

FDR Property Mediation Guidelines

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Introduction

The Lawyer-assisted Family Law Property Mediation Trial

The Legal Aid Commission of Tasmania has been funded by the Commonwealth Government (Commonwealth) to conduct a two-year trial of lawyer-assisted mediation for family-law property matters between 1 January 2020 and 31 December 2021 (the Mediation Trial.)

The Mediation Trial will deal with up to 50 matters over two years.

Families with a net property pool of up to \$500,000, excluding superannuation are the target audience.

Different 'income and asset' and merits tests apply to the Mediation Trial. Contributions may be imposed.

The Mediation Trial has its own eligibility criteria. Complex property matters with a current parenting dispute or Part VIII proceedings under the Family Law Act may be excluded.

Legal aid may be granted to lawyers to support and advise clients through the property mediation process. If an agreement is reached, lawyers will document the agreement and file consent orders with the Court. If an agreement cannot be reached, lawyers will advise clients about their options and may apply for aid to represent the client through a court process. A model has been developed for the Mediation Trial, see [flow chart](#).

At least one party must have a grant of aid. The second party can also have a grant of aid, or can be represented by a community legal service, a private lawyer or represent themselves.

Definitions:

Applicant: a person who makes an application for a grant of legal aid

Applicant's relationship: the relationship which entitles the applicant to make an application for an alteration of property interests under the Family Law Act

Application for Aid: a formal request by an applicant to the Commission for legal aid

Assets: as defined in Guideline 2 of Guidelines for Grants

Assisted person: a person who has been granted legal aid

Assistance: a grant of legal aid for the Mediation Trial

Case Manager: the person managing the intake and scheduling of matters in the Mediation Trial

Commission: the Legal Aid Commission of Tasmania

Conference phase: a matter in Stages 1, 2 or 3 of the Fee Schedule

Counsel: a barrister, or a solicitor acting as a barrister

Court: a court of law exercising jurisdiction under the *Family Law Act 1975*

E-lodge: the Electronic Lodgement system used for lodgement of applications for legal aid

Exceptional Circumstances: unforeseen and/or unusual circumstances outside the control of the applicant which would:

- cause unforeseen or unusual hardship to the applicant and
- directly impact on the applicant's ability to achieve an alteration of property interests under the *Family Law Act*

Family Law Act: the *Family Law Act 1975* as amended

Fee Schedule: the Mediation Trial Stage of Matter Work Items and Fee Schedule

Financially Associated Person: a person who is financially related to the applicant, excluding the other party to the Applicant's relationship. A person who has a financial relationship including a relative, partner, spouse, corporation, trust or group from whom the applicant:

- A. usually receives financial support; or
- B. usually gives financial support; or
- C. would be likely to receive financial help to obtain legal services

Guidelines for Grants: the Commission's published "[Guidelines for Grants](#)" created pursuant to s27 *Legal Aid Commission Act 1990* in force at the time

Grant of Legal Aid: The provision of legal aid to a person pursuant to s16 *Legal Aid Commission Act 1990*

Lawyer: a legal practitioner entitled to practise law in the State of Tasmania

Legal Aid Commission Act: the *Legal Aid Commission Act 1990*

Litigation Phase: a matter in or where there is an application for Stage 4 of the Fee Schedule

Merits Test: The test used to assess merit in Guideline 4 of the Guidelines for Grants

Other party: The other party to the Applicant's relationship

Property Settlement: An alteration of property interests under the *Family Law Act 1975*

Regular: Occurring at uniform intervals such as weekly, fortnightly, monthly, biannually or annually

Unusual Hardship: A hardship that is rare and uncommon and where there is a risk that if not funded, an applicant is unlikely to achieve an alteration of property interests under the *Family Law Act*

Guidelines:

1. Forum and Reciprocity

The forum and reciprocity test as set out in the Guidelines for Grants applies to the Mediation Trial.

2. Means, Assets and Income

The means, assets and income tests as set out in the Guidelines for Grants are modified for the purposes of the Mediation trial.

(a) Assets Test

The net assets of the Applicant's relationship (excluding superannuation) must not be more than \$500,000.

(b) Income Test

The Applicant will satisfy the income test if:

- (i) They receive a Centrelink or Department of Veterans Affairs (DVA) 'Income Support Payment' listed in Table A below or if their gross income is below the relevant 'Eligible weekly income limit' in Table B

Table A: Eligible Income Support Payments

• Abstudy	• Partner Allowance
• Age Pension (incl. DVA Age Pensions)	• Service Pension
• Austudy	• Sickness Allowance
• Carer Payment	• Special Benefit
• Disability Support Pension	• Widow Allowance
• DVA service pension and income support supplement	• Wife Pension
• Newstart Allowance	• Youth Allowance
• Parenting Payment	

Table B: Eligible weekly income limit

Household type	Eligible weekly income limit (Gross)
0 Dependents	\$1,375
1 Dependent	\$1,500
2 Dependents	\$1,625
3 Dependents	\$1,750
4 Dependents	\$1,900
5 + Dependents	\$2,050

- (ii) The eligible weekly income limit includes all money received on a regular basis including:
 - (a) Salary and wages
 - (b) Business income
 - (c) Money received from investments
 - (d) Child support
 - (e) Centrelink payments (except income support payments; see paragraph 2(b) above)
- (iii) The regular payments listed below are excluded from the calculation of the gross weekly income:

Table C: Excluded Centrelink Allowances
Mobility Allowance
Double Orphan Pension
Assistance for Isolated Children Scheme payments

- (iv) Contribution towards legal costs:
 - (a) An Applicant who satisfies the Assets and Income Tests may be asked to make a contribution towards their legal costs
 - (b) Guideline 2(5)(h) of the Guidelines for Grants does not apply to the Mediation Trial

3. Merits Test: Conference Phase

- (a) The Merits Test in the Guidelines for Grants does not apply to matters in the Conference Phase
- (b) Assistance may be provided if:
 - (i) the Mediation Trial is likely to resolve the dispute, and
 - (ii) the Applicant is committed to the early resolution of the dispute

4. Merits Test: Litigation Phase

- (a) The Merits Test in the Guidelines for Grants applies to matters in the Litigation Phase
- (b) The Commission will not normally fund more than one party in the litigation phase
- (c) Funding may be provided for a second party in the litigation phase, if:
 - (i) The second party satisfies the Merits Test; AND
 - (ii) The second party is a Priority Client (Guideline 4(1)(3)) and has a priority matter (Guideline 4(4)(b)); OR
 - (iii) The second party can demonstrate exceptional circumstances

5. Limits on Costs

A maximum of up to \$10,000 is available for legal costs and disbursements per party.

6. Entry to the Mediation Trial where there is a legally aided parenting dispute

- (a) If an Applicant has a grant of Aid for their parenting dispute at the time of entering the Mediation Trial, the Case Manager may delay the start of the matter except:
 - (i) If the delay would not allow the matter to be completed before 31 December 2021
 - (ii) The delay might result in there being insufficient legal aid funds for the matter
 - (iii) The delay would cause the applicant, or the applicant's dependents, unusual hardship

7. Eligibility for Aid

1. The Commission may grant aid for the Mediation Trial where:

- (a) the Applicant satisfies the Assets test¹,
- (b) the Applicant satisfies the Income test
- (c) the Applicant is entitled to make an application for an alteration of property interests under the *Family Law Act*, and
- (d) The dispute is about:
 - (i) A superannuation split, and/or
 - (ii) A total net asset pool of up to \$500,000 (excluding superannuation), or
 - (iii) A negative property pool (the dispute is about debts)

2. The Commission will not grant aid where:

- (a) The Applicant has a current legal parenting dispute and does not have a grant of aid under the Guidelines for Grants for their parenting dispute
- (b) The Applicant is a party to proceedings under Part VIII of the *Family Law Act*, and does not have a grant of aid under the Guidelines for Grants for their parenting proceedings
- (c) The Applicant, or the other party, is a party to a business, partnership, company or any other non-individual entity
- (d) The Applicant, or the other party, is a party to an active discretionary or unit trust with assets

¹ If the first party is eligible for Aid, the second party will be deemed eligible.

- (e) The property in dispute includes
 - (i) More than 20% of assets located outside Tasmania, excluding bank accounts and shares
 - (ii) Property located outside Australia, excluding bank accounts and shares.
 - (iii) A self managed super fund
 - (iv) Assets or liabilities associated with a business, partnership, trust, company or any other non-individual entity
 - (v) Livestock, crops, mining, fishing or other farming/mining/commercial fishing assets
 - (vi) The Applicant, or the other party to the relationship, has more than two years of personal taxation returns outstanding and/or there are outstanding taxation returns relating to a non-individual entity
- 3. Aid may only be granted in the litigation phase if an Applicant has, or had a grant of aid in the Conference Phase
- 4. Applications for Legal Aid for the Mediation Trial are to be submitted in e-lodge
- 5. An Applicant must satisfy all eligibility criteria in Part 7 of these Guidelines, unless the Commission waives a condition. A condition will only be waived in exceptional circumstances.
- 6. The Applicant must continue to meet the eligibility criteria in Part 7 of these Guidelines for the whole time that the Applicant is in the Mediation Trial, unless the Commission waives a condition. A condition will only be waived in exceptional circumstances.

8. Conditions of Aid

(a) Available Funds

- (i) Limited funding has been made available to the Commission for the Mediation Trial. In determining whether to approve an Application for Aid the Commission will assess whether there are sufficient funds to meet the costs of the matter.
- (ii) In assessing availability of funds, the Commission may have regard to (a) funds committed to other matters, and (b) funds expended in the Mediation Trial
- (iii) If the Commission determines there are insufficient funds, the Commission may refuse an application or terminate assistance
- (iv) If the Commission receives additional funds, an Applicant refused a grant of aid due to an insufficiency of funds, may reapply for aid

(b) Matters must be completed before 31 December 2021

A matter will not be accepted into the Mediation Trial unless the matter is likely to be completed before the end of the Mediation Trial on 31 December 2021

(c) Report to the Commission

A lawyer must immediately notify the Commission if:

- (i) They become aware that information provided in the Assisted Person's application is incorrect or incomplete, or
- (ii) There is any change in the Assisted Person's means, or
- (iii) The Assisted Person no longer meets the merits test, or
- (iv) The lawyer believes there are grounds for the termination of aid under Part 9(a) of these Guidelines

(d) Examination of Lawyers Files

The Commission may examine a lawyer's file at any time during or after the conclusion of the matter

(e) Assisted Person Must Follow Legal Advice

- (i) An Assisted Person must accept or follow the reasonable advice of the Lawyer providing representation
- (ii) If an Assisted Person fails to accept or follow their Lawyer's reasonable advice the Commission may withdraw the grant of aid

(f) Change to another Lawyer

If an Assisted Person wants to change their lawyer and continue to receive legal aid, the Commission will consider the change if:

- (i) It receives a written request for the change, and
- (ii) Another lawyer will accept the matter and apply for aid in e-lodge, and
- (iii) There is no breach of any of the conditions in Part 8 of these Guidelines, and
- (iv) There is no additional cost to the Commission

9. *Termination of Assistance by the Commission*

(a) Grounds for Termination

The Commission may at any time terminate or suspend assistance under the Mediation Trial on any of the following grounds:

- (i) If the Assisted Person ceases to meet the eligibility criteria as set out in Guideline 7

- (ii) If the Assisted Person, or their Lawyer, has provided information to the Commission which is inaccurate and that information affects the Assisted Person's eligibility under the Mediation Trial
- (iii) The Assisted Person has refused to accept, or follow, the reasonable advice of their Lawyer
- (iv) If an Assisted Person acts in such a way to cause their lawyer, or any other lawyer in the Mediation Trial, to fear for the safety or wellbeing of themselves or their staff, colleagues or others in the matter
- (v) A failure by the Assisted Person or their lawyer to respond in a timely and complete manner to a request for information made by the Commission
- (vi) A failure by the Assisted Person or their Lawyer to comply with any of the guidelines, or any request or direction, by the Commission

(b) Insufficient funds

The Commission will terminate the grant of aid if the Commission determines it has reached the limit of the funds allocated by the Commonwealth for the Mediation Trial

10. Fees, Work Types and Disbursements

(a) Stage of Matter limits

- (i) The Commission will pay fees in accordance with the [Fee Schedule](#). Lawyers will be advised of the maximum amount payable for each Stage of Matter as set out in the [Fee Schedule](#)
- (ii) The Commission will not pay any account that exceeds the maximum limit, unless an extension of assistance was sought and approved prior to the work being performed or the cost incurred
- (iii) Where a work item is not normally covered by the [Fee Schedule](#), the Assisted Person must provide evidence as to the exceptional circumstances, and/or complexity of the matter, that justifies the additional payment
- (iv) Restrictions will apply to the following
 - (a) Conveyancing – only one party will be given a grant of aid for this item
 - (b) Urgent injunction – if aid for this item is granted, no additional aid will be granted to initiate proceedings, except for enforcement
 - (c) Enforcement – aid will only be granted if the alleged non-compliance would result in the Applicant being denied the benefit of the Orders and not for minor non-compliance, such as a short delay
 - (d) Counsel reading brief – aid will only be approved if the Commission has approved the briefing of counsel

(b) Disbursements

- (i) The following expenses will ordinarily be approved:
- Chairperson fee
 - Interpreter fee
 - Subpoena production expenses
 - Reasonable photocopying²
 - Reasonable regional Travel/Accommodation for Counsel
 - Reasonable witness expenses
 - One valuation per matter³
 - Superannuation Information Form/Actuarial fee⁴
 - Process Server Fee, in litigation phase only
- (ii) The following expenses will not normally be approved:
- Valuations for any non-real estate assets
 - Other expert/medical reports
 - Sundry items including telephone, fax, postage and photocopying
- (iii) Where a request is made for a disbursement that is not normally covered by the Schedule, the Commission will require evidence as to the exceptional circumstances, and/or complexity of the matter, that justifies the additional payment

11. Cost Guidelines

(a) Lawyers payment

- (i) Lawyers must only receive payment authorised by the Commission
- (ii) A Lawyer must not accept any payment from an Assisted Person (or from any other person on their behalf) other than those payments that are authorised by the Commission
- (iii) Receiving unauthorised payments may amount to a breach of *Section 22(3)(b)* of the *Legal Aid Commission Act*

(b) No payment for work done before assistance approved

- (i) The Commission will not pay a Lawyer for any work done prior to the Lawyer making an application for legal aid

² Where USB or other electronic copy is not available

³ Only available if the parties can demonstrate that they have made a genuine effort to reach agreement about value and it cannot be resolved in any other way - such as appraisals. It is only available in the conference phase and must be a joint valuation. Quotation must be supplied at time of application and must not exceed maximum specified fee.

⁴ Quotation must be supplied at time of application and must not exceed maximum specified fee.

(c) No payment for Correspondence with the Commission

The Commission will not pay any fee charged by a Lawyer for:

- (i) Assisting an Applicant to complete an Application Form
- (ii) Interviews, letters and communications with the Applicant/Assisted person and/or the Commission for the purpose of an application, or allocation, and concerning the allocation or refusal of an Application for assistance
- (iii) Preparation of, and work done in connection with, any itemised bill which it may require
- (iv) A report to the Commission regarding matters relevant to the Applicant/Assisted Person's continuing eligibility or any assistance in the Mediation Trial

(d) Appointment of Counsel

Counsel may be briefed on condition that:

- (i) The brief fee to Counsel does not exceed the amount contained in the [Work Item and Fee Schedule](#) for the relevant stage, and
- (ii) There are no additional costs to the Commission except where authorised in advance.
- (iii) The lawyer with the grant of aid will be responsible for briefing Counsel
- (iv) Where a brief to Counsel may incur additional costs to the Commission, the Commission must approve the brief before any additional cost are incurred

(e) Finalisation of Matter

Within 14 days of the completion of a matter the Lawyer will provide a report to the Commission, which must include:

- (i) The result of the matter, including details of any full or partial settlement
- (ii) Details of any Orders made, whether resolved in the conference or litigation phase, and particulars of any Orders for costs
- (iii) Full details of all monies recovered, or to be recovered
- (iv) A certified pro forma invoice

(f) Assisted Person's Contribution to Legal Costs

- (i) The Commission may, at any stage, require that the Assisted Person make a contribution towards the costs of representation in the Mediation Trial. The contribution may be up to the total estimated or actual cost of the representation

- (ii) In assessing and/or imposing a contribution, the Commission will apply the principles as set out in Guideline 7 (1) (a) (b) (c) (f) (g) (h) (i) and (j) of the Guidelines for Grants
- (iii) The Commission may require the Applicant/Assisted Person to provide information about their, or any other Financially Associated Person's, income, asset holdings in bank accounts, investments, real estate, business interests, all other assets other than household furnishings or any other information as required under the "**Guidelines for Grants**"
- (iv) Contributions
 - (a) **Contributions on income**
 - A. In assessing contributions on income, an Applicant's income will be considered together with the number of dependents
 - B. An Applicant can earn up to the contribution threshold as set out in Table D without being required to pay a contribution of more than \$60
 - C. If an Applicant's income exceeds a contribution threshold, a contribution will be imposed using the client contribution table set out in Table E

Table D: Contribution Thresholds

Number of Dependents	Gross Weekly Income
0 Dependents	\$775
1 Dependent	\$900
2 Dependents	\$1,025
3 Dependents	\$1,150
4 Dependents	\$1,300
5 + Dependents	\$1,450

Table E: Client Contribution Table

Threshold	Client Contribution
Up to threshold	\$60
\$100 over	\$100
\$200 over	\$200
\$300 over	\$300
\$400 over	\$400
\$500 over	\$500
\$600 over	\$600

- (b) Contributions on assets in the Mediation Trial will be levied as follows:

Where the Applicant's net assets exceed \$200,000 an asset contribution may be levied for an amount up to the gross fees

and disbursements incurred by the Commission, excluding any amount already payable, or paid, for an income contribution.

- (v) Applicant's who are required to make a contribution exceeding \$200 can ask to enter into an equitable charge to secure the contribution if they own real estate with enough equity to secure the contribution levied
- (vi) Any failure of an Applicant/Assisted Person to provide financial information as requested may lead to a refusal or termination of aid.

(g) Applicant/Assisted Person's Contribution – Lawyers Obligations

- (i) If the Commission levies a contribution on the Applicant/Assisted Person, the Lawyer will retain control of any money or property that comes into the Lawyer's possession or control, to cover the full amount levied by the Commission, unless the Applicant/Assisted Person has entered into an equitable charge with the Commission to secure the contribution.
- (ii) The Lawyer will continue to retain those funds until the Commission gives notice of the assessed amount payable by the applicant/assisted person.
- (iii) When notified of the assessed amount the Lawyer will make payment to the Commission in the full amount assessed or, if the sum held by the Lawyer is less than the amount assessed, the whole of the amount held by the Lawyer

(h) Lawyers Responsibility for Costs

- (i) The Commission will not pay, and the Assisted person will not be liable for, costs arising from any application to correct faults of a procedural nature due to a mistake of the Lawyer or Counsel
- (ii) The Commission will not be liable for any personal order for costs made against the Lawyer or Counsel

(i) Costs Order against Assisted Person

- (i) The Commission will not pay any order for costs on behalf of an Assisted person unless a determination has been made under the [Guideline 8](#) of the Commission's "[Guidelines for Grants](#)" pursuant to s26(2)(a) of the *Legal Aid Commission Act*
- (ii) The Commission will not be responsible for any order for costs made against an Assisted person if assistance has been terminated due to the failure of the Assisted person to comply with any obligations under these Guidelines

(j) Application for Costs

- (i) The Commission may require the Assisted Person to make an application for costs
- (ii) In assessing if the Assisted Person will be required to make a costs application the Commission may request a report setting out:
 - (a) A summary of the conduct of the Assisted Person and other party/s to the proceedings
 - (b) An assessment of the financial capacity of the other party/s to meet a costs order
 - (c) The impact upon any child of the relationship, or other family member, if a costs order is made
 - (d) Details of any financial or other hardship that may be incurred by the other party/s if a costs order is made
 - (e) An assessment of the merits and likelihood of success of the costs application

12. Review and Complaints

(a) Review of Decisions

- (i) An Applicant/Assisted Person may request a review of a decision of the Commission that:
 - (a) An Applicant is not eligible for assistance
 - (b) Refuses a request for an allocation of funds or disbursement
 - (c) Terminates assistance under these Guidelines
- (ii) A request for review must be made in writing within 14 days of being notified of the decision.
- (iii) The review will be dealt with in accordance with Part Five of the *Legal Aid Commission Act*

(b) Complaints

Complaints about the administration of The Mediation Trial, or the representation provided, can be made in writing to:

The Director
Legal Aid Commission of Tasmania
GPO Box 1422
HOBART TAS 7001