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26 July 2006

UPDATE FOR ALL PRACTITIONERS ON LEGAL AID FOR ADULTS WITH INCAPACITY AND MENTAL HEALTH CASES

There were a number of important changes to legal aid legislation in 2005, affecting adults with incapacity and mental health cases. On 1 August 2006, the requirement to assess financial eligibility for some types of civil legal aid applications will change. Solicitors providing advice or representation for adults with incapacity and mental health cases should note the following guidance.

1. ADULTS WITH INCAPACITY

Advice and assistance

The means test for advice and assistance has changed for applicants claiming an interest in the financial affairs, welfare or property of an adult with incapacity under the Adults with Incapacity (Scotland) Act 2000. This was effective from 1 July 2005. The applicant's personal resources are now disregarded. You must assess financial eligibility based on the disposable income and capital of the adult with incapacity.

- Enter the personal details of the person who has the interest in the incapacitated adult's affairs on the AA/APP, but
- enter the incapacitated adult's financial information on the form.

This change aligns the means assessment in such cases more closely with the existing approach for civil legal aid.

Civil legal aid

On 1 August 2006, the requirement to assess financial eligibility for some types of civil legal aid applications will change.

No means test will be applied where civil legal aid is sought by a person claiming an interest in the

financial affairs, welfare or property of an incapable adult in relation to the following proceedings:

- applications for an intervention or guardianship order relating solely to the welfare of the adult
- applications for an intervention or guardianship order relating to a combination of welfare and property or financial affairs.

The applicant still has to meet the merits tests: that there is probable cause and that it is reasonable to make legal aid available. This change only affects applications for civil legal aid made on or after 1 August. All applications made before that date must be assessed on the basis of the incapable adult's financial circumstances.

Where the application relates to an intervention or guardianship order concerned only with property and/or financial affairs, the existing means test in Regulation 14(3) of the Civil Legal Aid (Scotland) Regulations 2002 continues to apply. No other proceedings listed in Regulation 14(3) are affected.

When an application for civil legal aid is made for proceedings covered by this change to remove the financial eligibility test, the applicant does not need to submit any financial information. However, your covering letter and CIV/SOL must clearly explain that the intervention or guardianship order has a welfare component. Any applications which incorrectly claim that the new rules apply will be subject to the normal assessment of the incapable adult's income and capital.

The relevant amendments are to be found in SSI 2005/339 and 2006/325. This is available on the Office of Public Sector Information website at www.opsi.gov.uk. The legislative sections of the Civil Legal Assistance Handbook incorporate the 2005 amendment.

2. MENTAL HEALTH (CARE AND TREATMENT) ACT 2003

A number of changes were made to coincide with implementation of the Mental Health (Care and Treatment) Act 2003 (the 2003 Act):

- Representation of a client in any proceedings before the Mental Health Tribunal for Scotland is funded under ABWOR. No means or merits test is applied by the solicitor or Board. ABWOR is not available for any proceedings under the Act in any other court or tribunal. Appeals to the Sheriff Principal or Court of Session are covered by civil legal aid, subject to the usual means and merits tests. While the means test does not apply to ABWOR, it still applies to advice and assistance.
- Under transitional provisions, ABWOR continues to be available for proceedings under Part V of the Mental Health (Scotland) Act 1984 that had not concluded before commencement of the 2003 Act.
- The definition of a "legal representative" who can sign an application for civil legal aid on behalf of a person who is mentally disordered in terms of the 2003 Act includes a person authorised to act on that person's behalf by the 2003 Act.
- The definition of a "legal representative" who can sign an application for advice and assistance on behalf a person who is mentally disordered in terms of the 2003 Act is unchanged (judicial factor or person authorised to act on the adult's behalf under the Adults with Incapacity (Scotland) Act 2000).
- The definition of a "legal representative" who can sign certain applications for criminal legal aid or legal aid for contempt of court proceedings on behalf of an incapable adult or a person who is mentally disordered in terms of the 2003 Act now includes persons authorised to act on behalf of the

applicant under the Adults with Incapacity (Scotland) Act 2000 or the 2003 Act.

- Where an application for civil legal aid is made by a named person (by virtue of sections 250-254 or 257 of the 2003 Act), we disregard the applicant's resources. We assess the patient's disposable income and capital.
- The reference to "mental disorder" for the purposes of an additional fee under Schedule 6 to the Civil Legal Aid (Scotland)(Fees) Regulations 1989 now relates to the 2003 Act, except where the assisted person had also been mentally disordered within the meaning of the 1984 Act.

The relevant amendments can be found in SSIs 2005/445, 448, 449, 450 and 451. These are available on the Office of Public Sector Information website at www.opsi.gov.uk. The legislative sections of the Civil Legal Assistance Handbook incorporate the amendment.

3. PROCEEDINGS UNDER THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Before the court can grant any Guardianship Orders in terms of the Adults with Incapacity (Scotland) Act 2000, medical reports need to be produced to the court. Many solicitors have been seeking sanction for these reports.

We have been asked whether sanction is needed in these cases. We have decided that you do not need sanction for such medical reports, which are essential to support the case, provided

- they deal with factual issues only and
- they are unlikely to involve unusually large expenditure.

Who to contact if you have any questions:

- Please tell us if the firm or address details we have used are incorrect. You should notify our Receipts and Payments Department in writing of any changes in address or practitioner details. If you have any queries on mailing addresses please contact: *Receipts and Payments on 0131 240 2080*
- If you any queries about any of our mailshots or publications, or to order a Handbook, please contact: *Communications on 0131 240 1985.*
- Copies of forms and leaflets are available from our printers, Stewarts – tel 0131 659 6010. You can also find all of our publications, including this mailshot, online at www.slab.org.uk

