

Schedule 1: A Breakdown

Bethany Scarsbrook (BA Hons) (BCL) (Oxon)
Barrister, St John's Chambers

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Procedure

Making an Application

- Form A1
- Fast-Track Procedure
 - *The Family Procedure (Amendment) Rules 2018*
 - Specify any wish to use the Standard Procedure, rather than Fast Track in your original Form A1
 - *FPR r.9.18 to r.9.21A*

Fast-Track Procedure – Rules v. Reality?

- Just Skip the FDR? -> Not that simple
- FPR r.9.20(1):
 - *'If the court is able to determine the application at the first hearing, it must do so unless it considers that there are good reasons not to do so.'*
 - Optimistic? Family Court Practice:
 - *'The expectation is that the case will be concluded at the first hearing and that proceedings will only be adjourned for*

good reason, for example where the filing of further evidence or documentation is required for a fair determination.'

- FPR r.9.20(4)-(7):
 - (4) *The court may use the first hearing or part of it as a FDR appointment.*
 - (5) *Where the court uses the first hearing or part of it as a FDR appointment, rule 9.17 applied with these modifications*
 - *(a) for paragraph (3) substitute, "(3) At the first hearing, the applicant must produce to the court all offers and proposals and responses to them"; and*
 - *(b) paragraphs (7) does not apply*
 - (6) *The court may direct that the application be referred to a FDR appointment.*
 - (7) *If the court decides that a referral to a FDR appointment is not appropriate it must direct one or more of the following –*
 - *(a) that a further directions appointment be fixed;*
 - *(b) that an appointment be fixed for the making of an interim order;*
 - *(c) that the case be fixed for a final hearing and, where that direction is given, the court must determine the judicial level at which the case should be heard.'*
- Pros and cons of Fast Track Procedure – consider this at the very outset.

The Application

Who can apply?

- Application is brought on behalf of the child for their benefit
- Application for financial remedy in respect of children, who can apply is set out under FPR r.9.10
- An schedule 1 application can be brought by:
 - A parent of the child
 - A guardian of the child
 - Anyone who holds a Child Arrangements Order for the Child
 - If no CAO, the child must be living with solely with the applicant or under a shared care arrangement

- Note: N v. C (Financial Provision: Schedule 1 Claims Dismissed) [2013] EWHC 399 (Fam) The applicant mother had become the non-resident parent and her claim for a home for herself was therefore necessarily dismissed.
 - Can be brought by the child themselves in certain situations
- Step-parents can be respondents
 - An application can be brought against any present or former step-parent who has treated the subject child as a child of the family
 - 2 Exceptions:
 - Where the child is over 18;
 - Where the Local Authority makes a contribution to the maintenance of the children
 - BUT – A Schedule 1 order cannot be made against a same sex former partner who has no biological link.
 - T v. B [2010] EWHC 1444 (Fam): Moylan J dismissed the application. Respondent was social and psychological parent, but the statutory interpretation of parent in Schedule 1 was confined to a 'legal parent'. Therefore Schedule 1 applications could '*...only be made against biological parents, those who were parents by operation of law (eg by adoption or under the HFEAs 1990 and 2008) and those specifically included by Schedule 1, paragraph 16 (spouse or civil partner who had treated the child as a child of the family). A person who acquired parental responsibility (for example by shared residence order or equivalent) did not thereby become a legal parent.*'¹

What can they apply for?

- Orders can be either directed to the child, or to the applicant for the benefit of the child.
- Orders available:
 - Periodical payments
 - Secured periodical payments
 - Lump sum
 - Settlement of property
 - Transfer of property
- Beware the Magistrates court.

¹ Rayden & Jackson

When can you apply for Periodical Payments?

1. Top-Up Jurisdiction

- In any case where the CMS has jurisdiction to make an assessment/calculation, the court has no power to make vary or revive any maintenance order re a no-resident parent and child. (see s.8(1) and 8(3) Child Support Act 1991).
- Doesn't matter whether CMS have actually *made* a calculation or not
- Therefore most cases with parties living domestically will be exempt from claiming Schedule 1 periodical payments.

- 'Top-Up jurisdiction' is the main exception:
 - Where the respondent non-resident parent has an income greater than the maximum CMS assessment (currently more than £3,000 per week gross income). (See s.8(6) Child Support Act 1991).
 -
- Do you *actually need* a maximum assessment CMS to have been made?
 - Finally clarified in Dickson v. Rennie [2014] EWHC 4306 (Fam)
 - Holman J held a maximum CMS assessment must have already been made by the CMS
 - Claiming that the respondent had more income than the CMS assessment figures would essentially be seeking an appeal through the back door. First port of call then would be to challenge the CMS calculation through the first Tier Tribunal.
 - *[31] '...and I so hold, that the top up jurisdiction under section 8(6) of the Child Support Act 1991 is not available unless the Child Maintenance Service have themselves assessed the gross weekly income as being or exceeding £3,000 per week, or (which comes to the same thing) have made a maximum maintenance calculation, currently in the sum of £294 a week or £15,288 per annum. Accordingly, for so long as the asserted jurisdiction of the Child Maintenance Service remains in force, it is simply not open to the mother to seek, as Mr McGhee said she was seeking: "a full restoration of the previous order."*

[32] I am, of course, profoundly sympathetic to the

position of the mother in this case. The fact remains that, after a fully contested hearing at which they were both very well represented, a district judge in 2007 fixed a liability by the father to maintain the child at a rate which has now risen with indexation to £4,009 a month, or just over £48,000 per annum. As a generalisation, the costs of caring for a child tend to increase and certainly do not decrease as a child grows older. In 2007 the child was aged about two and a half. She is now aged about nine and three quarters. It is widely known that between 2007 and now, the cost of living has increased, which is why the order has, indeed, increased by indexation. The father, responsibly and punctually, paid the full amounts for a period of over six and a half years. As I have already described, he sought between 2010 and 2012 to reduce the amounts, but he abandoned that application. So, after that history, and with no suggestion at all that there has been any diminution in the overall financial circumstances of the father, it must be a devastating blow to the mother to now find that her maintenance income has fallen so drastically to a calculated £1,300 a year and a paid £12,000 a year. But this is a court of law. To my mind the law is crystal clear, as I have described it. She has her avenue of appeal to the First Tier Tribunal, but meantime this court can do absolutely nothing to remedy her plight.'

- What if you *previously* had a maximum assessment, but don't right now?
- NB also when you are in the top-up jurisdiction, there is also scope for consideration of Carer's Allowance as part of the periodical payments.

2. Special Circumstances

- Court retains jurisdiction to order periodical payments even when there is no maximum assessment, when there are 'special circumstances' - s8(8) Child Support Act 1991:
 - (8) *This section shall not prevent a court from exercising any power which it has to make a maintenance order in relation to a child if –*
 - (a) *a disability living allowance is paid to or in respect of him; or*
 - *No such allowance is paid but he is disabled*

- *And the order is made solely for the purpose of requiring the period making or securing the making of periodical payments fixed by the order to meet some or all of any expenses attributable to the child's disability.*
- *(9) For the purposes of subsection (8), a child is disabled if he is blind, deaf or dumb or is substantially and permanently handicapped by illness, injury, mental disorder or congenital deformity or such other disability as may be prescribed.'*
- Query compatibility between description of 'disability' in s8(9) CSA 1991 and the definition in s6 Equality Act 2010
 - 'A person has a disability if –
 - *P has a physical or mental impairment; and*
 - *The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'*
- C v. F (Disabled Child: Maintenance Orders) [1998] 2 FLR 1 confirms the jurisdiction for periodical payments to extend beyond a child's 19th birthday where there are such 'special circumstances.'
 - Confirms the court is required to focus *'entirely on the expenses attributable to the child's disability.'*
 - But – also said the court should take the *'broadest view'* of what constitutes expenses attributable to the disability.
 - Butler-Sloss LJ:
 - *'In general a court considering this difficult assessment should take into account in the broadest sense the expenses attributable to the child's disability. The additional help needed, the cost of feeding additional help, a larger or better-appointed house, heating, clothing, car expenses, respite care are only some of the expenses which immediately spring to mind. The expenses attributable to the disability, broadly assessed, the income and allowances coming into the family house the child under a disability have to be weighed in the balance against the income, assets, liabilities and outgoings of the period asked to meet some or all of those expenses....'*
- Two observations:
 - Practical – consider the need for a SJE

- Substantive – periodical payments orders on this basis may extend indefinitely:
 - *'...There is indisputably jurisdiction in the Children Act to extend indefinitely a periodical payments order for the benefit of someone over the age of 19. It is part of the philosophy of the Children Act that a young person in T's position with a total dependence upon others for the rest of his life should look for continuing financial support from his parents for whatever period may be necessary.'*

3. Over 16 and under 20 but not in education in limited circumstances, see s.55 CSA 1991

4. School Fees

What's the test?

Benefit to the child

- Orders made must be for the benefit of the child
 - Increasingly generous interpretation
 - Stretching nature meaning of the phrase to its limit
 - Examples:
 - Re S (child financial provision) [2005] 2 FLR 94
 - Foreign travel to pursue contact
 - Re M-M (Schedule 1 provision) [2014] 2 FLR 1391
 - Credit card debts
 - Cost of repair works to property in M's name
 - MB v. MB [2007] 2 FLR 586
 - Application brought for settlement of property after M's MCA 1973 claims had been concluded
 - Notion of Carer's Allowance

Schedule 1, Paragraph 4

- When deciding whether to make an order, court shall have regard to factors set down in Schedule 1, Paragraph 4:
 - *'(1) the income, earning capacity, property and other financial resources, and the financial needs, obligations and responsibilities*

which each of the following people has or are likely to have in the foreseeable future, namely:

- *(a) in relation to a decision whether to exercise its powers under para 1, any parent of the child;*
- *(b) in relation to a decision whether to exercise its powers under para 2, the mother and father of the child;*
- *The applicant for the order;*
- *Any other person in whose favour the court proposes to make the order;*
- *(2) The financial needs of the child;*
- *(3) the income, earning capacity (if any), property and other financial resources of the child;*
- *(4) any physical or mental disability of the child;*
- *(5) the manner in which the child was being, or was expected to be, educated or trained.'*
- Where the court is considering making an order against a person who is not M or F, the court must additionally have regard to Paragraph 4(2), which sets out additional factors:
 - *(i) whether that person had assumed responsibility for the maintenance of the child and, if so, the extent to which and basis on which he assumed that responsibility and the length of the period during which he met that responsibility;*
 - *(ii) whether he did so knowing that the child was not his child;*
 - *(iii) the liability of any other person to maintain the child.*

Re P 'Framework'

- Re P (child: financial provision) [2003] EWCA Civ 837
 - Useful summary of guiding principles from previous case law
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 - Bodey J [76-77]
 - Thorpe LJ [43-44]
 - Welfare of the child is not paramount. However it is a 'constant influence on the discretionary outcome' and also a 'very relevant consideration'
 - Nature / duration of parents relations has little relevance
 - The child's need for a carer allows for account to be taken of the resident parent's needs – 'carer's allowance'

- Circumstances which resemble non-resident parent's standard of living
 - Court must not provide for the sole benefit of the resident parent dressed up as being a 'benefit for the child'
 - Where there are resources which allow it, the child and his resident parent will need to be provided with a home that reverts to the non-resident parent at the end of minority, and also a capital sum for furnishing it and a car and income provision (which can include school fees);
 - Budget needs calculations require a broad brush approach.
- Useful checklist to direct early thinking – but – Re A (a child) [2014] EWCA Civ 1577 warn that it shouldn't be taken as a benchmark from which you simply enlarge up or down based on the wealth of the respondent...
 - Useful authorities for 'smaller money' cases:
 - H v. P (illegitimate child: capital provision) [1993] Fam Law 515
 - Re R (1999) LTL 21/10/99
 - B v. V [1999] CLY 2347

Costs

Costs Rules

- Schedule 1 applications – FPR r.28(3) does not apply, excluded from the general no order rule
- Costs remain at the court's discretion CPR r.44.3
- Re N (payments for benefit of child: costs) [2009] 2 FLR 687
 - Broad brush approach
- In KS v. ND (Schedule 1: appeal: costs) [2013] EWHC 464 (Fam), Mostyn J considered that Schedule 1 costs should start from a 'clean sheet' basis, though the starting point may be that of costs following the event
- Calderbank offers are still permission in Schedule 1 applications.

Legal Funding Options for Schedule 1

- Clients with little funds in their own right, facing potentially Schedule 1 litigation and concurrent ToLATA proceedings as well

- LSPO is available in Schedule 1 cases
- BC v. DE [2016] EWHC 1806, Cobb J gives useful summary of the established history.
 - M applied for
 - Outstanding costs £140k
 - Prospective costs £154k
 - M could legitimately claim historic costs, see Rubin v. Rubin [2014] EWHC 611 (Fam)
 - [13] ‘... *It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate inter partes costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.*’

Interplay with ToLATA costs

- Beware separate records of costs

Recent Case Law

- RS v. JS & Another [2020] EWFC 63
 - Sir James Munby sitting as a High Court Judge
 - 41 adult son of the respondents applied to financial relief from them, under:
 - S.27 MCA 1973
 - Schedule 1 Children Act 1989
 - Inherent jurisdiction as a ‘vulnerable’ person
- <https://www.civillitigationbrief.com/2020/09/30/a-most-unusual-case-a-judges-draft-judgment-is-not-an-invitation-to-treat/>

Bethany Scarsbrook
St John's Chambers

bethany.scarsbrook@stjohnschambers.co.uk

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