

1KBW

Some aspects of Schedule 1 applications and how far can you push the court?

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Significance of Schedule 1 provision - unmarried parents

- There were 679,106 live births in England and Wales in 2017
- In 2017 48.1% (just under half) or nearly 327,000 of all live births were born to parents who were not married or in a civil partnership.
- But more than 2/3rds of those live births born outside of marriage or civil partnership were to parents who live together.

The Basics – The orders

The court has a power under paragraph 1, Sch. 1 Children Act 1989 to order either or both of a child's parents to:

- a. make **periodical payments** (including interim payments and secured payments para. 1(2)(a) and (b)), or
- b. pay a **lump sum** (para. 1(2)(c) and **more** than once 1(5)), or
- c. **settle property** (para 1(2)(d) but once only 1(5)), or
- d. **transfer property** (para 1(2)(e) but once only 1(5))

either to the applicant for the **benefit of a child** or to the child directly.

Key Principles

1. In the vast majority of cases the court has **no** jurisdiction to award periodical payments under Schedule 1 and child maintenance can only be assessed through the CMS.
1. If 'top-up' maintenance is sought under Schedule 1, a maximum CMS assessment must first be made (though it is not necessary to have an assessment in place at the time of the application, only the final order). It does not matter that the payer's wealth *would* qualify for top-up maintenance; an assessment must have been made before jurisdiction can be established. *Dickson v Rennie* [2014] EWHC 4306
1. The primary carer has no independent claim to capital, property, pension or maintenance for him or herself (save for a carers' allowance).

Key Principles

- 4. The court will not order outright transfer of property to the primary carer, but instead settle property on trust for the child's minority.
- 4. Lump sums are limited – they are for child's needs only; and capital (not income) expenditure only.
- 4. Orders are limited to the child's minority (age 18) or completion of tertiary education save in exceptional circumstances, e.g. disability.
- 4. Costs allowances can be made to fund one party's financial (Schedule One) and/ or welfare (section 8 or other) proceedings.

Re P [2003] EWCA Civ 837

Still the key case in relation to how to approach Sch 1 applications.

- Establish the proper housing needs of mother and child during minority
- Value size location all bear upon reasonable cost of furnishing and equipping as well as upon future income needs directly in terms of outgoing but also indirectly in the case of travel, education and perhaps holidays
- Lump sum to meet the cost of furnishing and equipping and a family car
- Capital cost incurred in meeting birth costs or in maintaining the child before the order?

Re P [2003] EWCA Civ 837

- Those things settled can determine what budget the carer reasonably requires to fund expenditure in maintaining the home and its contents and in meeting other expenditure external to the home, such as school fees, holidays, routine travel expenses, entertainments, presents, etc.
- In approaching this last decision, the judge is likely to be “assailed by rival budgets that specialist family lawyers are adept at producing”.
- The carer’s entitlement to an allowance may be ‘*checked but not diminished*’ by the absence of any direct claim in law.
- Court must recognise responsibility and often sacrifice of primary carer and have control of a budget that reflects his/her position and that of the payer.

Who can apply and who pays?

Applicant

- A “parent” of a child (including step-parent or civil partner);
- A guardian or special guardian of a child;
- Any person in respect of whom a child arrangements order provides a child is to live;
- A child who is over 18, who can apply her- or himself for periodical payments and/or lump sum provided he/she is in full time education or there are special circumstances which justify making the order (e.g. disability).

Who can apply and who pays?

Applicant

- Application is normally brought by the resident parent but there is **no bar** to the application being brought for housing provision by a non-resident parent – *N v C* [2013] EWHC 399 (Fam)

Respondent

- An order under paragraph 1 of Schedule 1 can only be made against a 'parent' of the child, i.e. a 'legal parent'. The concept of psychological parent not yet recognised under schedule 1 though it is under the Children Act 1989 generally – *T v B* [2010] 2 FLR 1966

The Test

- The ‘no order principle’ at section 1(5) of the Children Act 1989 does **not** apply to applications brought under Sch 1
- “Welfare” is not **paramount** under Schedule 1 (though it is of course under the rest of the Children Act 1989).
- Schedule 1 does not echo the language of s. 25 MCA 1973 in terms of “first consideration” being the welfare of minor children.
- But welfare will not just be ‘one of the relevant circumstances’ of the case, but ‘a **constant influence on the discretionary outcome**’ *Re P*

Factors that will not be considered

The following factors are expressly irrelevant:

- a. Conduct;
- b. Circumstances of the birth;
- c. Duration / nature of the parental relationship;
- d. Legal principles in other jurisdictions.

In relation to:

c. : Children born as a result of a brief encounter should not be disadvantaged : *J v C (Child: Financial Provision)* [1999] 1 FLR 152

d. : Once jurisdiction is established under Schedule 1, the court will apply English law and not be influenced by the principles that would be engaged in another competing jurisdiction even if that is the country in which the order will take effect. *PG v TW (No 2) (Child: Financial Provision)* [2014] 1 FLR 923, [2013] Fam Law 1123

Claims after a MCA 1973 final order?

- A person may bring a claim under Schedule 1 notwithstanding the fact that remedies may separately be available (or claims may even have been determined) under the MCA 1973 / CPA 2004.
- The existence of a final order is part of the background to a case which will inform a judge dealing with the merits but this does not mean that the application cannot be made or should be struck out : *MB v KB* [2007] EWHC 789.

Claims after a MCA 1973 final order?

- Where there has already been a clean break under MCA 1973 a further lump sum would only be awarded in “*exceptional*” circumstances.
- But a clean break **does not** act as a dismissal of Schedule 1 claims. *PK v BC (Financial Remedies: Schedule 1)* [2012] 2 FLR 1426 it was accepted that there was still power to make an award under Schedule 1.
- In *MG v FG (Schedule 1 – Application to Strike Out Estoppel Legal Costs Funding)* EWHC 1964 Cobb J refused to strike out what looked like a hopeless schedule 1 claim made by a mother 6 days after the dismissal of mother’s application for Part III provision (after provision in Australia).

Pre – Existing agreement a bar?

- In *Morgan v Hill* [2007] 1 FLR 1480 there had been a previous agreement which made housing and income provision which had **not** been converted into a court order. M sought additional provision.
- Argument that provision had already been made – per *Phillips v Peace* was rejected.
- Whether Para 1 or Para 10 pre-existing agreement no more than a starting point.
- Had the agreement been turned into an order the court would have been prevented from making a substantial settlement of property order.
- See also *H v C* – order recited M’s intention not to seek further lump sums

Standard of living – A magnifying factor ?

- Standard of living does **not** appear in the factors that the court considers in paragraph 4 of Sch 1
- Bodey J in *Re P - never lived together* : “considerations as to the length and nature of the parents' relationship and whether or not the child was planned are generally of little if any relevance, since the child's needs and dependency are the same regardless”
- Singer J in *F v G (Child: Financial Provision)* [2004] EWHC 1848 (Fam) – *cohabitation - but not lengthy* : “In some cases ... **the standard of living enjoyed by child (and mother) during lengthy pre-separation cohabitation ... could promote the standard of living so long enjoyed by the child to the position of an important, if not the dominant, feature of the case.** Here the ...cohabitation lasted far less long, but during their relationship ... the parents lived in a way where little expense was spared and generous indulgences were frequent.

Standard of living cont.

- Charles J in *FG v MBW* [2011] EWHC 1729 (Fam) – *Relationship ended shortly after birth* : The standard of living was held not to be objective, but subjective; and it is to be pitched at a level informed by the standard of living enjoyed during the period of the parties' relationship (if it subsisted) and the standard of the other parent's living in present and future.
- HHJ Barnet QC (DHctJ) *H v C* [2009] EWHC 1527 (Fam) – *never lived together no contact* - held that it was a wholly reasonable aspiration on the part of mother that the children should enjoy a standard of living that showed some reflection of and relationship to their father's wealth (notwithstanding that, for no good reason, the children had not had or enjoyed that standard in the past).

Lump Sums - Principles

HOUSING – Provision for capital for housing can only be made on one occasion (Sch 1 para 1(5)(b))

The court will not permit attempts to get around this by allowing application for a later lump sum to increase the housing provision *Phillips v Peace* [2005] 2FLR 1212

But :

- *H v C* [2009] EWHC 1527 (Fam) a lump sum was awarded which was intended to be applied to improvements to a property
- Very recently in *MT v OT* [2018] EWHC 868 Cohen J made provision for the purchase of a replacement property a previous property already having been purchased under a trust many years beforehand in 2007.
- He rejected the submission based on *Phillips v Peace* that the purchase of a replacement property amounted to a second settlement.

Lump Sums – Principles

INCOME – Lump sums should be ordered to meet specific items of capital expenditure and not to seek to circumvent the CSA by providing for items of an income nature. *Phillips v Pearce* [1996] 2 FLR 230

- Followed in *Dickson v Rennie* [2014] EWHC 4306 when the mother's application for 'top-up' maintenance having failed on the grounds that the CMS maintenance calculation was not a 'maximum assessment', Holman J refused to order a lump sum in order to make up the shortfall in her maintenance.
- Unique still is *V v V* [2001] 2 FLR 799 – Wilson J ordered a lump sum for the benefit of a child of £50,000 in MCA 1973 proceedings to fill deficit when H withdrew agreement above £5,000 p.c.m.

Examples of Lump Sums

A conventional Sch. 1 lump sum order is directed to specific expenses for the **benefit of a child** such as furnishing and equipping a house, hospital costs, nursing costs etc. "Singular items of a capital nature" *Philips v Peace* [1996] 2 FLR 230.

But courts have interpreted this broadly:

- £25,000 for a family car: *H v C* [2009] 2 FLR 1540;
- £20,000 to cover moving costs: *Re N (Payments for Benefit of Child)* [2009] 1 FLR 1442
- £100,000 for internal decoration of a property in a case which involved a multi-millionaire father: *Re P*

Lump sums - examples

- £50,000 - £25,000 for removal costs and new furnishings now PLUS £25,000 for improvements **at a later date** : *MT v OT* [2018] EWHC 868
- £50,000 to clear a mother's debts arising in part from having moved house (reduced on appeal from £100,000): *Morgan v Hill* [2006] [2007] 1 FLR 1480;
- Order to pay £113,000 reimbursing mother for costs incurred in private law proceedings and £25,000 to cover future costs: *R v F (Schedule One; Child Maintenance: Mother's Costs of Contact Proceedings)*[2011] 2 FLR 991
- Exceptionally, an interim order to meet legal costs even where the court has no power to award ongoing periodical payments: *CF v KM*

Lump sums - examples

- for a Kayak, a laptop, a child's trips abroad: *Green v Adams* [2017] EWFC per Mostyn J “ there is no jurisdiction to provide for the ‘quotidian expenses’ of day to day living”

But consider...

- £44,000 reimbursing an applicant for the mortgage payments and general running costs incurred in providing the child with a home resulting from father underpaying flawed CSA assessment: *DE v AB* [2011] EWHC 3729
- £44,620 to clear credit card debts even where CSA income maximum not reached; *M v M* [2014] EWCA Civ 276 (CA)

Legal Costs Funding

- A whole separate lecture but ...
- No separate statutory regime for legal services payment orders in Sch. 1 claims
- Court has power to make orders applying principles in *Currey v Currey (No2)* [2007] 1 FLR 946
- In *CF v KM*, Charles J held that provision for legal costs could be made not only for proceedings under Sch 1 Children Act 1989 but also for those under section 8 of the Children Act 1989.
- Lump sum as well as periodical payments
- Historic costs recoverable but not in concluded proceedings: *Rubin and BC v DE* [2017] 1 FLR 1521

Costs in Schedule 1

- The “no order” provisions relating to financial remedy proceedings do **not** apply
- Calderbank offers are available (and should be made)
- Applies CPR Part 44.2 with exception of 44.2(2) ie the general rule that the unsuccessful party will be ordered to pay the costs of the successful party
- Court will adopt the “clean sheet” approach per Baker v Rowe [2011] FLR 761 but success usually at the top of any clean sheet
- Illustration : *KS v ND* [2013] 2 FLR 698

Summary

- Power to make a Sch. 1 award in favour of a non-resident parent.
- Power to make a Sch. 1 award even after an earlier agreement and even after MCA 1973 claims resolved.
- In most cases “standard of living” will assist in magnifying a claim.
- “Benefit of a child” has been interpreted very widely – wider still?
 - Not as wide as membership of Annabel’s: Re A
 - But what about £10,500 p.a. for wine for the mother of an 8 year old?
- Lump sums are available repeatedly and for a whole range of things and have been ordered to meet what is obviously day to day expenditure and to improve settled property or even property owned by an applicant.

Summary

Finally ...

- Legal costs funding means that you can get the respondent to pay for the litigation !

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