

Policy on Costs – Legal Services Amendment Act 2006

Introduction

These procedures apply to situations in civil/family cases where:

1. There is an order of costs against a legally aided person.
2. The other party requests the Agency pay costs that the court indicated would have been ordered if the person had not been legally aided
3. Costs are awarded in favour of the legally aided person.

All costs awards from 1 March 2007 are covered by the provisions of the Legal Services Amendment Act.

Legislation

Section 40

- limits the liability of the legally aided person for costs
- establishes that there must be exceptional circumstances for costs to be ordered against a legally aided person
- sets out possible matters the court may take into account in deciding to establish costs against a legally aided person
- provides that the court must specify the amount that it would have ordered as costs but for the limitations of liability
- sets out the approach to costs where the person is mentally disordered and has a next friend or guardian ad litem

Section 41

- requires the Agency to consider, on request, payment of costs that would have been awarded were the person not legally aided
- sets out matters to be taken into account when considering a payment request
- provides for the Agency to recover from the legally aided person the amount it pays if an actual award of costs has been made under s 40
- allows the Agency to pay a lawyer who is not a listed provider

Order of costs against the legally aided person

An award of costs against the legally aided person may specify an amount the aided person has to pay, and must specify what would have been ordered if they were not aided. In making an award, the court must determine that there are special circumstances and may take into account: s 40(3a-f).

Note: these conduct issues will assist the Agency to understand whether to make a payment under s 41 to the other party of an amount up to what would have been ordered. Ideally the court will be quite specific in the costs order.

Implications: If an application is made by the aided person to write off an interim repayment or a repayment because they must also pay a costs award, the conduct issues may help the Agency with the “just and equitable” aspects of this decision.

Making a decision on an application for the payment of costs

If a request for the payment of costs awarded against a legally aided person is received, the following applies

- an application for payment of costs needs to be made by the person in whose favour the order is made using the Agency's form for costs
- the Agency will establish whether an appeal is likely. In such a situation, or if or the matter is partly heard, the Agency will not determine an application for payment of costs until the appeal or the full case has been heard.

In assessing whether it will pay the difference between the amount of costs that would have been ordered if liability were not limited, and the amount actually ordered, the Agency will consider (as set out in section 41)

- the conduct of either party to the proceedings; or
- the courts findings under 40(2); or
- the hardship caused to the applicant if the costs were not paid by the Agency (use the Hardship policy under the Legal Services Act 2000, noting that hardship is not only financial hardship). The Agency has the power to require any person to provide information on the financial circumstances and needs of the applicant for payment of costs (s 41(4)).

The Agency will be guided by the court's findings. These should assist the Agency to determine whether the conduct of the party against whom costs are awarded has caused the litigation to be unnecessarily protracted and difficult, at the expense (financially and/or emotionally and or in terms of time) of the other side. Where this is evident from the court's findings or from other reliable sources, the Agency would be likely to agree to the request.

Where the costs award establishes a specific amount to be paid (i.e. where it is not an award under s 40(5)) a payment of costs by the Agency is considered a debt due to the Agency by the aided person. This debt due is over and above any interim repayment or repayment already established. In this way, the direct costs against the aided person are limited to a level they could reasonably pay now, and other costs are paid by the Agency, to be repaid by the aided person in the same way as an interim repayment or repayment. The Agency would consider a request to write this debt off under its write off policy, taking into account the conduct issues and other relevant findings of the court. In line with the general principle outlined in High Court Rule 47 made under the Judicature Act 1908, the Agency will not pay costs that would have been ordered if these are more than the costs that have actually been incurred by the party seeking a payment of costs.

If the Agency determines that the conduct of the legally aided side caused the proceedings to be unnecessarily prolonged, it may decide to pursue this with the legal aid provider in order to determine whether it will take any action in relation to that provider.

The Regional Manager approves a payment of costs to the other party based on an assessment by the Grants Officer and the recommendation of a specialist adviser. Reconsideration and review provisions apply to all costs decisions

Guidance for specific scenarios

1. The aided person is ordered to pay amount A to a non-aided party (“the other party”). The order also says that amount B would have been ordered if the aided person were not receiving aid.
 - a. The aided person must pay amount A. If the aided party seeks to renegotiate an interim repayment or a repayment as a result of the payment of costs, the Agency would consider this as set out in the repayment policy. A request to write off the interim repayment or the repayment is considered under the write off policy. The conduct and other issues behind the costs award may well make a write off unlikely under the just and equitable provisions.
 - b. The other party can ask the Agency to pay some or all of the difference between amounts A and B. The Agency will consider this request on the basis of the criteria in s 41, that is, the conduct, the court’s findings and hardship. Any amount the Agency pays becomes a debt due by the aided person, on top of any interim repayment or repayment debt already due. The Agency would consider a request not to establish this as a debt due as an application to write off this amount under its write off policy. The conduct and other issues behind the costs award and the justification behind the Agency’s decision to pay the other party may make a write off unlikely under the just and equitable provisions.
2. The order says no amount is required to be paid, but that amount B would have been ordered if they were not an aided person. The other party can ask the Agency to pay up to and including amount B. See 1 b. above.
3. A non-aided party is ordered to pay an aided party. The costs in favour of the aided party are proceeds of proceedings and recoverable by the Agency. The listed provider is required to seek a Deed of Assignment of the costs (assigning the costs to the Agency). The Agency pursues this with the other party as needed. The Agency would consider a request to write off these proceeds (whether or not the aided person has an interim repayment or a repayment) under the write off policy, taking into account the additional costs of litigation attributable to the conduct of other party. A write off may be appropriate if the effect of the conduct of the other party has put the aided person under significant pressure, or if it has materially increased the cost of services and this cost will be borne by the aided person.
4. An aided party (X) is ordered to pay costs to an aided party (Y). The order could be as in 1 or 2 above.
 - a. X may seek to renegotiate an interim repayment or a repayment as a result of the requirement to make the payment of costs. See 1a above
 - b. The costs awarded to Y are proceeds of proceedings and recoverable by the Agency. See 3 above.
 - c. Y may seek payment by the Agency of an additional amount that would have been awarded. See 1b above.

Legislation

Section 40 Liability of aided person for costs

- (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
- (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
- (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
- (a) any conduct that causes the other party to incur unnecessary cost:
 - (b) any failure to comply with the procedural rules and orders of the court:
 - (c) any misleading or deceitful conduct:
 - (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
 - (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
 - (f) any other conduct that abuses the processes of the court.
- (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
- (5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.
- (6) If an order for costs is made against a next friend or guardian ad litem of an aided person who is a minor or is mentally disordered, then—
- (a) that next friend or guardian ad litem has the benefit of this section; and
 - (b) the means of the next friend or guardian ad litem are taken as being the means of the aided person.

Section 41 Costs of successful opponent of aided person

- (1) This section applies if an order is made under section 40 that specifies that an aided person would have incurred a liability, or a greater liability, for costs if that section had not affected his or her liability.
- (2) If this section applies, the party to the proceedings who is prejudiced by the operation of section 40 (in this section the **applicant**) may apply to the Agency in the prescribed manner for payment by the Agency of some or all of the difference between the costs (if any) actually awarded to that party against the aided person and those to which that party would have been entitled if section 40 had not affected the aided person's liability.
- (3) In considering any such application, the Agency must have regard to the following matters:

(a) the conduct of the parties to the proceedings:
(b) the court's findings under section 40(2):
(c) the hardship that would be caused to the applicant if the costs were not paid by the Agency.

(4) For the purposes of subsection (3)(c), the Agency may require any person to furnish information on the financial circumstances and needs of the applicant.

(5) If, having regard to the matters specified in subsection (3) and to any information received under subsection (4), and to all relevant circumstances, the Agency considers that any payment should be made by the Agency to the applicant, it may determine accordingly and must make the payment.

(6) The Agency may recover any payment made under this section from the aided person as a debt due to the Agency, unless the payment relates to an order made under section 40(5).

(7) The Agency may make a payment under this section to a lawyer who is not a listed provider under this Act.