Cohabiting Parents – What Are You Entitled To For Your Child?

Financial Provision for Children for Unmarried Couples

Unmarried couples with children who separate do not have the same legal remedies as married couples who are divorcing. The legal position at present is set out under Section 15 and Schedule 1 to the Children Act 1989, (save in relation to property claims under the Trusts of Land and Appointment of Trustees Act 1996).

In recent cases the levels of housing provision awarded in Schedule 1 claims are getting higher, interim funding in relation to legal fees has now been held to be acceptable in principle, full maintenance awards are being made (where there is jurisdiction), the standard of living and lifestyle of a rich father is being considered when assessing the resource needs of the children, orders are being made for mothers to have their pre-existing debts paid off, mothers are being allowed to retain pre-existing assets and the idea of accounting to the father for expenditure is rapidly going out of fashion.

What are the General Principles applied by the Courts?

In general the courts do not have jurisdiction to deal with issues of Child Maintenance. This is something for the Child Support Agency. However where the courts do retain Jurisdiction the courts will look at a reasonable figure having regard for the father's means for the maintenance of the child. The maintenance must be not only for food, clothing, heat, light and housing and so on but for the care of a young child. It has also long been accepted that the mother may well be forced and rightly forced to give up employment or not to take employment in order to look after a child. This should be reflected in the maintenance order for the child. In addition, some allowance must be made for the mother and this can be left entirely within the discretion of the courts who can have regard to the fact that the father is a rich man.

What are the Orders that the Courts can make? (the Legal Provisions are Governed by Paragraph 1 of Schedule 1 of the Children Act 1989)

All orders are for the benefit of the child as follows:-

1. Periodical payments, (ie maintenance, subject to the Child Maintenance and Enforcement Commission's jurisdiction).

2. Lump sum payments (to cover capital expenditure for the benefit of the child).

3. Settlement of Property to be made for the benefit of the child, (on trust).

4. Transfer of Property for the benefit of the child.

5. School fees order.

In relation to periodical payments, the Applicant can only apply for maintenance under Schedule 1 if a maximum assessment has been made under the Child Support Act 1991, the claim is for educational or disability costs or if the other party lives abroad. Although Schedule 1 does not require that any property transferred reverts back to the transferor at the conclusion of the child's minority, the interpretation is that because any transfer is for the benefit of the child that need no longer exists once the child has grown up. For that reason in the vast majority of cases where a transfer (or settlement) of property order is made, the property reverts back to the provider at the end of a particular term, mainly linked to the child's age and/or stage of education.

Also, because the property is normally settled on trust, it is advisable to take tax advice when setting up a trust.

What are the Factors the Courts consider in making an Award? (governed by Paragraph 4 of Schedule 1 of the Children Act 1989)

a.) The income, earning capacity, property and other financial resources which each person has or is likely to have in the foreseeable future.

b.) The financial needs, obligations and responsibilities which each person has or is likely to have in the foreseeable future.

c.) The financial needs of the child.

d.) The income, earning capacity (if any), property and other financial resources of the children.

e.) Any physical or mental disability of the child.

f.) The manner in which the child has been or is expected to be educated or trained.

Standard of Living

In the case of **F v G (Child: financial provision) [2005] 1 FLR 261** Singer J considered that the omission of standard of living from paragraph 4 of Schedule 1 does not render its consideration inappropriate or impermissible and that in a case where the lifestyle of the parties was a factor that would impact to an extent on the outcome, standard of living must be among the totality of the circumstances which a court is to hold in view when making an order.

Conduct

In cases where findings have been made against a mother, such misconduct did not affect the child's claim for maintenance, (see **A v A (A Minor: Financial Provision) [1994] 1 FLR 657**).

Recent case law developments

Re P [2003] 2 FLR 865

In this leading case the court of appeal overturned the trial judge's decision more than doubling the initial awards made at first instance. **The mother received £1 million for a central London property** (on trust), £100,000 to refurbish that property and **£70,000 per annum by way of child maintenance**. The award for child maintenance was not distinguished as between the carer's allowance and the child's needs. In addition, the father agreed to pay school fees and reasonable extras and to replace the car every five years with a value of up to £20,000. Furthermore the court ordered the father (who referred to himself as being "fabulously wealthy") to pay the mother's costs of the appeal.

Thorpe L J gave the following guidance in relation to future Schedule 1 applications as follows:-

a.) Determine the nature of the housing need.

b.) Determine the lump sum required for furnishing and equipping the home, the cost of a family car and any other reasonable chattels for the child's benefit (computers, musical instruments, etc).

c.) Determine the mother's reasonable requirements to fund her expenditure in maintaining the home and its contents, her other reasonable expenditure outside the home and of course the child's direct needs.

Why did the courts make such a large award?

None of the judge's in **Re P** expressed any rationale for a figure of £70,000, nor how much of that should represent the carer's allowance. However, it was stated that the Applicant Mother had no personal entitlement in any award and secondly she is entitled to an allowance as the child's primary carer.

F v G (Child: Financial Provision) [2005] 1 FLR 261

In the decision of Singer J on 30 July 2004 the **Re P** principles were re-considered. It was held that the cost of a nanny should in this case be notionally allocated to the mother's salary leaving the mother with about one third of her net salary for her own use and the father was to pay the mother the full primary carer's allowance. This would allow the mother to make her own decisions about employment and she would have either to make her own financial contribution from employment or accommodate her lifestyle choices through the money received from the father.

The approach of Singer J was as follows:-

1. **Re P** is now regarded as an authority.

2. There should be a generous approach to the carer's allowance.

3. A sense of financial independence and self-respect for the mother was important, ie the money should be paid to her and she should decide how to spend it, including taking responsibility for the nanny. The judge expressed no enthusiasm for receipts.

4. The mother's own income was borne in mind but the judge did not reduce maintenance pound for pound (or anywhere near).

5. A recognition that the mother would have to plan for her own future – allowing her to retain her own modest capital and as much of her income as she wished. The costs of the nanny were agreed at £24,000 per annum leaving £36,000 general maintenance in addition to the mother's income. The mother was therefore at liberty to cease working, dispense of the nanny and receive global maintenance of £60,000 plus property costs if she so wished. It was her choice.

Re S (A Child) [2006] EWCA Civ 479 2 FLR 950

The key question in this case was the size of the capital fund to provide for the parties' housing needs. The brief facts of this case were that the mother presented a case which focused on her being provided with a property on behalf of her daughter in Knightsbridge where the parties were living and where the school that the daughter attended was also situated. The mother's case was that properties in that area were in the region of between £1.6 and £2 million. The father asserted that there was no reason why the mother and daughter should not relocate to Parsons Green or Fulham and particulars were produced to illustrate that a house could be purchased in that area for in the region of £500,000 to £550,000.

The judge at the first instance made an award of £800,000 to cover purchase price, survey fees, stamp duty, conveyancing and trust fees. The judge stated that the mother's claim for accommodation in the region of £1.6 to £2 million "is grossly excessive". The judge in this case was guided by the award in the case of **Re P** and in particular the award of £1 million made in that case.

The case went to the court of appeal where Thorpe L J referred to the "four S's":

1. Security.

2. Stress.

3. Schooling.

4. Stability.

The judge stated that the child needed to be close to her school and her friends. In addition, the child should not be subjected to any further change and it was important to take on board the differences in the living standards between the home of her father and the home of her mother. Thorpe L J made it clear that his decision and the amount of the award made in **Re P** was not a benchmark or a ceiling. The award to the mother in relation to the daughter must be proportionate to the father's wealth. Initially an

award was given of £1 million but the matter was then reconsidered by the court of appeal having been provided with the necessary further evidence and **the mother was awarded £1.1 million to include the costs of purchase**.

Re C (A Child: Financial Provision) [2007] 2 FLR 13 – decision of DJ Million at the Principal Registry

This case confirmed that **Re P** is not a ceiling when considering awards and **ordered the father to provide a housing fund of £2 million**. The maintenance award remained very similar to that in **Re P** at £72,500 per annum plus all school fees. DJ Million took particular exception to the issues of the mother having to provide receipts and secondly the ban on any form of saving by the mother.

Re N v D [2008] 1 FLR 1629

This case concerned the mother's application against the father for maintenance and in addition a lump sum payment for a property refurbishment, replacement of household items and a car. The couple in this case had cohabited for 17 years and had a daughter who was aged 14 at the time of the court proceedings. Following the parties' separation they agreed a property settlement whereby the mother and daughter remained in the family home until the daughter attained the age of 18. The father paid maintenance in accordance with the guidelines set by the Child Support Formula. As the father lived abroad at the time of the application, the court had jurisdiction in respect of periodical payments because of this.

The mother sought an additional £4,400 per month for the daughter's benefit and the court awarded the mother £4,000 per month and a lump sum payment of £45,000. Whilst the length of the parties' relationship was not in itself significant under Schedule 1 of the Children Act, which does not make any reference to this factor, the length of the parents' relationship was relevant on the facts of this case in as much that how it concerned the manner in which the child had been brought up and become accustomed to. It was also considered that the father was able to afford the sums ordered. Had the father been living in the UK at the time of the application, the mother would have undergone difficulties obtaining a maximum assessment (due to difficulties in establishing the nature and extent of the father's income) and the court's jurisdiction would have been limited to a "top up" award under Paragraph 8(6) of the Child Support Act 1991.

Legal costs in Schedule 1 cases – can these be included in award made by the court?

In the case of **W v J (Child: Variation of Financial Provision) [2004] 2 FLR 300** Bennett J dismissed the mother's application for a fund, up front, to meet her legal costs and held that the court had no jurisdiction under Section 15 and Schedule 1 of the Children Act 1989 to order one parent to make a payment to the other parent to cover the latter's legal fees in relation to litigation over their child or children. This was because the parent was seeking a benefit for his or herself and not for the child.

However, in the case of **Re S [2005] 2 FLR 94** the mother sought payment to cover her legal costs in the context that the father moved the child to Sudan and following her application to the court the child was returned to England. The mother then sought payments in respect of the child and the court held in this case that the order sought under Section 15 and Schedule 1 was for the benefit of the child. This was because the child had in this case suffered great loss as a result of the abduction. The order was for the benefit of the child as well as for the mother.

In the case of **Re M v T (financial provision: costs) [2007] 2 FLR 925** the mother was awarded £25,000 per month in respect of legal fees to litigate her Schedule 1 claim. Charles J concluded that it was for the benefit of the children for the mother to be able to litigate on their behalf. The order was framed as a periodical payments order for the benefit of the children.

Procedural Issues

Applications under Schedule 1 are governed by Family Proceedings Rules 2010 and can be made to the High Court, County Court and Magistrates Court. Application is made by way of Form C1, Form C10 and Form C10A (statement of means) at the appropriate court. The Respondent must answer any application with Form C7 and Form C10A.

There is no express provision for a Financial Dispute Resolution Hearing but the courts may prefer an application of this nature being managed in this way.

In what Circumstances would the Court combine Schedule 1 and Trust of Land claims?

In the Court of Appeal case of **W v W (Joinder of Trust of Land Act and Children's Act Applications) [2004] 2 FLR 321** the mother issued under Section 14 of the Trust of Land and Appointment of Trustees Act 1996 (TOLATA) to defer the father's half share interest in the jointly owned property until the parties' youngest child attained 18 or ceased full-time education. The father in this case was seeking for the property to be sold. However, due to a change of circumstances the father obtained a residence order and the mother's position changed to that of seeking an application for the sale of the property whereas the father was seeking deferment of the sale of the property. The father then subsequently issued an application under Section 15 and Schedule 1 to the Children Act 1989 seeking a transfer of the mother's interest in the family home during the children's minority. He also asked the court for the applications to be joined so that joint directions could be considered by the court. In this case, the court adjourned the father's application under Schedule 1 and dealt with the TOLATA application as the leading application. The court subsequently ordered the sale of the property. The father's appeal was unsuccessful and the court held:-

1. Where there were children and where both parties had an interest in a property both the Children Act 1989 and the TOLATA would apply.

2. Thorpe LJ considered that the leading status should be given to the Schedule 1 application as that statute confers more extensive powers upon the court to make

orders between the co-owners but this has to be taken in context as the TOLATA application in that case was to delay the sale rather than to quantify a beneficial interest.

In the case of **A v A (A Minor: Financial Provision) [1994] 1 FLR 657** the mother sought a declaration that the beneficial interest in the property was hers and that the legal interest should be transferred to her. The mother also made an application seeking an order under Schedule 1 in respect of the property. In that case Ward J commented that in order for the mother to succeed in her Schedule 1 application she had to establish that the property concerned was one that the father was entitled to in possession or reversion but in this case the mother was in fact claiming that she was entitled to the entirety of the beneficial and legal ownership of the property on various Trust principles.

It is clear that in any situation where there are two applications running concurrently it would seem that the TOLATA case must surely be pleaded first and the Schedule 1 claim must be put in the alternative.

In circumstances where the TOLATA application is for the entirety of the equity, if that application is not accepted then the Schedule 1 claim will need to be considered by the court.
In circumstances where the TOLATA claim is for a specified percentage of the equity then consideration needs to be given for the applications to be joined to protect the applicant and the child so that they are suitably housed.

Jurisdiction

If the parties are living in the EU the party to first issue in time will find primary jurisdiction. It will then be a matter for the court of that country to decide whether to stay their own proceedings or not. However, Brussels II provides for determination of jurisdiction in all matters of parental responsibility, rights of custody and rights of access with the exception of maintenance obligations. However, Brussels II does not apply to Schedule 1 disputes. It is therefore imperative that the mother issues her application first, as a second court seized must of its own motion stay the proceedings pending further determination by the court first seized (see Articles 27 of Brussels I).
It is also important to note that Paragraph 14 of Schedule 1 of the Children Act 1989 limits a mother's claims to periodical payments and secured periodical payments in circumstances where she is living abroad with the child.

If the mother is living in a non-member state no particular jurisdictional rules apply. The mother is free to issue in the UK. In circumstances where the father is resident abroad, again it is imperative that the mother issues her application first in time. This avoids enforcement issues later on.