

A step by step guide for completion of AA/Hardship/2

**Solicitor's application where
payments will be delayed or difficult**

**- application under Regulation
16(3)(b)**



Issued June 2004

General

If you need advice on how to complete the form or the information we require to assess the application, please contact the Principal Sums section of the Board's Treasury Department on direct tel 0131 220 1965.

Review process

There is no statutory or regulatory requirement for us to reconsider the refusal of an application under Regulation 16(3). We have set up an administrative process. We are prepared to reconsider an application to review the refusal where you respond to the reasons for refusal. You should submit a letter requesting that we reconsider our decision and address this to the Team Leader, PSUMS section of the Treasury Department.

Where a civil legal aid account has been submitted

It may be helpful for you to note that, where there is a civil legal aid account, we will retain the advice and assistance account and any applications under Regulation 16(3) until we have ascertained whether there has been any preservation or recovery of property. Only then can the advice and assistance account and application under Regulation 16(3) be dealt with. When you submit your advice and assistance and civil legal aid account, it would be helpful if you provided copies of the following documentation:

- the Closed Record or up-to-date pleadings
- any Joint Minute or Minute of Agreement
- the decree
- correspondence regarding the settlement
- values of any property being kept sold or transferred. The values must be as near to the date of decree as possible. The separation date is not a relevant valuation date for determining property recovered or preserved.

How to complete the application form

Section B – Expenses

- **Question 6**

You should give details of the steps you have taken to recover expenses. You should attempt to recover expenses wherever possible. If you make no attempt to recover expenses, please explain. You should have regard to Section 12(3) of the Legal Aid (Scotland) Act 1986 where the hierarchy of payments shows that you should seek payment of your fee from expenses before looking to any property recovered or preserved or the Fund.

Section C - Property

- **Question 1**

In most cases, you will know whether the applicant has recovered or preserved property. If so, you should mark 'X' at 'Yes' and proceed to the next question.

However, circumstances may occur in which you will not be aware of whether the applicant has made a recovery or preservation of property. This may arise where the applicant has withdrawn their instructions and proceeded to represent their own interests or they may have instructed union representation.

You should explain what steps you have taken to contact the applicant to find out whether a recovery or preservation has been made. Where the applicant has not responded to you, you should take all reasonable steps to ascertain whether the applicant continues to reside at the known address or telephone them.

- **Question 2**

You should complete your answers by providing the sufficient information to identify the item of property.

For example:

Capital Sum	£10,000
Ford Mondeo motor vehicle	£ 3,000

- **Question 3**

Please have regard to the list exemptions listed in Regulation 16(2). These are items that we will disregard as property recovered or preserved when assessing an application under Regulation 16(3)(a) or (b). If the applicant has recovered or preserved any of these items we will not insist that your fee is paid from them.

The relevant exemption limits that apply are detailed in the table below.

DATES	CLAWBACK LIMIT
Date of order or settlement is prior to 1 December 2002	£2,500
Date of order or settlement is between 1 December 2002 and 5 April 2003	£4,200
Date of application for A&A or civil legal aid is between 6 April 2003 and 11 April 2004	£4,275
Date of application for A&A or civil legal aid is between 12 April 2004 and the date of the next amendment	£4,395

If you submit an application under Regulation 16(3) and the property listed is exempt then we will refuse your application for this reason and will arrange for your account to be paid from the fund. We will issue a letter to you confirming that the property was exempt.

- **Questions 4 & 5**

We have asked these questions to ascertain whether the value of the items is realisable and whether the applicant has control over their sale.

- **Question 6**

Please explain what steps have been taken to enforce payment since the agreement or order was made. Why has the property not been distributed as per the agreement or order? If you have not taken any steps to enforce the agreement or order, you must explain the reason(s) for this. You should have regard to Section 12(3) of the Legal Aid (Scotland) Act where the hierarchy of payment shows that you must seek payment of your fee from property recovered or preserved before looking to the Fund.

If payment of your fee cannot be obtained without causing hardship or distress to the applicant, you should complete an application under Regulation 16(3)(a), using form AA/HARDSHIP/2.

Section D - Account

- **Question 2**

You should complete this question by providing a full breakdown of the total fees and outlays claimed, including VAT. Do not only complete the 'Total' box.

- **Question 3**

Expenses

If there has been a subsequent grant of civil legal aid then the expenses section should be completed as 'Nil'. Section 17 (2A) of the Legal Aid (Scotland) Act 1986 provides that expenses recovered must be sent to the Board. They are unavailable for use as payment of your advice and assistance account.

Property recovered or preserved

The property recovered or preserved section should be completed where only part of the property recovered or preserved is to be used to pay your fee. The Board has the power to disregard a part of any property recovered or preserved.

Where you have taken all reasonable steps and payment of all of your fee cannot be made without unreasonable difficulty or delay, you should insert 'Nil' as the amount of property recovered or preserved that is to be taken into consideration for payment of your fee.

Example:

The applicant received a share of a pension of £10,000 which will not be paid for ten years and £5275 in cash. The first £4275 of the cash sum will be disregarded as it is exempt. The sum of £1000 remains to be taken into consideration. As the pension will not be realised for ten years, you should complete the property recovered or preserved section by stating that the amount of £1000 is the sum to be used for payment of your fee.

Amount claimed from the Fund

Once you have subtracted the amount of contribution, expenses and property recovered or preserved from your total fee, the amount left should be completed at 3(b) as this is the amount that you are claiming from the Fund.

Section E – Steps taken to obtain payment and nature of unreasonable difficulty or delay

Please consider the terms of the guidelines issued. These provide details of the issues to be taken into consideration when assessing applications. The test in Regulation 16(3)(b) contains two parts.

- You must have taken all reasonable steps to obtain payment and
- it must be shown that you cannot receive payment without unreasonable difficulty or unreasonable delay.

You must give full details of what steps you have taken to recover payment. It is not enough to have written a single letter of demand. The outcome of any attempts you have made should be stated. If no steps have been taken to obtain payment, you must give good reason for this.

The second stage of the test should then be addressed. You should give full details of the difficulty or delay in obtaining payment. Is it because you will have to wait for some time before payment can be obtained or is it because of the nature of the property?

Section F –Declaration

You should read the declaration and sign and date the form.