

Property policy – exceptional circumstances

Case studies for guidance on policy application

Background

In March 2024, Legal Aid NSW launched its [new policy for funding in family law property settlement matters \(the property policy\)](#). Legal aid is available for property settlement matters where the net pool of assets is \$850k or less. The property policy focusses on people who are 55 or older, or people whose ability to negotiate a reasonable settlement is materially affected by a disability or experience of DFV.

Applicants who don't satisfy the property policy may be eligible for legal aid if there are "exceptional circumstances".

This tip sheet is intended as a guide for inhouse and panel lawyers. The decision about whether there are exceptional circumstances in a property settlement matter will depend on the circumstances of each case.

What are exceptional circumstances?

Exceptional circumstances must be considered within the context of legally aided clients, not the general population.

Whether there are exceptional circumstances will depend on the facts of each case but, in general, it should be used sparingly. Legal Aid NSW expects only a small number of applicants will be approved aid under exceptional circumstances.

Examples of exceptional circumstances, or not.

We have prepared the following examples to illustrate when a client might be eligible for legal aid under exceptional circumstances, or not.

Case study 1 - Vulnerabilities not covered by the policy

Tai is 35 years old and was married for 6 years. She does not disclose the experience of any domestic or family violence and does not have a disability. Tai satisfies the Means Test.

The net asset pool is approximately \$400,000.

Tai cannot speak English and there are only a handful of interpreters who speak her specific dialect. Her husband has commenced proceedings and is pressuring Tai to sign consent orders that would see her receive only 10% of the net asset pool. Tai doesn't understand the court process and her lack of English has made it difficult for her to obtain financial disclosure of even her own bank accounts. You form the view that, without legal aid, it will be nearly impossible for her to participate in the court process.

Discussion:

While coming from a culturally or linguistically diverse background is not one of the client cohorts identified in the policy, in certain situations a client's inability to speak English, in addition to other issues unique to their situation, could be considered exceptional circumstances to grant aid for a property settlement matter.

Where can I find more information?

The Client Eligibility Unit can answer questions about the property policy. Email us at T-CEU@legalaid.nsw.gov.au

Case study 2 – doesn't meet client cohort

Ashley is 35 years old. The net asset pool is \$750,000. Ashley satisfies the Means Test. Ashley is not a victim of domestic violence and does not have a disability, however, two of her children do. Ashley is the full-time carer of both children who are profoundly disabled and require round-the-clock care.

Significant alterations have been made to the former matrimonial home to accommodate the children's disabilities. Ashley is overwhelmed by the legal process and doesn't understand what she is entitled to. She is concerned that if the house is sold, she will struggle to find alternate accommodation suitable for her children's special needs or close to their established medical and allied health supports. Ashley also has an established relationship with local social workers who arrange respite care for her on a regular basis.

Discussion:

Ashley's net asset pool is less than the \$850,000 maximum, but she does not meet the client cohort.

Although the policy contemplates that it is the *client's* disability that impacts their ability to negotiate a reasonable settlement, there may be matters like Ashley's where a child's disability is relevant to the client's ability to negotiate a reasonable settlement. In this situation, the fact that Ashley is effectively fully occupied with caring responsibilities and the children require round-the-clock care could negatively impact Ashley's ability to negotiate a reasonable property settlement and may be exceptional circumstances to grant aid.

It is important to remember that "exceptional circumstances" must be considered with reference to legally aided clients, not the general population. Simply having caring responsibilities for another person would not, of itself, be "exceptional circumstances".

Case study 3 – Net asset pool significantly exceeds the allowable amount

Lee is 50 years old and was married for 30 years. She was the victim of severe and frequent domestic violence throughout her marriage. Lee is currently living in a refuge. The net asset pool is at least \$1 million, the majority of which is equity in the former matrimonial home held in joint names.

Discussion:

While Lee is a victim of domestic violence, any consideration of whether there are exceptional circumstances to grant her aid must also be balanced against the size of the net asset pool and whether there are other options available to her.

A **net** asset pool of more than \$1 million is a significant amount of money. Notwithstanding Lee is vulnerable and a victim of domestic violence, exceptional circumstances must be considered in the context of legally aided clients, not the general population. For that reason, a significant asset pool would generally counter any other circumstances and suggest there are not exceptional circumstances to grant aid.

Case study 4 – Net asset exceeds allowable amount, but only by a modest amount

James is 60 years old and was married for 25 years. He has an acquired brain injury. James has difficulties with memory and cognition and has been unable to provide much information about the asset pool. During his marriage, James's wife was responsible for all financial decisions. You have done a search on the address of the former matrimonial home, and it is in the name of the wife. A search on real estate websites suggests the former matrimonial home could be worth about \$700,000. James has provided some of his bank statements and you can see that prior to separation the parties had savings of about \$200,000 but the wife then transferred this into an account in her sole name.

You think that the net asset pool is around \$900,000. The nature of James' disability and his inability to give instructions and understand your advice leads you to think he might need a litigation guardian.

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Discussion:

Even though the net asset pool exceeds the maximum amount, it is only by a modest amount. This, combined with the James inability to conduct the proceedings on his own or take alternate steps to secure a lawyer, could be sufficient to grant aid under exceptional circumstances.

Case study 5 – short relationship, big asset pool

Amira is 28 years old. She satisfies the Means Test. She was in an on-off de facto relationship with her partner for approximately 2 years. There is one child of the relationship, aged 6 months old. The parties did not share finances, but Amira says that her ex-partner has “lots” of money, including an apartment in Mosman where she sometimes stayed. The parties separated for good after an incident involving police. The police took out a provisional AVO for Amira’s protection. Her ex-partner is paying child support more than the child support assessment.

You have googled the partner’s name, and reports suggest he is a wealthy business owner. Real estate searches suggest the Mosman apartment could be worth more than \$2 million.

Discussion:

The property policy is based on the value of the net asset pool, not the amount your client might receive and there is no difference whether the parties were in a relationship for two years or 35 years.

In this situation, it is irrelevant that the client might only receive a small property settlement – you must still look at the net asset pool. Based on the information available to you, the net asset pool is likely more than \$2 million.

Unless there were other unusual or unique circumstances in the matter, this matter would not be considered exceptional in the context of legally aided clients.

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