

The Child Maintenance Service – a gentle reminder guide (and why we need it) – Part II

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interface with the court and the new structures that apply to the identification of the parent with care.

In this, Part II, we seek to race through the formula itself, rules about income and the variation scheme.

The CS3 formula

The formula used by the child support administration is laid out in Sch 1 of the Child Support Act 1991 ('CSA 1991'). We are now on the 3rd version. Those of us used to working with the formula 'CS2' under the Child Support, Pensions and Social Security Act 2000 for claims between 3 March 2003 and (broadly) 2012/13 were used to the '15%, 20%, 25%' rules. That formula might be summarised:

- a) identify the NRP's income;
- b) deduct their pension contributions;
- c) deduct a percentage to reflect any children now living in the NRP's household (for example step children – the children of their new partner – or children born or adopted within that new relationship);
- d) apply a rate, depending upon the number of children for whom child support is being paid;
- e) reduce that sum where the child has overnight stays with the 'the non-resident parent' ('NRP').

In Part I of this article (November issue at [2020] Fam Law 1530) we looked at the imperative on practitioners to build skills around the CMS, the jurisdiction of the Child Maintenance Service ('CMS') and its

Under CS2, the income entering the formula at a) above was the current net income of the NRP. One of the cost-saving reforms adopted in the latest iteration would see the CMS absolved from needing to identify the

NRP's current income in most situations. Instead, under CS3, the NRP's income would usually be the sum appearing on the last tax return (provided that it was no more than 6 years' old), or the sum available from 'Real Time' information submitted to HMRC by the employer.

The fact that (in stark contrast to the court's approach, generally focused on what future income was likely) the NRP's ability to pay would be determined by historic earnings, was considered a realistic price to pay for the administrative burdens that would then fall away from it. (It was intended that it would be then released to enforce effectively – which is perhaps why those of us working with the system and now watching the inexorable rise of arrears feel that we have been short-changed . . . but more of that later).

Further, (and for reasons that have never in our view been adequately explained) this figure would, under CS3, have to enter the formula as a gross figure, thus requiring the abandonment of our neat set of 15, 20, 25 percentages and their being replaced with a plethora of other numbers, designed (with varying degrees of accuracy) to target the same outcomes as under CS2 across different tax bands.

So CS3 would be a change of methodology rather than a wholesale change of approach (as took place when the first formula in the original Act was abandoned in favour of CS2). What this would mean is that different rates would apply to different bands of income because of different levels of tax (and we suspect that as tax rates change, there is a risk that these figures will further depart from the 15/20/25% of net income targets).

Various calculators are available on the web, but the CS3 formula now operates as follows:

- a) Identify the NRP's gross income;
- b) Deduct pension contributions;
- c) Reduce that figure:
 - a. By 11% where 1 child lives in the NRP's household;
 - b. By 14% where there are 2 such children;
 - c. By 16% where there are 3 or more such children.
- d) Apply a rate to the resultant figure:
 - a. To the first £800 of income apply:
 - i. 12% where there is one child for whom child support is being calculated;
 - ii. 16% where there are two or more such children;
 - iii. 19% where there are three or more such children.
 - b. To the remainder of the income above £800, apply:
 - i. 9% where there is one child for whom child support is being calculated;
 - ii. 12% where there are two or more such children;
 - iii. 15% where there are three or more such children.
- e) Each child's entitlement would be reduced where s/he was spending more than a certain number of nights with the NRP:
 - a. 52 or more, reduce by one seventh;
 - b. 104 or more, reduce by two sevenths;
 - c. 156 or more, reduce by three sevenths;
 - d. 175 or more, halve (and additionally deduct £7 pw, a sum intended to achieve the equalisation of the child benefit that the PWC is assumed to be receiving).

There are different formulae applying in particular circumstances:

- The Nil rate applies to a range of specific categories such as prisoners, children (who are also parents), some young people and those earning less than £7 pw.
- The flat rate applies to those earning under £100 per week gross and those on certain benefits, meaning currently a payment of £7 per week.

- The reduced rate is a formula applying to those earning between £100 and £200 per week gross, in effect offering some of the advantages of the lower level paid on the flat rate but reducing those advantages for those earning higher in the bracket.

Additional rules about income

There are various additional bodies of rules to address those situations where:

- There is a conflict between the PAYE and self-assessment information.
- There is no filed tax return or other evidence that the CMS can turn to.
- The NRP's income has increased by 25% or reduced by 25%.

The last of these is perhaps the most important category as it is likely to be the most numerous. Here for the first time in the case, the CMS is required to roll up its sleeves and undertake the task of assessing the current level of the NRP's income. The calculation is then adjusted to be based on the assessed level of current income. This adjustment would need to be applied for – either by the PWC who is aware that the income has gone up (though how s/he would know this must be in doubt) or by the NRP who experiences a sufficient reduction in their earnings.

If the maintenance is revised to take account of current income, there a legal obligation on the NRP to report any further changes of 25% or more to that income. Failure to report an income increase is likely to result in revisions at a later date, with consequential arrears.

It is to be noted that the CMS has no power to investigate whether the figures for income declared to the HMRC (and adopted in the CMS calculation) are correct or not. The disgruntled PWC probably has no option but to make a report to HMRC that the NRP is making a false return of income and hope that the HMRC will see fit to investigate the matter. We are not aware that HMRC has been given any further resources to undertake such investigations and its

failure to act on concerns raised by PWCs is one of the key areas of complaint. This may throw the PWC back on seeking to argue out the case by applying for a variation direction on the grounds of 'diversion' as to which see more below.

Once a calculation has been made then it is intended to be updated each year. The annual review takes place on the anniversary of the effective date (when the NRP was told about the application). The CMS will gather information 30 days before the review date and 10 days later will write to each parent to notify them of what is anticipated. There is then a 20 day period for each to respond.

This initial notice is not a formal decision, and is not subject to the mandatory reconsideration or appeal process. Either party may, within the twenty day period, make representations to amend the information before the final, or formal, decision is completed. Once the formal decision is received, any dispute must follow the Mandatory Reconsideration process.

Private pension contributions often fall foul of this process. It is the NRPs responsibility to provide details of private pension contributions (at each Annual Review) and these must be reported within the 20 day period. If this is not done then the assessment proceeds without the information and only if the 25% threshold is breached is the NRP likely to have them taken into account.

Variations

Within a few years of when the scheme went in live April 1993, the policy makers recognised that the formula would not be sufficient to deliver even a relatively fair outcome for a number of cases, exhibiting particular circumstances. It seemed to those of us closely involved, that the policy makers were collecting the headlines from the *Daily Mail* (most vociferous in complaining about the scheme among the daily papers at the time) and crafting a system in response, seeking to silence the loudest of the criticisms, by permitting 'a

departure direction' to be applied for in certain circumstances. This facility was responsible for significant additional administrative burdens upon the scheme and this seems to have resulted in the categories being reduced by the successor schemes, during which time the 'departure direction' became a 'variation application'.

The categories are each set about with conditions but are easy to access in the regulations themselves (the Child Support Maintenance Calculation Regulations 2012 and the Child Support (Miscellaneous Amendments) Regulations 2018) and so only need to be stated here in summary and where relevant then further work will be needed by the practitioner. In short:

- The NRP can apply for the award to be reduced where, the NRP has particular costs in connection with:
 - maintaining contact with the child;
 - the illness or disability of another child in his household;
 - residual debts or other costs (such as a mortgage) of the relationship (with many, many restrictions);
 - meeting the child's boarding school fees.
- The PWC can apply for the award to be increased where:
 - There is annual unearned income in excess of £2,500 a year;
 - The NRP is able to divert/manage the amount of income that enters the formula and s/he has done so; or
 - Has underused assets of in excess of £31,250.

Those who like their justice built on discretion, will be disappointed to discover that these categories are not simple gateways through which the applicant passes to a general re-assessment of the award that will do fairness between the parents. Instead, the granting of the variation direction triggers a further calculation – either an addition to the income entering the calculation or a reduction on that income. For example, the boarding school variation operates with 35% of the total fees being deducted from

the NRP's income and then the formula being run as usual. (And yes, this can mean that for this category, any impact of the variation can be relatively slight.)

Crucially, the PWC's stand-by 'catch-all' under CS2 has been abolished. Lifestyle inconsistent, no longer exists. Signs that it might be re-introduced have withered in the harsh climate of competing with other government priorities. This category formerly permitted a small army of applicants to secure radical increases in their awards from those with complex financial circumstances as the likely incomes of their former partners were held up to scrutiny often in long hearings before a tribunal. The applicant would point to an array of lifestyle badges (holidays/ wedding costs with new partners/HMLand Registry details/cars and their personalised number-plates) as evidence that a higher number for income should enter the formula. With the abolition of this provision under CS3, now the applicant who sees the other parent with a lavish lifestyle is usually stuck with the numbers declared in last year's tax return.

Having said this, not all hope should be abandoned. First, whilst the CMS will not make a decision based on 'inconsistent lifestyle' it may well be willing to act upon the information by referring the case to the Financial Investigations Unit. The optimism needs to be tempered by the relatively slow strike rate that is usually adopted in the processing of such cases. Secondly, allegations over inconsistent lifestyle can help create the 'credible doubt' necessary for the Tribunal to conclude that the NRP's income is understated.

The abolition of the lifestyle inconsistent ground has reduced the levels of award being made, which in turn has meant a small number of cases reaching the income maximum of £156,000 such that there are fewer schedule one cases where the court is given a free hand to investigate the financial realities and decide the appropriate level of general maintenance to award. Some PWCs are thus prevented from seeking general maintenance provision for the child at the

higher levels that are generally available from the courts, which in turn is likely to impact on the level of other claims that the PWC might seek. For example, without other income, the PWC is unlikely to be able to maintain say a £1,000,000 property on the basis of £15,000 of child support.

Start date for liability under the CMS

Advisors need to know about the date from which the maintenance debt starts to accrue, which is called ‘the effective date’.

- When NRPs make the application (that is, when NRPs apply ‘against’ themselves) the effective date is the date on which application is made.
- The effective date when the PWC makes the application is when the NRP is notified of the application (r 25(2) Child Support (Maintenance Calculation Procedure) Regulations 2000). Notification to the NRP can be made by telephone or in writing (the CMS increasingly prefers telephone contact).

The CMS may take some time to process an application. Because the liability to pay maintenance starts when contact is made with the NRP, delays to getting started would create direct losses for the PWC. The CMS introduced voluntary time scales, and now it promises to contact the NRP within a month of an application. If it takes longer than this, then a claim for compensation can be made to the CMS by way of the complaint process.

There will generally be an initial period during which debt will have been accrued and during which any voluntary payments will need to be brought into the reckoning, to see whether the NRP is in credit or in arrears. Voluntary payments remain a discretionary decision and carry no appeal rights. Naturally there are regulations as to what can count.

The rules are different where the application is made when there is a court order in place. Here:

- the maintenance clock starts ticking from the effective date (two months and two days after the date of application); and

- the court order ceases to have effect from the effective date of the calculation.

This is why the popularly referred to ‘12-month rule’ is actually a 14-month rule because even if the application is made to the CMS on the anniversary of the order as s 4(10)(aa), CSA1991 permits, there will always be a further two months before the court order is then swept to one side.

The need for vigilance

Clients often find it very hard to accept that, once a decision has been made, broadly it remains in place until there is a change – and this has to be a change to the decision, not a change of circumstance. Whilst the court might remit arrears at a hearing seeing that a payer had become unable to pay at an earlier date, the CMS has no easy option to do so, unless it has been notified of a change. The start date for the change can usually be no earlier than the date of application or notification to the CMS. The CMS’s letters contain reminders that clients should report changes of circumstances. However, for those who have failed to do so, applications to backdate corrections to when the changes took place are likely to fail.

Liability

It is little wonder therefore that many parents have little idea about the real state of their account with the Agency. Where arrears have started to build and where assessments have changed (upwards or downwards – and sometimes both) and perhaps are backdated, it can be very hard to understand whether there is money due or if there has been an overpayment. Making it harder still, the CMS does not currently send out statements of account.

Online statements are available for those registered for the online portal, but this may not necessarily provide an accurate summary, as the system simply ‘assumes’ the NRP is making payments as per the pay schedule. Any adjustments to that assumption relies upon the CMS

undertaking the work of rebuilding the account, which takes time and is prone to error.

Where a direct payment arrangement is in place (ie funds passing directly rather than through the CMS) under the 'Direct Pay' scheme, the CMS will assume that the parties are regulating the arrangement directly. It is only if the direct pay arrangement is terminated that the ledger of the CMS is opened again and tabs are kept on the sums that accrue and the sums that are paid.

Only the PWC has the authority to ask for the case to be moved away from Direct Pay, and they will need to move quickly if the payments stop because they will not be able to ask for all the arrears to be made good. In a report from Gingerbread, *Direct Pay – innovation or failure* it found that many PWC's were reluctant to report a shortfall in payments for fear of the repercussions of the NRP becoming subject to the 20% additional fee.

On the other hand, some clients have started within the scheme, come to an accommodation only to find that 'the books are still open' and so the NRP can find themselves liable to pay [again] any sums that they cannot prove having paid in compliance with the outstanding award.

The end of CMS jurisdiction

CMS jurisdiction ends through:

- **Geography:**
 - If the child leaves the UK.
 - If the NRP leaves the UK (unless the extended jurisdiction rules apply (see s 44(2A) of the CSA 1991).
- **Age and stage**
 - For most, jurisdiction ends after the last day of August in which they take their A levels;
 - (Though there is a plethora of detailed rules on the subject for those continuing in apprenticeships, non-advanced education and in training for certain careers).
- **Adoption** of the child.
- **Separation:** If the parties are able to report that they have begun to cohabit again.
- **Application:** an application can be made at any time for the CMS to cease acting (s 4(5) CSA 1991):
 - but there is nothing to stop a new application being submitted (save for an order which prevents application for 12 months (s 4(10)(aa) CSA 1991); and
 - any purported agreement not to apply is non-enforceable (s 9(4) CSA 1991).
- **Shared-care:** where the parties care is equal within r 50 of the Child Support (Maintenance Calculation Procedure) Regulations 2000.

So, where parties are relying on the CMS, it is of course clear from the 'age and stage' comments above that the child is dropped for the university years. Application has to be made to the court for provision during this period.

Next time we will round up our look at the CMS by considering the administration's processes and its performance of the tasks that it is charged to deliver.