Your guide to child maintenance

Overview

Child maintenance is financial support payable towards a child's everyday living expenses. It can also cover one-off expenses and housing costs. Child maintenance is a regular (usually monthly) payment made by the parent with whom the child does not live - commonly referred to as the non-resident parent (NRP) - to the person or parent with care (PWC).

Child maintenance can be agreed between you and your former partner, calculated by the Child Maintenance Service (CMS) or ordered by the court in certain circumstances or where the CMS does not have the power to make a child support assessment.

This guide will explain your child maintenance options and the formula the CMS use to calculate the level of maintenance. For a detailed overview of other financial orders the court can make for a child please refer to our guide to Schedule 1 of the Children Act.

What are the options?

Separating parents have three main options; the statutory CMS scheme, family-based arrangement or a court order in limited circumstances.

Assessment by the Child Maintenance Service

The CMS has the power to assess and enforce child support when there is a qualifying child, a person with care, a non-resident parent and all three are habitually resident in the UK. A qualifying child is generally either under 16 or has attained 16 but not 20 and meets specific educational criteria, including receiving full-time non-advanced education.

The CMS will not have jurisdiction if the child and the parent with main day-to-day care live outside the UK.

The CMS will not have jurisdiction if the parent without main day-to-day care lives and works outside the UK unless they work abroad for certain British organisations, for example:

- The Civil Service
- His Majesty's Diplomatic Service
- The Armed Forces
- A company or organisation based and registered in the UK
- The NHS
- A UK local authority

How do you work out the level of maintenance to pay?

The current method of calculating child support liability is referred to as the gross income scheme. An online calculator is available on the government website *Calculate your child maintenance*. To use the calculator, you will need to work out gross income after deduction of pension contributions and work out the number of overnight stays.

There are four rates of child maintenance which may apply:

- The nil rate band, the flat rate which applies where the NRP income is £100 gross a week or less and is set at £7;
- The reduced rate which applies where the NRP's income is between £100.01 to £199.99 gross a week; and
- The basic rate. The basic rate applies percentages across two income bands.

What is assessable income?

Maintenance calculations will be based on gross income figures without any deductions for tax or national insurance. There are two ways of calculating a NRP's gross weekly income: historic income and current income.

Historic income is determined using figures provided by HMRC for income from employment, pensions, taxable social security income, and trading income, which have been adjusted to take account of any pension contributions made during that year. Account can also be taken of charges when converting foreign currency into pounds sterling if the NRP receives income in a currency other than pounds sterling. Historic income figures will be used for the maintenance calculation unless no historic income figure is available, the amount of historic income is nil, or the NRP's current income differs from historic income by a figure that is at least 25% of the historic income.

Current income is calculated as a weekly amount at the effective date of the relevant calculation. While the regulations require historic income figures to be provided by HMRC, they do not limit the source of current income figures in the same way, so current income figures can come from any source that the decision maker considers to be reliable

Where a current income figure has to be used because historic income was nil or is not available, and the evidence available in relation to current income is insufficient or unreliable, the CMS may estimate current income, including making assumptions of fact.

Where insufficient information is available in respect of the NRP's income an interim maintenance assessment also known as a default maintenance decision can be made.

Maximum assessable income

Under the gross income scheme the maximum amount of gross income from all sources which can be taken into account is £3,000 a week, £156,000 per annum. Where a calculation has been made on the basis of this maximum level of assessable income, the court recovers jurisdiction to make an order for top-up maintenance. See later section in this guide for information on top-up orders.

How often does the child stay overnight?

The number of overnight stays a NRP has is taken into account in the child support calculation. To assess the number of nights that count the CMS loos forward 12 months from the effective date of the calculation to determine how many nights the NRP expects to have overnight care of the qualifying child. The CMS does not have to adopt any care arrangements set out in an agreement between the parties or any court order, or any shared care pattern over the previous 12 months. It only has to consider these matters.

To complete the assessment, you will need to work out how many overnight stays there are in a year from the following categories:

- Less than 1 night a week (less than 52 nights a year)
- 1 to 2 nights a week (52 to 103 nights a year)
- 2 to 3 nights a week (104 to 155 nights a year)
- 3 nights a week (156 to 174 nights a year)
- More than 3 nights a week (175 or more nights a year)

Where a child's day-to-day care is shared equally, no statutory child maintenance liability arises because neither person provides care to a lesser extent and therefore neither person can be treated as a NRP. There is a rebuttable presumption that where the applicant of statutory child maintenance is in receipt of child benefit for a qualifying child, then the care they provide is greater than that of any other person.

Relevant other children

Where a NRP has a liability for children from different PWCs, maintenance payments will be apportioned between the PWCs. An innovation under the gross income scheme is that apportionment will apply where the NRP is supporting another child who is not a qualifying child under a qualifying maintenance agreement. This agreement can be oral or written but must relate to the child of a NRP who is habitually resident in the UK, be between the NRP and a person with whom the child has their home and who usually provides day-to-day care for that child and provide for the NRP to make regular payments for the benefit of that child.

Variations

An application for a variation can be made by either a PWC or a NRP. The grounds for variation fall into two categories:

- Special expenses; and
- Additional income

<u>Special expenses</u>
The regulations specify five categories of special expense:

- Contact costs
- Expenses attributable to long-term illness or disability of a relevant other child
- Prior debts
- Boarding school fees
- Payments of mortgages, loans, or insurance policies

Where a variation is agreed based on special expenses, all the special expenses are aggregated and the weekly amount is deducted from the NRP's actual gross weekly income (subject to the maximum gross weekly income cap of £3,000).

<u>Additional income</u>
A variation can be considered on the basis that the NRP:

- Has unearned income (for example rental) and at least £2,500 per year
- Has income from assets exceeding an aggregate prescribed value of £31,250
- Is on a flat or nil rate but has gross weekly income equal to or more than £100
- Has diverted income. There is no fixed monetary threshold but must show the NRP is diverting or suppressing income.

Where a variation is agreed based on additional income, effect is given to the variation by adding the additional weekly income to the NRP's gross weekly income, subject to the maximum gross weekly income cap of £3,000.

A variation (or the aggregate of variations) agreed to cannot reduce the NRP's child support liability below the flat rate of £7. If the gross weekly income exceeds the cap following a variation based on additional income, the PWC may apply for a top-up order under Schedule 1 to the Children Act 1989.

Review and updating assessable income

The CMS must review each maintenance calculation every 12 months. On the review date each year the CMS will, if available, obtain updated information from HMRC in relation to the NRP's earned income and if the NRP's income has changed, they may make a supersession from that date. Outside of the annual reviews or unless there has been an error of law, no supersession will be allowed where the difference in the NRP's income to be taken into account is less than 25%.

Where a decision is based on the NRP's current income and no supersession has been made in the last 12 months, the NRP can provide the CMS with updated gross weekly current income information. If the NRP fails to provide the information requested, the CMS can make a supersession based on the NRP's historic income.

Family-Based Arrangements (private agreement)

If you can agree the level and frequency of child maintenance, you can record your agreement in a written document called a child maintenance arrangement. It is not possible for any agreement to exclude the power of the or the court to make financial provision for a child. Any agreement that seeks to restrict a PWC or NRP from applying to the CMS for a child maintenance assessment will be void. This restriction applies to all forms of agreement including pre-nuptial and cohabitation agreements as well as court orders. This will not be legally binding and therefore if circumstances change it will be easy for you to review your agreement.

Any clause outlining child maintenance arrangements in a family-based arrangement can be reviewed after separation. Either party can apply to the CMS for an assessment of child maintenance or to the court for a variation of the agreement if there has been a change of circumstances, or where the agreement is inadequate.

Arrangements you may want to include within your agreement can include:

- Who will pay for the child's clothes, shoes and school uniform;
- Who will pay for any sports equipment and kit;
- Who will pay for school trips;
- Who will give the child pocket money;
- Who will pay for one-off items such as computers, bicycles or musical instruments;
- How often will the maintenance be paid; and
- When, or in what circumstances, will the arrangement be reviewed.

More information on entering into a child maintenance agreement can be found on government website *Child Maintenance Service and a downloadable child maintenance arrangement can be found at Your child maintenance arrangement - GOV.UK*

Child Maintenance Court Orders (also known as periodical payments)

The family court can make child maintenance orders if:

- The CMS does not have jurisdiction;
- Parents agree a child maintenance order by consent;
- It is an order providing for a child's educational expenses (including school fees and expenses directly related to education or training for a vocation, trade or professions or for costs attributable to a child's disability (the court should take a broad view of expenses associated with a child's disability);
- Children over the age of 20 who remain in education;
- One of the parties or the child are not habitually resident in the UK;
- Cases involving stepchildren (provided the parents were married);
- It is a top up order (see below); or
- It is an order against a person with care of the child.

If none of the above apply, a PWC has no right to apply to the court for a child maintenance order and, failing agreement to enter into a child maintenance arrangement, will have to apply for a child support assessment by the CMS.

Consent order and the 12-month rule

If you and your former partner agree the child maintenance arrangements, the court can make an order (called a consent order) confirming the terms of your agreement. Any order for child maintenance (excluding a school fees order and an order attributable to a child's disability) will prevent an application to the CMS for a child support assessment for a period of one year (also known as the 12-month rule).

Once the child maintenance order has been in force for more than a year, you or your former partner may apply to the CMS for an assessment. There has been debate about the meaning of "in force" in this context, and the general view is that a variation of a court order does not start the clock running again for the purposes of excluding the statutory scheme. If parties wish to re-start the 12-month lock-out period they will need, by consent, to ask the court to make a fresh order.

Top-up orders

Top-up orders can be made provided that a maintenance calculation has been made, the NRP's income exceeds £156,000 gross a year if assessed under the gross income scheme or £104,000 net a year if assessed under the net income scheme, and the court is satisfied that in the circumstances of the case it is appropriate.

An order for 'top-up' maintenance is an order requiring an NRP to make child maintenance payments over and above the CMS child support calculation. It does not extinguish or replace the CMS calculation, rather a top-up order is payable in addition to a CMS child support calculation.

In James v Seymour [2023] EWHC 844 (Fam) Mostyn J (at para 43) emphasised that all orders for child maintenance must be decided with reference to the discretionary balancing exercise set out in the relevant statute and that every application must include a budget that will be subject to careful consideration. The Appendix to the judgment sets out an adjusted formula methodology (AFM) to calculate the child support starting point (CSSP).

The AFM works as follows:

1. Calculate the paying party's exigible income (E). The 'exigible' sum or the paying party's gross income that can be properly subject to child maintenance payments is determined by taking their gross earned income, then:
    - applying a percentage reduction for the number of children living in their household in the same way as the CMS (11% for one, 14% for two, 16% for three or more).
    - deduct their pension contributions as the CMS also does, and
    - deducting any school fees paid for the benefit of the relevant children grossed up at the payer's marginal rate of tax.

    Or formula: E = (G x (1-Z) – P – (S÷0.55)

    G is the payor's gross income as disclosed in their most recent P60 or tax return

    Z is the reducing factor referable to the number of children living in the payor's household

    P is the amount of pension payments currently being paid; and

    S is the amount of school fees and extras currently being paid

2. If E is £156,000 or less then the court should simply apply the formula (subject to the appropriate reductions for shared care).

3. If E is over £156,000 and less than or equal to £650,000, then the formula should be applied to the first £156,000, and the balance subject to a tariff (2.4% for one child, 3% for each of two or three children).

4. Finally, an adjustment is made to reflect the number of overnight stays the children have with the paying party each year in accordance with the CMS formula, (52–103 1/7th, 104–155 2/7ths, 156–175 3/7ths, 176–183 50% minus £7 per child per week).

A downloadable spreadsheet calculator that applies the AFM can be found at mostyn-child-maintenance-formula-james-v-seymour-may-2023-v2.xlsx

The CSSP should not be used in cases;

- Where there are 4 or more children for whom CSM is to be paid; or
- The exigible income of the paying party is greater than £650,00; or
- The paying party's income is largely unearned; or
- The paying party lives on capital; or
- The application is for variations of an existing child maintenance order; or
- Where a Home Expenditure Child Support Allowance (HECSA) is sought.

In the circumstances above, CSM should be calculated without reference to CSSP but instead by reference to statutory provisions under s.25(3) Matrimonial Causes Act 1973/para 4(1) Schedule 1 of the Children Act 1989 (or in variation cases by reference to the original award adjusted for inflation).

A problem with applying the AFM also arises where a paying party's amount of shared care, as calculated by the number of nights that the child spends with them annually, falls close to one of the boundaries set out in the appendix. Mostyn J gives the example of a payor whose exigible income is £500,000 per annum whose two children spend 175 nights a year with them and will have a liability of £11,700 per child whereas, were they to spend one additional night with the paying party, the liability would reduce to £9,500 per child.

At paragraph 43 of his judgement Mostyn J emphasised that the AFM produces a 'loose starting point which a decision-maker can summarily choose to accept or reject without fear of appellate review'.

Automatic termination of court orders

Once a maintenance calculation has been made by the CMS, this will automatically bring to an end any court order for child maintenance with the exception of orders made to meet educational expenses or expenses attributable to a child's disability. The order ceases to have effect on the effective date of the maintenance calculation, which is two months and two days after the date of the application. The words "cease to have effect" mean that the order is extinguished completely and cannot be revived except by a fresh application.

Care must be taken to ensure that the provisions for maintenance that would fall outside the scope of the CMS's jurisdiction, such as maintenance during tertiary education are not unintentionally revoked by a subsequent application for a maintenance calculation. This may be achieved either by incorporating arrangements for financial support during tertiary education in an undertaking within an order or other form of freestanding agreement, or by making an order which is expressed to take effect only when the CMS ceases to have jurisdiction (also known as a delayed commencement order).

A child maintenance order must not extend beyond a child's 17th birthday, unless the court thinks it is right in the circumstances for the order to be made for a longer period. If so, the order cannot extend beyond a child's 18th birthday unless the child is, or will be, in training or education, or there are special circumstances (for example, the child has a disability).

If the parent making the payments and the parent receiving the payments live together for more than six months, the order will cease. An order also ceases on the death of the person making the payments.