



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

**Draft Legal Aid (General) (Amendment)
Regulations (Northern Ireland) 2012**

10 May 2012

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr Peter Weir
Mr Jim Wells

Witnesses:

Ms Angela Ritchie	Department of Justice
Mr Paul Andrews	Northern Ireland Legal Services Commission

The Chairperson: I welcome Angela Ritchie from the public legal services division of the Department of Justice and Paul Andrews from the Northern Ireland Legal Services Commission.

Mr Paul Andrews (Northern Ireland Legal Services Commission): I will say just a few words, because I feel that I am wearying the Committee with this subject. Effectively, the statutory charge is a common law jurisdiction mechanism, which claws back to the legal aid fund those moneys that are expended in costs from which people have secured a successful property or money but for which the costs are not met by the other side. It is a well-established practice in civil law. It is used in personal injury claims for any small amount of money that was not met by the other side. Technically, it would be, perhaps, an unused expert's report or something of that nature.

There is a difference in matrimonial cases, particularly with divorce and ancillary relief. In such cases, there is a practice of not awarding costs against anyone, so each party effectively bears their own costs. Legal aid provides assistance to those who are financially eligible to pursue their divorce and ancillary relief. They can get a share of a property or money, but they do not get their costs paid, so the legal aid fund has to pay for their costs.

The current proposal is common in these islands. It proposes that when someone is successful in securing assets, be they money or property, and their costs are not paid, they are responsible for reimbursing the legal aid fund for the money that is spent on them. In such cases, legal aid, in a sense, acts as a loan to enable people to prosecute their divorce and ancillary relief and then pay it back so that the legal aid fund can assist others in similar circumstances.

At present, the current exemptions to that provision deal with periodic payments, such as maintenance payments for a spouse or children, but exclude instances in which there is a transfer of assets, be they money or property. The proposal is to make no change whatsoever to a situation in which periodic payments are being made for the maintenance and upkeep of a spouse or children but to make a change that, when money or property assets are recovered, they are now part of the statutory charge.

In previous appearances before the Committee, we discussed whether that would have an adverse impact on individuals who perhaps found themselves in difficult situations. We attempted to provide a number of levels of assurance to members to attempt to win your favour on the proposal. One assurance was that, if the main asset is a house in which someone is living and retains an interest, the commission does not, and will not, enforce the sale of that house. It will seek an agreement with an individual to pay periodic contributions to us, with the fallback to the public purse being that a charge is placed on that house, so that if people do not honour those payments, they can be recovered, as and when a property is sold. In a previous evidence session, I said that, in a sense, it is not dissimilar to what the Assembly did with rate relief, in that someone could defer payment to a later date. We also wanted to assure the Committee that we were introducing a cushion of £3,000, which would mean that we would be the most generous of the jurisdictions in that the first £3,000 that someone got would be exempt from the statutory charge. So, if someone had a £5,000 legal bill and got £3,000 at the end of the case, then the £3,000 would be exempt and they would not have anything to pay. The legal aid fund would pick up the difference. However, if they got £10,000 and the legal aid bill was £7,000, they would keep £3,000 and pay us back the £7,000.

I said at the first evidence session, although it was not met with universal acclaim, that one thing that concerns the commission is that the assets of people of significant means are disregarded, as if they do not exist, because they are in dispute between the parties. So, you can have people of quite considerable means who qualify for legal aid and can get significant assets out of the ancillary relief process but the legal aid fund cannot recover any of the costs of those cases. The commission's viewpoint is that there is something fundamentally wrong with that approach because they are getting legal aid only because the assets were disregarded in the first instance.

We are trying to introduce a system that will provide a modest and future-based income stream for the commission because the moneys that the commission would recover through that mechanism are additional moneys for the legal aid fund to spend on other cases. If we cannot create such a revenue stream through, perhaps, a widening of the statutory charge, then it will become increasingly difficult to have the coverage of scope and entitlement that people currently enjoy under the legal aid scheme.

I have tried to distil two previous evidence sessions into one for your assistance. We have provided examples in the most recent information pack. We tried to provide examples that indicate to the Committee that there are a very wide range of scenarios in which the statutory charge can apply. It should not be presumed that it is the lady remaining in the house who is exposed to the charge. There are a whole range of scenarios, which we have tried to illustrate for the Committee. However, I have wearied you long enough and I suspect that I should just take your questions on this matter.

The Chairperson: The solicitors' costs in all those cases are what struck me most. They are all tragic, of course, but the legal expense of going through those disputes is significant.

Mr Andrews: It is indeed, Chair, and part of the reason for that is that the majority of those cases fall in the High Court, so you are automatically ramping up the level of expenditure by virtue of that. Dare I say, that then leads to taxation by the taxing master — but let us not go back there, please. However, that is the reality of the system. I am not making an argument for a different way of doing divorce. That is a broader conversation for MLAs to consider. I think we are just dealing with the way the system currently works.

Mr Wells: Having read this paper, I am determined to remain a faithful, devoted husband. Some of the figures are shocking, surprising and worrying.

Mr Andrews: May I point out, Mr Wells, that I do not decide how much money people get in the divorce settlement?

Mr Wells: Certainly, I do not want to be involved of any of these, I can tell you. I am being entirely facetious, by the way. Does every jurisdiction grant legal aid for divorce proceedings? I ask because the availability of legal aid often prompts people to go straight to the nuclear option rather than trying to sort it out more amicably, such as a fixed agreement settled in a solicitor's office. Does everybody automatically throughout, for instance, the UK and Ireland pay legal aid for divorce settlements?

Mr Andrews: Your point is well made. Broadly speaking, the system in Scotland is very similar to ours, and Angela will, of course, correct me at any point. England and Wales have a slightly different system in respect of undefended divorces; they do not tend to get legal for that area of work. In other matters of divorce, however, there can be some eligibility. I think the difficulty, Mr Wells, is one that will become evident in your consideration of the access to justice review, because in England and Wales the proposals were to remove legal aid for practically anything that looked in any way family or matrimonially orientated. The review set its face against that. Again, there is a mixed bag, but there is a general availability of legal aid for divorce matters.

Ms Angela Ritchie (Department of Justice): Yes; legal aid is available in Scotland, here and in the South of Ireland to pursue divorce and ancillary relief proceedings. England is different, but sometimes there are differences in substantive law between the jurisdictions that play into the availability of legal aid and so on. For instance, my understanding of the system in England is that one does not have to go to a court, let alone the High Court in London, in order to obtain a divorce. If I was lucky enough to be married to Paul Andrews here beside me, and we both, as adults, agreed that our time was up, and we would be happier apart, we would not have to go to court to obtain a divorce. The only people who are going to court there are people who are in dispute about the breakdown of the marriage.

Mr Wells: Does the Legal Services Commission still pay out if the parties have been unable to show that they have exhausted all other routes available? In other words, can they go straight to the High Court, or must they go through all the normal negotiations to try to have a clean break and a settlement without all of this?

Mr Andrews: With the exception of England and Wales, which Angela dealt with, people in the other jurisdictions can go straight to court. In the Republic of Ireland, for example, they have got quite an interesting pilot scheme going on in one of the court venues whereby they have brought together a mediation facility in the court with a legal aid system. They try to divert people who are interested in engaging in active mediation to resolve their issues, or effectively to negotiate their settlement. Again, if people do not want to go down that route, they have the option of going straight to court.

Mr Wells: So, in Northern Ireland, if you want to go straight to the High Court, and you have not gone through any of the other mediation facilities, can you do that?

Mr Andrews: There is no requirement to —

Mr Wells: Is that not an obvious way of trying to divert as many people out of the High Court as possible: to insist that they must show evidence of having gone through well-established procedures that often divert people away from the High Court? In my experience, by the time it gets to the High Court, it is guns at dawn.

Mr Andrews: It is too late.

Mr Wells: Things are really very bitter, and I wonder if that is not a terrible drain on the taxpayer that we have that option at the moment?

Mr Andrews: Well, my plea to you is "Can I get my proposal through before we go back to the other proposal?", because I think the commission agrees with your position; we would like to have earlier, less expensive, but perhaps more importantly, less painful experiences, particularly for children who have to go through the consequences of these relationships. Angela, through her work on the access to justice review, has been heavily involved in that.

Ms Ritchie: In fact, we will be coming to you with advice very shortly about the Minister's preliminary decisions in respect of the access to justice review recommendations. I hope that I am not speaking out of turn, but one of those —

Mr Andrews: May be.

Ms Ritchie: — may be to put measures in place to encourage mediation for the right cases at the right time. I completely agree with Mr Wells' observation that, two years down the line, when allegations of bad behaviour have been made by both sides, it may be too late in the day to get a successful meeting. We need to get in there early to identify that the marriage is over, see what we can agree on and identify what is in dispute between us.

Mr Wells: The reason I ask is because I have letters to your predecessor, Mr Andrews, about cases where one side has legal aid and the other does not. That puts the plaintiff with legal aid in an incredibly strong position.

Mr Andrews: That is why this proposal is important; if you have two privately paying people involved in a divorce, they can fight for as long as they want as long as they are prepared to pay the price that their fight involves. At the moment, the commission corporately and I personally accept your proposition that, because there is no private-client reality, to use a jargon expression that the commission would use, the person in receipt of legal aid is not subject to the same discipline as a privately paying client. Under our proposal, if someone wants to pursue a divorce in the most difficult and protracted way that they can, whatever they get out of it, they will pay for the privilege of conducting themselves in that way.

Mr Wells: Yes, but the case that I have with you involves a gentleman who paid over £110,000 for his legal costs. His estranged wife paid nothing, because she had legal aid. Even with what you propose, he will still be out a vast amount of money in comparison to her.

Mr Andrews: I accept that proposition, but we can only change things in the context of existing legislation. As Angela said, without anticipating what the Minister might bring to the Committee next month, I suspect that his proposals will speak to the core of your issue. I accept that we are tinkering at the edges, but it is an important adjustment to make at this point.

Mr Wells: The fact that he would have got back roughly £9,598 would have been of very little solace to him, given that he spent one hundred and one grand to the deficit. Unless you deal with that issue, there is an incentive for the person on legal aid to string it out as long as possible because she or he can starve out the other party, regardless of the bona fides of the case. That is the fundamental problem and, unless you can provide a sense of balance between the two parties, that will always be the issue. The person with the upper hand will always be in a strong position.

Mr Andrews: I sort of go back to Yeovil Town, which, as you may recall, had a football pitch which was on a dreadful slope. I always think that legal aid was meant to create a level playing field, so that someone with very slender means could withstand the pressure from someone with significant means. In the commission's view, the way the system works at the moment is that the person with legal aid is effectively indemnified from any costs, and that creates a very un-level playing field. That is part of the proposals: we need to find a way of balancing those out. I do not disagree with your basic premise at all.

Mr Wells: What I can tell you about this particular case is that, by the time it was finished, that gentleman was in a position where he would definitely have qualified for legal aid. He was ruined.

Mr Andrews: I regret that, in my short time at the commission, I have seen such cases.

Ms Ritchie: This is something that we explored in the access to justice review, and we made a number of recommendations on that. So, I anticipate that you will shortly hear the Minister's response to that.

Mr Wells: That is interesting.

The Chairperson: OK. Thank you very much. Your attendance is much appreciated.