Best practice

Best practice: making financial claims for children

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The statistics show that the largest growing family type is cohabiting couples. It is therefore unsurprising that we are seeing growing number of clients who are not married but wish to make financial claims against their former partners for the benefit of their children. These claims are made under Sch 1 of the Children Act 1989. This month's column is not a detailed guide to those applications but is intended to provide some practical pointers to consider when making an application.

1. The claim is a needs based assessment for the benefit of the children

It is therefore important to manage clients' expectations from the outset; there are no sharing or compensation claims, as there might have been under the matrimonial legislation. The primary carer has no independent claim to capital, property or maintenance for him or herself (save for potentially a carer's allowance). The claim is for the benefit of the child.

2. Who can the application be made against?

Applications under Sch 1 can only be made against (i) a legal parent, or (ii) a person who was either married to or in a civil partnership with the applicant parent and the child or children were treated as a child of the family (although if the couple were married or in a civil partnership, the Matrimonial Causes Act may provide more substantive relief).

An application cannot be made against a 'psychological parent'.

3. Does the court or the CMS have jurisdiction over child maintenance?

In the majority of cases, if both parents and the child are all habitually resident in England and Wales, the court will not have jurisdiction to award periodical payments under Sch 1, unless there has already been a maximum CMS assessment, in which case the court can make a 'top up' order. If this is the case, it is therefore important to remember to apply to the CMS for an assessment at the outset. It is not necessary to have an assessment in place at the time of the application, only by the final order. It does not matter that the payer's wealth would qualify for top-up maintenance; an actual assessment must have been made before the court's jurisdiction to make an order can be established.

Although the court will have jurisdiction to order child maintenance if there is an agreement between the parties, be wary of relying solely on this; there must be an agreement in relation to the amount. Further, agreement can be withdrawn at any point up until an order is made.

Where the court does have jurisdiction to order a top up, the recent case of *CB v KB (Financial Remedies: Calculation of Income Streams and Child Support)* [2019] EWFC 78, [2020] 1 FLR 795 should be considered, where Mostyn J stated that, in considering the quantum of child maintenance where income is up to £650,000 per annum, the starting point for the court should be the result of the CMS formula, ignoring the cap on annual income. If the gross income is more than £650,000 then the result of applying the formula to an income of £650,000 should be the starting point with full discretionary freedom to depart from it having regard to the scale of the excess.

4. Carer's allowance

An award for maintenance for a child under Sch 1 can include funds comprising a carer's allowance, although the court will have in

mind that the applicant has no personal entitlement to maintenance. It may be appropriate to expect the primary carer to keep detailed accounts of his or her outgoings and expenditure.

It remains to be seen whether the court's approach to the carer's allowance is impacted by the trend in matrimonial cases towards a more restrictive approach taken to periodical payments in recent years.

5. Housing

Under Sch 1, the court has the power to make an order transferring or settling property for the benefit of a child, during their minority, in order to provide a home for the child. However, case law (*Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865) has established that the provision of a home for the child should ordinarily be ordered by way of a settlement of property rather than a transfer of property.

An applicant will only be able to apply for housing once (*Phillips v Peace* [2004] EWHC 3180 (Fam), [2005] 2 FLR 1212). The house will need to last until the children are fully grown (even if that property is sold and another purchased in its place, the value will remain the same). However, the applicant parent should be able to bring up the child in circumstances that have some relationship to the other parent's resources and way of life.

It is therefore important to consider carefully both location and the property itself. Think about schools/friends and family. Property particulars are helpful, but there is no substitute for your client viewing the properties themselves in person.

6. Capital lump sums

Significantly, an applicant can apply to the court at any time and on any number of occasions for a lump sum payment.

A lump sum order is normally made to meet one off capital expenditure such as expenses incurred in connection with the birth of the child or otherwise reasonably incurred before the making of the order. They can also meet future needs such as the costs of purchase of the new property including stamp duty, furnishings, refurbishment costs, or a car (and its replacement, usually no more than every 4/5 years). If there is a future need (for example, the cost of a laptop or other equipment for an older child) that can be applied for at that later time.

However, a lump sum order should not be used to meet ordinary day to day living expenses.

7. Legal costs

It is often applicants in Sch 1 cases who have the most difficulty in funding their legal fees. It can be more difficult for them to secure lending from litigation loans providers. Fortunately, legal services payment orders can be made under Sch 1 to fund both the financial proceedings and any welfare proceedings (*CF v KM (Financial Provision for Child: Costs of Legal Proceedings)* [2010] EWHC 1754 (Fam), [2011] 1 FLR 208) and those costs can be funded both by a lump sum or by periodical payments.

There is no statutory regime for legal services payment orders in Sch 1 proceedings, but the court has a power to make orders, applying the principles as set out in *Currey v Currey (No 2)* [2006] EWCA Civ 1338, [2007] 1 FLR 946.

In assessing quantum, the court is entitled to view the legal costs incurred by the respondent party as a benchmark of reasonable expenditure.

8. Costs orders and *Calderbank* offers

The 'no order' provisions relating to financial remedy proceedings do not apply in Sch 1. The court will adopt the 'clean sheet' approach. This can result in costs orders being made against the 'unsuccessful' party. *Calderbank* offers can and should therefore be made