

APPENDIX

CAYMAN ISLANDS



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

[MEMORANDUM OF OBJECTS AND REASONS]

TO BE COMPLETED WHEN BILL HAS BEEN CONSIDERED

THE PRIVATE FUNDING OF LEGAL SERVICES BILL, 2015.

ARRANGEMENT OF CLAUSES

PART 1- PRELIMINARY

1. Short title and commencement
2. Interpretation

PART 2- CONTINGENCY FEE AGREEMENTS

3. Contingency fee agreements
4. Conditions applicable to contingency fee agreements
5. Form and content of conditional and contingency fee agreements
6. Agreement not to affect costs as between party and party
7. Awards of costs in contingency fee agreements
8. Claims for additional remuneration excluded
9. Agreements relieving attorney-at-law from liability for negligence void
10. Determination of disputes under the agreement
11. Enforcement of agreement
12. Reopening of agreement
13. Agreements made by client in fiduciary capacity
14. Client paying without approval to be liable to estate
15. Purchase of interest prohibited
16. Bills under agreement not liable to assessment
17. Regulations under this part

PART 3- LITIGATION FUNDING AGREEMENTS

18. Litigation funding agreements

PART 4- GENERAL

19. Repeal of maintenance and champerty
20. Civil rights in respect of maintenance and champerty
21. Rules
22. Regulations generally

CAYMAN ISLANDS

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

ENACTED by the Legislature of the Cayman Islands.

PART 1- PRELIMINARY

1. (1) This Law may be cited as the Private Funding of Legal Services Law, 2015.

Short title and commencement

(2) This Law shall come into force on such date as may be appointed by order made by the Governor in Cabinet, and different dates may be appointed for different provisions of this Law and in relation to different matters.

2. In this Law-

Interpretation

“client” includes 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, and 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 referred to in section 3;

“family law matter” means any matter arising under-

(2003 Revision)
(1995 Revision)
(2012 Revision)
(1996 Revision)
(2005 Revision)
(2006 Revision)

- (a) the Adoption of Children Law (2003 Revision);
- (b) the Affiliation Law (1995 Revision);
- (c) the Children Law (2012 Revision);
- (d) the Maintenance Law (1996 Revision); and
- (e) the Matrimonial Causes Law (2005 Revision);

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

“legal services” means any professional services and advice rendered by an attorney-at-law in relation to any action or proceedings;

“litigation funding agreement” means any agreement as defined in section 18;

“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 are taxed on an attorney-at-law and own client basis, in the absence of a contingency fee agreement;

“proceedings” means any proceedings in or before any court of law or any tribunal or functionary having the powers of a court of law, 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 any professional services rendered by the legal practitioner concerned and any arbitration proceedings, but excludes any criminal proceedings or any proceedings in respect of any family law matter; and

“success fee” means any fees under a contingency fee agreement which are higher than the normal fees of the attorney-at-law.

PART 2- CONTINGENCY FEE AGREEMENTS

Contingency fee
agreements

3. (1) Notwithstanding anything to the contrary in any law or the common law, an attorney-at-law may, if in his opinion there are reasonable prospects that his client may be successful in any proceedings, enter into a contingency fee agreement with such client in which it is agreed-

- (a) that the attorney-at-law shall not be entitled to any fees for legal services rendered in respect of such proceedings unless the client is successful in such proceedings to the extent set out in such agreement; or
- (b) that the attorney-at-law shall be entitled to fees equal to or, subject to subsection (2), higher than his normal fees set out in

such agreement, for any such legal services rendered, if the client is successful in the proceedings to the extent set out in such agreement.

(2) An attorney-at-law shall not enter into a contingency fee agreement if the attorney-at-law is retained in respect of-

- (a) a proceeding under the Penal Code (2013 Revision) or any other criminal or quasi-criminal proceeding; or (2013 Revision)
- (b) a family law matter.

4. (1) Subject to subsection (2), 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. Conditions applicable to contingency fee agreements

(2) Notwithstanding subsection (1), in the case of claims sounding in money, the total of any such success fee payable by the client to the attorney-at-law, shall not exceed twenty-five per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

(3) If 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 proceeding, 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 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 proceeding or where the success fee exceeds either of the percentages set out in subsections (2) or (3), if, upon joint application of the attorney-at-law and his client whose application shall be brought within ninety days after the agreement is executed, the agreement is approved by the Grand Court.

(5) In determining whether to grant an application under subsection (4), the court shall consider the nature and complexity of the action or proceeding and the expense or risk involved in it and may consider such other factors as the court considers relevant.

(6) 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) 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 them.

(7) A contingency fee agreement that is subject to approval under subsection (4) or (6) is not enforceable unless it is so approved.

(8) For purposes of assessment, if a contingency fee agreement-

- (a) is not one to which subsection (4) or (6) applies, the client may apply to the Grand Court for an assessment of the attorney-at-law's bill within thirty days after its delivery or within one year after its payment; or
- (b) is one to which subsection (4) or (6) applies, the client or the attorney-at-law may apply to the Grand Court for an assessment within the time prescribed by rules made under this Law.

Form and content of conditional and contingency fee agreements

5. (1) A contingency fee agreement shall be in writing and in the form prescribed by the Cabinet after consultation with the Chief Justice and the legal associations.

(2) The Attorney General shall cause a copy of the form referred to in subsection (1) to be tabled in Legislative Assembly before such form comes into operation.

(3) A contingency fee agreement shall be signed by-

- (a) the client concerned;
- (b) the client's appointed guardian, a trustee or an attorney under a power of attorney; or
- (c) if the client is not a natural person, by its authorised representative,

and by the attorney-at-law representing such client.

(4) A contingency fee agreement shall state-

- (a) the proceedings to which the agreement relates;
- (b) that before the agreement was entered into, the client-

- (i) was advised of any other ways of financing the litigation and of their respective implications;
- (ii) was informed of the normal rule that in the event of the client being unsuccessful in the proceedings, the client may be liable to pay the taxed party and party costs of the client's opponent in the proceedings; and
- (iii) understood the meaning and purport of the agreement;
- (c) what will be regarded by the parties to the agreement as constituting success or partial success;
- (d) the circumstances in which the fees and disbursements of the attorney-at-law relating to the matter are payable;
- (e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;
- (f) either the amounts payable or the method to be used in calculating the amounts payable;
- (g) the manner in which disbursements made or incurred by the attorney-at-law on behalf of the client shall be dealt with;
- (h) subject to subsection (5), that the client will have a period of fourteen days, calculated from the date of the agreement, during which the client will have the right to withdraw from the agreement by giving notice to the attorney-at-law in writing; and
- (i) the manner in which any amendment or other agreements ancillary to that agreement will be dealt with.

(5) In the event of withdrawal 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, calculated on an attorney and client basis.

(6) 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 agreement is signed.

(7) The Cabinet may make regulations to give effect to this section after consulting with the Chief Justice and the legal associations.

6. (1) A contingency fee agreement does not affect the amount, or any right or remedy for the recovery, of any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by the person to or from the client to be assessed in the ordinary manner, unless such person has otherwise agreed.

Agreement not to affect costs as between party and party

(2) Notwithstanding subsection (1), the client who has entered into the agreement is not entitled to recover from any other person under any order for the payment of any costs that are the subject of the agreement more than the amount payable by the client to the client's own attorney-at-law under the agreement.

Awards of costs in contingency fee agreements

7. (1) 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.

(2) Notwithstanding section 6(2), even if an order for the payment of costs is more than the amount payable by the client to the client's own attorney-at-law under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his or its attorney-at-law.

(3) If the client recovers the full amount under an order for the payment of costs under subsection (2), the client is only required to pay costs to his or its attorney-at-law and not the amount payable under the contingency fee agreement, unless the contingency fee agreement is one that has been approved by a court under section 4(6) and provides otherwise.

Claims for additional remuneration excluded

8. A contingency fee agreement excludes any further claim of the attorney-at-law beyond the terms of the agreement in respect of services in relation to the conduct and completion of the business in respect of which it is made, except such as are expressly excepted by the agreement.

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

9. (1) A provision in a contingency fee agreement that the attorney-at-law is not to be liable for negligence or that he is to be relieved from any responsibility to which he would otherwise be subject as such attorney-at-law 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 for liabilities incurred by professional negligence in the course of the employment.

Determination of disputes under the agreement

[10. No action shall be brought upon any contingency fee agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Grand Court.]

11. (1) Upon an application under section 10, if it appears to the court that the contingency fee agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit.

Enforcement of agreement

(2) If the terms of the contingency fee agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner.

12. Where the amount agreed under any 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 if it appears to the court that the special circumstances of the case require the agreement to be reopened, reopen it and order the costs, fees, charges and disbursements to be assessed, and may also order the whole or any part of the amount received by the attorney-at-law to be repaid by him on such terms and conditions as to the court seems just.

Reopening of agreement

13. Where any contingency fee agreement is made by the client in the capacity of guardian, attorney or of 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 agreement, the agreement shall, before payment, be laid before the Clerk of the Court who shall examine it and may disallow any part of it or may require the direction of the court to be made thereon.

Agreements made by client in fiduciary capacity

14. If the client pays the whole or any part of such amount without the previous allowance of the Clerk of the Court under section 13 or the direction of the court, the client is liable 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 such payment may be ordered by the court to refund the amount received by him.

Client paying without approval to be liable to estate

15. An attorney-at-law shall not enter into an 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.

Purchase of interest prohibited

16. 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 assessment or to any provision of law respecting the signing and delivery of a bill of an attorney-at-law.

Bills under agreement liable to assessment

Regulations under this Part

17. (1) The Cabinet, after consultation with the Chief Justice and the legal associations, may make regulations governing contingency fee agreements, including regulations-

- (a) governing the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee, including-
 - (i) setting 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) differentiating 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;
- (b) imposing duties on attorneys-at-law who enter into contingency fee agreements;
- (c) prescribing the time in which an attorney-at-law or client may apply for an assessment under section 4(8)(b); and
- (d) exempting persons, actions or proceedings or classes of persons, actions or proceedings from this Part, a regulation made under this section or any provision in a regulation.

PART 3- LITIGATION FUNDING AGREEMENTS

Litigation funding agreements

18. (1) A litigation funding agreement is an agreement under which-

- (a) 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) the agreement relates to proceedings as defined by section 2; and
- (c) 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 funder shall be a person, or person of a description, prescribed by the Cabinet;
- (b) the agreement shall be in writing;
- (c) the agreement shall comply with prescribed requirements, if any;
- (d) the sum to be paid by the client shall consist of any costs payable to him 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; and

- (e) the amount funded shall not exceed such percentage of that anticipated expenditure as may be prescribed by Cabinet in relation to proceedings of the description to which the agreement relates.
- (3) The requirements which the Cabinet may prescribe under subsection (2)(c)-
 - (a) include requirements for the funder to have provided prescribed information to the client before the agreements is made; and
 - (b) may be different for different descriptions of litigation funding agreements.
- (4) The Cabinet shall consult with the Chief Justice and the legal associations before making regulations under this section.
- (5) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation agreement.
- (6) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement.

PART 4- GENERAL

- 19. Any distinct offence under the common law of maintenance, including champerty, but not embracery is repealed. Repeal of maintenance and champerty
- 20. (1) No person shall be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect. Civil rights in respect of maintenance and champerty
- (2) The abolition of criminal and civil liability under this Law for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.
- 21. (1) The Rules Committee of the Grand Court may make such rules as are necessary in order to give effect to this Law. Rules

