



Practice note

Financial eligibility for civil legal aid - Dependants

This note is intended to set out guidance for practitioners following the decision in [R \(oao of WA\) v Director of Legal Aid Casework and The Lord Chancellor \[2023\] EWHC 689 \(Admin\)](#). The decision is available on [Westlaw](#) and [Lexis](#) but is not yet on Bailii. The dependants' allowances section of the current guidance¹ now refers to the judgment stating:

'(a) The Director will have regard to the judgment in the case of R(WA) v The Director of Legal Aid Casework and Lord Chancellor [2023] when considering how to apply the dependants' allowance'

The case is relevant wherever an applicant for civil legal aid has a dependant who does not live in their home all of the time. This will often arise in family cases where separated parents share caring arrangements for a child.

Previously, guidance directed the LAA to decide which household the child belonged to. WA clarifies that a child **can be a member of more than one household** and sets out guidance as to whether the dependant should be treated as a member of the applicant's household.

This impacts the outcome of the means assessment, as:

- If the dependant *does* form part of the household, a dependants' allowance can be applied under Regulation 25(2), and actual rent or cost of living accommodation deducted under Regulation 28;
- If the dependant *does not* form part of the household, no dependants' allowance is applied, though it may be possible to deduct maintenance under Regulation 26 (but accommodation costs will be capped at £545).

The decision of the High Court in WA

The Claimant was a survivor of domestic abuse from her ex-partner. She applied for legal aid for private family law proceedings relating to her child. The Claimant sought at the least, a return to a 50:50 care arrangement and prevent a proposed move to another part of the country. At the time of the application, the child was living with her on alternative weekends.

The Legal Aid Agency determined she was financially ineligible for legal aid. Her child was deemed not to be a member of her household, and instead he was deemed a member of her ex-partner's household, who received child benefit. This was in line with the Lord Chancellor's guidance, which had indicated a child could only be part of one household for legal aid purposes and stated that receipt of child benefit would normally be determinative.

The issue

The LAA did not dispute that the child, G, was a dependant. The LAA had allowed a deduction for G's maintenance under Regulation 26, however as he was not treated as part of WA's household, no

¹ Lord Chancellor's guidance on '*determining financial eligibility for certificated work*' (May 2023), §5.6.7 and '*determining eligibility for controlled work*' (May 2023), §6.1.4.



dependant's allowance was applied, and her accommodation costs were capped at £545 (lower than her actual costs). She was deemed financially ineligible.

The Court's ruling

The Court held that a dependent child or other dependent relative can be a member of both the applicant's household and another household [§49]. To insist that a child can only ever be a member of one household is to misread the Means Regulations [§74]. Whether an individual is a member of the household will depend on 'their exact circumstances':

50. A typical definition of "household" might be a home and its occupants regarded as a unit and, in that ordinary meaning, it may be entirely natural for a child of separated parents, depending on their exact circumstances, to regard themselves, and to be regarded as, part of each parent's separate household at the same time; at all events, if they have a regular pattern of living some of the time in one home and some of the time in the other. Questions of fact and degree will arise and it may be important to bear in mind that "whether a child remains a member of a household is just as much a function of attitude (and perhaps emotion) as an application of a simple test of hours spent in the home": per Leveson J, as he was then, in R(Richards) v. Legal Services Commission [2006] EWHC 1809 (Admin) at [17] .

The nature and strength of a parent/child relationship is potentially relevant to the question of whether a child is part of the household [56]. The amount of time spent in each home is not relevant, so long as the child considers each to be their home:

67. It is of the essence of a successful shared custody arrangement, in the case of a child of separated parents, if that arrangement has the child's welfare at heart, as it should, that for the child, each home is qualitatively their home, whether or not their time in residence is split 50:50...

Another example of a dependant who is part of more than one household would be where adult siblings share care for a disabled sibling who cannot live independently:

68. Moving away from separated parents and their children, suppose three siblings, one with a significant disability rendering independent living unrealistic, and a family arrangement under which that sibling lives with the other two (who live separately from each other), Monday to Thursday with one, Friday to Sunday with the other, with associated increased housing need for both. Either sibling might be a legal aid applicant for legal work that may or not have anything at all to do with their disabled sibling. The policy choices underlying Means Regulation 28(7) to my mind tend naturally to apply equally in favour of both siblings, such that one would expect it not to apply to either of them, rather than only one of them with some choice then having to be made, for example, as between the significance of hosting for four days per week and hosting over weekends.

Where the status quo of spending time has broken down due to issues between parties, the child may nonetheless remain a part of the applicant's household, on the basis that the current arrangements are a temporary 'blip' and the applicant seeks to restore the previous arrangement, as per the following paras of the judgment:

27. Ground 2, as pleaded, averred that the Decision was wrongly reached because it was wrongly treated as irrelevant that, (i) the claimant had an existing right to custody of G, (ii)



legal aid was being sought to enforce that right, (iii) the only reason G was not living more of the time with the claimant was because of the abusive ex-partner's breach of that right, and (iv) the only reason the claimant was not the recipient of child benefit in respect of G was because of the ex-partner's coercive abuse...

82. Put another way, those factors were the claimant's answers to the question, why, given that she claimed to regard G as part of her household, he was spending only one weekend a fortnight staying with her and his child benefit was going to her ex-partner, and those answers were regarded, on behalf of the Director, as prima facie credible, given that her cause was taken to have satisfied the merits assessment.

Further examples – children

We suggest that further examples of situations where the dependant's allowance would previously have been awarded to one parent but either parent could now qualify include:

- Live with ('dual order') where the child lives with applicant, for example, 12 days out of 14 with one parent and 2 days with the other (or some imbalanced time but they are both 'live with' orders not spending 'time with').
- A 'spend time' with order – an order stating one parent is 'live with' (mum) and the other 'spend time' (Dad), would not be determinative. The child may also be part of Dad's household where time is being spent as part of that household.
- An out of town parent, where due to distance, the 'living with' is reduced to school terms with the other parent due to distance.
- A shift pattern parent e.g. police / medical staff – just because the parent is on shifts and cannot commit to a regular time and this fluctuates does not mean the child doesn't live with that parent.

NB: Dependent adults

WA did not concern a dependent adult but the judgment considered their situation in passing, as these dependants are addressed in the same Regulation 25(2). The Lord Chancellor's guidance refers to an additional requirement that the applicant 'fully supports the relative'. This wording does not appear in Regulation 25(2), though 25(3) does permit the allowance to be reduced by reference to the dependant's income or other resources.

If applying for legal aid on behalf of an applicant with a dependent *adult* who spends time supported by other relatives, reliance should be placed on para 68 of WA (above), noting that there is no such requirement of 'full' support in the wording of the regulation. PLP may be able to offer advice and assistance if the application is refused. Our casework team can be contacted at enquiries@publiclawproject.org.uk.

Relying on the judgment

In order to obtain a dependant's allowance and uncapped deduction of rent or cost of living accommodation, the legal aid applicant must demonstrate that the person in question is:

1. a dependant; and
2. a member of the applicant's household.



Baker J's criteria for assessing membership of a household is set out at [74]. While framed by reference to a child, it could be relied upon in reference to an adult:

"a child is a member of a parent's household if, quantitatively and qualitatively, the parent's home is sufficiently the child's home that they would be identified as one of the occupants of that home, thinking of it and its occupants as a unit; subject to considering the circumstances of the individual case and any questions of fact and degree that arise." [74]

Applications determined by the Legal Aid Agency

The applicant should be included in the relevant sections of CCMS as a member of the household. The further information section on CCMS should flag that the dependant does not live with the applicant full time, but they are nonetheless considered a part of the household. Any evidence in support (such as a family court order) could be uploaded together with other means evidence.

The amount of additional information or evidence that should be provided will depend on the circumstances. In the case of children with separated parents, where there is an existing order or formalised agreement this should be summarised and ought to be determinative. Equally, receipt of child benefit was previously treated as determinative by the Legal Aid Agency. In other cases, reference can be made to:

- A regular pattern of time spent at the home.
- A bedroom being maintained at the home.
- The dependant keeping their own belongings at the house.
- The expressed wishes and feelings of the dependant.

Where circumstances have recently changed, but legal aid is sought to restore the previous arrangement, this should be fully explained.

Applications determined by the Provider (controlled work or delegated functions)

A note should be kept of the reasons why the dependant was considered part of the household, together with any relevant evidence (just as providers would hold means evidence on file). The additional information section of the evidence page of the controlled work form can be a useful place to record this information so it is not lost. In the event that the provider's assessment is later challenged, a right of appeal lies to the Independent Costs Assessor, whose attention should be drawn to the judgment in *WA*.