

GLOBAL GRANTING

FAMILY LAW SECTION

COMMENTS ON GLOBAL GRANTING AND PRO FORMA INVOICING

Introduction

The Family Law Section welcomes the opportunity to comment on the global granting proposal. The Section's response incorporates comments from the Society's Legal Services Committee.

The purpose behind the proposal, of streamlining grants of legal aid and reducing administration costs, is to be encouraged. However, the global granting concept, as outlined in the Legal Services Agency proposal, is of limited application. The Section considers that changes could be made to the existing structure that could simplify compliance and would be equally effective.

In the experience of members of the Section there are very few cases that fall neatly within the existing standard steps. The Section understands that under the global granting proposal payment will be based on a fixed fee for a particular task – from a menu structured around the family steps. The argument in support of this is that there will be some cases where the task will take less time and some where it will take more and therefore the provider will not be disadvantaged overall. This certainly does not reflect members' experience of legal aid grants.

There are a number of general difficulties with the proposal:

Fixed Fees

The fixed fees for each menu item are based on the average of previous grants made by the Agency. As inexperienced providers do the bulk of legal aid work, basing the amounts on an average grant will have the effect of reducing the hourly rate for experienced providers. This will have a flow-on effect of further discouraging the more experienced providers from doing legal aid work at all. In addition, using the average grant as the basis for fixed fees does not take into account the time that practitioners are already writing off prior to the submission of their legal aid invoices. While the Agency's proposal relies on there being an equal number of 'overs and unders' the general experience is that there are almost never unders and in fact the practitioner is invariably obliged to write off time in the great majority of cases.

The fixed fee for each menu item under the global grant is based on completion of the items. In practice many cases do not proceed in this orderly way. It is not uncommon for counsel to proceed along one path, not complete the item as specified in the table, but be required to move in a different direction. This would mean there would be no payment for the partial work done on the first item. While global granting requires that work be completed in a 'building block' way, this type of ordered approach is only rarely achieved.

Exiting the Global Grant System and Special Circumstances Payments

Exiting the global granting system is an issue. At paragraph 5(x), under the heading 'General Procedures for Global Granting and *Pro forma* Invoicing', it is proposed that a provider may apply for an amendment to leave the global grant system if the fixed fee is insufficient because of complexities or special circumstances. The Agency case officer, not the provider, has the discretion to accept or reject the application. The potential administrative complexities involved in effecting an exit would be a strong disincentive to choosing the global grant option.

There are a number of additional factors where a one-off grant of \$260.00 can be claimed. The Section's concerns about these additional factors are that they include factors that would themselves render the case too complex to be dealt with under the current Family Steps system. It is unclear whether the listing of those additional factors in special circumstances means they cannot be taken into account if counsel wishes to exit the global grant system. If a factor that would presently permit a provider to apply for an amendment because of the additional time and complexities it involves, is instead only the basis for a one-off grant of \$260, it is likely that this will discourage providers from choosing the global grant option.

Furthermore the suggestion that the types of additional factors listed can be dealt with by this one-off payment is unrealistic. For example language or mental health difficulties or a difficult litigious party will not resolve as proceedings continue. They will have a continual impact, which will inevitably increase the time spent on the matter.

Property (Relationships) Act Proceedings

An unders and overs system potentially disadvantages clients in cases where repayment is required. This occurs in various types of proceedings and is always a consideration in relationship property matters. The amount to be repaid has always been based, in part, on the amount of the legal aid grant, which again is based on the actual time a provider spends on a file. If an unders and overs system is in place, this means that clients whose files have taken less time than the global grant, if any, will effectively be subsidising, in terms of repayment, those clients whose cases have taken more time than the global grant. Neither clients nor solicitors should be expected to operate in a lottery situation. This encourages solicitors to cut corners, the alternative being to do unpaid work, and increases the momentum of the development of a second class representation system.

The Section's view is that relationship property proceedings, including relationship property agreements pursuant to s21 of the Act (or 'contracting out'), are generally non-standard and vary from case to case so will not fit well to a global approach. The numbers of defended cases that require hearings are small (only 2000 nationwide in 2004, of which only a small proportion would have been legally-aided) but they represent a wide range of issues and complexities.

A much larger number of cases involve the completion of relationship property agreements. Using the table headed 'Global Grant for Legal Disputes Without Proceedings' in the consultation paper as a starting point, it appears that the proposed global grant for the completion of a relationship property agreement would amount to \$920 (GST inclusive). This is based on the maximum grant of \$260 being provided for initial instructions and completion of the legal aid form, the \$400 maximum grant for negotiation, leading up to the formalisation of the agreement, which appears to allow a maximum grant of \$260.

From the outset this grant would be quite inadequate to cover the necessary attendances to ensure a properly prepared and adequately advised and certified contracting out agreement under the Act. The

following breakdown of the usual factors involved in completing a relationship property agreement shows that the grant would not reflect what time would actually be needed to complete a proper agreement. Furthermore, and crucially, a proper agreement would need to withstand any challenge based on an argument that a serious injustice has occurred as the result of inadequate preparation or advice.

The following is a breakdown of what must be done by the practitioner and a fair assessment of the actual time required to carry out the work.

Initial Consultation

- (a) An initial interview, obtaining all information from the client in terms of the relationship property pool and what they may or may not suspect the other spouse has in his or her possession.
- (b) The preparation of a letter of advice. Depending on the way in which the proceeding should move forward, a second interview would be necessary to consider further options, obtain further information from the client and/or consider any response letter from opposing counsel or party based on earlier request.

It is estimated that at least five hours would be required to carry out this process.

Negotiation Stage

- (c) This is when the majority of work is done in formulating and completing an agreement. It will usually require substantial correspondence between counsel for the parties, the request for disclosure of information relating to assets (i.e. financial statements, bank statements, trust documents, valuations etc). It could also result in third party correspondence with potential valuers to be instructed on obtaining valuations for any number of assets. It would be during this period of time when counsel could determine what, if any, further compensatory or post-separation adjustment arguments could be run for either spouse.

It is estimated that the time that would be used in this process is by no means fixed but that in a usual straightforward case would be between eight and ten hours.

Preparation of Agreement Itself

- (d) The preparation of the agreement and subsequent drafts. Further rewriting and correspondence associated with the exchange of drafts is usually required before finalisation. It is estimated that this process in itself would involve between two and three hours. Associated with the preparation of the relationship property agreement is the preparation of share transfers, trustee documents and any documentation which would be required to implement the terms of the agreement. This in itself also requires time.

Certification of the Agreement

- (e) Certification of the relationship property agreement is one of the most crucial aspects of the entire process. It is when the signing party receives independent legal advice as to the implications and effects of the agreement in accordance with what information has been provided to date. This would require at least one to two hours depending on the scope and size of the agreement and its effects and implications for certification.

Ancillary Matters

- (f) This would be the necessary work required to give effect to the agreement following settlement. There could be the exchange of monetary consideration for the transfer of assets, registration of transfer documentation, filing documents with the Companies Office etc. At least one to two hours would be required for this.

Accordingly for a relationship property agreement to be completed to its full extent, usual practice would indicate between 20 and 25 hours.

A calculation using this number of hours paid at any of the current guideline hourly rates, makes it very clear that the proposed global grant of \$920 falls far short of what would be adequate remuneration for the preparation of such an agreement.

A full breakdown of the actual number of hours involved in completing proceedings, whether defended or undefended, with regard to any of the other relevant legislation has not been included in these submissions, although the Section would be willing to provide these if requested by the Agency. The Section has no doubt that should the exercise be carried out on proceedings under the Domestic Violence Act, the Care of Children Act or in any other Family Court proceedings, the result would be the same. That is, an unacceptable difference between the number of hours the maximum grant would allow for, even at the lowest current hourly rate, and the actual time required to properly complete the proceedings.

PPPR Act Proceedings

The number of proceedings under the Protection of Personal and Property Rights Act 1988 are relatively few and those where the subject person is legally aided are relatively rare. The Section questions the benefits of using the global grant system.

Adoption Act Proceedings

The number of legally-aided adoption proceedings are also likely to be very small. It is unclear from the guidelines as to how consent issues in adoption are to be covered. The convention is that the cost is borne by the adoption applicants, but there appears to be no allowance for this.

In any event the global grant appears to relate to only undefended applications. If that is the case, the sum of \$920 appears to be the suggested grant with an additional \$130 for finalisation of matters. Accordingly an undefended adoption proceeding global grant under the proposal is \$1,050. Contrasting that with the current maximum guideline rates, five hours is provided as a basic minimum with an additional two hours if the matter is combined with an application to dispense with consent and an additional three hours depending on additional factors.

Therefore, a comparison between an adoption application that includes substituted service under the current rates and an identical case under the proposed global grant system, where the maximum grant is available, provides for less legal aid under the global grant than is currently available under the existing steps, even at the lowest guideline rate. For example, ten hours at \$110 per hour, the maximum guideline rate provided for and approved for a Level 1 provider, would equate to \$1,100. As senior counsel would receive the same global grant their effective discount to the Agency would be much greater.

If one of the aims of global granting is fiscal neutrality and less administration/compliance costs then the Section acknowledges this maybe achieved to some extent in this instance but at the potential loss of senior providers prepared to undertake legally-aided work. This is not an acceptable result.

It is therefore submitted that the global grant proposal for adoption proceedings will often be inadequate, even for an undefended application. Any defended adoption tends to have unique circumstances and is unlikely to be appropriate for a global grant and would have to be the subject of consideration with the grants officer managing the file. This does appear to provide some leeway for extension of the grant if the application for adoption should, for example, be defended, usually in a situation where an application for dispensation of consent has arisen.

Domestic Violence Act Proceedings

The comments which were made above, under the heading Fixed Fees, are equally relevant to the global grants proposals on Domestic Violence Act proceedings. The general view is that the fixed fee in the menu would only be sufficient in a few very simple domestic violence scenarios, for example, between a boyfriend and girlfriend with no children.

Some of the most difficult, complex and intransigent work undertaken on legal aid has begun as domestic violence but expanded into many other areas (Care of Children, CYFS and relationship property). The proposed add-on menu does not effectively address the complexity of such situations. Inevitably domestic violence proceedings will need to be dealt with on a case by case basis.

It is also noted that domestic violence work appears to have been treated differently in that fixed fees are proposed for hearings unlike other Family Court proceedings. The proposed fixed fees are of concern. It is not feasible for senior counsel to undertake work at \$130.00 for the first hour of work, \$100.00 per hour for two hours, \$107.00 per hour for three hours, \$113.00 per hour for four hours and \$108.00 per hour for a full day. This will, without doubt, lead to work being delegated to junior counsel or it not being done at all. Actual hearing time should be paid at the appropriate rate.

The imposition by the Agency of a separate regime with regard to domestic violence proceedings is not new. The Legal Services Board (Civil Legal Aid Remuneration) Instructions 1996 include a 'Maximum Guideline Fee' (or fixed fee) for defended and undefended domestic violence proceedings. As at 6 May 1996 the maximum fee for undefended proceedings was \$900, and for defended proceedings \$2,200. An interesting comparison can be made with the respective proposed global grants of \$520 and \$1,040.

Care of Children Act/Children, Young Persons, and Their Families Act Proceedings

Of general application is the Section's observation that the way in which most Family Court proceedings actually progress does not fit neatly into the menu for 'General Family Matters with Proceedings.' Little thought appears to have been given to the increasingly common situation where there are a number of parties involved (other than the token allowance of \$260.00 on a one-off basis). The guiding principles of the Care of Children Act include the requirement that consideration be given to maintaining the child's ongoing connection with other family members. There is also a requirement now that the child must be consulted and their views ascertained, which can increase the complexity and need for consultation and negotiation.

If the Agency is relying upon data collected under the old Guardianship Act legislation then this is inherently flawed. The new processes are more complex and require a more transparent balancing of a variety of interests (parents/children/grandparents/other family). Inevitably there is an added cost to this but it appears that under global granting the cost will be borne by counsel prepared to do the work at rates based on flawed projections.

Test Period

It is the Section's view that the proposed test period of six months will be insufficient to provide a real picture of whether global granting and *pro forma* invoicing is operating as intended by the Agency. The general experience is that very few cases, other than those that are undefended – and then only some of them – are concluded within six months.

The Agency is proposing shadow testing where providers who work with the Agency to test this system will run a legal aid file in the usual way and have a global grant run alongside. As this will almost certainly mean additional time and therefore costs for lawyers involved, the Section suggests that the lawyers submit an invoice to the Agency for their costs, separately from the invoice for their work on the client's case.

Fixed Fees for Hearings

In addition to the particular comments made above, on the costs of Domestic Violence Act hearings, it is the Section's view that remuneration should be based on the actual hearing time, no matter what type of hearing, as in other proceedings. This has long been the Section's view as it has made clear with regard to the development of the Family Steps, and most recently in the case of mediation and settlement hearings.

Unless considerable increases were made in the global grants fees it is likely that the concept, in its current form, would be more of a disincentive to counsel, and senior counsel in particular, at a time when there is a strong voice for an increase in the legal aid hourly rates.

Changes to Current System

As stated the Section's view is that an easier route would be to make changes to the current system rather than introduce a new one. The following are the Section's recommendations for the simplification of current compliance requirements:

- Any provider from the same firm should be able to work on a file, without prior approval.
- Regular providers could complete a simplified application form i.e. certify applicant is on a benefit and therefore eligible for legal aid.
- Simplification of billing. Is there a need to break work down into particular types e.g. telephone/personal attendances/correspondence?
- Automatic grant of office expenses, say \$50.00.
- Reduce duplication of information. For example, every time a form is completed dates need to be filled in which should be recorded in the system from the start.
- Simplify the steps and remove the rigidity of not being able to carry over from one step to the next. Often the point of cross over is not clear.
- Better indexing of the LSA manual, so information on guideline amounts, charges, disbursements etc. can be easily found.



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19 December 2005