



Legal Aid
Agency

Working with others to achieve excellence in the delivery of legal aid

Help us say yes webinar: initial applications: financial eligibility (means assessment including trapped capital)

Your questions

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Hints and tips

Q: Subject matter of dispute (SMOD): We are told to make sure we include only the assets that may be under attack. How will we know what those are before exchange of financial disclosure? Surely all known assets are potentially under attack?

A: All known assets can potentially be under attack. However, the rules around the SMOD allowance state that this can only be applied to assets that are *specifically* under attack within the proceedings.

- If your client has an asset held in their own name, such as a savings account, unless you can show that the opponent is specifically making a claim against this asset then it cannot be classed as SMOD.
- If an asset is claimed as SMOD but when it comes to the statutory charge decision, is shown not to be SMOD, this could lead to a retrospective capital contribution being requested from your client, even if the charge does not attach.
- In the same way, if an asset is not initially declared as SMOD but upon financial disclosure, it is shown to be SMOD, we can treat it as SMOD at that point, carry out an amended means assessment and refund any capital contribution paid by the client that arose from the asset not having been treated as SMOD.

Q: My client is on a very low income (eligible for a Legal Aid Certificate). He then received money from his mother for car parts and the same sum was paid out for the car parts. This money was classed as income and the client just got too much money in his account. Is it correct that he was no longer eligible to funding?

A: Ideally, we would need to see the specifics of this case to give a definitive answer. However, if the client only received one payment from a relative, then we would usually class this as capital rather than income. If the client was in receipt of regular financial support from his mother and then received this payment, then I can see why it may have been included as income. In this scenario however, you could potentially argue that this payment was a one-off and should therefore not be treated as income or included alongside any other financial support received from that source.

Q: Can you apply the deduction for the main home if the client is not living in the main home?

A: Yes, if the client has been forced out of the property due to domestic abuse then we can still treat the main home as the client's primary dwelling. If the client has gone onto rent another property this will make things a bit more difficult for us to treat the former property as the client's main dwelling, particularly if they are receiving Housing Benefit (or the housing element of Universal Credit (UC) as the client is presenting to either the local authority or the Department for Work and Pensions (DWP), that their current property is

their main dwelling. Another point to consider is, if the client is not passported and is paying rent or board / lodgings elsewhere and we treat the former property as the main dwelling for capital purposes, we cannot then treat the current property as the main dwelling for deduction purposes (e.g. we couldn't apply the main dwelling allowance to one property and give a rental / board allowance for another).

Q: If my client has received financial support on passporting benefit do you add the financial support to the amount received from UC, even if the UC has deductions in their calculation?

A: In short, no. If the client is in receipt of UC and receives regular financial support, this support would be classed as income for which the client is passported. If, however, the client receives a large one-off payment from a 3rd party, that could be classed as capital and can be included in the assessment as such.

Q: If the parties have a joint account why do we have to take both parties income into account when assessing eligibility in a family matter?

A: If the parties are opponents, or have a contrary interest in the proceedings, we would not include the other sides income in the assessment. We would include the full balance of the account as capital within the assessment though, as there are usually no restrictions on the account and the client has full access to the capital held in it.

Trapped capital

Q: If property is not jointly owned and Matrimonial Home Rights (MHR) has been made, how is the property then considered?

A: If the opponent owned the property and our client only had MHR, there would be nothing to assess as legal ownership rests with them. If our client owned the property and the other side registered MHR on it, we would include it in the means assessment, but it would potentially be subject to the SMOD disregard of £100,000 and there would be potential for a trapped capital argument to be made.

Q: We have had many clients on passported benefits that would usually qualify for funding, but the equity in the jointly owned properties has put them out on capital, particularly cases for injunctions with no linked Ancillary Relief so no SMOD on the assessment. We deal primarily with domestic abuse cases and it would have helped hugely if the trapped capital argument had been available for those who were not able to borrow against the property. Does the client have to show that they have tried to borrow or have asked the opponent?

A: In most cases where the client potentially has trapped capital in a property / properties, they will not have to demonstrate that they have tried to borrow monies against their interest in the property / properties. If the client is in receipt of an income-passporting benefit (usually UC) the Legal Aid Agency would accept that lending institutions would not be prepared to offer further lending. A low disposable income for clients not in receipt of an income-passporting benefit would also prevent the need to demonstrate that no further monies would be advanced.

Q: Would a trapped capital argument work if the client jointly owned several properties, or is it just with their main residence?

A: The 'trapped' capital argument would potentially work regardless of the number of properties a client had an interest in. If they can't borrow money against their interest in one property, it's likely they won't be able to borrow money against their interest in any other property.

Q: A client suffered domestic abuse and received legal aid. She has a commercial property in her name and is currently on passporting benefits. She is also at child-care proceedings; would she be eligible for legal aid?

A: If the client is in receipt of an income-passporting benefit there's certainly scope for a trapped capital argument to be made. It doesn't matter that the property is residential or commercial. The type of proceeding is not a big influencing factor either (although it would

be easier to argue that equity in property was trapped in an injunction case than in a children case).



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