevent the statutory charge arising or reduce its amount, the parent's or parents' interest will reduce the net equity in the property which was at issue between the parties. The parent's interest does not need to have been registered in any way.
10. A beneficial interest may arise under an informal agreement such as a 'constructive' or 'resulting trust'. The general test for a trust not evidenced by formal documentation is that *there must have been a common intention, whether express or implied, at the time that the money was advanced that the person making the contribution would acquire an interest in the property.*

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11. It is for the legally aided individual or their solicitors to prove that a constructive or resulting trust in fact existed. Regional offices look at the following matters in considering whether to accept a claim that property is subject to a constructive or resulting trust:
- (a) whether there is a trust deed or instrument of charge evidencing the agreement. If not:
  - (b) whether the parent was living in the property with the parties. If there was a clear intention that the property was also intended to be used as a home for the parent, it is likely to be subject to the parent's rights;
  - (c) whether the parent applied to be joined in the matrimonial proceedings, claiming a beneficial entitlement to a share in the matrimonial home as opposed to merely a generalised debt;
  - (d) whether the court decided the issue of whether the parent had a beneficial entitlement to the home.

### **Payment to a child of the legally aided individual**

12. Where the legally aided individual pursues applications on his or her own behalf and an order is made providing payment to a child of the individual, the regional office should investigate why the order was made. Particularly in matrimonial proceedings, lump sum or property adjustment orders in favour of children should be questioned. Under the Act, the fact that an order does make provision for property or money to be settled on children does not of itself stop the statutory charge from arising. S25 of the Act<sup>19</sup> provides that the charge attaches to “*any property recovered or preserved by the individual in proceedings, or in any compromise or settlement of a dispute, in connection with which the services were provided (whether the property is recovered or preserved for the individual or another person)*”. This means that whilst the property may on the face of the order be recovered for the benefit of the child or children of the individual, the recovered property will be impressed with the statutory charge and unless payment is made to the Lord Chancellor out of that property, the Legal Aid Agency would have grounds for bringing proceedings against the person holding that property to recover the charge.

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<sup>19</sup> S10(7) AJA 1999 similarly provides that the charge attaches to “*any property recovered or preserved by him (whether for himself or any other person)...*”

13. Courts do in practice approve consent orders which make provision for lump sum payments to be held on trust for the children of the family. The wording of s25(1)(a) of the Act<sup>20</sup> means that the statutory charge attaches to that property and so has to be repaid from it. If payment has not been received, the regional office will consider whether the provider is in breach of the contract or regulations; if the provider is in breach of the contract or regulations (e.g. the provider failed to notify the Lord Chancellor about the attempt to circumvent the statutory charge as required by regulation 13(3)<sup>21</sup>, the regional office should set off / defer payment of the solicitor's costs until such time as the statutory charge is paid (see section 6.2). Where the solicitor is not in breach of the contract or regulations the case should be referred to **Recovery Services**. In the first instance, the trustees are asked to repay the charge out of the lump sum which they hold on trust. If payment is not made, then consideration can be given to applying to the court for the consent order to be varied to take into account the client's statutory charge liability. Alternatively, proceedings against the trustees is another way in which the charge money can be recovered. Advice can be sought from the Central Legal Team about these additional steps.

### 3.11 Recovery or preservation by trustees and representatives

1. Where an individual is funded in a representative, fiduciary or official capacity, he or she is only nominally bringing the proceedings, the real purpose of which is to benefit someone else.

#### Examples

*Where a trustee of a fund defends a claim to that fund on behalf of the beneficiaries. The means of the trustee will not be assessed (unless he or she also has a beneficial interest in that fund) but instead the means of the beneficiaries and the value of the property, estate or fund out of which he is entitled to be indemnified will be taken into account: regulation 15 of the Financial Regulations<sup>22</sup>.*

*An action over a deceased's estate under the Inheritance (Provision for Families and Dependants) Act 1975. The executors of the Will, or administrators of the estate if the deceased died intestate, are the defendants to the proceedings whether or not they also benefit under the will or intestacy.*

<sup>20</sup> See s10(7) AJA 1999.

<sup>21</sup> Regulation 20(3) of the CLS Costs Regulations.

<sup>22</sup> Regulation 10 of the CLS Financial Regulations for cases under AJA 1999; Regulation 33 of the General Regulations 1989 and regulation 6 of the Civil Legal Aid (Assessment of Resources Regulations 1989 for cases under the LAA 1988.

2. In these cases the statutory charge will arise on any property recovered or preserved by the trustee or personal representative. The fact that the trustee or personal representative is involved in the proceedings in a representative capacity does not itself mean that they have to contribute from their own income or capital towards the cost of the case, but as representative of those who benefit from the trust or estate, they *do* have to contribute by way of the statutory charge.
3. A child under 18 or patient is funded in the name of a person of full age and capacity – a "litigation friend". In these cases the certificate will be in the name of the child or patient stating the name of the litigation friend - see regulation 30 of the Procedure Regulations. The charge applies to property recovered or preserved for the child or patient.

### 3.12 EXEMPTIONS from the Statutory Charge

1. Regulation 5<sup>23</sup> exempts some property recovered or preserved from the statutory charge. The exemptions apply to the property that would otherwise be subject to the charge. They do not affect the costs giving rise to the statutory charge.

#### (a) Interim payments: regulation 16.

CPR 25.6 allows a claimant to apply for an interim payment from the defendant pending the final disposal of an action where it is almost certain that the claimant will recover substantial damages at the end of the case. Regulation 16 enables the Legal Aid Agency to make or allow a provider to make an interim payment direct to the client where '*the Lord Chancellor* considers it essential to protect the client's interests or welfare'. This provision has a similar effect to regulation 20 (3) of the CLS Costs Regulations and regulation 94(a) of the General Regulations 1989 for certificates granted under the AJA 1999 and the LAA 1988 respectively.

Section 2(2) of the Damages Act 1996 gives the court power to order interim payments in the form of periodical payments under a structured settlement. Such payments will come within regulation 16 [for AJA 1999 cases, regulation 20(3) of the CLS Costs Regulations] as they are expressed by the Damages Act to be payable by virtue of rules of court.

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<sup>23</sup> Regulation 44 of the CLS Financial Regulations; Regulation 94 of the General Regulations 1989.

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An interim payment is exempt only so long as the payment remains interim. So there is effectively no difference between Regulation 16 and regulation 20(3) of the CLS Costs Regulations, and the General Regulations 1989 in this respect, other than the discretionary element to the exemption under the Act and AJA 1999. Once a final order for damages is made, it will give credit for the payment and the interim damages are included in the calculation of the property subject to the statutory charge. If at that time additional damages and costs recovered are insufficient to meet the charge the legally aided client may be liable to reimburse the balance out of what was originally an interim payment.

The statutory charge cannot be avoided by securing an interim payment and then discontinuing the proceedings as this would then make the interim payment a final one and therefore subject to the charge.

**(b) Payments under Section 5 of the Inheritance (Provision for Family and Dependents) Act 1975 or Part IV of the Family Law Act 1996: Regulation 5(1)(b)(ii) and (iii).**

Payments under section 5 of the 1975 Act are a form of interim payment. The court may order a payment under this section to alleviate hardship pending the final disposal of an action. If the payment were affected by the statutory charge, that would defeat the object. Payments under Part IV of the 1996 Act tend to be related to property i.e. where the court has made an occupation order it may impose on either party an obligation under section 40(1)(a) to discharge rent or mortgage payments or other outgoings affecting the dwelling house, or to repair or maintain the dwelling house. The statutory charge will not apply to those payments.

**(c) Periodical payments of maintenance: Regulation 5(1)(a)**

Maintenance is defined in Regulation 2 as “money or money’s worth, towards the support of a spouse, former spouse, child or any other person for whom the payer has previously been responsible or has made payment.”

A payment of what is in reality a lump sum despite being described as maintenance or as payment in lieu of maintenance is subject to the charge: *Stewart v. Law Society* [1987] 1 FLR 223.

Orders under Section 40(1)(b) Family Law Act 1996 for periodical payments to be made to the party excluded from the home which are deemed to be made purely as compensation for the legally aided client’s exclusion from the home and do not amount to maintenance as defined within the exemption at [Regulation 94(c) General Regulations 1989 or 44(1)(a) CLS Financial Regulations ] will still be exempt from the charge due to the exclusion set out in Regulation 5(1)(b)(iii).



**(d) Any sum or sums order to be paid under sections 25B(4) or 25C of the Matrimonial Causes Act 1973: Regulation 5(1)(b)(i)<sup>24</sup>.**

These provisions relate to pensions. Under Section 25B(4) any benefits that under a pension arrangement become due to a person with pension rights, may be required to be paid to the other party (e.g. payment from the husband's pension made to the wife). Under Section 25C any lump sum payable from the pension upon the death of the party with pension rights, can be paid at the relevant time to the other party. The statutory charge will not attach to these payments. See also section 3.13.

**(e) Sums paid under paragraph 25(2) or 26 of Schedule 5 to the Civil Partnership 2004: Regulation 5(1)(b)(iv)**

This relates to financial relief in a High Court or a County Court etc. The statutory charge will not attach to these payments.

**(f) The client's clothes or household furniture or tools of trade unless of an exceptional value or quantity: Regulation 5(2)[Regulation 44(1)(b) CLS Financial Regulations].**

**Note:** this exception does not apply where the legally aided party is a legal person – refer to regulation 5(4).

**(g) AJA 1999 case - where property is recovered under a certificate issued before 1 April 2005: the first £3,000 of any money or the value of any property recovered or preserved in a family case: Regulation 44(1)(d) and (2).**

If you have a case in which this exemption still applies, (because the certificate was issued before 1 April 2005), it works as follows: The exemption applies to the first £3,000 of money or property recovered, (not to the first £3,000 of the costs incurred under the certificate). If the value of the property recovered is worth £3,000 more than the amount of the costs, the exemption has no effect on the amount of the statutory charge.

The exemption applies to the *first* £3,000 recovered or preserved. It applies *only once and only in matrimonial proceedings*.

It is usual in matrimonial cases for the final order or agreement to provide for several different items of property. If so, the Legal Aid Agency will allow the legally aided client to choose which of the recoveries the exemption is to apply to. In practice, it may well be that the exemption will be applied in the following order:

- i) first, to any assets which the legally aided individual does not wish to sell and over which enforcement of a charge is not postponeable (e.g. insurance policies or personal policies);

<sup>24</sup> This exemption applies to AJA cases with effect from 9 April 2007 under Regulation 44(1)(aa) CLS Financial Regulations.

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- ii) next, to any money payable under the order which can be released to the legally aided individual free of the charge;
  - iii) finally, to the matrimonial home over which enforcement of the charge is likely to be postponed so that the legally aided individual would gain no immediate benefit from the exemption.

Under the AJA 1999 the Legal Aid Agency applies the exemption in calculating the amount of money to be released to the former legally aided individual when the charge is enforced (whether enforcement has been postponed or not), and in calculating the amount on which interest accrues<sup>25</sup>.

**If a property has low or negative equity at the time of recovery**, the Lord Chancellor is still entitled to register a charge, and whether or not that charge can be paid is determined when the property is sold at a future point. The matrimonial exemption is applied at that point. Therefore, if when the property is sold, the proceeds of sale after repayment of prior charges are £2,789 (for example), then as this falls within the £3,000 exemption, there is no money from which the charge can be paid.

Where the legally aided individual is to recover a share in the property in due course under a Mesher order, the exemption will apply at the time the legally aided client is paid out their share of the net proceeds.

- (h) One-half of any redundancy payment within the meaning of Part XI of the Employment Rights Act 1996: Regulation 5(1)(c) [Regulation 44(1)(e) CLS Financial Regulations].**
- (i) AJA 1999 case – where property is recovered under a certificate issued before 9 April 2007: Any payment made in accordance with an order made by the Employment Appeal Tribunal (excluding an order for costs): Regulation 44(1)(g) CLS Financial Regulations.**

If you have a case in which this exemption still applies (i.e. certificate issued prior to 9 April 2007), any payments awarded by the Employment Appeal Tribunal are exempt.

- (j) Where the statutory charge is in favour of the supplier, the client's main or only dwelling: Regulation 5(3) [Regulation 44(1)(h) CLS Financial Regulations].**

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<sup>25</sup> In cases funded under the LAA 1988 the regional office will apply the exemption to the value of the property at the time it is recovered or preserved. So if the whole equity of a house was in issue, and transferred to the legally aided client, the exemption will apply to the value of the equity in the house at the date of the order.



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The charge is only in favour of the provider if it arises under Family Help (Lower) where the costs escape the standard fee. Note that if the client recovers a sum of money which they wish to use to purchase a home, this exemption does not apply. As controlled work costs are usually relatively low, it is usually reasonable for these costs to be repaid out of a sum of money recovered and for the remainder to be put towards the purchasing a property.

**Note:** this exception does not apply where the legally aided party is a legal person – refer to regulation 5(4).

**(k) Sums, payments or benefits which by virtue of any provision of or made under an Act of Parliament cannot be assigned or charged: Regulation 5(1)(d) [Regulation 44(1)(i) of the CLS Financial Regulations].**

This definition includes statutory instruments (including regulations and orders made under an Act of Parliament). The exemption mostly applies to state benefits and pensions where there is a statutory provision that the sum cannot be charged or assigned. The exemption includes most occupational pensions which are generally part of a scheme drafted under statutory or regulatory provisions preventing assignment, either for tax or public policy reasons.

Section 187 of the Social Security Administration Act 1992 declares void any charge on: any benefit as defined by Section 122 of the Social Security Contributions and Benefits Act 1992 (including attendance allowance, carer's allowance, guardian's allowance, retirement pension and age additions, injury and disablement benefits, sickness and incapacity/invalidity benefits and mobility allowance), a jobseeker's allowance (contributions and income-based), any income-related benefit (including income support, income-related and contributory employment and support allowance, and housing benefit) or child benefit. Section 45 of the Tax Credits Act 2002 similarly declares void every assignment of or charge on a tax credit, and every agreement to assign or charge a tax credit (i.e. Child Tax Credit and Working Tax Credit).

### 3.13 Pensions earmarking or sharing and the statutory charge

1. Where one of the parties to ancillary relief proceedings has applied for an order attaching or 'earmarking' their spouse's pension or for a pension sharing order, the statutory charge position has given rise to a number of queries. Leading Counsel has advised that the exemption in regulation 5(1)(d) will cover any property affected by the court's decision to make, or decline to make, a pension attachment or sharing order. See also section 3.12(d).

## 4. Valuing recovered or preserved property

### 4.1 General

1. Under s25(2) of the Act – the charge consists of “(a) amounts expended by the Lord Chancellor in securing the provision of the services (except to the extent that they are recovered by other means), and (b) other amounts payable by the individual in connection with the services under section 23 [i.e. payment of contributions] or 24[enforcement].”<sup>26</sup> The value of the property is only relevant in two ways:
  - (a) If the Lord Chancellor postpones enforcement of the statutory charge, and the value of the property at the time of recovery or preservation is less than the amounts expended or payable under s25(2), **interest** accrues on the net value of the property recovered or preserved at the time of recovery: see regulation 25(1)(d)(ii) [see regulation 53(3)(e)(ii) of the CLS Financial Regulations for AJA 1999 cases];
  - (b) On enforcement, the Lord Chancellor can only get back money to repay the statutory charge to the extent of the value of the property at the time of enforcement. Any balance deficit does **not** become a personal debt owed by the client (unless the client does an act which deliberately devalues the property).

#### Examples:

*The individual recovers a sum of money (e.g. £20,000) that is less than the total amounts expended or payable under s25(2), (e.g. £30,000), which forms the value of the statutory charge. This money (£20,000) is immediately paid to the Lord Chancellor and the statutory charge is thus enforced straight away. The individual has discharged his or her statutory charge liability despite the £10,000 deficit.*

*However if in this scenario the individual chooses (and the Lord Chancellor agrees) to postpone enforcement of the statutory charge in order for the money to be utilised to purchase a home, the statutory charge will be secured on the equity in the home (by way of a contractual charge signed by the individual) but is not limited to the original amount recovered. Interest will accrue on the net value of the property recovered i.e. £20,000 being the lesser figure determined under regulation 25(1)(d)(ii) [or for AJA 1999 cases, Regulation 53(3)(e)(ii) of the CLS (Financial) Regulations].*

<sup>26</sup> Under s10(7) of the AJA 1999 **the value of the statutory charge is the cost of the funded services in the client’s dispute** The statutory charge arising under s16(6) of the LAA 1988 was calculated by reference to **the extent of the deficiency, or the value of the property at the time of recovery or preservation, whichever is less**. Regulation 99(6) applies this approach to the postponement of enforcement and the calculation of interest. This means that if the value of property increases after recovery or preservation, the value of the charge will not go up correspondingly, even if it was less than the deficiency

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*In the above postponement scenario, or in a case where the legally aided individual recovers a flat or house with low or negative equity which subsequently increases in value, this means that the individual may end up paying considerably more than the original amount recovered and the Lord Chancellor may be able to get back the value of the charge, not merely the value of the property at the time of recovery. (See also section 4.4 Property in Negative or Low Equity).*

### The Provider's Report on the Case (CIV ADMIN 1 Form)

2. In all cases, the provider should set out the value of the property recovered or preserved on the ADMIN1 form if this information is known.
3. It is a central part of the provider's duty to report on the outcome of the case under regulation 15(1)(a) [regulation 20(1)(a) of the Costs Regulations, AJA 1999 cases]<sup>27</sup>.
4. If the value of the legally aided individual's interest in the property is not quantified or quantifiable at the time of recovery, then the regional office is entitled to, and must, assume that the equity recovered is at least equal to the amounts described within s25(2) (otherwise the private client test is not made out). Accordingly, in the absence of a valuation, a note should be put on CIS/CCMS to show that an interest in land has been recovered, and so the statutory charge is equal, at least, to the amounts described under s25(2) [or the costs of the funded services under s10(7) AJA 1999]. If no bill has been submitted, then it should be noted on CCMS/CIS that an interest in land has been recovered, and the quantification of the charge cannot be made until the solicitor's bill has been assessed.
5. A maximum value of charge should be assumed to be the maximum costs limitation on the certificate plus VAT.
6. This assumption could be rebutted by the legally aided individual upon their producing evidence as to the actual value of the equity in the property at the time of recovery by reference to the house price and amount of outstanding mortgage at that time. This valuation may affect the principle amount on which interest accrues on (assuming enforcement of the statutory charge is postponed), but it does not affect the **value** of the statutory charge as explained in paragraph 4.1.1 above.

## 4.2 Disputes over Valuations

1. It is the provider's responsibility to report on the outcome of the case. This includes getting any necessary valuation of recovered or preserved property.

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<sup>27</sup> Regulation 90(1)(a) of the General Regulations

2. The client (i.e. the legally aided individual) may wish to get a valuation at their own expense but the Legal Aid Agency cannot make the individual get a valuation and nor is the Legal Aid Agency ever obliged to get a valuation on its own behalf. Regional offices are however entitled to get a valuation or contribute towards the costs of a valuation if necessary, as an **administrative expense** i.e. if a valuation is necessary, and there is no other way to pay for it.
3. If after taking into account all the information put forward, the Legal Aid Agency cannot accept the legally aided individual's or provider's assessment of the value of the property, but has no other basis to go on, the Legal Aid Agency is entitled to assume that the client was represented in proceedings in which they stood to recover or preserve at least as much as the cost of the proceedings. If the individual had legal aid when either the property at stake did not justify the costs, or the individual's prospects of winning it or keeping it were too poor to justify being represented, the provider should have reported to the Legal Aid Agency under regulation 40(3)(d) of the Procedure Regulations [under Funding Code Procedures C43.2 for AJA 1999 cases]<sup>28</sup>.
4. The Legal Aid Agency may then either
  - (a) treat the value of the recovered or preserved property as being at least equal to the amount under s25(2), (for older cases the amount of the net deficiency to the Fund); or
  - (b) accept that the value of the property is lower than the deficiency would be if the full costs were paid, but set off / defer the provider's costs under the contract (for LAA 1988 cases defer costs under regulation 102 of the General Regulations 1989) on the basis of their failure to report; or
  - (c) offer the provider the alternative of these courses.

### 4.3 Valuing assets other than land (houses and flats)

1. Where the individual recovers **money**, whether in the form of damages or a lump sum, providing there has been no attempt to avoid the statutory charge, the charge can only attach to the money actually paid by the opponent.
2. Where other types of property are recovered or preserved, the regional office must assign a value to each item to be able to quantify the value of the property subject to the statutory charge. Again, the charge applies to actual property recovered or preserved, not to what they might have or should have recovered or preserved, in the absence of any active avoidance of liability.

#### The timing of recovery or preservation

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<sup>28</sup> For cases under the 1988 Act, regulation 67 of the General Regulations.

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3. If recovery is deferred, for instance because the individual is to get a share of the proceeds of sale of property in the future, then the property is valued at the time the individual actually comes into possession of it. Although the legal position may be that the individual has recovered a legally enforceable right to the property at a future event, which could be enforceable even before the property comes into their hands, for practical purposes the Lord Chancellor is unlikely to be able to enforce the statutory charge until the actual payment is made.
  4. Where there is nothing in the order deferring recovery and the property is not land, regional offices may take the following approaches:

- (a) The order or agreement provides that property is to be transferred to or kept by the individual, and he or she wishes to pay off the statutory charge by getting the money from another source.

The provider will tell the regional office the current value of the property subject to the statutory charge. Normally, it should be the value adopted in the proceedings, although the regional office should accept a lower valuation if the provider puts forward a good reason. If the value of the property is at least equal to the amounts described under s25(2) (or to the deficiency to the Fund for older cases), the Lord Chancellor will accept payment of enough to satisfy the deficiency in satisfaction of the statutory charge.

- (b) The order or agreement provides that property is to be transferred to or retained by the individual and they decide to sell the property immediately to pay off the statutory charge.

The regional office may take the net proceeds of sale, after deducting necessary sale costs such as auction costs, as the value of the property subject to the statutory charge. Because this figure is what the client actually got, the regional office should take it as the value of the property subject to the statutory charge even if it is less than the estimated value of the property in the proceedings or at the date of the order.

- (c) The order provides for property to be transferred to (or preserved by) the client and the Lord Chancellor takes possession of the property and sells it to enforce the statutory charge.

Again the actual net sale proceeds recovered by the Lord Chancellor is taken as the value of the recovered property.

- (d) The order provides that the property is to be sold.

See (c) above.

### **Stocks and shares**

5. The value of stocks and shares in a *publicly quoted* company is usually straightforward as there is published information on what the shares are worth at any given time.

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6. It may be difficult to value shares in a *private* company, particularly if they are partly owned by the individual and partly by their opponent. There may, under the Articles of the company, be a restriction on the right to sell the shares. Usually there will be evidence of the value of the stocks and shares in the proceedings. If agreement cannot be reached, regional offices should, if necessary, require the stocks and share certificates to be lodged in satisfaction of the statutory charge.

### **Boundary Disputes *Kanubhai Patel v. LSC* (2 April 2004) (unreported)**

7. Boundary disputes and disputes concerning right of way are not within the scope of legal aid under Schedule 1 of the Act. Boundary disputes could also not be funded under the AJA 1999<sup>29</sup>, but disputes concerning rights of way could be funded, and similar statutory charge issues can arise. However, boundary disputes between neighbours were funded under the LAA 1988. In neighbour disputes, including proceedings over where the boundaries between properties lie or rights of way, the parties' feelings often run high, and they may incur disproportionate legal costs. Solicitors would frequently fail to advise their clients that the statutory charge will arise. As a result regional offices often faced arguments that the value of the property recovered or preserved was low or nil – because it was a small strip of land, for example.
8. The property recovered or preserved in these cases is the value to the client of successfully having taken or defended the proceedings. This may be:
  - (a) the ability to sell the property when previously it was unsaleable; or
  - (b) the enhancement to the value of the client's property, as a result of (say) gaining an additional strip of land at its boundary, or unimpeded use of a right of way.
9. In *Kanubhai Patel v. Legal Services Commission* (2 April 2004) (unreported) Mr Sheldon QC sitting as a Chancery Judge said at para 18 of his judgment:

*"18. It was common ground between the parties that the statutory charge would not only bite on the strip of land which was recovered or preserved in the Proceedings but also the enhanced value of the Property as a result of such recovery or preservation. This might have occurred if, for example, the strip carried with it a right of way to the Property or if it had a ransom value which would enhance the value of the Property. But such evidence as was before me indicated that not only did the strip of land in question itself have no more than a nominal value (see the judgment of HHJ Green QC) but that its recovery or preservation did not enhance the value of the Property (see letter from Mr Crosbie, Mr Patel's expert in the Proceedings, dated 8 January 2002). The LSC did not adduce any evidence to the contrary effect. Accordingly, I find that in fact the strip of land in question had no more than a nominal value and that its recovery or preservation in the Proceedings did not enhance the value of the property."*

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<sup>29</sup> Paragraph 1(c) of Schedule 2 of the Access to Justice Act 1999



10. If a client has been able to unlock the value of the property as a result of the proceedings, because they are able to sell it having been unable to do so previously, the statutory charge arises on the same basis as in the case of *Curling* (see 2.2 above).
11. In the remaining boundary dispute cases under the LAA 1988, regional offices should ensure that the statutory charge is protected by registering a substantive charge or a restriction **before** the solicitors' bill is paid. If the client disputes the application of the statutory charge, or if it transpires that the increase in the value of the property resulting from the proceedings is very much less than the cost of the funded services, the regional office should consider whether to defer the solicitors' costs under regulation 102 of the General Regulations 1989 or set-off payment under Clause 14.11 of the Standard terms of the 2013 Standard Civil Contract because they failed to report that the client was unreasonably pursuing proceedings that did not justify their cost. Under Regulation 40(3)(b) of the Procedure Regulations, the provider must report *any* aspect of the conduct of the individual which the provider considers relevant to the determination that the individual qualifies for civil legal services. [For 1988 and 1999 Act cases respectively, the solicitor has a duty to report when a client is unreasonably pursuing proceedings with the benefit of public funds under Regulation 67 of the General Regulations 1989 and Funding Procedure C44(a)].
12. If the matter is settled by both sides granting concessions, the regional office should look at the end result of the proceedings and compare it with the worst-case scenario if the client's claim had failed and any claim against them succeeded. The value of the property recovered and preserved should reflect the difference between the two positions.

#### **Life insurance and endowment policies**

13. Where life insurance or endowment policies are recovered or preserved in proceedings the value for the purposes of the statutory charge is the surrender value of the policies at the date of the order or agreement.
14. The parties would normally have used a valuation in the proceedings. If not, or if the legally aided individual or their solicitor no longer accepts the valuation used in the proceedings, the solicitor should get the current surrender value from the relevant insurance company. If the policy has no current surrender value, then there will have been no recovery or preservation for statutory charge purposes.
15. If a policy is linked to a mortgage, so that in practice the legally aided individual cannot surrender it, it is likely that there is no value in the policy on which the statutory charge may arise.

#### **4.4 Land, including houses, flats and the home**

1. The value of the property when it was recovered or preserved may or may not be its value on the date of the order or agreement.



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**The legally aided individual acquires an interest under an order or agreement.**

2. Where the order or agreement provides for land to be transferred to the legally aided individual or declares that the individual has a certain interest in the land, the regional office must treat the value of the property subject to the statutory charge as the value of the legally aided client's interest in the equity recovered or preserved.

**Immediate sale**

3. Where the order or agreement provides for the property to be sold **immediately** and the legally aided individual has a certain share of the proceeds of sale, the value of the property subject to the statutory charge is that of the money **actually received**, not the notional share of the equity at the date of the order. This is the same as the amount of the statutory charge in a 1999 or 1988 Act case. If the court has ordered sale or the proceedings were settled on that basis, the Lord Chancellor would accept a lesser sum than the statutory charge if that was the full value of the net proceeds (this also applies to a 1999 Act case).

**Delay between the order/agreement and actual transfer.**

4. Where a property is transferred to the legally aided individual, e.g. where a house in joint names is transferred to the sole name of the legally aided wife, there is generally some delay between the date of the order and the transfer of title. The transfer from joint names to the client's sole name is not simply a transfer of legal title (which would be a nominal transfer), it is a transfer of the opponent's **legal and equitable interests** in the property. The general rule is therefore that:
  - (a) when the legally aided individual recovers an interest in land; and
  - (b) there is nothing in the order or agreement which delays the recovery; but
  - (c) there nevertheless is a delay,

**the property should be valued as at the date of transfer.** The solicitor should specify the relevant value on form ADMIN1.

**Property in Negative or Low Equity**

5. The mere fact that the legally aided individual's interest in a property recovered or preserved is in negative equity or low equity at the time of recovery, does not prevent the statutory charge from arising and attaching to that interest. The statutory charge is no different from a commercial charge and so is not limited in value by reference to the value of the property recovered or preserved. Consequently, if a property with negative equity is recovered, the statutory charge calculated by reference to s25(2) of the Act (or for 1999 Act cases, the cost of the funded services) will still arise and attach to the individual's interest in the property. The value will have a bearing only on how the individual's interest in a property is calculated, but not on the charge arising. As the charge is paid when it is enforced, or the property sold, the Lord Chancellor's chances of recovering the full amount of the charge is dependent on the property increasing in value over the subsequent years which would create equity out of which the charge could be paid.
6. Furthermore, the Lord Chancellor is not obliged to accept a lesser sum in respect of the statutory charge. For example, if the value of the recovered equity was worth £1,500, and the costs calculated by reference to s25(2) of the Act were £10,000, the Lord Chancellor is not obliged to accept £1,500 in full and final settlement of the charge. Once the charge is registered, the individual's interest is calculated by reference to the £1,500, but the Legal Aid Agency is entitled to recover the full £10,000 plus any accrued interest before taking its charge off the property register voluntarily. If the property were sold, and the amount shown on the completion statement was less than £10,000, then the statutory charge would have to be satisfied from that remainder of the proceeds of sale.

### Contingent Recovery and Mesher Orders (see also 7.3 below)

7. In matrimonial proceedings it is commonly ordered that a party will receive property at some time in the future or on the happening of a future event. The most frequent example is a **Mesher Order**, where the Court allows one party to remain in the matrimonial home until the children reach a certain age or cease full-time education, when the property will be sold and the proceeds divided. The property should be valued in the following ways:
  - (a) the statutory charge arises *at once* in respect of the **party allowed to remain in the home**, as they have recovered or preserved possession of the house and/or part of the equity. The property subject to the statutory charge should be valued *at the date of the order*;
  - (b) the **party removed from the home** has recovered or preserved property similar to a lump sum of money which is payable at a future date, but the value should be the *actual* proceeds *when the individual gets them*.

### Calculating net proceeds

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8. Generally, an order may well specify what items are to be deducted before the "net proceeds are divided". Where the sale carries out what has been ordered or agreed in the proceedings, allowances can be made for the following:
    - (a) costs of sale, including all legal fees and expenses and all estate agents' fees;
    - (b) the mortgage (including arrears of mortgage);
    - (c) any other pre-existing charge on the property;
    - (d) debts which the order expressly provides may be paid out of the proceeds of sale **and** are secured on or are directly referable to the property. This does not include debts which the legally aided individual wants or even expects to be able to discharge out of the proceeds of sale: the statutory charge is a *first charge*. See also 3.10: Recovery must be for the legally aided individual (LAA 1988 cases only).
  
  9. The Legal Aid Agency will accept a valuation after deduction of actual sale costs if an asset is sold immediately to satisfy the statutory charge. This is because the charge takes effect on *actual* recovery and preservation. But it will not do so in respect of "*notional*" sale costs, because a sale may in fact never occur.

#### **Valuing the property subject to the statutory charge where possession has been in issue**

10. If possession of a property is recovered or preserved the statutory charge applies to the legally aided client's share in the equity or proceeds of sale, even if that share has not been increased as a result of the proceedings and even if the extent of the party's shares was not in dispute. Mr Justice Oliver at page 715 of the judgment in Curling stated that generally in cases of recovery of possession: *"It seems to me entirely inappropriate and irrelevant to seek to assess the increment to the claimant of the value of their interest. He has, quite literally, recovered (i.e. got into his hands) property which he would have not had in his hands had it not been for the proceedings"*.

#### **4.5 Setting off gains and losses**

1. Many actions end not in outright victory for one side but provide for damages and costs to be paid from both A to B and B to A. Sometimes the court will expressly order that certain liabilities are to be set off against other liabilities, and sometimes the parties will assume that a set-off operates so that only the net sum is payable.
  
2. Section 16(8) of the LAA 1988 says:

*"The charge created by subsection (6) above on any damages or costs shall not prevent a court allowing them to be set off against other damages or costs in any case where a legal representative's lien for costs would not have prevented it."*

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Although not explicitly stated in s25 of the Act or s10(7) of the AJA 1999 the position is essentially unchanged.

3. This means that if the court itself allows a set-off of costs or damages against other costs or damages, regional offices should take the set-off into account in deciding the value of the property recovered or preserved, or the amount of the costs recovered, for the purposes of valuing the statutory charge.

### **Set-offs of damages**

4. In practice the court will almost invariably order mutual orders for **damages** in the same proceedings to be set off, or the parties will settle on that basis, and only the net sums will be paid. In actions for damages therefore regional offices will accept that, for the purposes of valuing the property subject to the statutory charge, they should only take into account the net damages recovered.
5. Regional offices will not agree to the opponent setting off debts owed or claimed to be owed by the legally aided individual where the actual or alleged debt is not at issue in the proceedings. By virtue of Regulation 15<sup>30</sup>, monies due to the legally aided individual under any order or agreement in the proceedings are payable to the Lord Chancellor, and the opponent should not be allowed to set off as against the Lord Chancellor any other debts that the legally aided individual may owe him. See *Legal Services Commission v Transatlantic Securities* CH D 2000 (Unreported).
6. The principle that the statutory charge attaches only to net gains also applies where a legally aided individual has to pay something for their property. If the legally aided individual has property transferred to them, but has to pay the true market value to the other party, the legally aided client has no chargeable gain, unless possession was also in issue. See section 2.2.
7. Regional offices will not agree to take account of a set-off where different items are in issue. Instead the regional office will treat each item as a separate recovery or preservation.

### **Setting off gains and losses in matrimonial disputes**

8. Where a number of assets have been in dispute in matrimonial proceedings each recovery or preservation is considered separately. For the purposes of determining whether the statutory charge arises, the Legal Aid Agency does not look at the whole of the matrimonial assets and judge whether the client has gained or lost compared with their position before the proceedings. The Legal Aid Agency's approach is likely to be different from that taken by the parties, who may often see the outcome in terms of the proportion of the matrimonial assets, taken as a whole, they have gained or kept.

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<sup>30</sup> See Regulation 87 of the General Regulations 1989 and Regulation 20 of the CLS Costs Regulations.

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9. Where a party has recovered property by 'buying' it from the other side using an asset or part of an asset which was not itself in issue, the statutory charge will arise on the net benefit to the client.

**Example:**

*A husband and wife jointly own a house with equity of £50,000 and a small cottage with equity of £10,000. The legally aided wife seeks both properties and the husband concedes that the wife is entitled to at least a half-share in both the house and the cottage. They eventually settle on the basis of the wife receiving the house in full and the husband receiving the cottage in full.*

*The wife will then contend that whilst she has gained half the house, she has lost half the cottage, and only the net gain should be chargeable. The key to deciding whether this set-off is permissible is to look at the facts to determine whether the wife's share of the cottage really was not in issue. If the husband has accepted at all times that the wife was entitled to a half share of the cottage, the regional office will accept that the value of that half should be treated as the price she has paid for the husband's share of the house, and allow a set-off. One way of looking at the situation is to say that the wife transferred her half-share in the cottage to the husband at the market value of £5,000 and the wife in effect paid this to the husband in return for the half-share of the house.*

*The chargeable recovery for the wife is therefore half the house, £25,000, less half the cottage, £5,000, namely £20,000 (before application of the £3,000 exemption if the certificate was issued before 1 April 2005).*

## 5. Calculating the Statutory Charge

### 5.1 General approach

1. The statutory charge is calculated by reference to s25 of the Act, which provides that amounts described in subsection (2) constitute a first charge on any property recovered or preserved (within the meaning of s25) and any costs payable to the individual by another person in connection with such proceedings or such a dispute. Subsection (2) provides that those amounts are:

- (a) The amounts expended by the Lord Chancellor in securing the provision of services (except to the extent that they are recovered by other means)

*Note: The amount will **not** include: (a) costs incurred by a provider as a result of fulfilling the provider's statutory obligations to a legally aided party with a disability within the meaning of the Equality Act 2010; (b) where a determination is withdrawn (but not revoked) the cost of assessment proceedings – Regulation 6(1) exempts those amounts from the charge on any **property** recovered or preserved by the legally aided party in relevant proceedings or a relevant dispute<sup>31</sup>.*

*In respect of **costs** (as now there is express provision for recovery of costs payable to the individual via the statutory charge under the Act) Regulation 6(2) also provides for a partial exemption so that the following amounts do not constitute a charge on any **costs** payable to a legally aided party under a legally aided party's cost order or costs agreement – (a) any contribution owed by the individual under regulations made under s23 of the Act (payment for services); (b) legal aid only costs.*

- (b) And, other amounts payable by the individual in connection with the services under ss23 or 24. Regulation 22(5) confirms that interest payable under Regulation 25 is an amount for the purposes of the amount of the statutory charge under s25(2). This means that rather than being merely contractual, interest increases the amount of the statutory charge under the Act.<sup>32</sup>

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<sup>31</sup> Other than the cost of drawing up the bill for the purpose of these proceedings under (i) CPR, Part 47 (procedure for detailed assessment of costs and default provisions); or Supreme Court Rules 2009, Part 7(g) (fees and costs).

<sup>32</sup> For AJA 1999 cases the statutory charge is the cost of the funded services, less the costs of assessing the costs, which are exempt from the charge. Regulation 43(1) of the CLS Financial Regulations provides, "the amount of the statutory charge shall be the aggregate of sums referred to in section 10(7)(a) and (b) of the Act" These subsections provide (a) the amount paid to fund civil legal services in the dispute or proceedings in which property was recovered or preserved, less any costs recovered from the opponent or contributions received from the client plus (b) other money due from the client. Regulation 43(b)(i) states that this includes interest payable under regulation 52 CLS Financial Regulations.



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2. The regional office must calculate **the total amount paid out**. This will be:
    - (a) civil funding costs paid out on the legally aided individual's account including profit costs, disbursements, counsel's fees and VAT (less the costs of the detailed assessment of the solicitors' bill);
    - (b) related costs of legal assistance.

The regional office must then deduct sums paid in by the legally aided client or on their behalf. Sums paid in will be:

any contribution paid;

any 'inter partes' costs actually recovered from the other side.

3. Before costs recovered can be credited to the legally aided individual's account. However, this means that they must have been actually paid in and retained by the Lord Chancellor. It is not enough that the court has ordered the other side to pay the costs, or that the other side has agreed to pay them.
4. Where a certificate was issued after February 25, 1994, (i.e., all certificates under the Act and AJA 1999) the solicitor claims his or her costs at prescribed rates (legal aid rates) from the Lord Chancellor, but can recover costs at market rates from the other side (provided a costs order is made in the legally aided client's favour, and the other side is capable of paying a costs order, e.g. is an organisation or solvent individual). The Lord Chancellor does not keep the full amount of the costs recovered at market rates. Where the amount recovered exceeds the amount allowed at prescribed rates, the Lord Chancellor pays the excess to the solicitor: regulation 17(1)(b)<sup>33</sup>.
5. This means that in prescribed rates cases, the 'legal aid only' costs (which are the costs which can never be recovered from the other side, such as the costs of completing legal aid forms, correspondence with the regional office) form a debit on the legally aided individual's account which attaches as a charge to any non-exempt property recovered.

**Example:**

*The legally aided individual obtains an order for costs against the defendant.*

*The costs the other side has to pay are assessed at £1,900 at prescribed rates and £2,300 on an inter partes basis.*

*The 'legal aid only' costs are £500.*

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<sup>33</sup> For AJA 1999 cases see regulation 22(3)(b)(i) of the CLS Costs Regulations; for LAA 1988 cases see Regulation 92(1)(c) of the General Regulations 1989



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*The £2,300 inter partes costs recovered should be paid to the Lord Chancellor. But the solicitor is entitled to the excess of that figure over the prescribed rates costs (£2,300-1,900= £400). This means that the regional office will treat £1,900 as a credit to the legally aided individual's account.*

*The legally aided individual's account is debited with a total of £2,400 (i.e. £1,900 at prescribed rates plus £500 legal aid only costs). This means that the deficit to the Fund is £500 (£2,400-£1,900). The statutory charge arises to that extent on any non-exempt property recovered or preserved.*

6. The regional office cannot calculate the deficiency until the total costs under the certificate(s) have been finalised by assessment. The regional office can accept a solicitors' undertaking that their claim will not exceed a particular sum and allow them to pay the balance to the client, but the actual amount of the deficiency is unknown until the solicitors have submitted a final assessed bill.

### **Legal Help and other Controlled Work costs**

7. *Legal help and help at court costs* in all categories of work usually do not form part of a charge i.e. the statutory charge does not apply to any property recovered or preserved under legal help or help at court where no other level of service is granted in relation to the same case or matter (see Regulation 4(1)(a) and (b))<sup>34</sup>. So in a housing matter, for example, if money or property were recovered under legal help, the statutory charge would not attach. Similarly, the costs of *family help (lower)* also usually do not form part of a charge (see Regulation 4(1)(c) or for AJA 1999 cases see Regulation 43(3)(d) of the CLS Financial Regulations). The costs of *help with family mediation* which is a new form of civil legal service under the Act, similarly do not usually form part of a charge (see regulation 4(1)(e). The costs of *family mediation* never form part of the statutory charge (see Regulation 4(1)(d) or for AJA 1999 cases see Regulation 43(3)(c) of the CLS Financial Regulations).

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<sup>34</sup> See Regulation 43(3)(a) and (b) of the CLS Financial Regulations for AJA 1999 cases. For applications made prior to 1 October 2007 Legal Help and Help at Court costs generally did not form part of the charge, save for Legal Help and Help at Court costs in a family, clinical negligence or personal injury case, which did make a charge on any property recovered under the Legal Help and Help at Court levels of service; these category specific provisions were removed by the CLS (Financial) (Amendment No 2) Regulations 2007.

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8. Regulation 4(1), however, needs to be read carefully along with regulations 4(2) and 4(3). Regulation 4(2) provides that in circumstances where the legally aided individual receives family help (higher) or legal representation in connection with a dispute or proceedings for which legal help, help at court, family help (lower) or help with family mediation was also granted, the charge amount *will include* the costs of these services. (See regulations (4) and 43(4A) of the CLS Financial Regulations for AJA 1999 cases). Family mediation costs will not form part of the charge even if a certificate is subsequently granted in relation to the same matter.<sup>35</sup>
  9. Where a certificate has not been granted but a client preserves or recovers property (which is not their main dwelling) under family help (lower), the statutory charge will arise *if* the claim escapes the standard fee i.e. where the costs in the case exceed the escape fee threshold. A case becomes an escape fee case (and is paid at hourly rates) where the actual costs excluding VAT and disbursements are 3x the standard fee. Regulation 4(3) provides that the amount of the statutory charge will include the sums expended under legal help and family help (lower) which exceed the level which would otherwise have qualified for a standard fee together with all disbursements (see the Payment for controlled work paragraphs below). The statutory charge will in these circumstances be in favour of the provider (refer to regulation 7(2), or for AJA 1999 cases refer to Regulation 45(2) of the CLS Financial Regulations).<sup>36</sup>
  10. Where the statutory charge arises in relation to the costs of legal help, help at court or family help (lower) where money or property has been recovered after a certificate has been granted in relation to the same matter, then the statutory charge is in favour of the Lord Chancellor (regulation 7(1), or for AJA 1999 cases Regulation 45(3) of the CLS Financial Regulations, refers).

### Payment for Controlled Work

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<sup>35</sup> Under section 10(7) of the AJA 1999 the statutory charge arises in respect of the cost of 'funded services' which can include Legal Help. Under the LAA 1988, in calculating the net deficiency of the Fund under a legally aided client's account in any funded matter, the regional office must include "any sums paid or payable for advice and assistance under Part III in connection with those proceedings or any matter to which those proceedings relate" (which used to be called "green form"): Section 16(9) of the LAA 1988.

<sup>36</sup> For applications made prior to 1 October 2007 where the statutory charge arose in relation to the costs of Legal Help and/or Help at Court in personal injury, clinical negligence or family matters only, the statutory charge was in favour of the supplier.

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11. From October 2007 Standard and Graduated Fee schemes replaced the Tailored Fixed Fee (TFF) scheme. The payment annex to the relevant Contract (e.g. 2013 Standard Civil Contract) contains details of payment rates and schemes for civil categories of work. Providers are paid for work properly conducted and claimed in accordance with the terms of the Contract under one of the following payment methods: (a) standard fees, (b) graduated fees, (c) hourly rates. Providers are paid the standard or graduated fee subject to detailed category specific rules unless the claim is for an 'Escape Fee Case'. Subject to category specific rules, where the amount of any claim (as calculated on the basis of hourly rates) exceeds the Escape Fee Threshold for the relevant category, the provider can apply by sending the appropriate form to the Legal Aid Agency for the claim to be treated as an Escape Fee Case. Escape Fee cases are paid on the basis of hourly rates. For example, for family work the escape fee threshold applies at 3x the standard fee; where the case escapes the escape fee threshold it will be paid at hourly rates. If a case is resolved under legal help or help at court the statutory charge does not arise, as set out previously; but if the dispute proceeds to a certificate the costs of all earlier forms of civil legal services count towards the charge. In calculating the amount of the charge, where the costs apply to legal help (and other controlled work) the costs to be included in the calculation are the actual costs of civil legal services which in most cases will be the standard fee.<sup>37</sup>

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<sup>37</sup> Under the TFF scheme the fee was calculated by reference to the firm's average claims from the previous year and therefore varied from firm to firm. Where the statutory charge arose in the supplier's favour, the supplier was entitled to calculate the charge by reference to the actual number of hours worked, charged at legal aid rates. This meant that for an individual case the supplier may have been able to recover in excess of what he would have been paid under the Fixed Fee scheme, directly out of the money he recovered for the client. (The TFF scheme operated between April 2005 to April 2007; a voluntary scheme had operated for certain suppliers from 4 October 2004).

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12. Where money or property is recovered under family help (lower), the statutory charge will not apply unless the costs in the case exceed the escape fee threshold and are claimed at an hourly rate. In these cases the charge will apply to costs above the escape fee case threshold i.e. the amount payable to the provider in excess of the amount which would otherwise have qualified for a Standard Fee, together with all disbursements. The charge will operate in the provider's favour. Therefore, where the statutory charge arises for an escape fee case, the provider will be paid the amount up to the escape fee limit by the Lord Chancellor but the amount in excess of the limit and any disbursements will be met from the monies recovered by the client. Where the charge is in favour of the provider there is discretion for the Lord Chancellor to provide authority to waive the charge under Regulation 8<sup>38</sup> where its enforcement would cause grave hardship to the client or distress or would be unreasonably difficult because of the nature of the property. Unless specified otherwise in the Contract, any decision to waive the Statutory Charge must be referred to the Lord Chancellor (i.e. sent to Legal Aid Agency).
  13. Note, when the charge is in favour of the provider, if the client's main or only dwelling is recovered then Regulation 5(3)<sup>39</sup> makes this property exempt. The home is only exempt from the charge if recovered prior to a certificate being granted; it is never exempt from the charge if recovered under a certificate.
  14. If the case does not conclude under Legal Help or other pre-certificate levels of service, and the individual continues his or her case with the benefit of a certificate, the statutory charge is in favour of the Lord Chancellor, Regulation 7(1).<sup>40</sup> The statutory charge is calculated by reference to the total costs of funding civil legal services i.e. the costs under the certificate (less the costs of assessment), plus controlled work costs<sup>41</sup>

**AJA 1999 Certificates only: Help with Mediation (This guidance applies where certificates were issued prior to October 2007 only. It does not apply to applications for funding made on or after 1 October 2007.)**

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<sup>38</sup> For AJA 1999 cases, see regulation 46 of the CLS Financial Regulations.

<sup>39</sup> For AJA 1999 cases, regulation 44(1)(g) of the CLS Financial Regulations refers.

<sup>40</sup> For AJA 1999 cases see regulation 45(3) of the CLS Financial Regulations: If the case does not conclude under Legal Help or other pre-certificate levels of service, and the client continues their case with the benefit of a certificate, the statutory charge is in favour of the Legal Aid Agency if it attaches to money or property recovered after the certificate is granted.

<sup>41</sup> Under the old TFF scheme prior to April 2007 the provider was paid the fixed fee for the legal help element, but the statutory charge was calculated by reference to the actual work done (so that if this worked out at less than the fixed fee, the client would not be prejudiced by the fixed fee arrangement).

15. Up to October 2007, prior to the introduction of family help, the funding code included additional levels of service under the Family category: *general family help* and *help with mediation*. Although these forms of civil legal services have now been removed, some certificates for general family help or help with mediation issued prior to 1 October 2007 may continue to be in force. Costs incurred under a help with mediation certificate are exempt from the statutory charge. [Prior to the CLS (Financial)(Amendment no 2) Regulations 2007, regulation 43(3)(c) and (d) of the CLS Financial Regulations stated, “... *the amount of the charge created by section 10(7) of the Act shall not include sums expended by the Commission in funding any of the following services ... (c) family mediation; or (d) Help with Mediation.*”] The reason for making these costs exempt was an initiative to encourage clients to resolve their matrimonial disputes in mediation, in order to reduce the workload of the courts.
16. If a legally aided individual received legal help in a family case prior to applying for help with mediation, and was able to resolve the case under help with mediation, then he or she benefited by the costs of the help with mediation being exempt from the charge. However, a small statutory charge, in favour of the Commission *as it was then called* (because of regulation 45(3) of the CLS Financial Regulations) for the legal help costs arises and attaches to the money or property recovered. Ordinarily, it is expected that the client should repay the charge immediately, but if unable to do so, then as a last resort a land charge should be registered against the property to secure the Lord Chancellor’s charge.
17. A common misunderstanding is the view that if a case is resolved under help with mediation, there can never be a statutory charge liability. This is not so, as only the costs of the help with mediation are made exempt from the statutory charge by the wording of regulation 43 of the CLS Financial Regulations prior to the 2007 Amendment regulations, and not the costs of legal help if incurred in the same matter, prior to property being recovered under the certificate. In order for the charge to arise in respect of the legal help costs, the property must have been in dispute at the time the legal help was given. In circumstances where the charge does arise in respect of the legal help costs, then it is in favour of the Lord Chancellor by virtue of regulation 45(3) of the CLS Financial Regulations.

## 5.2 Costs of detailed assessment by the court

1. The costs of detailed assessment proceedings where a determination is withdrawn (but not revoked) are exempt from the statutory charge: regulation 6(1)(b) refers.<sup>42</sup> Where the statutory charge arises, the solicitor’s bill must be split to show the detailed assessment costs. The court’s certificate of detailed assessment will show which costs are attributable to the detailed assessment. Detailed assessment costs include:

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<sup>42</sup> See regulation 40(4) of the CLS Financial Regulations for AJA 1999 cases and regulation 119(2) of the General Regulations 1989 for LAA 1988.

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- (a) the court fee for the detailed assessment;
  - (b) costs allowed by the court for preparing for, and attending at the detailed assessment; but
  - (c) **do not include** the costs of drawing up the bill, including costs draftsmen's fees for so doing: see regulation 6(1)(b)<sup>43</sup>.

### 5.3 Appeals against detailed assessment

1. The solicitor's costs of appealing against a detailed assessment are treated as costs under the legally aided client's certificate but **exempt** from the statutory charge: regulation 6(1)(b)<sup>44</sup>.

### 5.4 Costs recovered in the proceedings

1. Under the S.25(1)(b) of the Act, where civil legal services are made available to the individual, amounts expended in securing those services and any other amounts payable by the individual will constitute **a first charge on any costs payable to the individual by another person in connection with the proceedings or dispute**. In other words, the costs are recouped through the statutory charge.

#### Under the LAA 1988 and the General Regulations

1. The rules on how the Lord Chancellor treats recovered costs for AJA 1999 and LAA 1988 cases depend on whether the recovered costs are attributable to the time when the certificate was in force, or before it was granted, or after it was discharged; and on whether the costs recovered are enough to meet both the solicitor's claim for private client costs and the cost of the funded services.
2. Costs in respect of the period when the certificate was in force are 'sums recovered by virtue of an order or agreement for costs made in favour of a legally assisted person with respect to the proceedings' and must be paid to the Lord Chancellor under section 16(5) of the LAA 1988. According to Section 16(7), costs payable to the Board under Section 16(5) are not 'property' to which the statutory charge can attach.
3. (The reason recouped costs are not subject to the statutory charge under LAA 1988 is that they are taken into account in the process of determining the amount of the deficiency which gives rise to the statutory charge. The net liability is the cost of advice and assistance + representation + mediation, less the amount of any recouped costs; the deficiency + unpaid contributions give rise to the statutory charge: see section 16(6) and (9)).

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<sup>43</sup> See Regulation 40(4) of the CLS Financial Regulations and regulation 119(3) of the General Regulations 1989 inserted by regulation 17 Civil Legal Aid (General)(Amendment) Regulations 2000.

<sup>44</sup> See Regulation 40(4) CLS Financial Regulations and regulation 113 of the General Regulations 1989 as amended by regulation 16 Civil Legal Aid (General)(Amendment) Regulations 2000.



4. The Lord Chancellor pays the provider the excess over prescribed rate levels of the costs incurred under the certificate, together with interest: Regulation 92(1)(c) and (d) of the General Regulations 1989. Under Regulation 92(2)(a) of the General Regulations 1989 the Lord Chancellor retains the costs that have been received to the extent that they represent the prescribed rate costs that were paid out.
5. Section 16(5) of LAA 1988 does not include costs attributable to the same proceedings, but to the period before, or after, the “life” or duration of the certificate. These costs are nevertheless payable to the Lord Chancellor under Regulation 90(1)(b) of the General Regulations 1989 because they are ‘moneys ... received by [the solicitor] under the terms of the order or agreement ...’ Costs not paid to the solicitor under Section 16(5) of the LAA 1988 are ‘property’ under Section 16(7). Subject only to the provisions in Regulation 103 of the General Regulations 1989 for claims in respect of pre-certificate costs, the statutory charge attaches to them to the extent of the deficiency: section 16(7) of the LAA 1988 and Regulation 92(2) of the General Regulations 1989.
6. If private client costs were incurred *before* the certificate was granted or a solicitor has a lien over any documents in the proceedings in respect of his or her costs, Regulation 103(3) of the General Regulations 1989 provides for the Lord Chancellor to pay those costs. If the costs recovered do not cover both the deficiency to the Fund and the solicitor’s claim for pre-certificate costs, Regulation 103(4) of the General Regulations 1989 provides for the recovered costs to be apportioned between the solicitor and the Lord Chancellor. If private client costs were incurred after the certificate was discharged, there is no such provision in Regulation 103(3) or (4) of the General Regulations 1989.

### **Under the AJA 1999 and the CLS Financial and CLS Costs Regulations**

7. Property and costs payable under any order or agreement must be paid to the provider who has to pass them (unless they are exempt) to the Lord Chancellor: Regulation 18(1) and 20(b) of the CLS Cost Regulations. The Lord Chancellor then retains as much as was paid to the provider: Regulation 22(1)(b) of the CLS Cost Regulations. The aforementioned regulation does not say whether that is by operation of the statutory charge or as a separate authority. There is no provision equivalent to the statement in 16(7) of the LAA 1988 to the effect that any costs are not ‘property’ to which the statutory charge attaches, or deducting recovered costs in the calculation of the net deficiency like Section 16(9).
8. Like the General Regulations 1989, the CLS Costs Regulations provide for the payment of a solicitor with a lien on any documents in the proceedings: Regulation 22(4) of the Costs Regulations. If the recovered costs are not enough to cover the amount paid out by the Legal Aid Agency and the claim for pre-certificate costs or the costs of a solicitor with a lien, Regulation 22(7) of the CLS Costs Regulations enables the Legal Aid Agency to apportion them.



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9. The CLS Costs Regulations do not provide for any post-certificate costs to be apportioned along with the costs incurred under the certificate. The Lord Chancellor pays the solicitor the costs assessed at prescribed rates: Regulation 22(3)(a) of the CLS Cost Regulations. As long as the recovered costs are enough to cover what has been paid to the provider for the funded work, the expense of any enforcement, and any claim for pre-certificate costs or costs secured by a lien, the Lord Chancellor pays the solicitor the costs recovered in excess of prescribed rates: Regulation 22(3)(b)(i) of the CLS Cost Regulations; and the interest attributable to them: Regulation 22(3)(b)(iii) of the CLS Cost Regulations.

**Example:**

*A claimant suing for damages for breach of contract brings proceedings privately and becomes legally aided part-way through. She is successful and is awarded £3,000 damages and an order for costs in her favour.*

*The defendant pays the damages but does not have the funds to pay the inter partes costs order and no costs are recovered from him.*

*The damages are paid to the Lord Chancellor. The provider notifies the regional office that their unpaid pre-certificate costs amount to £1,500. The regional office assesses these under Regulation 103(5) or 22(6) on an indemnity basis as £1,000.*

*Legal aid costs have been assessed at £4,000.*

*Clearly the £3,000 paid to the Lord Chancellor is not enough to pay both the solicitor's private costs and to make up the deficiency in respect of legal aid. The money must therefore be apportioned.*

*Since the legal aid costs have a ratio of 4:1 to the assessed private costs the Lord Chancellor will be entitled to 4/5ths of the damages and the solicitor 1/5th.*

*The Lord Chancellor will therefore retain £3,000 x 4/5ths i.e. £2,400 and the solicitors will be paid £3,000 x 1/5th i.e. £600.*

*The remaining deficit to in respect of legal aid will, subject to any arrears of contribution, have to be written off.*

## 5.5 Setting-off costs

1. **Where the legally aided individual owes the Lord Chancellor money under another certificate**, the balancing exercise does **not** give the Lord Chancellor authority to withhold money owed to it from other sums held on behalf of the Claim. But regional offices should not release money to a legally aided individual to the extent that it is known that he or she owes money to the Lord Chancellor. Ideally, the individual's agreement will be sought (that he or she accepts that he or she owes the Lord Chancellor money under another certificate), and the individual will agree to the money owed being deducted from the money held on his or her behalf. Also, if the regional office knows that the legally aided individual owes other money to the Lord Chancellor, either in the form of arrears of contribution or because a certificate was revoked, it is legitimate to retain sufficient sums to satisfy that debt.
2. S25(1)(b) of the Act provides that the statutory charge bites on any costs payable to the individual by another person in connection with the proceedings or dispute i.e. costs are now recovered by way of the statutory charge. For older certificates, an order for costs in favour of a legally aided individual in proceedings when the individual was funded under the LAA 1988 belongs to the Lord Chancellor: see *Debtor v. Law Society* The Times 21 February 1981 and section 16(5) of the LAA 1988. The position is the same under the AJA 1999 because of Regulations 18(1) and 20(1)(b) of the CLS Costs Regulations.

But the court can order a set-off between costs payable to a legally aided individual, and costs or damages in favour of the non-funded party in the same proceedings: *Lockley v. National Blood Transfusion Service* [1992] 2 All ER 589, *Legal Services Commission v Transatlantic Securities ChD* 2000 (Unreported) and *Burkett v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342. Where the court has not ordered a set-off of costs, the regional office will start from the position that the costs awarded against the opponent should be recovered in full. If it is possible or likely that a set-off will arise if the legally aided individual or the Lord Chancellor pursues the costs award, the regional office will consider whether the court would order a set-off of the costs if the parties returned to court, and whether the cost of contesting the point, or requiring the parties to return to court, justifies the costs at stake.

3. The approach which the courts take to setting off legal costs may be summarised as follows:
  - (a) there is a general rule that it is just and equitable for mutual orders for costs to be set off against each other so that parties only bear the net result of orders (see *Lockley v. National Blood Transfusion Service* [1992] 2 All ER 589, where costs awarded against a legally aided individual in interlocutory proceedings were ordered to be set off against damages or costs he stood to win in the substantive proceedings and *Burkett v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342 where opposing costs orders in the proceedings were set off under the court's general costs jurisdiction);

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- (b) the courts will try to make orders which do not favour a legally aided party unfairly, at the expense of a non-legally aided party. They will normally allow a non-legally aided party to have the benefit of set-off so they are only liable for any net liability (see *Cooke v. S* [1967] 1 All ER 299);
  - (c) there may be particular circumstances where the non-legally aided party **ought not** have the benefit of the set-off and, in fairness to the Lord Chancellor, the non-legally aided party should pay costs ordered in favour of the legally aided party in full. An example is where a wasted costs order is made against solicitors to penalise them for negligence in the conduct of the proceedings. In these circumstances, the full extent of that costs order ought to be enforced for the benefit of the Lord Chancellor – and should be resolved between the lawyers in the case, and a set-off would not be appropriate (see *Curry & Co v. Law Society* [1976] 3All ER 832);
  - (d) the non-legally aided party cannot set off a separate claim for damages, not in issue in the proceedings, against the costs they have been ordered to pay: *Legal Services Commission v. Transatlantic Securities* ChD 2000 (Unreported).

## 5.6 Recovery in part of the proceedings

1. The costs of the civil legal services (excluding the costs of assessment) in a legally aided dispute count towards the statutory charge even if recovery is only in part of the proceedings. The wording in section 25(1) of the Act refers to recovery “in proceedings, or any compromise or settlement of a dispute, in connection with which the services were provided”, similarly s10(7) of the AJA 1999 refers to funded services and this means **all** of the work funded by the Lord Chancellor in connection the client’s proceedings or dispute. In a family case, this means, all of the costs arising out of the relationship breakdown.
2. Section 16(6) of the LAA 1988 refers to “the sums payable by the Board in respect of any proceedings” as forming the deficit to the fund, and the House of Lords in *Hanlon v. The Law Society* [1981] AC 124 stated that “proceedings” means the whole of any proceedings.

### Example:

*A legally aided client is unsuccessful at first instance but recovers property following an appeal to the Court of Appeal. All the costs incurred under the certificate, including those at first instance, form part of the statutory charge.*

3. Similarly, the costs of unsuccessful interlocutory applications during the course of the proceedings count towards the statutory charge.

## 5.7 More than one certificate in the same proceedings

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4. If an individual has been issued with more than one legal aid certificate in the same proceedings, either simultaneously or subsequently, costs under the additional certificates count towards the statutory charge. It is the costs incurred in provision of the services, not under the *certificate*, which s25(1) of the Act and s10(7) AJA 1999 refers to.

## 5.8 Certificate withdrawn

5. The statutory charge applies where property is recovered after a determination has been withdrawn (this includes revocation decisions), regulation 10 refers (for AJA 1999 cases see regulation 49 of the CLS Financial Regulations). Therefore if certificate A is issued and withdrawn and later certificate B is issued in the proceedings and leads to recovery or preservation of property, the costs under both certificates A and B will form part of the statutory charge.
6. If a certificate is revoked, and the individual continues the case, either  privately or as a litigant in person, all of the costs paid under the  certificate make a charge on any (non exempt) property recovered in the  proceedings. Furthermore, the individual is liable to repay all of the costs  under their certificate (the partial exemption under Regulation 6(1)(b) will  **not** apply – see section 5.2 above), and so once the solicitor's claim for  costs is authorised, the case should be referred to the **Recovery Services** who may then take steps to recover the costs paid under the  certificate from the client directly.

## 5.9 More than one set of proceedings on the same certificate

1. The statutory charge is calculated by reference to the costs of the funded civil legal services. Accordingly, although a family case might be dealt with in different parts by the court, it is the costs of all of the various parts of those proceedings which make the legally aided individual's statutory charge liability which attaches to any property recovered in those proceedings.
2. The relationship breakdown of an unmarried couple with children is usually dealt with in two parts: an application under the Children Act 1989 and an application under the Trusts of Land and Appointment of Trustees Act 1996. If property is recovered in the Trusts of Land application, then the costs of the funded civil legal services in connection with the dispute (the Children Act application) are included in calculating the individual's charge liability.

## 5.10 More than one defendant in one set of proceedings

1. Certificates often enable proceedings to be taken against more than one defendant and all parties or potential parties to the proceedings must be specified in the certificate (except to the extent that the Director considers it inappropriate to name any of the parties), Regulation 37(2)(f) of the Procedure Regulations.<sup>45</sup>

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<sup>45</sup> See Funding Code Procedure C32 (vi) and Regulation 47 of the General Regulations 1989 for AJA 1999 and LAA 1988 cases respectively.

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2. A single action brought against two defendants forms the same *proceedings*. If damages are recovered from one defendant, but not against the other, all the costs under the certificate form a charge on those damages. This is a result of the application of the Hanlon principle that the whole cost of the proceedings, not just the part of the proceedings where recovery took place, gives rise to the charge.

## 6. Enforcement of the Statutory Charge

### 6.1 General principles

1. The Lord Chancellor has a duty to enforce the statutory charge as soon as reasonably possible after the property has been recovered and the amount of the charge is known. The Lord Chancellor has no *general* discretion to release or delay enforcement of the statutory charge on grounds of hardship, the individual's or their family's welfare, or any such basis: regulation 21<sup>46</sup> provides that "*The Lord Chancellor may enforce the statutory charge in any manner which would be available to a chargee in respect of a charge given between parties to proceedings.*" Regulation 22(1)(a) provides that enforcement of the statutory charge may be postponed if it attaches to a property which by order of the court or agreement is to be used as a home by the client or their dependents (or where money is gained through family proceedings to pay for such a home); but only if the Lord Chancellor is satisfied that the property will provide appropriate security for the charge (Regulation 22(1)(b)) and he considers that it would be unreasonable for the client to repay the amount of the charge (Regulations 21(1)(c)). Postponement of enforcement of the statutory charge is therefore not automatic, and the regional office should only agree to postpone enforcement in the circumstances set out in Regulation 22<sup>47</sup>.

### 6.2 Providers' duties

1. The Legal Aid Agency must do all it can to ensure that a legally aided party's provider protects and enforces the statutory charge in the way the regulations provide. Although the property subject to the statutory charge represents public money, providers, who are not public servants, and who are acting for private individuals, actually deal with the charged property in the first instance. The law and principles of conduct to which they are subject do not impose on them any general duty to protect the statutory charge. Providers' duties to protect the charge are limited to those set out in the regulations.
2. They are:

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<sup>46</sup> For AJA 1999 cases see regulation 51 of the CLS Financial Regulations; for LAA 1988 cases see Regulation 95(2) of the General Regulations 1989.

<sup>47</sup> See Regulations 52 and 52A of the CLS Financial Regulations; Regulations 96 and 96A of the General Regulations 1989.

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- (a) Regulation 13(3)<sup>48</sup> places an obligation on the provider to tell the Lord Chancellor if there is an attempt to avoid the requirement that money payable to the legally aided individual in the proceedings or dispute is paid to that provider. Regulation 13(1) confirms that, *“all money payable to or recovered by a legally aided party in relevant proceedings or a relevant dispute, whether under a court order or an agreement or otherwise, must be paid to the legally aided party’s provider, and only that provider is capable of giving a good discharge for the money.”* (See Regulation 18(1) of the CLS Costs Regulations for AJA 1999 cases).
- (b) Regulation 14(1) provides where money is payable under regulation 13 by a person other than a party to the proceedings, the provider must give that person notice in writing that civil legal services have been made available to the legally aided party by the Lord Chancellor. The notice must state that it is a request that money payable under Regulation 13 is to be paid to the provider and the notice is sufficient authority for that payment.<sup>49</sup>
- (c) Regulation 15(1)(a) and (b) confirms that the provider must without delay<sup>50</sup>: (a) *inform the Lord Chancellor of any money or other property recovered or preserved; (b) send to the Lord Chancellor a copy of any order or agreement under which the money or other property was recovered or preserved”.*
- (d) Regulation 15(1)(c)<sup>51</sup> provides: *“(c) subject to paragraphs (2) and (3) and regulation 16 [which deals with interim payments], pay to the Lord Chancellor all money received by the provider by virtue of regulation 13.”*
3. A provider’s duty to their client requires them to avoid running up excessive costs, to keep property out of the dispute, and to make sure that their client appreciates the cost of the steps they instruct the provider to take, so that the statutory charge is not disproportionate.

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<sup>48</sup> See Regulation 18(3) of the CLS Costs Regulations and Regulation 87 (2) of the General Regulations 1989.

<sup>49</sup> Regulation 19(1) of the CLS Costs Regulations obliges providers to notify the opponent’s trustee in bankruptcy, assignee of deed of arrangement or liquidator that the client is publicly funded where i) money is payable to the client by the opponent in the proceedings; and ii) they have gone bankrupt, entered into a deed of arrangement or are a company in liquidation. For LAA 1988 cases see Regulation 88 (1) of the General Regulations 1989.

<sup>50</sup> See Regulation 20(1)(a) of the CLS Costs Regulations and Regulation 90(1)(a) of the General Regulations 1989.

<sup>51</sup> See Regulation 20(1)(b) of the CLS Costs Regulations and Regulation 90(1)(b) of the General Regulations 1989.



4. Providers vary in their attitudes towards the statutory charge. Some providers will try to minimise their clients' liability to satisfy the statutory charge, where it has arisen, as far as they can under the law. Others accept that they have a responsibility towards public funds and that they should not pursue their clients' interests at the expense of the charge. Although some providers will be prepared to help the Lord Chancellor, regional offices cannot require providers to do anything to secure the statutory charge beyond what is set out in regulations. But where providers fail to comply with the regulations and there is a resulting loss to legal aid, regional offices should set-off payment of the providers' costs under the relevant provisions of the Contract [see clause 14.11 of the 2013 Standard Civil Contract]<sup>52</sup> to the extent that is needed to make up the loss.
5. The provider's duty to report abuses under Regulation 40 of the Procedure Regulations (for AJA 1999 cases see Funding Code Procedures 43 or 44; for LAA 1988 cases, Regulation 67 of the General Regulations 1989) may also be the basis of a regional office setting off the solicitor's profit costs. This may be relevant where the report at the end of the case shows that the value of disputed property did not justify the costs.
6. Clause 14.11 of the 2013 Standard Civil Contract provides: ***"We have the right to set-off any amount payable by us to you under this Contract or otherwise, any amount payable by you to us, under this Contract (including under the Specification) or otherwise. For the avoidance of doubt, when this Contract ends, any obligation to make payment is subject to this right of set-off."*** For AJA 1999 cases concluded and claimed for prior to the latest contract, clause 14.11 of the 2010 Standard Civil Contract and clause 18.1 of the Unified Contract are written in similar terms; in the General Civil Contract, Specification Rule 1.14 is headed "Loss to Fund", and provides, ***"Where you have failed to comply with any provisions of the contract documentation or any applicable legislation and as a result of your default or omission, the fund has incurred loss, the Independent Costs Assessor<sup>53</sup> may, on referral of the matter by the Regional Director, refuse payment on our behalf of all or part of your costs (including any disbursements incurred) in connection with the matter in respect of which such failure occurred until the loss to the fund has been restored. 1. This rule covers situations where a failure to perform the work in accordance with this Contract, the regulations or guidelines has led to financial loss to the fund. 2. An example would be in a certified case where you have failed to take the steps required to protect the statutory charge."***

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<sup>52</sup> For AJA 1999 cases see Clause 14 of the 2010 Standard Civil Contract, Clause 18 of the Unified Contract,/General Civil Contract Specification Rule 1.14. For LAA 1988 cases see Regulation 102 of the General Regulations 1989 (only in relation to profit costs, and not disbursements).

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7. If the firm in question does not have a Contract, (and is acting under a certificate which dates back to the pre-contract regime) **Regulation 102** of the General Regulations 1989 can be used to remedy a loss to legal aid. It does not give the Lord Chancellor power to recoup losses to legal aid from solicitors' payments generally. It contains a power to *defer* payment of the solicitor's claim, subject to certain conditions:
    - (a) it relates only to **profit costs**, not counsel's fees or other disbursements;
    - (b) the solicitor must have **breached** an identifiable regulations;
    - (c) there must have been a **loss to legal aid** as a result of the breach;
    - (d) the claim and the failure to comply with the regulations must relate to the **same dispute**.
  
  8. The Regulation confers the power on the 'independent costs assessor'. There is no **procedure** set out in the general regulations 1989 for the decision to be taken. The procedures set out in subsequent Contracts should broadly be followed, i.e. the regional office should inform the provider that it is considering deferring their costs and should explain
    - (a) which regulation it considers has been breached and
    - (b) why the legal aid fund has suffered a loss as a result.

The solicitors should be invited to agree to this decision, or to seek a review of this decision if they disagree. If the solicitor does not agree to their costs being deferred, the regional office should refer the case to a Independent Costs Assessor to consider whether the provider's costs should be deferred.

### 6.3 Procedure on recovery or preservation

1. With very few exceptions, any money payable to a legally aided party by virtue of an agreement or order made in connection with legally aided proceedings, whether such an agreement was made before or after the proceedings were taken, must be paid to the legally aided party's provider, not to the individual directly: Regulation 13 (1) (for AJA 1999 and LAA 1988 see Regulation 18(1) CLS Costs Regulations and Regulation 87 of the General Regulations 1989 respectively). Where the legally aided party is no longer being represented by a provider, the money must be paid to the Lord Chancellor (see Regulation 12(2)). Only the provider or the Lord Chancellor is capable of giving 'a good discharge' for the money. This means that if the opposing party pays the money directly to the legally aided individual or elsewhere, they would still be treated as owing the money and the Lord Chancellor would be entitled to take proceedings to recover it again.

2. The regulations require all money payable in the proceedings to be paid to the provider or to the Lord Chancellor. This ensures that the money is safeguarded until the regional office can balance the client's account with the Lord Chancellor and determine the amount due under the statutory charge.
3. The exceptions are:
  - (a) **Any periodical payment of maintenance: Regulation 13(2)(a);**
  - (b) **Any money which in accordance with Regulation 11 is not subject to the charge. Regulation 11 deals with money ordered to be paid into and remain in court** and invested for the benefit of the legally aided individual. This will often be the case where the legally aided individual is a child or is under a disability. Regional offices should notify the court in writing of the amount necessary to safeguard the interests of the Lord Chancellor, after obtaining an undertaking from the provider that their costs when assessed will not exceed a stated amount. This secures the statutory charge and the court is free to release the balance to the legally aided individual: see Regulation 11<sup>54</sup>;
  - (c) **For LAA 1988 cases only: magistrates' court proceedings** where costs must be paid to the Justices' Clerk who then pays it on to the Lord Chancellor (Regulation 89(a) of the General Regulations 1989).
4. Regulation 15(2) confirms that the requirement under Regulation 15(1)(c) to pay all money received under Regulation 13 to the Lord Chancellor does not apply to any money that is not subject to the statutory charge by virtue of Regulation 5 (see section 3.12 of this guidance for details of the exceptions to the statutory charge). Regulation 15(3) confirms that the Lord Chancellor can: (a) authorise the payment under 15(1)(c) to be limited to the amount necessary to safeguard the Lord Chancellor's interests; (b) retain after payment of the sum under "(a)" any amount received under the legally aided party's cost order or agreement and (c) pay any other money to the legally aided party. Similarly for AJA 1999 cases: although there is no authority for it in the regulations, the practice has been that regional offices can authorise providers to release money which is exempt from the statutory charge to the legally aided client. Providers should not do so without the authority of the regional office. If a provider releases money without authority, and it later appears that the property is not exempt and there is a loss to legal aid, the regional office should set off payment of the provider's costs.

## 6.4 Payments to the Lord Chancellor

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<sup>54</sup> Regulation 18(2)(b) of the CLS Costs Regulations; regulation 89(b) of the General Regulations 1989.

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1. The money the provider gets on behalf of their client must be paid to the Lord Chancellor in accordance with Regulation 15(1)(c). However where enforcement of the statutory charge is postponed under Regulation 22, Regulation 23 confirms that Regulation 15(1)(c) does not apply and the provider may release money recovered **to buy a home (“purchase money”)**.<sup>55</sup>

### Undertaking as to costs

2. Discretion under regulation 15(3) (see regulation 20(4) of the CLS Costs Regulations) allows a provider to release money to the legally aided party provided the regional office is satisfied that the property will provide sufficient security for the statutory charge and therefore the Lord Chancellor’s interests will be safeguarded. Those interests can only be fully safeguarded if the provider provides a professional undertaking that their costs will not exceed a certain amount, and also, pays that amount in from the client’s damages/recovered money. The solicitor’s undertaking on costs must cover everything which might count towards the statutory charge, so the figure given must include:
  - (a) counsel’s fees;
  - (b) disbursements;
  - (c) VAT;
  - (d) earlier advice and assistance or relevant legal help costs;
  - (e) costs incurred by previous solicitors acting under the certificate;
  - (f) costs under any other certificate issued to the legally aided individual in the same proceedings; and
  - (g) any costs which have not yet been incurred, but may be.

If the solicitor underestimates his eventual costs, then he can be held to the undertaking and not paid anything in excess. His remedy is to recover any shortfall to the statutory charge from the client directly, and to pay this back to the Lord Chancellor so that the remainder of his costs may be paid. The safest option for the solicitor is to base his undertaking as to costs on the costs limitation on the certificate (plus VAT), because the regional office cannot pay the solicitor anything in excess of the costs limitation for the work done under that certificate (save for the costs of assessing the costs, which are exempt from the charge).

3. If the solicitor is for any reason making no claim on legal aid, the undertaking may be given by completing Form CIV CLAIM2. In any other case, where the solicitor may wish to make a claim against the legal aid fund, the undertaking may be given on Form CIV ADMIN1, or even in correspondence with the regional office.

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<sup>55</sup> See regulation 21 of the CLS Costs Regulations.

4. Although the regulations do not contemplate it, the regional office may allow the provider to hold the money, subject to their providing an undertaking not to release it to any other party. This is a sensible course if the money is needed to be held for a short time, pending recovery of costs from the other side, or purchase of a new property in a postponement case.
5. Regional offices should not allow providers to claim costs in excess of the sum they undertook to claim, if the result would be a loss to legal aid, because the regional office has released, or authorised the release of, money or other property that would be needed to satisfy the full amount of the deficiency.
6. If there would be no loss to legal aid, regional offices should allow claims in excess of the undertaking. However, the provider should be reminded that, but for the fact that it caused no loss to public funds in this instance the undertaking would have been strictly enforced.

## 6.5 Enforcement of statutory charge over land

1. In all cases where the property is to be used as a home for the legally aided individual or their dependants, it is possible to postpone enforcement of the statutory charge on land that has been recovered or preserved if it is unreasonable for the client to repay the amount of the charge.
2. Where the Lord Chancellor cannot agree to postpone enforcement of a statutory charge over land, the regional office will ask the legally aided individual to pay in enough money to redeem the charge. The regional office will explain that if the individual does not do so, it will have no alternative but to refer the matter to **Recovery Services** for recovery of the statutory charge. This might happen if the individual recovers an interest in more than one property in the relevant proceedings or dispute.
3. **Recovery Services** will decide whether to take enforcement proceedings, or to agree to secure the Lord Chancellor's interests by registering an interest-bearing charge on the legally aided party's home. It will take a commercial approach, deciding what is the most cost-effective way to secure the Lord Chancellor's interests.

## 6.6 Enforcement of statutory charge on other property

1. There are no express provisions as to enforcement of the statutory charge over types of property other than money or land, such as objects, shares, or insurance policies. All such property is caught by the general rule that the Lord Chancellor has no power to waive the statutory charge or agree to delay its enforcement: regulation 22(1) [see Regulation 52(1) of the CLS Financial Regulations and Regulation 95(2) of the General Regulations 1989].

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2. Like any holder of a charge over someone else's property the Lord Chancellor can take any reasonable steps to enforce the statutory charge. The action necessary will depend on the nature of the charged property. For example:
    - (a) **objects:** the Lord Chancellor is entitled to take possession of the object and arrange for it to be sold.
    - (b) **stocks and shares:** the regional office will arrange for the shares to be sold, but if necessary take possession of the share certificate.
    - (c) **insurance policies:** the regional office will notify the insurance company of the Lord Chancellor's interest and ensure that the policy is surrendered and the proceeds paid to the Lord Chancellor.
  3. Regional offices should take the initial steps in asking the legally aided  party or provider to hand in or sell the property in question. If the legally  aided party or their provider refuses to do so, the regional office must  refer the case to **Recovery Services** for it to take enforcement  proceedings.
  4. The legally aided individual will be given the opportunity to pay off the  statutory charge before any sale of the property in question is forced. If  the individual wishes to pay but needs time to raise sufficient funds, the  property is held securely either by the regional office, **Recovery Services**, or by the provider, subject to the provider undertaking to hold the  property safely to the order of the Lord Chancellor.

## 6.7 Costs of enforcement action

1. Action to enforce the statutory charge may result in costs or expenses, like the fees of solicitors, stockbrokers or auctioneers. Section 24(2) of the Act provides that regulations may make provision for costs incurred in connection with the enforcement of an individual's obligation to make a payment to be recovered from the individual. The regulations do not currently provide for this but it leaves open the possibility of adding administrative expenses (the land registry fee in particular) to the charge. For AJA 1999 cases these costs are not payable out of the Fund under section 5 of the AJA 1999<sup>56</sup>. They do not give rise to a statutory charge under Regulation 23(6) of the CLS Costs Regulations<sup>57</sup> because they are not incurred in enforcing an order or agreement in the funded proceedings.

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<sup>56</sup> Section 6 of the LAA 1988.

<sup>57</sup> Regulation 91(3) of the General Regulations 1989.



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2. If the enforcement is **successful**, as part of the settlement of the enforcement action the legally aided individual may agree that those costs and expenses are taken out of what is recovered. The net sums recovered can then be applied to pay off or reduce the statutory charge, with any balance left over being returned to the individual. But if enforcement action is **unsuccessful**, costs and expenses incurred must be treated as an administrative expense and cannot be paid from legal aid.
  
  3. Where property recovered is situated abroad, it is subject to the statutory charge. In theory the Lord Chancellor is entitled to bring proceedings in the foreign country to recover the statutory charge. But the costs of doing so could be prohibitive and the prospects of success uncertain. In such cases regional offices should not necessarily pursue enforcement action. But they may consider whether the provider should have reported that the difficulties in recovering the charge mean that the legally aided individual was not likely to recover any benefit in the proceedings, and should therefore have reported under regulation 40 of the Procedure Regulations [Funding Code Procedure C43 or 44 or Regulation 67 of the General Regulations 1989]. If the provider did not report, and the result was a loss to the Lord Chancellor, it is likely that the regional office would have grounds for setting off payment of the provider's costs under the relevant provision: Clause 14 of the 2013 Standard Civil Contract<sup>58</sup>.

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<sup>58</sup> For AJA 1999 cases concluded prior to the current contract pre-contract and LAA 1988 cases see: Clause 14 of the 2010 Standard Civil Contract, Clause 18 of the Unified Contract, General Civil Contract Specification Rule 1.14 or regulation 102 of the General Regulations 1989.

## 7. Postponing Enforcement of the Statutory Charge

### 7.1 Postponed enforcement over the home itself

1. When the statutory charge attaches to a house, flat or land which the legally aided party has recovered in the relevant proceedings or dispute, the Lord Chancellor has discretion to postpone enforcement of the charge if it appears that it would be unreasonable for the individual to repay the amount of the charge (regulation 22(1)(c)<sup>59</sup>. These conditions have to apply:
  - (a) it is clear from the Court Order or agreement that the property is to be **used as a home** for the **legally aided individual** (note: therefore generally this will not apply to legal persons) **or their dependants** (regulation 22(1)(a)(i)<sup>60</sup>);
  - (b) a land charge (like a mortgage) is **registered** on the property to secure the statutory charge or equivalent steps taken: Regulation 22(2)<sup>61</sup>;
  - (c) the Lord Chancellor is satisfied that the property will provide appropriate security: Regulation 22(1)(b)<sup>62</sup>.

A statutory charge which is protected by registration on a property is interest bearing automatically (regulations 22(5) and 25).<sup>63</sup>

2. The provider should use CIVADMIN1 to give the regional office the information necessary to determine whether all the conditions are satisfied. If any information is lacking, the regional office will ask the provider either to re-submit the forms, or otherwise supply the necessary details in writing.

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<sup>59</sup> See regulation 52A of the CLS Financial Regulations and Regulation 97A of the General Regulations 1989

<sup>60</sup> See regulation 52(1)(a) of the CLS Financial Regulations and Regulation 97 (1) of the General Regulations 1989.

<sup>61</sup> See regulation 52(1)(c) of the CLS Financial Regulations and Regulations 95(3) and 97(6) of the General Regulations 1989.

<sup>62</sup> See also Regulation 52(1)(b) of the CLS Financial Regulations for AJA 1999 CASES and similar provision for "Adequate security" for the charge in regulation 97(3) of the General Regulations 1989

<sup>63</sup> For AJA 1999 cases see Regulations 52(3) and 53 of the CLS Financial Regulations. In relation to cases under the LAA 1988 only, the legally aided client has to agree on the relevant form that the charge will carry interest (Regulation 97(3) and (4) of the General Regulations 1989).

**Postponing enforcement – continued**

Please supply brief details of your client's annual income:

\_\_\_\_\_

\_\_\_\_\_

If applicable, please supply brief details of the annual income of all proprietors/proposed proprietors of the property:

\_\_\_\_\_

\_\_\_\_\_

Is your client able to borrow funds from any existing mortgagee or other source in order to repay some or all of his or her statutory charge liability?

Yes       No

If yes, please confirm the total amount that can be borrowed: £ \_\_\_\_\_

If no, please set out what steps your client has taken to try to borrow funds from an existing mortgagee or other source. Please attach documentary evidence to demonstrate what steps your client has taken.

3. By "brief details", providers should be general i.e. "Client on income support", "Client on benefit", "£9,500 p/a" will suffice. The regional office simply needs to establish in general terms what the client's ability to repay is likely to be.
4. A common sense approach should be used to determine whether it is unreasonable for the client to repay the statutory charge. A sensible test is "can they borrow from a high street lender?" In the majority of cases, legally aided individuals are going to be on low incomes or benefits or will be in no position to repay the statutory charge at the conclusion of their case, or will not be able to borrow from a high street lender.

## 7.2 Enforcement postponed if money is to buy a home

1. The regional office may postpone **enforcement** of the statutory charge if it attaches to money recovered or preserved in family proceedings if, and only if, it is to be used to buy a home, regulation 22(1)(a)<sup>64</sup>. It must also be unreasonable for the legally aided individual to repay the amount of the charge. Therefore, if the client recovers £200,000 from the proceeds of sale, and their statutory charge liability is £2,500, it would probably be unreasonable for the client to ask for enforcement of the charge to be postponed so that the whole of the £200,000 could be used to purchase a new property.
2. There is **no power** to allow money subject to the statutory charge to be used for other purposes, such as **paying off other debts** or buying other assets. To do so would contravene regulation 22(1)<sup>65</sup>. This is so even if the parties intended or agreed, or the court intended or ordered, that the money was to be used for that purpose.
3. The conditions for postponement of enforcement over money to buy a home are similar to those for postponed enforcement over land, except that the postponement is only possible in certain proceedings. The conditions are:
  - (a) a sum of money has been recovered or preserved which, under the terms of the court order or the agreement is **to be used to** pay for a home for the legally aided individual or his/her dependants: Regulation 22(1)(a)(i)<sup>66</sup>;
  - (b) the recovery has taken place in Family Proceedings: Regulation 22(1)(a)(ii) (<sup>67</sup>;
  - (c) Under Regulation 22(5) interest accrues whether or not the client agrees<sup>68</sup>;
  - (d) Under regulation 22(2) the Lord Chancellor does not have to be able to register its interest, but does have to take steps to protect its interest<sup>69</sup>;

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<sup>64</sup> See Regulation 52(1) of the CLS Financial Regulations, and Regulations 96(3) and (4) and 95(3) of the General Regulations 1989.

<sup>65</sup> For AJA 1999 cases Regulation 52(1) of the CLS Financial Regulations and for LAA 1988 cases Regulations 96(4) and 95(2) of the General Regulations 1989.

<sup>66</sup> Regulation 52 of the CLS Financial Regulations and Regulation 96(1) of the General Regulations 1989

<sup>67</sup> Similar wording applies to Regulation 52(1) of the Financial Regulations and **in specified proceedings** provided for under Regulation 96(1) of the 1989 Regulations.

<sup>68</sup> A similar provision applies to AJA 1999 cases under Regulation 52(3) of the CLS Financial Regulations. For LAA 1988 cases the client agrees in writing, using the Commission's form, that the charge will carry interest (Regulations 96(2) & (3) of the General Regulations 1989.

<sup>69</sup> See Regulation 52(1)(c) of the CLS Financial Regulations. FOR LAA 1988 cases, a land charge can be **registered** on the property: (Regulation 96(3) of the General Regulations 1989.

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- (e) the Lord Chancellor is satisfied that the property will provide **appropriate security**: Regulation 22(1)(b). (For AJA 1999 cases, Regulation 52(1)(b) of the CLS Financial Regulations refers).
4. The regional office acting on behalf of the Lord Chancellor should postpone enforcement of the statutory charge if all the conditions are satisfied and it appears unreasonable for the client to repay the statutory charge.
  5. Although all money subject to the statutory charge must be used "for the **purpose** of purchasing a home" for the legally aided individual or their dependants, these words are taken to include the costs of making the property habitable for the individual and any dependants. As long as the Lord Chancellor is satisfied that the statutory charge will be adequately secured, the money may be used, not only towards the basic purchase price of the new property, but also towards:
    - (a) costs of purchase, including conveyancing and removal fees;
    - (b) reasonable repair work to the structure of the property;
  6. **Carrying out improvements** to the property is not covered, unless it is necessary to meet the *needs* of the legally aided individual or their dependants. A legally aided individual with a disabled child would be entitled to modify the property to meet the needs of the child.

### Proceedings under which postponement is possible

7. Where the legally aided individual has recovered or preserved a *home itself*, the Lord Chancellor's power to postpone enforcement does not depend on the proceedings in which the land was recovered or preserved regulation 22(1)(a)(i)<sup>70</sup>. Where the legally aided client recovers or preserves *money* to buy a home, postponement can only take place in "family proceedings" under regulation 22 (for AJA 1999 cases, Regulation 52 of the CLS Financial Regulations refers). The Lord Chancellor can postpone enforcement even if proceedings were never formally issued, provided the certificate related to "family proceedings".
8. A "family dispute" is defined within Regulation 2 of the Civil Legal Aid (Merits Criteria) Regulations 2012 with reference to certain paragraphs of Part 1 of Schedule 1 to the Act (civil legal services). For AJA 1999 cases "Family proceedings" is defined under regulation 2 of the CLS Financial Regulations as proceedings which arise out of family relationships.

### 7.3 The terms of the order or agreement

1. No particular form of words is necessary in the order or agreement. It does not need to refer expressly to the regulations. But it must make clear that the property will be used as a home for the legally aided individual or their dependants.

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<sup>70</sup> See regulation 52(1)(a) of the CLS Financial Regulations and Regulation 97(1) of the General Regulations 1989.

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2. If there are no such words in the order or agreement the regional office will tell the provider that there is no power to postpone enforcement. The provider has two ways of putting this right:
    - (a) An application to the court for the order to be amended or expanded under the "Slip Rule". This is a general power of the court to correct clerical mistakes in judgments or orders arising from any accidental slip or omission of a non-contentious nature.
    - (b) The solicitors may get a statement signed by or on behalf of both parties that the property is to be used as a home.
  3. There is a Practice Direction dated 19 August 1991 giving a form of words for the purposes of Regulations 96 and 97 of the 1989 Regulations. That wording is as follows:

*"And it is certified for the purpose of the Civil Legal Aid (Statutory Charge) Regulations 2013 [Community Legal Service (Financial) Regulations 2000] [Civil Legal Aid (General) Regulations 1989] [that the lump sum of £X has been ordered to be paid to enable the Petitioner/Respondent to purchase a home for himself/herself (or his/her dependants) [that the property (address) has been preserved/recovered for the Petitioner/Respondent for use as a home for himself/herself (or his/her dependants)]" (amended to reflect the regulations under the Act and AJA 1999) (see Practice Direction [1991]3 All ER, 896).*

#### 7.4 'Or his dependants'

1. The Lord Chancellor may postpone enforcement even if the property will not be a home for the legally aided individual, but instead it will be a home for a dependant or dependants.
2. "Dependent" is not defined in the regulations. Regional offices acting on behalf of the Lord Chancellor will consider whether the person in question really is dependent on the legally aided individual for a home. Providers are most likely to ask to postpone enforcement where the legally aided individual has died leaving a partner or children. The regional office should consider each case on its own facts but should normally treat as a dependant:
  - (a) the client's partner, if substantially dependent on the client's earnings or other resources;
  - (b) adult relative if they are elderly, disabled or for some other reason unlikely to be able to buy their own home;
  - (c) any child or children under 18 or in full-time education.



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## 7.5 The Power to Review a Postponed Statutory Charge

1. Regulation 24 provides an express power to review a decision to postpone enforcement of the statutory charge at any time: (following amendments to the regulations in 2005 this also applies to AJA 1999 and LAA 1988 cases: see regulations 52B(1) of the CLS Financial Regulations and regulation 96B of the General Regulations 1989).
2. The information on pages 4 and 5 of the CIV Admin 1 form will be useful to the Land Charge Department in undertaking a review, providing a starting point for further enquires as to whether it is still reasonable to continue postponing enforcement of the statutory charge. E.g. *"In 2008 when we agreed to postpone enforcing your statutory charge, you told us you were on benefits and were unable to repay. We are now reviewing that decision. Please could you complete the enclosed means form so that we can determine whether you are able to repay the amount of the charge. Unless it appears to us that it would be unreasonable for you to repay the charge, we shall either take steps to enforce the charge or continue to postpone enforcing on condition that you make regular monthly repayments. The repayment conditions will be determined from the information you provide."*
3. There are three possible outcomes provided for by the regulations under the power of review:
  - (a) **Proceed to enforce the statutory charge**, regulation 24(1) provides that where on reviewing the case the Lord Chancellor considers that the conditions set out in regulation 22(1) are no longer satisfied, the charge must be enforced. (For AJA 1999 cases see regulation 52(B)(1)(i) CLS Financial Regulations). For example, the charge was postponed a long time ago, and now the legally aided individual can repay the charge but has refused to do so.
  - (b) **Continue to postpone enforcement** of the charge; regulation 24(2)(b) provides that interest will continue to accrue in accordance with regulation 25. (For AJA 1999 cases see regulation 52B(1)(ii) CLS Financial Regulations). For example the client is on a subsistence benefit and has no other household income or client is retired or has a long term illness.

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- (c) **Continue to postpone enforcement, but on condition that the legally aided individual makes interim repayments.** Regulation 24(2)(a) and (b) confirms that where a decision is made for a further postponement, it may be on such terms and conditions as to repayment by way of interim payments of either capital or interest, or both, as appear to the Lord Chancellor to be appropriate; and interest will continue to accrue in accordance with regulation 25. (For AJA 1999 cases see regulation 52(B)(ii) and (2) CLS Financial Regulations). For example, client is better off than they were at conclusion of their case and is able to make regular repayments of say, £40 a month to clear their liability. The instalment amount that clients repay towards their charges should be set at an amount higher than the monthly interest which accrues; otherwise the client will not see their charge reduce in amount with each payment.

## 7.6 Payment of interest

1. Interest accrues on the statutory charge by virtue of regulation 25, (for AJA 1999 cases refer to regulation 53 of the CLS Financial Regulations). As a matter of good customer service, Regional Offices should try to ensure that clients sign the agreement because this records that they know about the statutory charge and the fact that it is interest bearing.
2. Under the Act (and AJA 1999 for older cases), interest runs from the **date the statutory charge was registered or the date the bill is paid, whichever is later**. This is because the sum interest is calculated on is either the amount outstanding on the legally aided individual's account at the time, or if the value of the property on recovery or preservation is less than the deficiency, "the value of the property recovered at the time of such recovery." See Regulation 25(1)(d). For AJA 1999 cases similar wording is found in Regulation 53(3) of the CLS Financial Regulations<sup>71</sup>. This provision exists so that if the value of the property at the time of recovery is lower than that of the statutory charge, interest does not accrue on the full amount of the charge.
3. For instance, if the equity in a property at the time of recovery was worth £4,000, and the funded services were £7,500, then the Lord Chancellor has a charge worth £7,500 which attaches to the property. Interest is calculated by reference to the £4,000 value of equity. Therefore:
  - (a) If the property is sold soon after the recovery, and the remaining proceeds of sale after the mortgage is repaid is £5,000, then all of this will be subject to the charge, and the Lord Chancellor will not recover all of its outlay.

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<sup>71</sup> For AJA 1999 certificates issued prior to 1 April 2005, Regulation 52(3) refers to – "the value of the property recovered at the time of such recovery, *less the amount of any exemption under regulation 44(1)(d) which would apply were the amount of the charge to be paid*" – i.e. the first £3,000 of any money or the value of any property recovered or preserved in a family case.

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- (b) If the property is sold many years later, and remaining proceeds of sale after the mortgage is repaid is £15,000, then the Lord Chancellor can be repaid the £7,500 principle sum, plus interest which has accrued on £4,000 for the time the charge was postponed.

**Note:**

*Where a legally aided individual recovers a share of a property, such as their former spouse's notional one-half share of the former matrimonial home, and the property is to be transferred into the legally aided individual's sole name, **the Lord Chancellor cannot charge interest until the Order has been implemented** i.e. we can only charge interest once the property is actually in the client's sole name, irrespective of whether a Restriction is registered prior to this.*

*Where the legally aided client preserves a share of equity under an order or agreement then that takes effect **at the date of the order or agreement**, since the opponent's attack has been defeated at that point – there is nothing more to happen.*

**Where no value has been given to the interest in the property recovered**

4. In a case where the providers have not reported the exact amount of the equity which the legally aided individual has recovered, it is appropriate to assume that the value of the property recovered is at least equal to the amount of the provider's costs (less the costs of assessment) because otherwise the private client test would not have been satisfied. This presumption could be rebutted by the legally aided individual producing evidence to demonstrate the value of the property at the time of recovery (i.e. realistic valuation, and mortgage statement from the relevant period).

**Cases under the LAA 1988**

5. For statutory charges to be postponed under the LAA 1988, it was/is a requirement that the client agrees in writing that the charge will be interest bearing (regulations 97(3) and (4) and 96(2) and (3) of the General Regulations 1989). Accordingly, if the client has not signed an interest agreement the Lord Chancellor cannot charge interest. If the client declines to agree to interest accruing on their charge, the Lord Chancellor has to enforce the charge.
6. Interest was introduced with effect on registrations on or after 1 December 1988<sup>72</sup>. Interest on the statutory charge is *simple* rather than *compound*. It runs on the principal amount owing and there is no interest on interest.
7. The **rates** applicable since interest was introduced are:

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<sup>72</sup> Under the Legal Aid (General) (Amendment) (No.2) Regulations 1988 SI 1988 no. 1938, which amended the Legal Aid (General) Regulations 1980, made under the LAA 1974.

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(a)	from 1 December 1988	to	31 December 1991	12%
(b)	from 1 January 1992	to	31 August 1993	10.5%
(c)	from 1 September 1993	to	31 March 2002	8%
(d)	from 1 April 2002	to	30 September 2005	5%
(e)	1 October 2005	to	present	<b>8%</b>

### The date from which interest runs LAA 1988

8. Where the interest agreement is dated before 1 August 1994 (whether or not the statutory charge is subsequently substituted onto a new property): the interest runs from **the date the charge is registered** (regulations 96(3)(b), 97(4) and 99(4) of the General Regulations 1989). This date may be before the solicitors' bill was paid or paid in full. This was quickly seen to work unfairly in cases where the solicitor did not have his bill assessed for many years after the statutory charge was registered. It meant the client was being charged interest on an amount which at the time could not be quantified and so could not be repaid, but which was added to the charge liability once the bill was paid.
9. Where the interest agreement is dated on or after 1st August 1994 the interest runs from **the date of registration** or **the date a bill is paid**, whichever is the later.

### The sum interest is calculated on

10. The statutory charge is calculated by reference to the cost of the civil legal services, less the costs of assessing the supplier's bill (which are exempt from the charge). Accordingly, interest is charged on this sum, **unless** the value of the property was less than the cost of the funded services, in which case, interest is calculated on the lower sum.
11. If a recovered interest in a property is in negative equity at the time of recovery, then the postponed statutory charge is effectively non-interest bearing, because interest is charged by reference to the value of the property at the time of recovery, which is zero if the property is in negative equity then.
12. Likewise, if a recovered interest in a property has a low equity value at the time of recovery of say, £1,000, then interest would be calculated on the £1,000. If the civil legal services cost £5,000, then the client's charge liability would be £5,000 plus interest. So every year, £80 interest would be added to the charge. If after 10 years, the property had increased in value and so the equity had increased to £10,000, the client's statutory charge liability would be £5,000 plus 10 years of interest at £80 per year, making £5,800.
13. Interest runs on an interim bill, provided that property has at that point been recovered and a land charge registered.

### Payments towards the statutory charge and interest

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14. A legally aided client can make payments towards the statutory charge at any time. Any sums paid are first set off against accumulated interest, before they reduce the capital outstanding (regulation 25(2)<sup>73</sup>). Costs are now recovered through the statutory charge under the Act. For AJA 1999 and LAA 1988 cases any costs paid by the legally aided client's opponent are used first to reduce the accumulated interest, then to reduce the capital.

## 7.7 Securing the statutory charge

### Cases granted under the Act and AJA 1999 Cases

1. The requirement under Regulation 22(2) (or Regulation 52(1)(c) of the CLS Financial Regulations for AJA 1999 cases) is that the statutory charge is registered under the Land Registration Act 2002, or that the Lord Chancellor takes equivalent steps. This means that the Lord Chancellor may decide how best to secure the statutory charge and may even agree to a charge being registered in another jurisdiction if doing so secures the charge adequately and is in the Lord Chancellor's interests.

### LAA 1988 Cases

2. Under the General Regulations 1989 the charge can only be postponed if it is registered in accordance with Regulation 95(3). This requirement is **express** in the case of charges over money (Regulation 96(3)(a)) and substitutions (Regulation 98(3)(a)). It is **implicit** in the case of postponement over land.
3. Regulation 95(3) permits the following types of registration:
  - (a) in the case of unregistered land, there must be a **Class B Land Charge** within the meaning of Section 2 of The Land Charges Act 1972, or a **caution against first registration** under s.15 of the Land Registration Act 2002;
  - (b) in the case of registered land, there must be either a **registerable substantive charge** or a **restriction** under s.43 of the Land Registration Act 2002.
  - (c) in the case of land in Scotland, by **recording a standard security** within the meaning of Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970 (see Regulation 95(3A)). The Scottish Legal Aid Board (SLAB) deal with registrations in Scotland on the Lord Chancellor's behalf. The regional office should send the details, together with the Form ADMIN1, to:

Scottish Legal Aid Board, 44 Drumsheugh Gardens, Edinburgh EH3 7SW.

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<sup>73</sup> Regulation 53(2) of the CLS Financial Regulations 2000 and Regulations 99(3) of the General Regulations 1989.

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4. Because of the requirement in the General Regulations that the statutory charge is registered in one of these ways the Lord Chancellor cannot postpone enforcement under the regulations where the legally aided individual has recovered or preserved a home which is:
    - (a) in Northern Ireland;
    - (b) in any country outside the UK;
    - (c) a mobile home (although it may be possible to register a statutory charge on the land where the mobile home is if the legally aided individual owns that land); or
    - (d) a houseboat.
  5. Under the Act and AJA 1999, the Lord Chancellor has discretion as to whether to allow enforcement of the statutory charge to be postponed if a charge can be registered on a property in Northern Ireland. In principle, enforcement of the charge could also be postponed if a security could be registered in a foreign jurisdiction. However, in practice, this step should only be taken if the property which was recovered with the benefit of legal aid is in a foreign country, and registration of a charge there is the only way in which the Lord Chancellor can protect the statutory charge.
  6. Enforcement of the statutory charge cannot be postponed if the client recovers a houseboat or mobile home (see paragraph 7.7.4(c) above). The scheme which the police run for registering houseboats is an anti theft scheme only, designed to help recover a boat if it is stolen.

## 7.8 The requirement of adequate or appropriate security

1. Under Regulation 22(1)(b) (Regulation 52(1)(b) of the CLS Financial Regulations) the Lord Chancellor must consider the security “appropriate”. Under the General Regulations 1989 the property over which the statutory charge is registered must provide adequate security for the charge (Regulations 96(2), 97(3), 98(2)(c) and 98(4)(c)).”
2. The extent of **protection which will be provided by registration** is relevant to whether the statutory charge can be secured. If the statutory charge is protected only by a caution against dealings it can be lost if the owners, for example, take out a second mortgage. (After 13 October 2003, cautions against dealings could no longer be registered, as they were abolished by the Land Registration Act 2002).

### Joint ownership cases

3. The regional office acting on behalf of the Lord Chancellor may not agree to postponement of the statutory charge unless the legally aided individual and any other owner of the property agree to execute a contractual charge in favour of the Lord Chancellor. This is an aspect of ‘adequate’ or ‘appropriate’ security. Regional offices should consider asking for a contractual charge in the following circumstances:
  - (a) where the statutory charge is **very large**;



- (b) where there is **little surplus equity** in the property; and
  - (c) it is reasonable to expect the owners to execute a charge in favour of the Lord Chancellor. It may well be reasonable to expect this if the owners are the legally aided individual and his or her **partner**, less so if they are **unrelated**.
4. If the legally aided individual is buying a property with money subject to the statutory charge the regional office should only agree to postpone enforcement if:
- (a) the property is bought in the **sole name** of the legally aided individual, or
  - (b) **both or all** the buyers execute a charge in favour of the Lord Chancellor.

## 8. The Process of Registering the Statutory Charge

### 8.1 Introduction to Land Registration

1. There are two different systems of land ownership in England and Wales. They are “registered land” and “unregistered land”. Registration is a convenient way of recording who owns a particular piece of land or house, and who else has an interest in that land, whether as a right of way, or a commercial charge. Since 1991, every sale of land to a new owner has to be registered. HM Land Registry is a government agency which is responsible for registering ownership of land in England and Wales, and to guarantee title to registered estates and interests in land for the whole of England and Wales. Eventually, unregistered land will become quite uncommon.
2. Before land registration, property was passed from one person to another by way of a Deed of Conveyance. Ownership of a property was normally established by reviewing those deeds and manually tracing back to see whether the property had been properly conveyed to the current owner.
3. Charges were secured against land by a mortgage company which asked the owner to sign a mortgage deed. The mortgage company would then physically take possession of the deeds to the property. Without the deeds, an owner of unregistered land is not able to sell the property or take out a subsequent mortgage.
4. The now repealed Land Registration Act 1925<sup>74</sup> sought to simplify the system by creating a central Land Register upon which, eventually, all property ownership would be recorded and on which most charges would be recorded. This would mean that simply examining the register for a particular property would reveal both the owner’s identity and whether there were any charges on the property.
5. When the statutory charge attaches to an interest in a property which has been recovered with the benefit of legal aid, the Lord Chancellor’s charge is a third party interest in that property which can be protected by:
  - (a) A registered statutory charge;
  - (b) A contractual charge (if all proprietors agree to the charge being registered);
  - (c) A restriction (which should be used only as a last resort as it only provides that the Legal Aid Agency is given notice that the property is to be sold, and does not give the Lord Chancellor an enforceable interest in the property);

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<sup>74</sup> Replaced on 13 October 2002 by the Land Registration Act 2002.

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6. The effect of registering a charge is that it is enforceable against the owner, any future purchaser or mortgagee of the property if not repaid on sale – which means the future purchaser will not want to purchase the property unless or until the charge is removed from the property register. The Legal Aid Agency acting on behalf of the Lord Chancellor should not remove the charge or restriction until the statutory charge liability and interest is repaid in full. A purchaser or mortgagee will take the property subject to the registered charge if it is not repaid out of the proceeds of sale on the purchase. A charge holder will not be able to take any security in the property that affects a charge that is already registered. Charges normally rank in the order in which they were registered.

### **Jointly owned property**

7. In some circumstances, it is not possible to register a charge. In the first instance, the regional office should try to obtain full payment of the charge from other sources, or ask the legally aided individual and other proprietors to sign a contractual charge in the Lord Chancellor's favour. As a last resort a "restriction"<sup>75</sup> should be registered. Restrictions provide that the property may not be sold unless the Lord Chancellor is given notice of the sale. A restriction does not establish any legal claim over the land – i.e., if the conditions of postponement are no longer met (property not being used as the individual's home), a possession action cannot be brought against the individual to recover the charge, whereas this can be done if a statutory or contractual charge is registered.
8. One of the difficulties for the Lord Chancellor is that if the legally aided client "A" is a joint registered proprietor with her husband "B" and "A" has recovered 50% beneficial interest in the land to which the statutory charge attaches, the Lord Chancellor cannot normally register a charge at the Land Registry as only the legally aided client's share of the property is affected. In the absence of the client being able to repay the charge in full, or client "A" being able to obtain the agreement of husband "B" to sign a contractual charge, the only application that the Lord Chancellor can normally make, in those circumstances, is for a restriction.
9. In practice a restriction (or in the past, a caution against dealings) is more of a deterrent rather than an absolute protection. Most purchasers or mortgagees of land will not proceed whilst a restriction or caution remains outstanding on the Property Register.
10. When property is jointly owned, the owners hold each other's shares on trust for each other. This is called a "trust of land". The Lord Chancellor's statutory charge is a derivative interest which arises under a trust of land and is capable of protection by the Form JJ Restriction if it is not possible to obtain both owners' agreement to enter into a contractual charge in the Lord Chancellor's favour.

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<sup>75</sup> Prior to the 13 October 2002, a "caution against dealings" could be registered to alert potential buyers that the Commission has an interest in a property. Cautions against dealings were abolished by the Land Registration Act 2002 and replaced by a system of notices and restrictions to protect third party interests.

## Unregistered Land

11. If the land is **unregistered** there is a separate system of land registration. A **Class B Land Charge** (as defined by the Land Charges Act 1972) can be registered against the client's name at Land Charges Department in Plymouth (which is the Land Registry office which deals with unregistered land). The Land Charges Department maintains a record of restrictive covenants, rights and mortgages relating to unregistered land. These are registered against the name of the land owner at the time the entry was made, rather than against the land or property.
12. In addition to a Class B Land Charge, or in the alternative if one cannot be registered, a "**caution against first registration**" should be registered at the Land Registry (not the Land Charges Department in Plymouth). This creates a "ghost" title number for the unregistered land at the Land Registry. As all unregistered land is subject to compulsory registration when it is sold or remortgaged, the Lord Chancellor (or rather the Legal Aid Agency acting on behalf of the Lord Chancellor) receives notice from the Land Registry in respect of the Caution Against First Registration and so is able to object to the land becoming registered unless it recovers its charge.

### 8.2 The Difference between Statutory and Contractual charges

1. A statutory charge arises under a statute (an Act of Parliament). A contractual charge only exists by virtue of the legally aided individual's *agreeing* to it as part of a contract.
2. When property is recovered or preserved for a legally aided individual within the meaning of s.25 of the Act (or s.10(7) of the AJA 1999 or s.16(6) of the LAA 1988), the charge arises and attaches itself instantly to the property as a matter of law, without the legally aided individual having to do anything. To register a **true statutory charge** the regional office can now use the online land registry portal (previously the regional office would send the Land Registry a declaration that the charge had arisen set out in a letter called "LETOF52").

3. If money has been recovered which the client wishes to use to buy a property, the statutory charge attaches to this money. If it is not possible for the statutory charge to be paid out of this money and for the client to use the remainder to buy a property, then the Lord Chancellor can postpone enforcing the charge over the money provided the client agrees to let the Lord Chancellor have a contractual charge registered against the property they buy. Because the property which the client purchases has not been recovered with the benefit of the legal aid, it is not caught by s.25 of the Act (or the relevant provisions in AJA 1999 AND LAA 1988). The legally aided individual has to *agree* to sign a **contractual** charge in the Lord Chancellor's favour before the Lord Chancellor will agree to let the client use the money to purchase the property. The money should have been paid to the Lord Chancellor under Regulation 15<sup>76</sup>, or be held by the provider pending the individual finding a property to purchase (Regulation 22(3))<sup>77</sup>.
4. No consent of an existing lender is required to register a **true statutory charge** which arises automatically by law, even if a prior entry on the Register states that the consent of a lender is required. However, if the entry on the Register stated that consent of the lender was required then consent would be needed before registering a **contractual charge**. [Notice under section 49 of the Land Registration Act 2002 will be sent of the statutory or contractual charge to prior mortgage or charge holders listed on the property register – see sections 9.4 and 9.5].
5. Where a legally aided individual recovers or preserves a *share* of a property, such as their former spouse's notional one-half share of the former matrimonial home, and the property is transferred into the legally aided individual's sole name, the Legal Aid Agency acting on behalf of the Lord Chancellor takes the view that it is entitled to register a *statutory* charge on the *whole* property. However if the former matrimonial home remains in the ownership of both former spouses then in the first instance, the client and co-owner should be asked to sign a contractual charge in the Lord Chancellor's favour. If the co-owner will not agree, then the client should be asked to repay the charge in full. If this is not a viable option for the client because of his or her financial circumstances, then as a last resort, the Legal Aid Agency should apply to the Land Registry to register a restriction as the charge only affects the legally aided individual's share of the property.

### 8.3 Beneficial interests/rights to the proceeds of sale: Mesher Orders

1. An order which transfers the former matrimonial home to one of the former spouses on condition that a charge is given to the other spouse not to be enforced until a trigger event occurs, usually the youngest child reaching 18 or finishing full-time education, whichever is later, or on similar terms, is known as a **Mesher Order** after the case *Mesher v. Mesher and Hall* (1973) [1980] 1 All ER 126.

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<sup>76</sup> Regulation 20 of the CLS Costs Regulations refers for AJA 1999 cases.

<sup>77</sup> For AJA 1999 cases see regulation 21(3) CLS Costs Regulations.

2. If the legally aided individual recovers a charge on the matrimonial home (sometimes called a “charge-back” because it is a charge back to a former proprietor), this is a **future right to the proceeds of sale**. The statutory charge does not arise until a trigger event occurs and the charge is paid. This means that by registering a sub-charge on the client’s charge the Lord Chancellor is not actually postponing enforcement of the charge; this simply secures the Lord Chancellor’s interest against a statutory charge which will not arise until a future date. For this reason, interest does not accrue on a sub-charge, because (a) the property has not been recovered
3. The charge could be repaid either by the occupier of the home raising sufficient money to pay the amount secured by the charge, or by the home being sold, so the proceeds of sale is then apportioned between the seller and the legally aided individual with the benefit of the charge. Charge-backs are often expressed to be as a percentage of the proceeds of sale, rather than for a fixed amount, owing to the general trend for property prices to rise.
4. If the property is **registered land**, and the legally aided individual’s interest is protected by a charge, the Legal Aid Agency acting on behalf of the Lord Chancellor should register a **sub-charge** (which is a “charge on a charge”) on the client’s charge. If the legally aided client’s interest is not itself registered as a charge, the regional office should protect the Lord Chancellor’s interest by registering a **restriction** (section 43 Land Registration Act 2002) in respect of the statutory charge on the legally aided individual’s future interest.
5. If the property is **unregistered land**, the Lord Chancellor is not entitled to a Class B charge: (See Land Charges Act 1972, s.17(1) and Perry v. Phoenix Assurance [1988] 3 All ER 60). In these circumstances the best form of protection available is a **caution against first registration**: section 15 Land Registration Act 2002. This type of caution entitles the Lord Chancellor to be served with notice before any application is made to register an interest in the land.
6. In none of these cases may the Lord Chancellor charge interest, as the Lord Chancellor is not postponing enforcement. There is no charge to enforce until the legally aided individual actually gets their share of the proceeds of sale.

#### 8.4 Protection of the Charge by Registration on Land

1. The way the regional office registers the charge on land will depend on:
  - (a) the **nature of the property** that was in issue and recovered or preserved; and
  - (b) whether it is **registered** or **unregistered** land.
2. The property that was in issue and recovered or preserved may be:
  - (a) **land** itself; or



- (b) **money** which is used to buy land or an interest in land; or
  - (c) a **right to a share in the proceeds of sale**.
3. The legally aided individual may wish to own the property:
- (a) in their **sole name**; or
  - (b) **jointly** with a new partner, relative or other person.

(The Regional Office should register a restriction wherever there is a dispute which is delaying registration of a statutory or contractual charge).

## **9. How to register the Charge in particular circumstances**

### **9.1 Who should register the Charge**

1. In most cases, the Legal Aid Agency on behalf of the Lord Chancellor registers a land charge to secure the statutory charge once the individual's legal representatives have reported that a property was recovered.

### **9.2 Interest Agreements**

1. In the past, interest agreements used to be sent to the land registry to be registered with the land charge. From 19 April 2004, the then Legal Services Commission and Land Registry agreed a new work practice whereby interest agreements would no longer need to be sent to the land registry when registering a charge, this continues for the Legal Aid Agency. Interest agreements should be sent to the legally aided individual to be signed, and when returned, should be kept on the file until the charge is registered. It should then be sent to Securities/Land Charges located in 102 Petty France with the bundle of other key documentation concerning the charge.

### **9.3 Property to be transferred to the legally aided individual, solely or with a new partner**

1. The caseworker must check that all the conditions in the regulations are met:
  - (a) the property is to be the legally aided individual's home (or that of a dependant);
  - (b) the order or agreement says so;
  - (c) the legally aided individual and any co-owner of the property have signed and returned the interest agreement;
  - (d) the legally aided individual's new home provides adequate or appropriate security for the charge;
  - (e) the regional office will be able to register the charge or ensure that it is registered.
2. Where property is registered in the client's sole name, register the charge on the land registry portal and copy the land registry reference to the CIS/ CCMS memo pad as a record of the transaction (refer to section 9.5 where property is jointly owned).
3. When the Land Registry registers the Lord Chancellor's charge, it returns a copy of the title information documents (TIDs) to the regional office showing that the application was successful:

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4. The entry that will appear in the register once the Land Registry has registered the Lord Chancellor's charge is "**REGISTERED CHARGE to secure the moneys charged on the land under [section 16(6) of the Legal Aid Act 1988, section 10(7) of the Access to Justice Act 1999 or section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012].**"
  5. **As best practice, the following documentation should be sent to the Land Charge Department, using the appropriate internal memo (FinStat1).**
    - (a) Application for Legal Aid
    - (b) CIV Admin 1 and final order/agreement giving rise to the charge
    - (c) Solicitor's bill of costs
    - (d) Court legal aid assessment certificate (if the costs were assessed by the court)
    - (e) CIV Claim 1
    - (f) Interest agreement
    - (g) TIDs/Office copy of the property register showing the Lord Chancellor's charge registered.

**9.4 Statutory Charge on Registered Property: Legally aided individual is living in the property which was recovered or preserved in the proceedings and on which the charge arises and is the sole owner of that property:**

1. Register the charge on the land registry portal and copy the land registry reference to the CIS/CCMS memo pad as a record of the transaction:
  - (a) No consent or certificate is required in respect of any restriction in the proprietorship register of the title.
  - (b) No interest agreement is to be sent to the land registry.
  - (c) Send notice under section 49 of the Land Registration Act 2002 to prior mortgage or charge holders listed on the property register. This alerts them to the Lord Chancellor's charge and means further lending to the client by the mortgage company does affect the equity to which the Lord Chancellor's charge attaches.

**9.5 Contractual Charge on Registered Property: Legally aided individual buys a new home (with money recovered or preserved or on the sale of the property recovered or preserved) or owns the property jointly:**

1. Check ownership of the property via the land registry portal. If there are two or more proprietors of the land, the charge must be by both proprietors. Send the following documents to the land registry:

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- (a) Land Registry form AP1;
  - (b) Contractual Charge (form CIV ADMIN1 pages 7 and 8);
  - (c) A consent certificate if there is a restriction in the Proprietorship Registrar of the title which requires either consent to a disposition or dealing, or a certificate (check the office copy of the register if you have one).
  - (d) Form J392 is no longer required. The Land Registry will use the Legal Aid Agency's key number to bill the appropriate fee under Scale 2 of the Land Registration Fee Order 2012<sup>78</sup>.
  - (e) Notice under section 49 of the Land Registration Act 2002 to prior mortgage or charge holders listed on the property register. This alerts them to the Lord Chancellor's charge and means further lending to the client by the mortgage company does affect the equity to which the Lord Chancellor's charge attaches.
2. These documents can be scanned and submitted using the document registration service via the land registry portal. If sent by post, there is no need to send anything other than a compliments slip to accompany these documents. No formal covering letter is required, as the Land Registry Offices have all the details they need about this application from the AP1 form. Do not send the interest agreement to the Land Registry Office.

**9.6 Sub-Charge on Registered Land: The legally aided individual has recovered or preserved a legal charge over registered land, usually with the legal and beneficial interest being transferred to the opponent.**

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<sup>78</sup> The 2012 Fee Order provides for a reduction in fees from the 2009 Order – see SCALE 2 fees below.  
NOTE: Where the amount or value is a figure which includes pence, it must be rounded down to the nearest £1.

<i>Amount or value</i>	<i>Fee</i>
£	£
0-100,000	40
100,001-200,000	60
200,001-500,000	80
500,001-1,000,000	120
1,000,001 and over	250

1. Check online whether client's charge is registered. If the client has not yet registered his charge-back, the regional office should ask the individual's legal representatives to put into effect the order giving the client the charge-back or otherwise provide payment proposals. If this fails, then a restriction in the Lord Chancellor's favour could be registered which at least would alert the Legal Aid Agency (acting for the Lord Chancellor) as to when the property was to be transferred to the opponent's sole name and a charge-back granted to the client (the case should be referred to **Recovery Services**).
2. Once the client's charge-back is registered, send the following documents (a) to (e) below to the Land registry. These documents can be scanned and submitted using the document registration service via the land registry portal:
  - (a) Land Registry AP1 form;
  - (b) the declaration that the charge is subject to a sub-charge (LETOF57 on CIS);
  - (c) Form J392 is no longer required. The Land Registry will use the Legal Aid Agency's key number to bill the appropriate fee under Scale 2 of the Land Registration Fee Order 2012
  - (d) No interest agreement is to be sent to the Land Registry
  - (e) No consent or certificate is required in respect of any restriction in the charges register of the title
3. The LETOF57 was changed in April 2013 to say the following:

Dear Sirs

**[Full name, full address, Certificate Reference]  
STATUTORY SUB-CHARGE**

A statutory charge under section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 10(7) of the Access to Justice Act 1999 or section 16(6) of the Legal Aid Act 1988 affecting the charge dated [~CHARGE\_DATE] registered in favour of [proprietor of charge] as entry number [APPROPRIATE ENTRY NO. AGAINST TITLE NO. ~] relating to the land known as [description of property] has arisen. Accordingly, please register the Lord Chancellor's interest against that charge.

Yours faithfully

[SIGNED]

Being a person holding the rank of or equivalent to Civil Service Grade 7 or above.

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4. When Title information Documents (TIDs) are received from the Land Registry, send to Securities/Land Charges with form **STAT1**.

**9.7 Restrictions<sup>79</sup> on Registered Land: The legally aided individual has recovered or preserved an interest in land other than a registered charge or legal title or when the legally aided individual is one of two registered proprietors and the other refuses to sign a contractual charge**

1. The Lord Chancellor is not obliged to postpone enforcement unless the charge can be registered. If one of two joint owners refuses to sign the contractual charge, the regional office acting on behalf of the Lord Chancellor may take the view that the requirement of adequate or appropriate security is not met and pass the case to **Recovery Services** for enforcement. There are, however, a number of situations in which it will be impossible for the legally aided individual to persuade his co-owner to sign the contractual charge. This may occur where the property remains in the joint names of the legally aided individual and his or her former spouse. Provided the legally aided individual has taken reasonable steps to have the co-owner sign the contractual charge, no enforcement action should be taken. Instead a **restriction** should be registered.
2. Restrictions do not provide the same level of security as a charge, and so they should be used only in circumstances where it is impossible for the individual to repay the charge from other sources and where it would be impractical or unfair to refer the matter to **Recovery Services** to enforce the charge.

Check details of ownership of the property via the land registry portal. Where the legally aided individual is the registered proprietor of the property, register the restriction on the land registry portal and copy the land registry reference to the memo pad as a record of the transaction. When the TIDs are received send to securities/land charges. (The Legal Aid Agency on behalf of the Lord Chancellor and Land Registry have agreed a form of wording for the Legal Aid Agency to use, and the restriction now appears in the list of the Land Registry's standard restrictions<sup>80</sup> and is called Form JJ (which means, form of words, - and does not refer to a particular "form"). This says:

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<sup>79</sup> Prior to the Land Registration Act 2002, a caution against dealing would have been registered. Whilst cautions against dealing registered before 13 October 2002 still have effect, it is not possible to register cautions against dealing now. They have been replaced by a system of Restrictions and Notices. You can't use a Notice to register an interest arising under a trust of land (which is what the statutory charge is when it attaches to one of joint owners beneficial share).

<sup>80</sup> See Schedule 4 of the Land Registration Rules 2003 for the complete list of standard wordings. They start with Form A (joint proprietorship).



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**Form JJ (Statutory charge of beneficial interest in favour of Lord Chancellor)**

No disposition of the

*[choose whichever bulleted clause is appropriate]*

- registered estate, other than a disposition by the proprietor of any registered charge registered before the entry of this restriction,
- registered charge dated [date] referred to above, other than a disposition by the proprietor of any registered sub-charge of that charge registered before the entry of this restriction

is to be registered without a certificate signed by the applicant for registration or their conveyancer that written notice of the disposition was given to the Lord Chancellor, at (*address and Lord Chancellor's reference number*).

When property is jointly owned, the owners hold each other's shares on trust for each other. This is called a "trust of land". The Lord Chancellor's statutory charge is a derivative interest arising under a trust of land and is capable of protection by the Form JJ Restriction.

**Note:** *Notice to prior mortgage or charge holders will be sent where a statutory charge or contractual charge is registered, but not for restrictions. Notice of a charge given under the Land Registration Act 2002 will prevent a prior chargee advancing more money on the security of their pre-existing charge which in practice will take priority over the statutory charge. The registration of a restriction does not confer any priority on our charge and hence notification of our restriction is not required.*

**9.8 The property subject to the charge is unregistered land and the legally aided individual is the sole owner**

1. The regional office acting on behalf of the Lord Chancellor will register a Class B Land Charge with the Land Registry's Land Charges Department in Plymouth. The DX number is DX 8249 Plymouth (3). The application will enclose Land Charges Act form K1.
2. The form is signed by a member of staff at the equivalent of Civil Service Grade 7 or above. **It must be followed by the words 'duly authorised signatory' and 'LC234'.**
3. When the TIDs are received send to Securities/Land Charges with form **STAT1.**

4. If the charge affects the interest of one of two joint proprietors, the regional office will not register a Class B Land Charge at the Land Charges Department in Plymouth. The Lord Chancellor cannot register a Class B Land Charge if the legally aided individual is one of joint owners as, in most circumstances, the charge will not apply to the other joint owner. In this case, the best protection for the charge is a caution against first registration at HM Land Registry – see section 9.10
5. If the recovery or preservation was in proceedings in which the client was represented under the 1988 Act, the Lord Chancellor cannot recover interest, and therefore cannot postpone the charge, unless the legally aided individual agrees to interest accruing on their charge liability.

**9.9 Voluntary Charges – (registered by Recovery Services in circumstances where a costs or judgment debtor owes the Lord Chancellor money, and offers a charge against his property to avoid enforcement action which might result in a charging order being made against him<sup>81</sup>)**

1. Use
  - (a) charge form DRU/HMLR01 (approved by the Land Registry under Reference MD772A).
  - (b) Land Registry AP1 form.
  - (c) A consent certificate if there is a restriction in the Proprietorship Registrar of the title which requires either a consent to a disposition or dealing, or a certificate (check the office copy of the register if you have one).
  - (d) No interest agreement is to be sent to the Land Registry.
  - (e) The appropriate fee under Scale 2 of the Land Registration Fee Order 2012.

**9.10 Caution Against First Registration on Unregistered Land: The property subject to the charge is unregistered land and the legally aided individual is either one of two joint owners or is not the owner but is entitled to a share in the proceeds of sale**

2. The Regional Office should register a caution against first registration by sending an application to the appropriate District Land Registry (not the Land Charges Department in Plymouth). The application should be accompanied by the following:
  - (a) Land Registry form CT1. The person making the declaration on that form must be a person holding the grade or equivalent to Civil Service Grade 7. The declaration must be made in the presence of a person empowered to administer oaths.

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<sup>81</sup>Voluntary charges may also be registered by Recovery Services for revocation debts.

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- (b) Form J392 is no longer required. The Land Registry will use the Legal Aid Agency's key number to bill the appropriate Land Registry fee.
3. If the recovery or preservation was in proceedings in which the legally aided individual was funded under the 1988 Act, the Legal Aid Agency cannot recover interest, and therefore cannot postpone the charge, unless the legally aided individual agrees. The regional office will send the individual an interest agreement to sign.
  4. If the legally aided individual recovered or preserved property in proceedings in which they were funded under the Act or the 1999 Act, interest arises by virtue of Regulation 22(5) or 52(3) CLS Financial Regulations. The Legal Aid Agency can recover interest that has accrued to the benefit of the Lord Chancellor without the legally aided individual having to sign an interest agreement.

### 9.11 Delays between recovery/preservation and purchase

1. If there is a delay between money being paid to the provider and completion of the new purchase (usually because the legally aided individual has not found a new property, or a proposed purchase falls through) the regional office should allow the provider to keep the money until completion.
2. If the money has not been used to purchase a home **one year** after the order or agreement under which it was recovered:
  - (a) it must be paid into the Fund: regulation 23(6)<sup>82</sup>. But
  - (b) the regional office has **discretion** under regulation 23(6) to allow a longer period such as is considered reasonable.<sup>83</sup>

### 9.12 Substitutions

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<sup>82</sup> For AJA 1999 cases see Regulation 21(6) of the CLS Costs Regulations; for LAA 1988 cases see Regulation 96(7) of the General Regulations 1989.

<sup>83</sup> See Regulation 21(6) of the CLS Costs Regulations for AJA 1999 cases; for LAA 1988 cases Regulation 7 of the General Regulations 1989 provides a discretion to extend any time limit and therefore to allow more than a year.

1. The Lord Chancellor has **discretion** to release the charge and allow a charge to be **substituted** on a new property where the Lord Chancellor is satisfied that the new property will provide appropriate security for the Charge and the steps set out in Regulation 22(2) are taken to secure the Charge (Regulation 22(3) refers)<sup>84</sup>. A charge can be substituted more than once. The Land Charge Department registers substituted charges. Interest continues to accrue as if the substitution had not taken place (see Regulation 22(5))<sup>85</sup>. The regulations do not require the legally aided individual to put all the proceeds of sale of the first property into the new property. But where there are surplus proceeds the starting point should be that the legally aided individual should use them to repay the statutory charge.
2. The conditions in regulation 22(1)-(3)<sup>86</sup> are:
  - (a) there is a registered **interest-bearing** charge on the existing property;
  - (b) the legally aided individual **agrees in writing** that a charge will be registered on the new property and will bear interest;
  - (c) the Lord Chancellor is satisfied that the new property will provide **appropriate security** for the charge.
3. If all the **conditions** for substitution are satisfied, the Land Charge Department will decide whether it is more reasonable to expect the legally aided individual to pay off the charge, or to allow substitution to proceed. They will take into account all the circumstances, including the legally aided client's finances, being *more likely* to agree to substitution where:
  - (a) the legally aided individual or their dependants would suffer **hardship** if they had to pay off the charge;
  - (b) the move is **necessary** for the legally aided individual's employment, or because the family is growing;
  - (c) any **compassionate** grounds, such as illness or disability in the individual's family.
4. The Land Charge Department will be *less likely* to agree to substitution if the legally aided individual wishes to:
  - (a) **trade up** to a better house or flat;

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<sup>84</sup> See Regulation 52(3) of the Financial Regulations; Regulation 98(1) of the General Regulations 1989,

<sup>85</sup> Regulation 52(3) of the CLS Financial Regulations; Regulation 98(3) of the General Regulations 1989.

<sup>86</sup> Regulation 52(1)–(3) of the CLS Financial Regulations; Regulation 98(1) and (2) of the General Regulations 1989.

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- (b) buy a property **jointly** with a new partner. The Land Charge Department may agree to a contractual charge in favour of the Lord Chancellor, depending on whether the legally aided individual can afford to pay off the charge, taking into account the resources of both partners. Both partners must jointly charge the new property to the Lord Chancellor.
  - (c) **trade down** and buy a cheaper property, using the difference in value to pay off existing debts. If so, the Land Charge Department will expect the legally aided individual to pay off the statutory charge at the same time as the other debts, unless in doing so they would be unable to afford the new property, or would otherwise suffer hardship.

### 9.13 Dealings with registered charges

1. Once the Lord Chancellor has a *registered substantive charge* the legally aided individual and any joint owner cannot sell the property unless:
  - (a) the Legal Aid Agency acting on behalf of the Lord Chancellor consents; or
  - (b) they pay off the charge.
2. Where the charge is protected only by an old *caution against dealings*, the Land Registry has to notify the Lord Chancellor acting through the Legal Aid Agency of any proposed dealings with the land and allow the Legal Aid Agency an opportunity to object before the dealing takes place: Land Registration Act 1925, section 55(1).
3. The land registry will notify the Land Charge Department by email at [Charge@Justice.gov.uk](mailto:Charge@Justice.gov.uk) which is checked on a daily basis in the Land Charge Department. This avoids old style cautions being lost merely because the notice warning of an intended dealing has not been picked up in time.
4. If the Lord Chancellor as proprietor of a charge or caution is asked to consent to a transaction the Land Charge Department will decide whether to agree and if so, carry out the Lord Chancellor's part in the transaction. The Department will make sure that nothing happens that could reduce the protection the statutory charge provides to legal aid.
5. If the legally aided individual wants to transfer the property **from their sole name into joint names** the Land Charge Department:
  - (a) will not agree if the result would be that a full charge was replaced with a caution, but
  - (b) may agree if the legally aided individual and other joint purchaser execute a contractual charge in favour of the Lord Chancellor.

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6. If the legally aided client wants to transfer the property **from joint names into his sole name**, the Land Charge Department may agree unless the legally aided individual is buying out another party, in which case it is reasonable to see whether the individual has sufficient funds to pay off the statutory charge at the same time.
  7. Where the legally aided individual **wishes to borrow money** on the security of the property, and asks if the borrowing can be added to the first mortgage or otherwise take priority over the statutory charge, the Legal Aid Agency must be careful not to put the Lord Chancellor's charge at risk.
  8. The Land Charge Department is *unlikely to agree* to postpone the charge to further borrowing where:
    - (a) the legally aided individual **could borrow enough** to pay off the statutory charge;
    - (b) the Lord Chancellor would **no longer have adequate security** for the charge;
    - (c) the charge would be registered by a **restriction** in Form JJ rather than a **full charge**, or
    - (d) the purpose of the further advance is to pay for anything that is **not a necessity**, such as a holiday, car, home improvements, rescheduling of debts or purchase of a second property, unless the legally aided individual can show that without the advance they would suffer hardship.
  9. The Land Charge Department is *likely to agree* to postpone the charge:
    - (a) for **essential repairs** to the property in order to maintain the fabric, condition and security of the property in a habitable condition. Repairs of this kind are in the Lord Chancellor's interests since they preserve the security for the charge. The Land Charge Department will ask for builders' estimates and surveyors' reports as evidence of the proposed work; or
    - (b) if the loan is being paid by the Dept. Of Work and Pensions (DWP). If so, it is likely to qualify for postponement as the DWP only pay interest on the further advance if the borrowing is for essential repairs or necessities.



## 10. Disputes concerning the statutory charge

### 10.1 General Disputes over the Charge

#### Lost charges

1. If the statutory charge is not registered in time to protect the charge, the regional office can consider whether any of the following remedies is open to it:
  - (a) If the problem is the result of a **mistake at the Land Registry**, the Lord Chancellor can apply for an indemnity from the Land Registry by following the Land Registry's complaints and compensation procedure.
  - (b) If loss has occurred because of the **providers' delay in notifying the Lord Chancellor** that the property has been recovered or preserved, the regional office should consider refusing the solicitor's profit costs under the relevant contract (e.g. 2013 Standard Civil Contract clause 14.11) or deferring payment under Regulation 102 of the General Regulations 1989 for LAA 1988 cases.
  - (c) If a statutory charge is lost because **the legally aided individual has sold the property** subject to the charge before it was been possible to register it, the best solution is for **Recovery Services** to negotiate with the legally aided individual for a contractual charge to be registered against their new home in favour of the Lord Chancellor, or alternatively, to bring proceedings against the individual for the recovery of the money previously secured by the charge.

#### Disputes over priority of the charge

2. The priority of the statutory charge will depend on:
  - (a) what it attaches to,
  - (b) when it was registered, and
  - (c) whether after an attempt to evade the statutory charge, someone else has innocently bought the property subject to it, or lent money on the security of it.
3. If a property subject to a pre-existing statutory charge in favour of a third party has been recovered in proceedings, it is likely that the third party charge has priority over the statutory charge. This is not because the third party charge carries any greater weight or force of law than the statutory charge, but because the statutory charge never attached to the equity in the property which is subject to the third party charge. The legally aided individual only recovered or preserved the balance after that charge.

4. Subject to pre-existing charges, the legal aid statutory charge generally takes priority over other rights and claims. This is because it is by statute a "first" charge over whatever has been recovered or preserved.
5. The statutory charge is a *proprietary* charge. This means that it attaches directly to the *property* recovered or preserved. In relation to that property should have priority over any purely *personal* claims against the owner of the property such as unsecured debts. Note in particular that the statutory charge is not affected by the bankruptcy or an Individual Voluntary Arrangement (IVA) of the client
6. Regulation 22(4)<sup>87</sup> states that "all conveyances and acts done to defeat or operating to defeat, any charge, shall, except in the case of a bona fide purchaser without notice, be void as against the Lord Chancellor." This principle is therefore subject to exceptions which make it of limited value to the Lord Chancellor in practice:
  - (a) There is a general principle of equity that when property is subject to an interest such as the charge, everyone taking the property takes it subject to the charge unless they are a good faith purchaser of the property for value who had no notice of the charge. So the Lord Chancellor cannot treat the evasion of the charge as void if it would mean that a transaction in favour of a bona fide purchaser for value without notice was affected.
  - (b) Rules of priority of rights and interests in land are set out in the Land Registration Act 2002 legislation. Registered charges rank according to the date they were registered, not according to the order in which they are created (see Land Registration Act 1925, section 29). The Regulations are expressly subject to these provisions.
7. Once the statutory charge is registered as a full charge it has priority over any subsequent entry. We cannot assert that it has priority over any full charge registered before the statutory charge.
8. Restrictions over registered land or for Class B land charges over unregistered land give notice of a claim, rather than establishing the legal claim itself. The date the restriction or caution against dealings is registered does not affect the priority of claims to the equity in the property or the proceeds of sale (see Barclays Bank v. Taylor and Another [1973] 1 All ER 752).

### **Disputes with Clients or Providers before reporting**

9. Solicitors and counsel often ask for advice about how the charge will apply in a particular case before they enter into a settlement of an action. Unfortunately it is not unusual for providers to put regional offices under pressure to say whether or not the charge arises when the regional office's response will affect whether or not a settlement can take place and a trial avoided.

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<sup>87</sup> See Regulation 52(4) of the CLS Financial Regulations and regulation 95(4) of the General Regulations 1989.

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10. Regional offices are not able to give this advice in these circumstances. The final decision on the charge can only be made at the end of the case when the regional office has all the information it needs. The Lord Chancellor cannot provide a commitment as to whether the charge will or will not apply on the basis of what may be an incomplete account of the history and outcome of the case. The provider should be aware of the impact the charge will have on their client's position as the case develops, in order to be able to determine what is in their client's best interests and advise the legally aided individual.
  11. The obligation on providers is to get the best possible settlement for their client, primarily without regard to the impact of the statutory charge (see Lord Denning in Manley v. The Law Society [1981] 1 All ER at 411).

### **Disputes with clients or providers after reporting**

12. At the end of a case the regional office will decide whether in its view the statutory charge applies and how it is to be quantified. A decision about the charge is not the exercise of discretion. It is a legal decision to which (in theory) there is only one right or wrong answer. Where providers or clients disagree with regional office's view about the charge they should:
  - (a) First, take the matter up with the regional office. If the certificate is still in force querying the charge will usually be within the scope of the certificate. If there is no certificate the provider will either have to undertake the work privately, free of charge, or as legal help if the client qualifies;
  - (b) Where disagreement persists about the charge and the case raises novel or complex questions (so that the decision is borderline or out of the ordinary), the regional office may refer it to the Central Legal Team for a view on whether the regional office's decision is correct. The request for a review should be accompanied by all the necessary information that will enable the Central Legal Team to reach its own decision. Until this further step has been taken, it would not be reasonable for providers to commence proceedings about the charge and the Lord Chancellor would raise these procedures on the question of costs;
  - (c) Where the matter cannot be resolved without proceedings, the legally aided individual may take proceedings under Part 8 of the Civil Procedure Rules (the alternative procedure for bringing a claim) against the Lord Chancellor seeking a declaration as to whether the statutory charge arises, and if so, its extent.

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13. Decisions as to the statutory charge can also be challenged by way of judicial review proceedings taken in the Administrative Court. However, these are less convenient than straightforward declaratory proceedings and are subject to strict time limits set out in Part 54 of the Civil Procedure Rules. Judicial review proceedings would be the most appropriate remedy where the decision being attacked is a discretionary one, such as a decision not to agree to postpone enforcement of the charge in accordance with the Regulations, or if the legally aided individual wishes to allege that the correct tests have not been applied in determining whether the charge arises.
  14. The legally aided individual can also object to the Lord Chancellor's application to register a charge or restriction under the Land Registration Rules 2003.
  15. The Legal Aid Agency on behalf of the Lord Chancellor takes a number of steps to make sure that legally aided individuals realise that the charge may arise at the end of their case and that eventually, they may have to pay the costs. The legal aid application forms, the letter which accompanies the offer of legal aid, and the Legal Aid Agency's leaflet "Paying for Your Legal Aid" contain warnings about the effect of the charge. But it is the provider's responsibility, as part of their basic duty to advise their client on the conduct of the case, to keep the client informed about the implications for the charge of every step they take in the proceedings.

## 10.2 Redemption of the charge

1. Postponement of enforcement of the charge should be reviewed, and the charge repaid:
  - (a) if the **conditions** for postponement in the regulations are **no longer satisfied**;
  - (b) when the property is **sold**, unless the legally aided individual satisfies the Land Charge Department that it is reasonable for the charge to be transferred to a new property;
  - (c) on the **death** or **bankruptcy** of the legally aided individual.
2. If the legally aided individual **dies**, but a **dependant**, such as a widow or minor child survives them, and the property continues to be a home for the dependant, the Lord Chancellor may agree to continue postponement. But the Lord Chancellor will not agree to continue postponing the charge if the legally aided individual's survivor is not really their dependant, for instance if they are a grown-up child or widow/widower who is capable of raising their own housing costs.

### **No Final Bill**

3. It is not unheard of for providers to delay, sometimes for a very long time, to submit their bill to the court or regional office for assessment. This might happen, for example, in a case where the provider has received payments on account during the course of the case, has fallen out with their client, and the case itself became unexpectedly complex. If there is an unwillingness on the part of the provider to prepare his bill for assessment, this can cause problems if in the proceedings the legally aided individual has recovered a property over which the Lord Chancellor has registered a charge in anticipation of the provider having his costs assessed. It can also cause problems if the legally aided individual has recovered damages which have been paid to the Lord Chancellor pending calculation of the charge. Obviously, no damages can be released until the charge is quantified or the provider gives a professional undertaking that their costs will not exceed a certain amount.
4. Whilst most cases can be resolved in the short term by quantifying the charge by reference to the maximum costs limitation on the certificate plus VAT, this is unsatisfactory in a case where the legally aided individual wishes to redeem their charge in full, in circumstances where he or she is moving house.
5. As a last resort, the Lord Chancellor acting through the Legal Aid Agency has power under the Civil Procedure Rules CPR 47.8 to make an application to the court, using the case number of the case which was funded through legal aid, for an order that the provider commence the detailed assessment procedure by a date to be stated by the court. Usually, the threat of making the application is enough to ensure the provider commences the legal aid detailed assessment procedure, but if not, the case should be referred to the Central Legal Team which can make the necessary application to the court.
6. Paragraph 6.36 of the 2013 Standard Civil Contract Specification addresses the position where a client has a financial interest in a provider's claim and the provider has failed to seek assessment by the Legal Aid Agency or submit its claim following assessment by the court within the relevant time limits. The Legal Aid Agency can serve notice on a provider requiring their claim to be submitted within two months, failing which their claim can be nil assessed.

### **Redemption statements**

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7. Once a case has been passed to the Land Charge Department, it is responsible for issuing redemption statements. But it may be necessary for the regional office to provide a redemption figure if the charge is to be paid off shortly before or after it is registered. Before issuing a redemption statement the regional office must make certain that the provider is not going to submit any further bills under the relevant certificate or certificates or bills are not subject to appeal by the provider, and any other statutory charges relating to the property or individual is taken into account.







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# Appendices

## Appendix 1 - Authorities

### List of authorities

Till v. Till [1974] 1 All ER 1096

Cooke v. Head (2) [1974] 2 All ER 1124

Draskovic v. Draskovic (transcript of judgment 8 December 1980) – Case concerning whether legally aided individual was allowed to let his young children have his share of the property

*Manley v. Law Society* [1981] 1 All ER 401 - Decision of the Court of Appeal covering the principles concerning avoidance or evasion of the charge as well as giving general advice on the duties of solicitors in relation to the charge.

*Hanlon v. Law Society* [1981] AC 12 - This is the key authority in the House of Lords, dealing with the meaning of recovery and preservation and the scope of the charge.

Van Hoorn v. Law Society [1984] 3 All ER 136 – Case where property was recovered in substitution of property referred to in pleadings.

*Curling v. Law Society* [1985] All ER 705 Decision of the Court of Appeal. This authority establishes that the charge may apply even when only possession of the property is in issue.

*Watkinson v. Legal Aid Board* [1991] 2 All ER 953 - Court of Appeal decision concerning calculation of the charge where there is more than one certificate. This case concerns the charge under the LAA 1988, and is arguably wrong in parts as the Court's attention was not drawn to regulation 85 of the General Regulations 1989 which provides that the costs under discharged certificates can make a legally aided individual's charge liability if they subsequently recover property in the same dispute.

*Parkes v. Legal Aid Board* [1996] 4 All ER 271 - This decision establishes that the charge applies where the legally aided individual preserves possession by avoiding an order for sale.

*McKay v. Legal Aid Board* (Unreported) 23 January 1997 - Decision of the Court of Appeal dealing with payments into court.

*Morgan v. Legal Aid Board* [2000] 3 All ER 974 - Chancery Division decision concerning the question of whether property was recovered or procured when it was not in issue, but was dealt with in the companion agreement.

*Cavaliere v. Legal Services Commission* [2003] EWHC 323 (QB)

Elizabeth Cassidy (Administratrix of the Estate of Paul Nevitt deceased) v Stephensons, Legal Services Commission [2009] EWHC 1562 (QB)

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*Kanubhai Patel v. Legal Services Commission* (Unreported) 2 April 2004 Chancery Division

Articles concerning the charge from previous editions of Focus Magazine

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