



The Child Maintenance Service and the New Rules: A Guide for Family Lawyers

by George Coates, Barrister

The CMS is the new name for the CSA or CMEC, but it is essentially the same organisation administered by the DWP.

The new rules were enacted by the Child Maintenance and Other Payments Act 2008 but did not come into force until the passing of the Child Support Maintenance Calculation Regs 2012 and are therefore referred to as either the 2008 or the 2012 Scheme. They now apply to all new cases opened after 25.11.13.

The 2008/2012 Scheme retains much of the previous 2000/2003 Scheme (eg maintenance is based solely on the paying parent's income), but some significant changes have taken place, which family lawyers should bear in mind:

- **Child Maintenance Options and Charges**

All new applicants will now be referred to the Child Maintenance Options¹ service who will attempt to broker an agreement or "family-based arrangement". If successful, then no fee is payable.

Thereafter, an application for an assessment or "calculation" by the CMS will cost £20². Either parent may then elect "Direct Pay" - or payment direct to the other parent - in which case no further fees are payable.

However, if difficulties arise, then the CMS is likely to grant a request by the receiving parent to collect the maintenance itself (although technically the rules require it to listen to representations by both parties). Then the receiving parent will be charged 4% and the paying parent a whopping 20%.

¹ Advice and support is available: tel: 0800 988 0988 or www.cmoptions.org.uk

² Exemptions exist for under 19s and victims of domestic violence



There are also new charges for enforcement - £50 for a deduction from earnings order up to £300 for a liability order. These will be retained by the CMS.

Maintenance can only be enforced by the CMS – the parent with care has no right to do so³.

- **Gross, not net income**

It is now the gross income of the paying parent which is used in the calculations. The percentages payable for 1, 2 or 3+ children have also changed to 12%, 16% or 19%, falling to 9%, 12% or 15% for income over £800 pw. The paying parent is entitled to a reduction of 11%, 14% or 16% for the number of children in his/her household.

Although now harder to calculate⁴, the overall effect of these changes is not very significant and the maximum payable remains at about £300/400/500 pw for 1/2/3+ children.

- **Use of HMRC figures**

The general rule is that the income of the paying parent will be his/her "Historic Income" - ie the income declared to HMRC in the latest available tax year⁵. This information will normally be provided direct by HMRC. The scheme therefore effectively amounts to an extra "tax" on past income.

Bonuses, commission and benefits in kind are therefore taken into account in full, however allowable deductions are ignored, save for pension contributions. Note that the CMS has wide powers to obtain information from HMRC and Banks/Building Societies without a Court Order.

"Current" income may be used if information of "historic" income is not available, or if the difference is at least 25%. Presumably, either parent may ask that more recent information be used for these purposes.

³ *R (on the application of Kehoe) v DWP [2005] UKHL 48*

⁴ The table in the FLBA's At A Glance is a useful ready reckoner

⁵ This may go back up to 6 years if more recent declarations have not been made



If on the current income basis, the paying parent may be placed under a duty to report any change in circumstances, defined as a change of employment, change of remuneration or working pattern, or simply two or more months of higher salary⁶.

- **Estimating income**

There is now express power for the CMS to estimate income, for example by using average salary figures for particular occupations published by websites such as ASHE (Annual Survey of Hours and Earnings). In fact this power is potentially very wide as it includes power to “make any assumption as to any fact”, but is only available where historic income is nil or unavailable.

- **Unearned income Variation**

Income exceeding £2,500 pa by way of property income under Part 3 ITTOIA⁷, savings and investment income under Part 4, or miscellaneous income under Part 5 will form part of the paying parent's assessable income. This is a significant change to the 2000 Scheme Rules which only applied to earned and pension income.

However this rule will not apply as a matter of course - the receiving parent must make a specific application for a Variation on this ground.

Again, the figures declared to HMRC in respect of the latest available tax year is the income to be used, however there is a specific exemption where it is based on a source no longer available, or property no longer owned.

- **Abolition of "Asset" and "Lifestyle" Variations**

The receiving parent's ability to make an application for a Variation (ie to step outside the normal rules) has been significantly reduced.

Under the 2000 Scheme, most assets owned by the paying parent (excluding their home) were deemed to produce an income of 8%⁸, whether the assets actually

⁶ Reg 9A Child Support Information Regs 2000

⁷ Income Tax (Trading and Other Income) Act 2005

⁸ Following *DWP v Cart [2011] UKSC 28* there is a discretion to use a lower figure, recognising that in recent years investment returns have fallen significantly



produced an income or not. This rule has now been replaced by the "unearned income" variation.

Also gone is the old "Lifestyle Inconsistent with Declared Income" Variation. This applied where the paying parent had a lifestyle which could clearly not have been financed by their declared income, although it did not apply where the lifestyle was funded by the capital of that person or his/her current partner. It was particularly relevant where the parent was guilty of non-disclosure or where he/she was funded by a trust or other family members.

- **Diversion of Income**

The new scheme retains this anti-avoidance provision, whereby a Variation may be granted if the paying parent can be shown to have diverted income away from him/herself - for example by ensuring that income from their company is paid to their new partner.

However, now that it can apply to Unearned as well as Earned income, it potentially has greater effect and could be a useful sanction where the paying parent has effectively purported to give away capital assets.

- **Shared Care**

The new rules apply if the care "is, or is to be, shared" and therefore the CMS will usually look forward to the proposed future child care arrangements pursuant to a Court Order or agreement rather than, as at present, be tied to those which have been in place over the previous 12 months. Whichever parent provides over 50% of the care is deemed to be the "parent with care" and hence entitled to claim maintenance from the other.

If there is dispute as to the arrangements (past or future), the CMS is entitled to assume that the paying parent cares for the child one night per week. Only nights where the paying parent stays under the same roof are deemed to count.

- **Age limit for Children**



The new scheme applies to all children under 16, and thereafter all children under 20 and in receipt of Child Benefit. They therefore fall out of the scheme once they have left secondary education.

- **Change of Circumstances applications**

A maintenance calculation will not be varied (or "superceded") during the year unless the income has changed by at least 25%, save where it was based on estimated income. This safeguards against trivial applications.

- **Annual Reviews**

The new rules require that maintenance will be reviewed regularly and the presumption is that this is annually (although this is not mandatory and a different period may be specified). Updated information will then be requested 30 days beforehand. This will amount to a significant change to the current system where the maintenance did not change until either parent notified a change of circumstances.

- **Disclosure of Information from Family Proceedings**

There is still no general power for either parent to disclose to the CMS financial information obtained in financial remedy proceedings in the Family Court⁹. The implied undertaking of confidentiality remains as reiterated in *Clibbery v Allen* [2002] 1 FLR 565. In practice, the CMS/CSA often receive and make use of such information, however it would be quite legitimate for a parent to object.

The correct course of action is either (i) to obtain permission from the Family Court (which application should be on notice to the other party); or (ii) ask that the CMS use its extensive powers to obtain the information from the Court or another person or body¹⁰. Importantly, it now has power to demand information direct from a party's accountant.

Curiously, if one party appeals to the Tribunal against the maintenance calculation, then there is specific power under FPR PD 14E to disclose information from Family

⁹ This power is contained in the new s.49B Child Support Act 1991 but has yet to be brought into force

¹⁰ The CMS has power under the Child Support Information Regs 2008 to demand evidence from the paying party, his employer, his accountant, a Court in which financial or children proceedings are or have been heard, a government department, local authority, bank or even a utility company. Failure to comply is an offence under s.14A Child Support Act 1991, punishable by a fine of up to £1,000.



Court proceedings to the CMS or to the Tribunal. (NB there is a possible argument that this rule does not apply once those proceedings have concluded).

There is a reported case¹¹ of a solicitor being held guilty of contempt for sending material to the CSA, and, given the controversy in recent years over “*Imerman* documents”, it is important to be cautious.

- **Migration of existing cases**

It is proposed that existing cases will be closed over 2014 to 2017. Parents will then have to re-apply under the new scheme over 2014-2017. Whether this happens or not remains to be seen.

Alternatively, the receiving party can agree to “close” the existing case and reapply after 13 weeks has elapsed. The paying party can only force a switch if he/she is on the receiving end of a new application in respect of a child with a subsequent partner.

- **Appeals**

A parent’s rights of appeal to the First-Tier Tribunal, which is part of HM Courts Service, remain unchanged. The time limit is 1 month following the decision, extendable by a further 12 months. The notice of appeal is sent to the CMS and must be signed by the appellant.

There is probably less scope for an appeal under the new rules. The appeal process is in practice very slow (typically 6-12 months to first hearing) and, because the CMS rarely enforce while an appeal is outstanding, some paying parents will inevitably lodge tactical appeals.

- **Arrears**

The CMS now has power to accept part-payment and/or write off arrears. This will promote negotiation towards a one-off lump sum payment and is surely welcome.

CONCLUSIONS

¹¹ *Davies v Welch* [2010] EWHC 3034 Admin



The new scheme is overall simpler, and the combination of the “25% rule” and the annual review process surely make a lot of sense. Hopefully parents will know where they stand and not be faced with random/trivial re-calculations on the grounds of change of circumstances.

However the charity Gingerbread states that the rate of applications has recently fallen by 38% and fears that this is as a result of the introduction of fees.

There is probably more scope for the paying parent to engineer a situation whereby his/her liability is minimised, however this is balanced by the increased powers to access HMRC records and estimate income. Then again, it will be harder for the receiving parent to challenge the figures if they have been accepted by HMRC.

Family lawyers should check the following:

- Have any relevant Variations been applied for (as they will not be granted unless specifically requested):
 - Paying parent has high contact costs
 - Paying parent cares for a disabled child
 - Paying parent liable for debts incurred prior to separation
 - Paying parent pays boarding school fees
 - Pre-1993 capital transfers
 - Paying parent has Unearned Income
 - Diversion of income by paying parent
- If a Variation is in place, are there grounds to challenge it? NB it should only be granted if it is “just and equitable” to do so and there are potentially a wide range of circumstances which may be relevant¹²
- Should the maintenance be collected by the CMS (incurring the extra charges) or should it be paid direct?
- When was the date of the last decision? Should an appeal be requested?

¹² The rules expressly forbid certain matters to be taken into account e.g. the income and assets of the caring parent or their new partner; contact arrangements; conduct during the relationship



- If there has been a change of circumstances since the date of the last decision, should an application for a supersession be made? (NB an appeal against the last decision will not assist)
- Could the client supply more relevant information to the CMS – perhaps to enable it to estimate the income of the other parent? Should leave to disclose documentation from previous/current financial remedy proceedings be obtained?
- Has the CMS used its powers to obtain disclosure adequately/unfairly? What about its enforcement powers?
- If the current calculation is based on the 2000/2003 scheme (or even the 1993 scheme), would it be beneficial to move to the new scheme?

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