A newsletter from NIFA
APPROVED EXPERT FINANCIAL WITNESSES

NIFA NEWS

ISSUE 16

WORKING TAX CREDIT, THE CLAIM THAT'S NEVER CLAIMED

In our experience, very few lawyers ever consider the effect of working tax credits on claims for loss of earnings. Those who ignore it do so at their peril!

The Government introduced the current working tax credit system on 6 April 2003 to assist those in low paid work. It is available to both the employed and self employed and replaced the previous system of working families' tax credits.

In very broad terms, eligibility for working tax credit arises if an individual or a member of a couple is in paid work. It is relevant to claimants seeking compensation for loss of earnings in circumstances where they or their partners were employed or self employed prior to an accident and neither has or is likely to work subsequently. In such cases, the claimant's loss should include a claim for any loss of entitlement to working tax credit. A loss will typically only arise if the claimant or his or her partner were relatively poorly paid. The flow chart overleaf gives an indication as to when it may be appropriate to include a claim for loss of working tax credit.

It should be emphasised that the flow chart is not intended to be a definitive guide and is based on a number of underlying assumptions which may not apply in particular circumstances. For example, it assumes that the person in work worked for thirty hours a week and that none of the members of the family were disabled prior to the accident. Typically, if the claimant has minor children living with him or her then there will be no need to consider a loss under this head because it will probably be compensated by an increase in the level of child tax credit after the accident.

By way of example, consider a couple in their mid fifties whose children have left home and where the husband has traditionally been the sole breadwinner. Suppose he was paid broadly in line with the national minimum wage, suffered an accident and has subsequently been unable to work. In those circumstances, prior to the accident, he would have received working tax credit of approximately £4,000 per annum. After the accident, assuming neither he nor his wife were able to work, he would lose that entitlement. In the writer's opinion it is therefore right that he should include in his claim for loss of earnings the loss of £4,000 per annum for the period up to his age of retirement.

Claims for loss of working tax credit may not arise often but they will do so in cases where the claims are relatively modest. They can therefore help to raise the quantum of the overall claim to a level where it becomes cost effective to pursue it in circumstances where this might not otherwise be the case.

Working tax credit claims are of much more significance from the perspective of those defending claims for loss of earnings. Often the level of working tax credit and child tax credit will increase after an accident and, in the writer's opinion, the increase in the level of tax credits should properly mitigate any claim for loss of earnings. In our experience few defendants or their lawyers have so far argued this point even in relation to tax credits paid between the accident and the date of trial, never mind the likely future credits which are, admittedly, not easy to calculate.

continued overleaf

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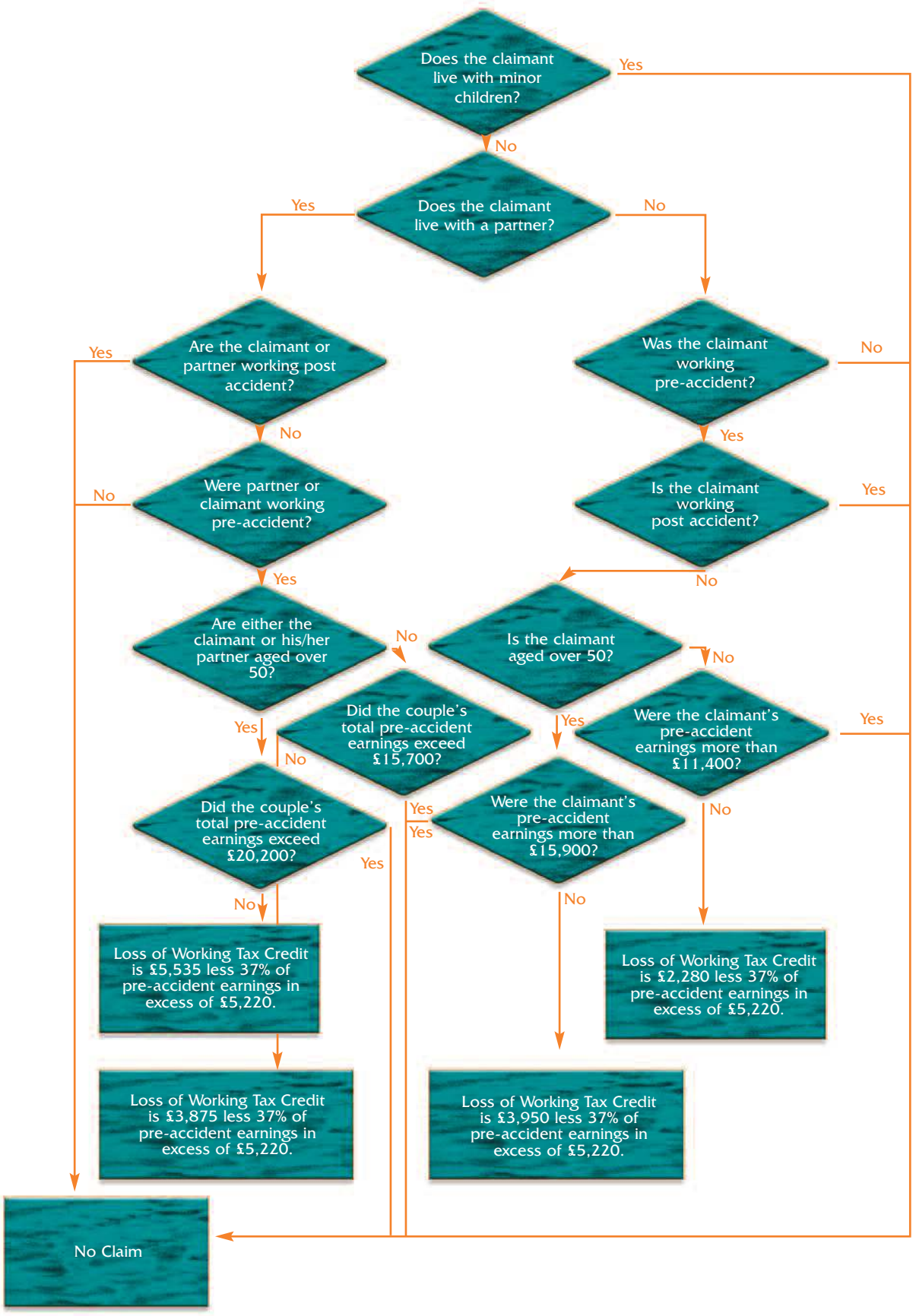
Flowchart to establish whether claimants may have a claim for loss or working tax credit



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It has been suggested by some claimant solicitors that this is an area where sleeping dogs are best left to lie. Such a line of thought is understandable but risky as it could expose them to criticism from those low paid claimants who have not been advised to seek compensation for loss of working tax credit.

Inevitably, as with any tax related matter, the detailed rules are complex in the extreme and if the question of tax credits arises in relation to any particular claim accounting advice should be sought.

As a final word of caution it is worth mentioning that reliance should not be placed on government certification of amounts paid to claimants since in a very high proportion of cases there are retrospective adjustments arising because the amounts paid do not match the claimants' entitlements. This will be of particular relevance if defendants start to argue that tax credit should be taken into account in mitigating claimants' claims. It will then be very important to ensure that any sums deducted in mitigation reflect the claimants' true entitlement and excludes any element of erroneous overpayment which could later be clawed back.

Pensions in divorce - The new Form P - a help or hindrance?

The Family Proceedings (Amendment) (No 5) Rules 2005 came into force in December last year and introduced new pension inquiry form P for use in ancillary relief applications.

Parts of the new forms are intended to be completed by the pension providers. We have yet to see how quickly or diligently pension providers complete the new forms. However, it is quite likely that they will make the work of matrimonial lawyers harder rather than simplifying matters as was Government's intention. Even if pension providers accurately and expeditiously provide the information requested of them, that information may give rise to as many questions as it answers. In many cases, some expert interpretation of the information provided is likely to be warranted.

In recent years many matrimonial solicitors have, of necessity, obtained a good working knowledge of pensions but, in all but the simplest cases, they would be well advised to suggest to their clients that they discuss the results of the form P enquiries with an independent financial advisor. Several NIFA members are already offering this service to matrimonial lawyers through our their in-house financial services companies. So, if you have any queries arising from replies to the new form P please do not hesitate to consult us.

Wives' hidden powers - For when the going gets tough

It is not uncommon for wives to be appointed by their husbands as directors and/or shareholders of family companies in circumstances where they have no actual involvement in the running of the business. In such cases the wives have substantial statutory and contractual powers and rights arising from their status as director, employee or shareholder which can be used as a bargaining tool in negotiations on divorce. Of course, such circumstances are not the sole preserve of wives and are equally true of husbands in relation to businesses run by wives or in same sex relationships where a civil partnership has been entered into. For grammatical ease this article refers to the non business spouse as the "wife" simply because this is the most common scenario.

The purpose of this article is to remind family lawyers that it is always worthwhile to establish what are the rights, powers and remedies available to a wife in these circumstances in her capacity as a shareholder, employee or director, rather than simply in her capacity as an applicant in ancillary relief proceedings. For example, she may be able to frustrate the payment of dividends, petition for the company to be wound up on just and equitable grounds, or seek compensation for unfair prejudice of a minority interest.

Similarly, it is often worth considering whether significant transactions into which family companies have entered can be challenged as void for lack of authorisation by board or shareholder resolutions. Examples of such transactions include those in relation to which a director has an interest or ones which constitute substantial property transactions.

Finally, it can also be worthwhile establishing whether the wife can establish rights as an employee which could, for example, give rise to entitlement to pay in lieu of notice, redundancy or even compensation for unfair dismissal.

Often a wife can run the risk of cutting off her nose to spite her face by pursuing such claims insofar as they could damage the business which will ultimately fund settlement of her claim. However, it can never do any harm to know the extent of the wife's remedies if only so that they can be used judiciously in negotiations if the going gets tough.

NIFA CONFISCATION ORDERS LIVE FOREVER

NIFA members are increasingly often being consulted to advise in respect of confiscation orders made following successful criminal prosecutions. We have established an excellent track record in assisting defendants to gain substantial reductions in the level of the amounts claimed.

In many cases criminal defence lawyers are reluctant or unable to obtain funding to challenge confiscation orders on the grounds that they far exceed the assets of the person convicted. The argument goes that, even if the level of orders were greatly reduced, the claimant would still lose all he or she had and the victory would be Pyrrhic.

Failing to challenge them can have unwelcome and unforeseen consequences.

Confiscation orders have been in existence for many years in relation to drug trafficking offences but are, of course, now applicable to almost any criminal conviction. What is all too often not appreciated fully is the fact that a confiscation order is **never** discharged until paid in full.

This lesson was learnt at significant cost to an individual with whom one of our members dealt recently. He was convicted of drug trafficking fifteen years ago and was the subject of a substantial confiscation order. At the time he had few assets and therefore the order was not challenged. During the following years, after his release from prison, the individual built up a substantial asset base from legitimate trading activities. It would be an understatement to say he was surprised when recently he received a letter reminding him that the confiscation order was still in force. He lost everything he had accumulated since leaving prison even though he had earned every penny legitimately.

The moral of the story is that, especially if funding can be obtained, it is always worth challenging confiscation orders and, failing to do so, could expose defence lawyers to criticism and potential liability at some time in the future. We have yet to hear of a case of a lottery winner whose winnings are claimed under a long outstanding confiscation order but, on the balance of probabilities, as more and more confiscation orders are made, it can only be a matter of time before the first case hits the headlines.

If, therefore, you require advice or assistance to challenge the quantum of confiscation orders or the evidence on which they are being sought, please feel free to contact us. We can also help you to obtain public funding for this type of work.

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