

CAYMAN ISLANDS



PRIVATE FUNDING OF LEGAL SERVICES BILL, 2020

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**A BILL FOR A LAW TO PROVIDE FOR THE REGULATION OF PRIVATE FUNDING OF
LEGAL SERVICES; AND FOR INCIDENTAL AND CONNECTED PURPOSES**

PUBLISHING DETAILS

Sponsoring Ministry/Portfolio: Portfolio of Legal Affairs (PLA)



Memorandum of
OBJECTS AND REASONS

This Bill seeks to regulate contingency fee agreements and litigation funding agreements which provide an alternative way of funding legal services, especially litigation in injury cases and medical malpractice. It is proposed under the Bill that the Grand Court will be able to review such agreements upon application by an attorney-at-law and a client.

PART 1 - PRELIMINARY

Clause 1 contains the short title of the Bill and the commencement provisions.

Clause 2 contains the interpretation provisions.

PART 2 - CONTINGENCY FEE AGREEMENTS

Clause 3 defines a contingency fee agreement. Clause 3 also provides that contingency fee agreements cannot be entered into in relation to —

- (a) a proceeding under the Penal Code (2019 Revision) or any other criminal or quasi-criminal proceeding; or
- (b) legal services relating to the care of a child or any order under the Children Law (2012 Revision).

However, an attorney-at-law, with the approval of the court, may enter into a contingency fee agreement for services relating to a matrimonial financial dispute which does not involve the care of a child.

Clause 4 sets out the conditions which are applicable to contingency fee agreements. For example, if a contingency fee agreement is an agreement under which the attorney-at-law is entitled to a success fee for any legal services rendered, the success fee shall not exceed the normal fees of the attorney-at-law by more than one hundred per cent. However, the attorney-at-law and the client can apply to the court to seek an exemption from that limit.

Clause 5 provides, among other things, that a contingency fee agreement shall be in writing and shall be signed by the attorney-at-law and the client or by an authorised person on behalf of the client. A contingency fee agreement must also state certain prescribed matters.

Clause 6 deals with awards of costs and how such awards affect contingency fee agreements.

Clause 7 prohibits an attorney-at-law who is a party to a contingency fee agreement from claiming more fees than the contingency fee agreement provides unless such extra fees are expressly permitted by the contingency fee agreement.

Clause 8 provides that any agreement which seeks to relieve an attorney-at-law from negligence or from liability for any action for which the attorney-at-law would otherwise be liable as an attorney-at-law is void.

Clause 9 provides that no action may be brought upon any contingency fee agreement but an application can be made to the court to determine the validity or effect of the contingency fee agreement and to set aside or enforce the contingency fee agreement.

Clause 10 provides for the enforcement of a contingency fee agreement upon a successful application under clause 9.

Clause 11 provides for the reopening of a contingency fee agreement upon application by a person who has made all payments under the contingency fee agreement if it appears to the court that the special circumstances of the case require the contingency fee agreement to be reopened.

Clause 12 provides that the Clerk of the Court, before payment under a contingency fee agreement, must examine such contingency fee agreement where the client is in a fiduciary position such as a guardian, attorney or trustee under a deed or will.

Clause 13 provides that, if the client pays the whole or any part of any amount due under a contingency fee agreement without the previous allowance of the Clerk of the Court under clause 12 or the direction of the court, the client may be directed by the court to account to the person whose estate or property is charged with the amount paid or any part of it for the amount so charged; and the attorney-at-law who accepts the payment may be ordered by the court, in certain circumstances, to refund the amount received by the attorney-at-law.

Clause 14 prohibits an attorney-at-law from purchasing all or any part of a client's interest in an action or proceedings which the attorney-at-law intends to bring or maintain on behalf of the client.

Clause 15 provides that except as otherwise provided by the legislation, a bill of an attorney-at-law arising under a contingency fee agreement is not liable to taxation by the court.

PART 3 - LITIGATION FUNDING AGREEMENTS

Clause 16 provides for litigation funding agreements which are defined as agreements —

- (a) under which a funder agrees to fund, in whole or in part, the provision of legal services to another person (“a client”) by an attorney-at-law;



- (b) which relate to the provision of legal services; and
- (c) under which the client agrees to pay a sum to the funder in specified circumstances.

PART 4 - GENERAL

Clause 17 repeals any distinct offence under the common law of maintenance, including champerty. The clause also makes it clear that embracery is not abolished.

Clause 18 abolishes the tort of maintenance and champerty but provides that the abolition of criminal and civil liability under the legislation for maintenance and champerty shall not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

Clause 19 provides for the making of regulations relating to litigation funding agreements and contingency fee agreements by the Cabinet after consultation with the Chief Justice and the legal association. The clause also provides that the Rules Committee of the Grand Court may make rules of court to give effect to the legislation.

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PRIVATE FUNDING OF LEGAL SERVICES BILL, 2020

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CAYMAN ISLANDS



**PRIVATE FUNDING OF LEGAL SERVICES
BILL, 2020**

**A BILL FOR A LAW TO PROVIDE FOR THE REGULATION OF PRIVATE FUNDING OF
LEGAL SERVICES; AND FOR INCIDENTAL AND CONNECTED PURPOSES**

ENACTED by the Legislature of the Cayman Islands.

PART 1 – PRELIMINARY

Short title and commencement

1. (1) This Law may be cited as the Private Funding of Legal Services Law, 2020.
- (2) This Law shall come into force on such date as may be appointed by Order made by the Cabinet, and different dates may be appointed for different provisions of this Law and in relation to different matters.

Interpretation

2. In this Law —

“**Clerk of the Court**” means the officer appointed as such under section 7 of the *Grand Court Law (2015 Revision)*;

“**client**” includes —



- (a) a person who, as a principal or on behalf of another person, retains or employs or is about to retain or employ an attorney-at-law for any legal services; and
- (b) a person who is or may be liable to pay the bill of an attorney-at-law for any legal services;

“contingency fee agreement” means an agreement specified in section 3;

“funder” means a person who provides funding for legal services under a litigation funding agreement;

“legal association” means the Cayman Islands Legal Practitioners Association;

“legal services” means any advice or representation provided by an attorney-at-law to a client in proceedings, or in anticipation of or in contemplation of proceedings;

“litigation funding agreement” means an agreement specified in section 16;

“normal fees” in relation to work performed by an attorney-at-law in connection with proceedings, means the reasonable fees which may be charged by the attorney-at-law for such work, if such fees were taxed on the indemnity basis, in the absence of a contingency fee agreement;

“proceedings” means any proceedings in or before —

- (a) any court; or
- (b) any tribunal or functionary having the powers of a court, or having the power to issue, grant or recommend the issuing of any licence, permit or other authorisation for the performance of any act or the carrying on of any business or other activity,

and includes arbitration proceedings;

“quasi-criminal proceeding” means a proceeding dealing with a non-criminal offence that carries a penalty similar to that of a criminal offence, but which is subject to less complex court procedures than criminal offences, such as traffic and workplace health and safety offences; and

“success fee” means any fee under a contingency fee agreement which is higher than the normal fees of an attorney-at-law but does not include a percentage of the amount or of the value of property recovered in an action or proceedings.



PART 2 – CONTINGENCY FEE AGREEMENTS

Contingency fee agreements

3. (1) Subject to subsections (2) and (3), an attorney-at-law may enter into a contingency fee agreement with a client in which it is agreed that the remuneration paid to the attorney-at-law for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which the legal services are provided.
- (2) An attorney-at-law shall not enter into a contingency fee agreement if the attorney-at-law is retained in respect of a proceeding under the *Penal Code (2019 Revision)* or any other criminal or quasi-criminal proceeding.
- (3) An attorney-at-law shall not enter into a contingency fee agreement under which the attorney-at-law is retained in respect of services relating to the care of a child or any order under the *Children Law (2012 Revision)* but may, with the approval of the court, enter into a contingency fee agreement for the provision of legal services relating to a matrimonial financial dispute which does not involve the care of a child.

Conditions applicable to contingency fee agreements

4. (1) Subject to subsection (2), where a contingency fee agreement provides that an attorney-at-law is entitled to a success fee, the success fee shall not exceed the normal fees of the attorney-at-law by more than one hundred per cent.
- (2) In the case of claims sounding in money, the total of any litigation payable by a client to an attorney-at-law shall not exceed the prescribed percentage of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for the purposes of calculating any excess, include any costs.
- (3) Where a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceedings, the amount to be paid to the attorney-at-law shall not be more than the maximum percentage, if any, prescribed by regulations, of the amount or of the value of the property recovered in the action or proceedings, however the amount or property is recovered.
- (4) Notwithstanding subsections (1), (2) or (3), an attorney-at-law may enter into a contingency fee agreement where —
 - (a) the amount paid to the attorney-at-law is more than the prescribed maximum percentage of the amount or of the value of the property recovered in the action or proceedings; or
 - (b) the success fee exceeds either of the percentages set out in subsections (1) or (2),

and where a joint application by the attorney-at-law and the client is brought within ninety days of the execution of the contingency fee agreement and the contingency fee agreement is approved by the Grand Court.

- (5) In determining whether to grant an application under subsection (4), the Grand Court shall consider —
 - (a) the nature and complexity of the action or proceedings;
 - (b) the expense or risk involved in the action or proceedings; and
 - (c) any other factors as the Grand Court considers relevant.
- (6) The Grand Court in determining an application under subsection (4) shall not approve a contingency fee which exceeds forty per cent of the total amount awarded, of any amount obtained by the client or of the value of any property recovered in the action or proceeding, however the amount or property is recovered.
- (7) A contingency fee agreement shall not include in the fee payable to the attorney-at-law, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless —
 - (a) within ninety days of the execution of the agreement, the attorney-at-law and client jointly apply to a judge of the Grand Court for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
 - (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of the costs, subject to subsection (6).
- (8) A contingency fee agreement that is subject to approval under subsection (4) or (7) is not enforceable unless it is so approved.

Form and content of contingency fee agreements

5. (1) A contingency fee agreement —
 - (a) shall be in writing; and
 - (b) shall be signed by —
 - (i) the client concerned;
 - (ii) the client's appointed guardian, a trustee or an attorney under a power of attorney; or
 - (iii) if the client is not a natural person, by the client's authorised representative,
and the attorney-at-law representing such client.
- (2) Subject to subsection (3), a client shall have a period of fourteen days, calculated from the date a contingency fee agreement is executed, during which the client



will have the right to withdraw from the contingency fee agreement by giving notice to the attorney-at-law in writing; and —

- (a) the attorney-at-law shall advise the client in writing of this right of withdrawal prior to the execution of the contingency fee agreement; and
 - (b) the contingency fee agreement shall state that the client has such a right of withdrawal.
- (3) In the event of withdrawal in accordance with subsection (2), the attorney-at-law shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, and the fees and disbursements shall be taxed on the indemnity basis if not agreed.
 - (4) A copy of a contingency fee agreement shall be delivered by the attorney-at-law to the client concerned upon the date on which the contingency fee agreement is signed.
 - (5) A contingency fee agreement which does not satisfy all of the conditions applicable to a contingency fee agreement by virtue of this section, sections 3, and 4 and any regulations shall be unenforceable.

Agreement not to affect costs as between party and party

6. (1) A contingency fee agreement does not affect the amount, or any right or remedy for the recovery, of any costs recoverable from a client by any other person, or payable to a client by any other person, and any such other person may require costs payable or recoverable by the person to or from the client to be taxed in the ordinary manner, unless such person has agreed otherwise.
- (2) Notwithstanding subsection (1), the client who has entered into the contingency fee agreement is not entitled to recover from any other person under any order for the payment of costs made in the proceedings to which the contingency fee agreement relates, any amount more than the amount payable by the client to the client's own attorney-at-law under the contingency fee agreement.
- (3) In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client's attorney-at-law is being compensated in accordance with a contingency fee agreement.

Claims for additional remuneration excluded

7. A contingency fee agreement shall exclude any further claim of the attorney-at-law in respect of legal services except such further claims as are expressly permitted by the contingency fee agreement.

Agreements relieving attorney-at-law from liability for negligence void

8. (1) A provision in a contingency fee agreement that an attorney-at-law is not liable for negligence or that the attorney-at-law is relieved of any responsibility to which the attorney-at-law would otherwise be subject, is void.

- (2) Subsection (1) does not prohibit an attorney-at-law who is employed in a master-servant relationship from being indemnified by the employer of the attorney-at-law for liabilities incurred as a consequence of professional negligence in the course of the employment.

Determination of disputes under the agreement

9. (1) Subject to subsection (2), no action shall be brought in respect of a contingency fee agreement.
- (2) Where there is a question in respect of the validity or effect of a contingency fee agreement, the court in which the business or any part of the business was done, or if the business was not done in any court, the Grand Court, may, upon application by a person under subsection (3), enforce or set aside the contingency fee agreement.
- (3) The following persons may make an application under subsection (2) —
- (a) a person who is a party to the agreement;
 - (b) a person who is or is alleged to be liable to pay the fees or disbursements in respect of which the contingency fee agreement is made; or
 - (c) a person who is or claims to be entitled to be paid the fees or disbursements in respect of which the contingency fee agreement is made.

Enforcement of agreement

10. (1) Upon an application under section 9, where it appears to the court that the contingency fee agreement is fair and reasonable, the court may enforce the contingency fee agreement by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit.
- (2) Where the terms of the contingency fee agreement are determined by the court to be invalid, unfair or unreasonable, the contingency fee agreement or the part of the contingency fee agreement determined invalid, unfair or unreasonable may be declared void, and the court may order that the contingency fee agreement or the part of the contingency fee agreement deemed invalid, unfair or unreasonable be cancelled and may direct the fees and disbursements incurred or chargeable in respect of the matters included therein to be taxed on the indemnity basis if not agreed.

Reopening of agreement

11. Where the amount agreed under a contingency fee agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Grand Court may, upon the application of the person who has paid it, where it appears to the Grand Court that special circumstances of the case require the contingency fee agreement to be reopened, the Grand Court shall reopen the contingency fee agreement and —



- (a) shall order the fees and disbursements to be taxed on the indemnity basis if not agreed; and
- (b) may order the whole or any part of the amount received by the attorney-at-law to be repaid by the attorney-at-law on such terms and conditions as the Grand Court deems just.

Agreements made by client in fiduciary capacity

12. Where a contingency fee agreement is made by a client in the capacity of guardian, attorney or trustee under a deed or will, or in the capacity of guardian of property that will be chargeable with the amount or any part of the amount payable under the contingency fee agreement, the contingency fee agreement shall, before payment, be laid by the client or the attorney-at-law before the Clerk of the Court, who shall examine the contingency fee agreement and may disallow any part of the contingency fee agreement or may require the direction of the court to be made thereon.

Client paying without approval to be liable to estate

- 13.** (1) Where a client pays the whole or any part of the amount specified in section 12 without the previous allowance of the Clerk of the Court under section 12 or the direction of the court, the client may, where the court is of the view that the client had not exercised due care in ensuring compliance with section 12, be ordered to account to the person whose estate or property is charged with the amount paid or any part of it for the amount so charged.
- (2) The attorney-at-law who accepts a payment in circumstances specified in subsection (1) may be ordered by the court to refund the amount received by the attorney-at-law where the court is of the view that the attorney-at-law has not exercised due care in ensuring compliance with section 12.

Purchase of interest prohibited

14. An attorney-at-law shall not enter into a contingency fee agreement by which the attorney-at-law purchases all or part of a client's interest in the action or other contentious proceeding that the attorney-at-law is to bring or maintain on the client's behalf.

Bills under agreement not liable to taxation

15. Except as otherwise provided in this Law, a bill of an attorney-at-law for the amount due under a contingency fee agreement is not subject to any taxation or to any provision of law respecting the signing and delivery of a bill of an attorney-at-law.

PART 3 – LITIGATION FUNDING AGREEMENTS

Litigation funding agreements

- 16.** (1) A litigation funding agreement is an agreement —
- (a) under which a funder agrees to fund in whole or in part the provision of legal services to a client by an attorney-at-law;
 - (b) which relates to the provision of legal services; and
 - (c) under which the client agrees to pay a sum to the funder in specified circumstances.
- (2) The following conditions are applicable to a litigation funding agreement —
- (a) the agreement shall be in writing;
 - (b) the agreement shall comply with prescribed requirements, if any; and
 - (c) the sum to be paid by a client shall consist of —
 - (i) any costs payable to the client in respect of the proceedings to which the agreement relates, together with an amount calculated by reference to the funder’s anticipated expenditure in funding the provision of the services; or
 - (ii) a percentage of the amount or the value of the property recovered in the action or proceedings to which the agreement relates.
- (3) The requirements which may be prescribed under subsection (2)(b) —
- (a) include requirements for the funder to have provided prescribed information to the client before the litigation funding agreement is made; and
 - (b) may be different for different descriptions of litigation funding agreements.

PART 4 - GENERAL

Repeal of maintenance and champerty

- 17.** (1) Any distinct offence under the common law of maintenance, including champerty, is repealed.
- (2) For the avoidance of doubt, embracery is not repealed.

Civil rights in respect of maintenance and champerty

- 18.** (1) A person shall not be liable in tort for the offence under the common law of maintenance or champerty, unless the cause of action accrued before the coming into force of this section.



- (2) The abolition of criminal and civil liability under this Law for maintenance and champerty shall not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

Regulations

- 19.** (1) The Cabinet, after consultation with the Chief Justice and the legal association, may make regulations providing for contingency fee agreements and litigation funding agreements.
- (2) Regulations under subsection (1) may, among other things —
- (a) provide for the form and content of a contingency fee agreement;
 - (b) provide for the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee and may —
 - (i) set a scale for the maximum percentage that may be charged for a contingency fee based on factors such as the value of the recovery and the amount of time spent by the attorney-at-law; and
 - (ii) differentiate the maximum percentage that may be charged for a contingency fee based on factors such as the type of cause of action and the court in which the action is to be heard and distinguishing between causes of actions of the same type;
 - (c) impose duties on attorneys-at-law who enter into contingency fee agreements; and
 - (d) exempt persons, actions or proceedings or classes of persons, actions or proceedings from this Law, regulations made under this section or any provision in those regulations.
- (3) The Rules Committee of the Grand Court may also make such rules as are necessary in order to give effect to court procedure relating to this Law.

Passed by the Legislative Assembly the day of , 2020.

Speaker

Clerk of the Legislative Assembly

