

Widening options

Melanie Barnes and James Pirrie set out the case for private child maintenance agreements and less state intervention



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'Where private agreements are made, a parent only has a right to apply for enforcement where the court retains jurisdiction, or until such time as an application is accepted by the CSA.'

The government, in support of its stated aims of decreasing child poverty and reducing costs to the state, is now actively promoting family-based arrangements, otherwise known as private agreements. This has resulted in support for collaborative individual agreements from the Child Maintenance and Enforcement Commission (CMEC), and proposals for new regulations recommending the implementation of collection charges in order to make applications to the Child Support Agency (CSA) less attractive. However, despite the encouragement to enter into private agreements, there is no structure in place to support parents through the negotiation process, no means to register the obligation and no methods of enforcement to ensure compliance. Indeed, despite the apparent moves towards supporting individually negotiated agreements, CMEC seems to insist that such agreements are, of their nature, unenforceable even with the Court of Appeal's indication in *Darke v Strout* [2003] that private maintenance agreements will often be ordinary contracts.

The aim of this article is to look at whether it is now time for the government to consider the implementation of an enforceable maintenance agreement that will allow parents to ensure compliance with a family-based arrangement without the need for (often unwelcome) state intervention, but being able to fall back on the enforcement processes of the CSA where required. Guidance will also be suggested for practitioners who are instructed to advise on what should be included in a private agreement for child maintenance.

Background

In supporting private agreements, the government has moved a long way

from the state-enforced, one-size-fits-all approach of the Child Support Act 1991 (CSA 1991). While many have advocated the simplicity and fairness of a percentage-based formula, the reality is that many parents resent the mandatory intrusion of the state into their private financial circumstances and a maintenance assessment can be over-complicated and lead to unjust results. For the government, costs are also high and with around half of non-resident parents (NRP) being unemployed, it represents a significant spend from the state budget to achieve a nil assessment and very little in return to the person with care (PWC).

These issues have been raised over the past few years and resulted in the government commissioning various studies and research that resulted in a report by Sir David Henshaw of 2006 (the Henshaw Report) and the more recent Green Paper *Strengthening families, promoting parental responsibility: the future of child maintenance 2011* (Dept for Work and Pensions) (*Strengthening Families*). Family-based arrangements are defined in *Strengthening Families* as:

One in which both parents agree on how to provide child maintenance for their child, how much and when, independently of the CSA or the courts... It is more flexible than other types of arrangement, emphasises collaboration between parents rather than conflict and helps to keep both parents involved in their child's life after separation.

An effective family-based arrangement is one where 'both parents have agreed the form of the arrangement and are complying with it'. Such arrangements were first considered in the Henshaw Report by Sir David Henshaw in which he concluded that:

The state should only become involved in issues of child maintenance where parents cannot come to an agreement themselves. Such arrangements... tend to lead to greater satisfaction and compliance.

Relevant key recommendations of the Henshaw Report were that:

- Those who want a private arrangement to be legally enforceable would be able to obtain a consent order.
- All parents should be able to access the most appropriate route for arranging child support.
- Increasing the choices for parents depends on clear, high-quality advice and support being made available to all. There should be more accessible and joined-up advice services to help people in making these choices.

The Henshaw Report envisaged a system whereby parents were well advised and supported to enable them to come to a private arrangement that was enforceable by application to court, with the CSA as a 'back up' service. This is important for practitioners to note as clients may soon be seeking specific advice about private agreements, and forms are now available online through Child Maintenance Options (CMO) and the CSA.

Statistics

Positive steps were taken by the government to achieve the Henshaw Report's vision, such as the introduction of a CMO that provides an impartial telephone service for separated parents. In 2008, the National Centre for Social Research evaluated the effectiveness of the helpline, in order to establish whether it helped to increase parents' likelihood of subsequently making child maintenance arrangements. The study found that most calls to CMO lasted between five and 30 minutes, with 77% being referred from the Jobcentre Plus Service. Of those surveyed, around 56% had child maintenance arrangements eight to nine months after contact with CMO, but some of these parents already had arrangements in place; 62% considered

that their arrangements were fair; and parents with more contact and a better quality of relationship with their ex-partner were more likely to have a working arrangement – 81% of those in the 'recent, friendly, contact' group had a working arrangement, compared to 50% in what was called the 'long-term, bitter' group.

The conclusion of the study was that the CMO service does help to achieve the aim of CMEC 'to ensure that the maximum number of children who live apart from one or both parents benefit from an effective maintenance arrangement'. However, over two-fifths of parents who had some contact with CMO did not have an arrangement in place eight to nine months later, with the most common reasons being that the NRP was unwilling or unable to pay. The CMO service was also found to be most effective for those parents who had the most in-depth and personalised contact with the service.

These statistics suggest that information may assist parents, but that the quality of the relationship was conducive as to whether an effective arrangement was put in place. It is therefore clear that, although positive, the availability of a telephone advice-line is simply not enough to provide parents with the necessary tools to achieve an effective arrangement. If parents are to be supported in coming to an agreement, then it is likely that they will need much more active advice and provision

of services such as legal assistance, parenting classes, mediation and information. Could this be something that the government now envisages being offered nationally?

CMEC also highlighted the attractiveness of private arrangements by discouraging the use of the CSA through the introduction of collection charges that would tax parents between 12% and 20% on top of their monthly maintenance, depending on whether they were the PWC or the NRP. The government's response to the consultation on the *Strengthening Families Green Paper* in July 2011 reported a 'plethora of different responses' to the issue of collection charges (most negative), but concluded that they should be introduced on the basis that they were fair, given the administrative cost to the government. Quite simply, the state's position is that the costs of the CSA are too high and so collection charges will force parents into reaching sensible solutions because they find the idea of paying them so undesirable. This is similar to an argument that problem drinking is discouraged by the increase of the cost of alcohol but there are few teenagers who would be coerced into drinking lemonade as a result of rocketing alcopop prices. Research has also revealed that few parents would be deterred by the CSA simply because of collection charges, however, for the sake of this article, let us assume that

Key points

When instructed to advise on private agreements, the following is recommended as guidance:

- The safety of the family is paramount – are there any issues that prevent the parties from reaching agreement on an equal footing?
- Offer a holistic approach to negotiation – does the family need support through counselling, debt advice, family mediation?
- Focus on reaching an agreement that both parents consider fair – not just one that represents the 'likely outcome' should the matter be decided upon at court.
- Be aware of the statutory formula – some parents find it difficult to negotiate a private agreement and may prefer to settle for a simple percentage calculation.
- Ensure that the parties are happy with the disclosure provided.
- Provide parents will advice about the CSA, private agreements, enforceability and the 12-month rule.
- If practitioners are drafting the agreement, ensure that recitals provide evidence of disclosure, advice and information provided. If agreed, the agreement should also state the parents' intention about whether or not legal relations were intended.