

What is realistic and achievable in schedule 1 applications, supported by case law and practical examples? Are they only appropriate for asset/income rich cases?

Short answer: Not much unless there are substantial resources available, and basically yes.

Longer answer: Lawyers want to find creative solutions to the legal problems of a wide range of clients. A combination of the statutory framework, the role of the CMS and the inherent cost risk in pursuing a Schedule 1 claim make it difficult for us to achieve this for many clients who would benefit from flexible financial provision for children.

Abbreviations used in this handout:

- CA 1989 – Children Act 1989
- CMS – Child Maintenance Service
- CP – civil partnership
- CSA 1991 – Child Support Act 1991
- EW – England and Wales
- PP – periodical payments
- MC Regs - Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677)
- CMS terms
 - PWC – person/parent with care
 - NRP – non-resident parent
 - QC – qualifying child

Part 1: barriers faced by applicants

Getting past the CMS: the impact of the CSA 1991, s8

To get a PP order for the benefit of a child, the applicant must first get a maximum assessment (£156,000 gross annual income) from the CMS.

The vast majority of PWCs will not qualify. According to the Institute for Fiscal Studies 'Where do you fit in?'¹ income calculator, a single parent of two dependent children earning the gross income threshold is in at least the top 5% of the UK income distribution.

There was a suggestion that a CMS calculation (at any level) plus a factual finding of gross income over £156,000 enabled the court to make a PPs order. This was confirmed as incorrect in *Dickson v Rennie* [2014] EWHC 4306, para 30, per Holman J. **A maximum assessment is therefore a must to get a PP order unless an exception applies.**

¹ https://ifs.org.uk/tools_and_resources/where_do_you_fit_in

Exceptions to the need for a maximum assessment:

- No CMS jurisdiction because PWC, NRP or QC are habitually resident outside the UK (CSA 1991, s44) but the jurisdictional requirements of CA 1989, Sch 1 are fulfilled
 - Example: EW-based mother and child; father plays for overseas football club.

- PPs relate to:
 - School fees/educational expenses only
 - Expenses connected with child's disabilities
 - Rare to see standalone applications in these circumstances

- Order embodies an agreement but note the destabilising effect of the “one year rule” (CSA 1991, s8(5) combined with s4(10)(aa))

Playing the system

Even if the income is there, self-employed NRPs have huge scope to structure their remuneration to prevent a maximum assessment. PWCs can apply for variations for additional income on a number of bases, including:

- Unearned income (rental, dividends, interest)²
- Assets exceeding £31,250³
- Diversion of income⁴

This is likely to require an appeal to the Social Security and Child Support Tribunal, which may take years of complex proceedings with no prospect of costs, even if the application succeeds.⁵ This requires tremendous motivation and good quality advice. In my experience, the Tribunal is usually well-informed and robust – a Tribunal Judge sits with a lay person with financial qualifications (usually a forensic accountant) and they have very wide powers of disclosure which often go beyond those that the Family Court would make (I have seen a Tribunal order ten years of accounts and bank statements, for example). However, the process is extremely slow taking on average 1-2 years on current anecdotal experience. This often results in Schedule 1 proceedings concluding without a maximum assessment, leaving PP's out of play.

Even a positive outcome can be outrun by a determined NRP. There is nothing to stop a paying party reapplying to the CMS on the basis of their stated income from a fresh tax year,

² MC Regs, reg 69

³ Reg 69A

⁴ Reg 71

⁵ The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), r10.

provided a year has elapsed since a PPs order was made.⁶ It is also worth noting that an appeal will be superseded by an annual review – this can send an applicant straight to the bottom of the board in what can feel like a game of snakes and ladders.

The reality is that only an extremely small percentage of litigants will qualify for top up PP's; the vast majority of litigants will not be able to apply for an income-based order and will be in the hands of the CMS.

Funding

Who will pay the applicant's legal fees?

- Self-funding – beyond the reach of many PWCs
- Informal provision from own circle – highly uncertain
- Litigation loan – an impossibility given the inability to recover capital in the substantive application
- Costs allowance by way of lump sum, generally by instalments⁷ (no statutory equivalent to MCA, s22ZA) – likely only to be available to big money cases.

Risky for law firms to run even an application for a costs allowance on credit, usually pre-disclosure when it is entirely unclear what the likely level of provision will be, and if the paying party is likely to have resources which justify the making of a costs allowance. This is certainly true in cases where assets are likely to be modest.

How can a litigant be fund a case where the only realistic outcome is the short to medium term occupation of a property on trust terms?

Who will take the case?

Part 2: standalone capital provision – is it worth pursuing?

No maximum assessment, so what's left?

Bearing in mind the comparative rarity of a maximum assessment, it is clear that only a very small proportion of potential applicants will fall within the Sch 1 jurisdiction for PPs.

⁶ See above discussion of the “one year rule”

⁷ See *CF v KM (Financial Provision for Child: Costs of Legal Proceedings)* [2010] EWHC 1754 (Fam)

No maximum assessment does not mean no application is possible, but it is limited to capital provision. My experience is that we almost never see these applications in practice. Why?

What can an applicant actually get?

The ‘template’ schedule 1 provision originates from the leading case of *Re P* [2003] EWCA Civ 837 – a big money case. The main boxes we tick in such a case tend to be housing on reversionary terms, a fund to furnish the property and a car. In a big money case this is not a particularly challenging exercise, usually dependant on the court’s assessment of the standard of living that it is appropriate that the child be brought up in by reference to that enjoyed by the NRP. In a modest asset case, it is a more fraught and problematic exercise within the current statutory framework.

Lump sum

Lump sum order to fund past and future expenditure.⁸

No limit to the number of applications that can be made.⁹

Examples of allowable items:

- Expenses associated with child’s birth
- Equipping a property using a “John Lewis list”
- Cars
- School fees fund

Common features:

- Financial provision to acquire wasting assets or one-off expenses
- **Cannot** be used to secure the PWC’s financial future¹⁰. See *CA v DR* [2021] EWFC 21 at para [64]-[70], a “millionaire’s defence” case in which Roberts J declined to allow an element of PPs for the applicant to build up a pension fund, considering herself bound by the principles in *Re P* [2003] EWCA Civ 837:

[65] This claim amounts in effect to an entitlement to build up personal savings over many years of E’s dependency to fund ongoing income needs at a time when the child’s claims have come to an end as a matter of law. Mr Mitchell QC seeks to justify

⁸ CA 1989, Sch 1 para 1(2)(c) and para 5

⁹ Sch 1, para 1(5)(a)

what he accepts is a novel departure by suggesting that the time has come for the court to revisit the well-honed principles which underpin the Court of Appeal's decision in Re P. In that case, Thorpe LJ, on behalf of the full court, was clear. Periodical payments for the benefit of a child in the context of a Schedule 1 claim were intended to be an income resource designed to meet the child's expenses on an annual basis. His Lordship expressly ruled out the existence of any "slack to enable the recipient to fund a pension or an endowment policy or otherwise to put money away for a rainy day" (see paragraph 49).

It is suggested that such reasoning would apply even more forcefully to lump sum orders.

- **Cannot** use a lump sum as PPs by the back door as this would undermine the policy of CSA 1991, s8, which gives the CMS near-exclusive jurisdiction over sub-£156k maintenance cases¹¹.
- **Cannot** be used for housing provision (see below).

This throws into sharp focus the limit of the lump sum jurisdiction:

- Even when the resources are there, why do the courts readily provide PWCs with SUVs but not capital security? Their career prospects and financial futures are no less shaky than their married counterparts, but the legislation is absolutely not on their side, choosing to draw a bright line between the married/CP and the unmarried/non-CP. In FR proceedings, an assessment of the needs of a PWC routinely addresses their financial security both during and beyond their parental obligations. Can the stark difference in the regimes be justified in 2022?
- When vast resources are not there in "ordinary" middle-class cases, it is doubtful whether it is worth the risk of pursuing a free-standing capital claim of such limited scope, particularly as costs are awarded on a clean-sheet basis, rather than following the presumption of no order as to costs.

¹¹ *Phillips v Pearce* [1996] 2 FLR 230

Housing provision

Children need somewhere to live. Schedule 1 aims to meet this need by allowing the court to order either a settlement of property for the benefit of the child¹² or the transfer of property to the applicant for the benefit of the child, or to the child himself.¹³ However, in *Re P Thorpe* LJ clarified that a property should be provided by settlement, rather than by outright transfer:

'[36]. In the case of A v A Ward J stated that the provision of a home for the child should be ordered under paragraph 1(1)(d) rather than under sub-paragraph (e) of Schedule 1, that is to say by way of settlement of property rather than transfer of property order....'

We have recently seen further clarification that absolute provision in favour of children no longer in education or training is “limited to ‘special’ or ‘exceptional’ circumstances”. In *UD v DN (Sch 1, Children Act 1989: Capital Provision)*, [2021] EWCA Civ 1947, the Court of Appeal determined that a father’s abusive, coercive and controlling behaviour did not amount to justification for the subject children to retain capital absolutely on the expiration of the settlement trust:

*[76] Despite Mr Howard’s submissions to the contrary, it is, in my view, clear that such power as there is to order financial provision in favour of an adult child who is not in education or training is limited to “special” or “exceptional” circumstances. It is also clear, for example from what Booth J in Kiely v Kiely, that these are circumstances “relating to the children”. **They must be circumstances, such as a physical or mental disability, which create a financial need.***

[77] In the present case, with all due respect to the Judge, it is clear to me that there are no special or exceptional circumstances which could justify the settlement he made in favour of the children.

Property provision is therefore realistically limited to transferring to or settling a property on the applicant on trust for the benefit of the relevant child(ren), generally reverting to the settlor/payer when they leave full-time education.

¹² Sch 1, para 2(d)

¹³ Sch 1, para 2(e)

An applicant cannot obtain housing provision via any route which provides outright capital. This rules out PP's to fund rent or mortgage payments (and in any event there is no jurisdiction to make PP orders in the vast majority of cases, as discussed above), or lump sums to fund deposits.

Is this fit for purpose?

In my view: no.

First, this cliff-edge effect does not adequately reflect modern norms of parenting of adult children who face precarious graduate employment and diminished housing security. Food for thought: according to research undertaken by Halifax, the average age of a first-time buyer is now over 30 in every region of the UK.¹⁴

Secondly, is provision of an entire home on trust preferable to providing the means to acquire a home of one's own, albeit subject to mortgage? There are a number of clear disadvantages in my view:

- Settling a house on trust costs money: drafting the trust instrument, potential IHT and CGT liability etc.
- It prevents an applicant from obtaining their own property during the term of the trust, restricting their ability to provide for their future, thereby mitigating *against* financial independence in a way that is actively discouraged by statute in FR proceedings. It encourages financial dependence and does nothing to allow an applicant to steer towards anything like a clean break.
- It often restricts an applicant's movement. An applicant occupying a trust property can usually move in theory, but of course this requires the agreement and cooperation of the respondent. Where that is not forthcoming, an applicant can find themselves quite literally stuck. Of course, a lot of applicants do not have the funds to subsequently litigate points like this when relations breakdown. Trust arrangements can therefore be a gift to controlling respondents.
- It often places restrictions on the ability of an applicant to form a new cohabiting relationship. How can this be factored into a trust agreement, particularly in cases where control is an issue. Should an applicant have to declare their personal relationships to an ex-partner in 2022? It feels paternalistic and archaic.

¹⁴ <https://www.lloydsbankinggroup.com/media/press-releases/2022/halifax/halifax-first-time-buyer-review-2021.html>

Providing a deposit for a home is possible in an agreed case but why shouldn't the court be able to order it? The ability to order a lump sum as a deposit would also widen the range of potential payers. Few NRPs can afford to buy and equip a second home on trust and wait for 18+ years for the capital to return to their estate. A greater proportion could raise a meaningful deposit, as might happen in a MCA/CPA "needs case".

Part 3: limitations on provision for housing – the case for reform

Enabling the court to order the provision of capital – as distinct from housing provision on a reversionary basis or lump sums to meet expenditure – would:

- Achieve greater security for caregivers, possibly at a comparable overall cost to the paying party (deposit v provision of a house on trust)
- Compel comfortably off but not super wealthy paying parties to make a meaningful contribution to the housing security of their children's primary carer
- Provide more options for obtaining litigation funding and/or refinancing due to the prospect of equity / free capital at the conclusion of proceedings
- Eliminate the cliff-edge effect of removing housing provision when children leave university
- Avoid the practical problems that arise with an applicant living in a trust property as identified above
- Avoid initiating a "sharing" jurisdiction for the unmarried. The legal system is already familiar with the distinction between a capital award based on needs rather than sharing. This head of claim would be predicated upon the lifelong impact of being a parent rather than marital/CP status.

Such a change would arguably require legislative change. It also raises profound policy questions about the appropriate level of difference between marriage/CP and other forms of intimate relationships. In particular,

- Some jurisdictions offer financial relief on the basis of length and/or nature of cohabitation.¹⁵ Should the law differentiate between couples who cohabit for many years and have children, and casual relationships that result in the birth of a child?
- Which status should be of defining importance, that of parent or spouse/CP?

¹⁵ See for example the Family Law (Scotland) Act 2006, ss25-30. Some Canadian provinces have parity between spouses and qualifying cohabitants for the purposes of dividing property. See for example British Columbia's Family Law Act, SBC 2011, s3.

- If legislation were to put unmarried/non-CP parents on a par with married/CP parents in terms of capital provision, should it be possible to opt out? How could this be achieved without exploitation?

Summary

It is not uncommon for articles and discussions about Schedule 1 to remind lawyers that the jurisdiction is not just for the super-rich, but I could not advise the former partner of a middle-class professional without very substantial capital to simply “go for it”. These applications cost money, even to get to a point of having sufficient disclosure to advise on prospects. It is difficult for law firms to manage the financial risks of running semi-speculative applications in an environment where the litigation risk of a disappointing outcome is even greater than in the more familiar territory of financial provision on divorce.

Nothing can be taken for granted. Unless the paying party is of very substantial means, it is very challenging to advise with confidence.

References

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