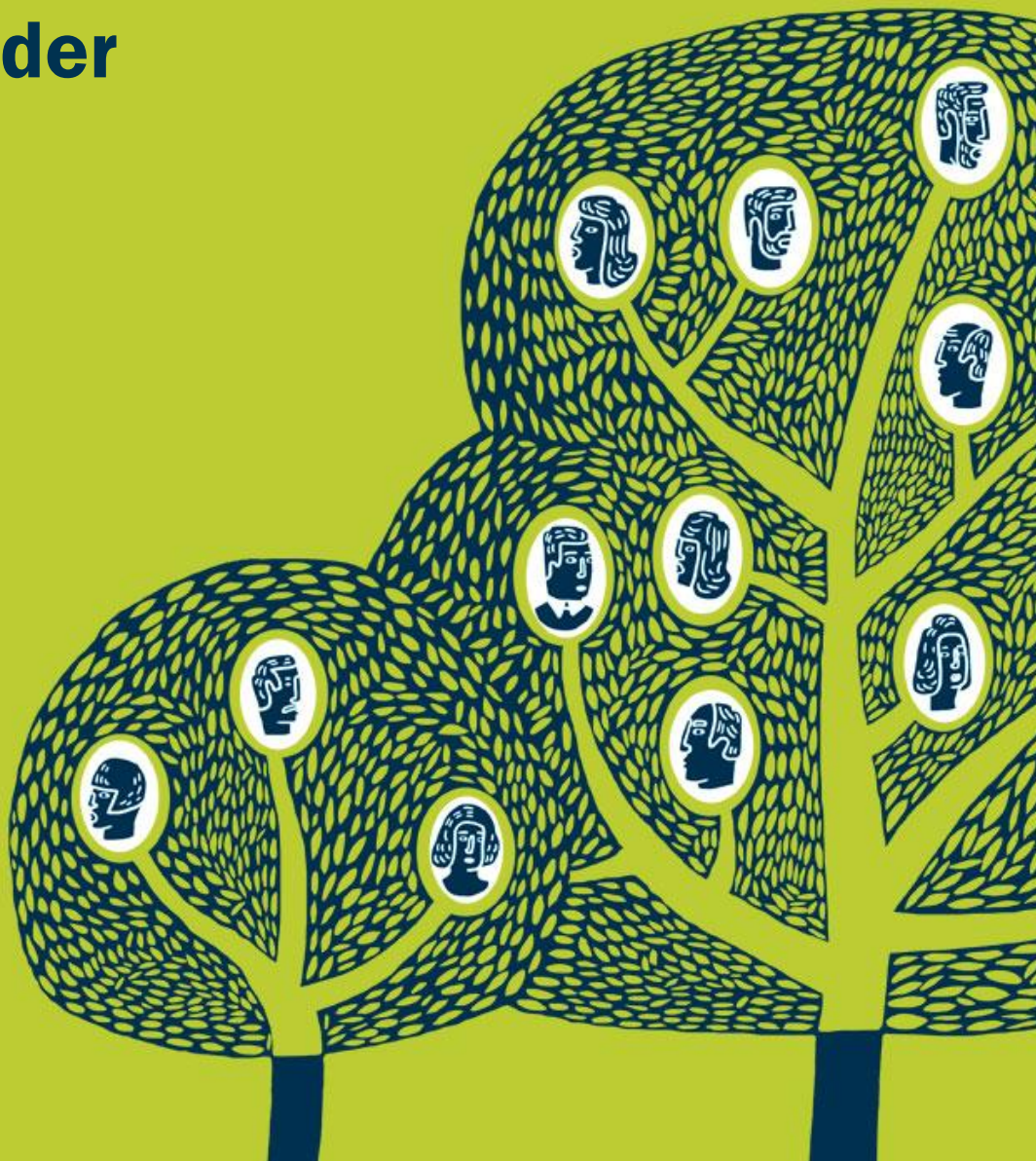
FOURTEEN

Maintenance for older ‘children’



Christopher Miller, 15 March 2017

1. The basics

Statutory routes for child support

- i) Child Support Act 1991
- ii) Matrimonial Causes Act 1973
- iii) Children Act 1989 Schedule 1

Child Support Act 1991

- Only applies to birth children or adopted children (N.B. position of step-child under MCA 1973 and CA 1989)
- (Mostly) only applies to children where both parents are in this jurisdiction, (s44 CSA 1991)
- Only applies (see s55 CSA 1991) to unmarried children who are:
  - Under 16,
  - Under 19 and in full time education (not advanced education),
  - under 18 and in specific types of vocational training
- For definitions of 'advanced' and 'vocational', see CS (MAP) Regs 1992 SI 1992/1813

Matrimonial Causes Act 1973

- Applies to children of the family (s23 1) d))
- Section 29 imposes limits on duration
  - Must not in the first instance last beyond 17th birthday, unless welfare requires that it does so
  - Must not extend beyond 18th birthday unless
    - Child is, or will be, attending training or education,
    - Special circumstances exist
- Application can only be made by spouse against a spouse (but child may intervene)

Children Act 1989 Sch 1

- Application can be made in respect of children who are under 18 by a parent, Guardian, Special Guardian or someone who is named in CAO - lives with - order (sch1 para 1)
- Application can by made by ‘children’ who are over 18 (sch 1 para 2)
- Children under 18 can intervene in proceedings

- The respondent must be a birth parent, adoptive parent or a step parent or, a step parent if the step parent was married/ a civil partner and the child is a child of the family (sch 1 para 16)
  - But N.B. *Morgan v Hill* [2007] 1 FLR 1480
- Limits on duration of application for a child under 18:
  - Shall not extend beyond 17 in first instance unless the Court thinks it right
  - Shall not extend in any event beyond 18 unless:
    - Child is attending education or vocational training
    - Special circumstances exist

2. Oddities, pitfalls and future trends

The role of the CSA formula

- CSA/CMS applies a set formula, not discretionary in the true sense
- Not relevant to children older than 18
- However, obviously, where it applies, it ousts the jurisdiction of the Court (save 1 year by agreement e.t.c.)

- Under the Matrimonial Causes Act 1973:
  - Starting point for quantum is as per CSA calculation: *GW v RW* [2003] EWHC 611
    - Query: whether or not this has any relevance at all for the child who is over 18?
- Otherwise the section 25 criteria apply (interests of child first but not paramount)

- Under the Children Act 1989 Schedule 1:
  - para 4 sets out the criteria to apply
  - However the starting point should be as per the CSA calculation; *TW v TM* [2015] EWHC 3054 (Fam)
    - Can this be right in respect of a child who is over 18?

The millionaire's defence

- Post *White*, the Millionaire's defence in MCA 1973 proceedings has been relegated to the history books,
- However, not so (or at least not so completely) in the case of Children Act 1989 Sch 1 cases:
  - *PG v TW* (No 2) [2014] 1 FLR 923, *Re A* [2014] EWCA Civ 1577

Timing

"The early bird catches the worm, but the second mouse gets the cheese"

Willie Nelson

- As set out above, a child cannot make a free-standing application unless he has reached the age of 18; CA 1989 para 2,
- However, on reaching the age of 18, he is barred from making such an application as follows:

  "*An application may not be made under this paragraph by any person if, immediately before he reached the age of sixteen, a periodical payments order was in force with respect to him*." para 2 (3)

- The term 'periodical payments order' is defined at para 2(6) and includes an order under s23 MCA 1973 but does not include a payment pursuant to the CMS

- The risk, then, is that an order for maintenance obtained by the resident parent hits a trigger event after the child reaches the age of 16. The child then, as a young adult, decides to undertake further education, but is debarred from making an application, there is no existing order to vary and the resident parent cannot reapply because Sch 1 para 1 only allows applications in relation to a child (which is defined in s105 as a person under the age of 18, unless the application is brought under para 2 i.e. by the adult child themselves)
- There is one common scenario to be worried about in particular…

- Solutions?
  - Make sure that you incorporate provision for a gap year(s) in your drafting
  - Warn clients about this potential lacuna
  - Obtain good professional indemnity insurance

Vive la difference

- Parliament and the judiciary have a clear aim to ensure as much congruence as possible between the different routes to obtaining maintenance for children (hence *GW v RW* e.t.c.)
- So are there any differences between CA 1989 sch1 and MCA 1973 criteria which we need to be aware of?
  - Duration of marital relationship is a key factor in MCA 1973, duration of parental relationship could be entirely irrelevant under sch 1 of CA 1989; see *J v C* [1999] 1 FLR 152
  - Court is not concerned with fairness/ equality between spouses under CA 1989 sch 1
  - Cohabitation of resident spouse may be of less relevance under Sch 1 than MCA 1973

- These differences will be important in very few cases, but may be more likely to be of relevance where the child is older and his needs may not be synonymous with those of the resident spouse

- It has been settled law for 4 decades that a child can intervene in MCA 1973 proceedings; *Downing v Downing* [1976] Fam 288,
- The intervening child in CA 1989 Sch 1 proceedings is a much more recent phenomena:
  - *Morgan v Hill* [2007] 1 FLR 1480 appears to have opened the door that had been left ajar by *Re P* (which suggested an exceptionality test for separate representation)

- Intervention requires particularly careful consideration in cases involving older children because:
  - The resident parent may not adequately be able to represent the child's interests without conflation with their own interests
  - Older children may want a say in any event
  - As has been explored above, decisions made prior to age 16 may have repercussions later on in life

The disabled child

- It is clear from the framing of both MCA 1973 s29 and CA 1989 Sch 1 para 1 that parliament wished to ensure that there were means of securing financial support for children of separated parents, when necessary, well beyond the end of education. This, of course, was aimed principally at children with disabilities or other significant needs; *J v C* [1999] 1 FLR 152.

- None of the statutory options apply where the disabled child's parents have not separated:
  - CSA applies to separated parents
  - MCA 1973 jurisdiction is invoked on decree
  - CA 1989 and sch 1 specifically excludes applications by children whose parents have not separated; para 2(4)
- The disabled child of parents who are not separated will have to look to other means to obtain help if his parents are not providing for him