Financial Provision for Children
Schedule 1 to the Children Act 1989

1 Importance

1.1 The obvious statistics:

1.2 40% of all children in England and Wales born to unmarried parents

1.3 1 in 6 heterosexual couples who live together unmarried

1.4 Whilst the Child Support Agency has jurisdiction in respect of general maintenance for children, regardless of the marital status of their parents, Sched 1 to the 1989 Act contains important powers relating to capital provision for children.

2 The powers of the court

2.1 Under para 1(2), the court may order any of the following:

2.1.1 periodical payments to the applicant for the benefit of the child, or to the child himself or herself;

2.1.2 secured periodical payments to the applicant for the benefit of the child, or to the child himself or herself;

2.1.3 a lump sum to the applicant for the benefit of the child, or to the child himself or herself;

2.1.4 a settlement of property to be made for the benefit of the child, where the property in question is property to which either parent is entitled;

2.1.5 the transfer of property to the applicant for the benefit of the child, or to the child himself or herself, again property to which either parent is entitled.

2.2 Magistrates' courts can only make periodical payments orders and lump sum orders (para 1(1)(b)), the latter limited to £1,000 (para 5(2)).

2.3 The court has the power to vary or discharge orders for periodical payments (para 1(4)).

2.4 The court's powers to make or vary orders for periodical payments are subject to the restrictions contained in s 8 of the Child Support Act 1991 (see below).

2.5 Who is a **parent**?: in general, under Sched 1, parent includes any party to a marriage (or civil partnership) (whether or not subsisting) in relation to whom the child concerned is a child of the family (see para 16(2)). Parent does not include the partner or cohabitant of the child's parent (*J v J (A Minor: Property Transfer)* [1993] 2 FLR 56.

2.6 Who may apply under para 1? An application may be made by:

2.6.1 a parent (as defined above) of the child,

2.6.2 a guardian of the child,

2.6.3 any person in whose favour a residence order is in force with respect to the child.

2.7 Against whom may orders be made under para 1? The only respondents to such an application are the parents (as defined above) of the child.

2.8 Once the court has made an order against a parent with respect to a child:

2.8.1 it can make a further order in respect of the same child against that parent for periodical payments, secured periodical payments or lump sums;

2.8.2 it cannot make a further order for the settlement or transfer of property: para 1(5).

2.9 The court may make orders under para 1 of its own motion where making, varying or discharging a residence order, or where the child is a ward of court (para 1(6), (7)).

2.10 Duration of periodical payments orders:

2.10.1 The order can be back-dated to the date of the application (subject to the provisions of the back-dating of top-up orders) (para 3(1), (5)-(8)).

2.10.2 The order shall not in the first instance extend beyond the child's 17th birthday unless the court thinks it right in the circumstances of the case to specify a later date (para 3(1)(a)).

2.10.3 Where the court specifies a later date, the order cannot extend beyond the child's 18th birthday (para 3(1)(b)), unless:

2.10.4 the child is, will be, or would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment (para 3(2)(a)), or

2.10.5 there are special circumstances which justify the making of an order going beyond the child's 18th birthday (para 3(2)(b)).

2.10.6 What are **special circumstances**? In *C v F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1, the Court of Appeal approved the following dictum of Johnson J in *T v S (Financial Provision for Children)* [1994] 2 FLR 883, 889:

"Whilst I do not think that the category of 'special circumstances' should be necessarily always so limited, it does seem to me that in its reference to special circumstances in relation to the duration of periodical payments, Parliament was intending the court ordinarily to look at special circumstances related to the children – such, for example, as some physical or other handicap."

2.10.7 An order made against one parent payable to the other parent ceases to have effect if the parents live together for more than six months (para 3(4)).

3 Applications by adult children

3.1 Under para 2 of Sched 1, a child who has reached the age of eighteen can make an application for periodical payments or lump sum orders.

3.2 In order for the court to make such orders, the applicant adult child must come within the rules above justifying the extension of periodical payments orders beyond his or her 18th birthday (ie in education etc or special circumstances) (para 2(1)).

3.3 The only respondents to an application by an adult child under para 2 are one or both of the child's parents, and for this purpose the definition of parent **excludes** a step-parent who has treated the child as a child of the family (ie the extended definition of parent in para 16(2) does not apply to para 2).

3.4 The court can only order payments (either periodical or lump sum) to be made to the applicant adult child.

3.5 Although there is no specific limitation on the term of periodical payments payable under an order made under para 2, given the need for the applicant to satisfy the education/ special circumstances criteria for the court to make the order in the first place, it cannot be right that any order extend beyond the termination of the course of education etc or the end of any special circumstances.

3.6 The ability of the court to make orders in favour of adult children under para 2 is subject to certain restrictions:

3.6.1 no order can be made when the parents of the applicant are living together with each other in the same household;

3.6.2 no application can be made if there was a periodical payments order (under Sched 1, the MCA 1973 or the DPMCA 1978) in respect of the applicant in force immediately before his 16th birthday.

3.7 However, a child aged 16 is entitled to apply for the variation of an order made under para 1 if the order is still in force (para 6(4)).

3.8 In addition, a child aged 16 or over can apply to revive an order which was made under para 1 for his or her benefit, but which ceased to have effect on any date between his 16th and 18th birthdays inclusive, provided he or she satisfies the education etc/ special circumstances criteria (para 6(5),(6)).

3.9 A child is also able to apply to intervene in the divorce proceedings between his or her parents for the purpose of seeking financial provision from one or both of the parents: see *Downing v Downing* [1976] Fam 288, and FPR r 2.54(1)(f).

4 Interface with CSA: when can the court make maintenance orders?

4.1 Section 8(3) of the Child Support Act 1991 prevents the court from making or varying any maintenance orders for the benefit of children where the CSA has jurisdiction.

4.2 Under s 44 of the 1991 Act, for the CSA to have jurisdiction, each of the child, the person with care, and the non-resident parent must be habitually resident in the United Kingdom. Under s 44(2A), the court will still have jurisdiction if the child and person with care are habitually resident in the UK, even if the non-resident parent is not, but where the non-resident parent is employed by one of the following:

4.2.1 the civil service (including the diplomatic service);

4.2.2 the armed forces;

4.2.3 a UK-based company, whose employees work outside the UK but which makes earnings calculations and payment arrangements in the UK;

4.2.4 local authorities or the NHS (including trusts).

4.3 Accordingly, the court retains jurisdiction where the child or person with care is not habitually resident in the UK, or the non-resident parent is not habitually resident in the UK or not employed as above.

4.4 The other circumstances where the court can make maintenance orders are as follows:

4.4.1 consent orders: under s 8(5) of the 1991 Act, the court can make orders by consent in the same terms as a written agreement. In *V v V (Child Maintenance)* [2001] 2 FLR 799, Wilson J expressed the view that there was no need for anything more than an order to be expressed as being made by consent to come within s 8(5) (at paras [20]-[21], p 805). However, any orders made for general maintenance on or after 3 March 2003 do not continue to oust the jurisdiction of the CSA for longer than one year after they are made: although the order remains in force after the year and can still be varied, either party after the year is up may apply to the CSA for an assessment, which when made will discharge the order (ss 8(3A), 4(10(aa) of the 1991 Act);

4.4.2 parties consenting to the court adjudicating on quantum of periodical payments. In *V v V* (above), Wilson J described the practice of a nominal order being made by consent at the beginning of the hearing which can then be varied at the conclusion of the hearing. The attractions of this course are now highly dubious given the limited lifespan of orders for the general maintenance of children made or on after 3 March 2003 (see above);

4.4.3 'topping-up' of a CSA maintenance calculation. Under s 8(6), for the court to have power to make an order topping up the CSA figure, there must already be a CSA maintenance calculation in force, the non-resident parent's net weekly income must exceed £2,000 per week, and it must be appropriate for the non-

resident parent to make periodical payments in addition to his or her liability under the CSA maintenance calculation.

4.4.4 'school fees' etc: under s 8(7), the court may make an order 'solely for the purposes of requiring [the respondent] ... to meet some or all of the expenses incurred in connection with the provision of' instruction at an educational establishment or of training for a trade profession or vocation which the child is, will be, or would be receiving or undergoing.

4.4.5 expenses connected with disability: under s 8(8), the court may make an order solely for the purpose of requiring the respondent to meet some or all of the expenses attributable to the child's disability. In *C v F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1, the Court of Appeal held that such an order could extend beyond the child's 19th birthday where the disability would also so continue. The magistrates who had assessed the needs of the applicant as being the expenses connected with the child's disability, minus the disability benefits received by her for the child, had taken too narrow an approach to the assessment of the right order to make. The court should consider the expenses attributable to the disability in the broadest sense: '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.' (per Butler-Sloss LJ at p7).

4.4.6 *Segal* order: only available where there is a spousal claim (thus not under Sched 1) and only where the order includes a substantial element of genuine spousal support (see *Dorney-Kingdom v Dorney-Kingdom* [2000] 2 FLR 855).

4.4.7 step-parents: the CSA only deals with the liabilities of natural parents, and the court retains its powers under both the MCA 1973 and Sched 1 to the 1989 Act to make orders against a party to a marriage (whether or not subsisting) in relation to whom the child was a child of the family.

4.5 Lump sum orders to top-up CSA maintenance?

4.5.1 In *Phillips v Pearce* [1996] 2 FLR 230, Johnson J held that the court should not exercise its jurisdiction to make a lump sum order in a way designed to evade the

restriction in s 8(3) of the 1991 Act on the courts' power to make maintenance orders. F lived in a house worth £2.6m, and had three cars worth £36,000, £54,000 and £100,000, and was assessed at having nil income by the CSA, who therefore assessed his child support liability as nil. M sought, in addition to the settlement of a property for her and the child to live in and lump sum provision for furniture etc, lump sum provision to cover the child's day-to-day needs, either by way of a lump sum capitalising the child's needs for the next 3 years (with an application for a further lump sum in 3 years' time), or an order for the payment of a lump sum by instalments. The court, whilst making the former provision, declined to make the further provision for a lump sum to meet general maintenance:

"the undoubted power which I have to make a lump sum award should not be exercised in such a way as to provide for the regular support of the child, which would ordinarily have been provided by an order for periodic payments.

I hold that in a case to which the Child Support Act 1991, and in particular s 8(1), applies, then in exercising its remaining jurisdictions under Sch 1 to the Children Act 1989, here to award a lump sum, a court should do so only in order to meet the need of a child in respect of a particular item of capital expenditure" (p234).

4.5.2 A very limited exception to this was made in *V v V (Child Maintenance)* [2001] 2 FLR 799. Here W sought £10k pa per child, H suggested £5k per child. The parties had not gone through the process of having a nominal order for the benefit of the children made at the outset of the hearing, to be varied at the conclusion of the hearing (see above), but H had conducted himself in such a way as to lead the court and W that he would not oppose the making of a child maintenance order at the rate determined by the court. Wilson J assessed W's total income needs as between £80,000 to £90,000, and if she received £20,000 pa in child maintenance, the capital provided by his order (£2.25m) would be sufficient to rehouse her and capitalise her maintenance claim and thus ordered a clean break. When faced with H's lack of consent to any order for child maintenance exceeding £5k pa per child, Wilson J made a lump sum totalling £50,000 representing the capitalised sum of £5k pa per child for the rest of their

dependency. Wilson J distinguished *Phillips v Pearce* on the basis that in that case there had been a CSA assessment and the court should not entertain what was in effect a challenge to that assessment. In *V v V*, on the other hand, there was no assessment, nor could there be one now a court order had been made, which also prevented the court from entertaining a top-up application.

4.5.3 **Past expenses**. The court is given the specific power under para 5 of Sched 1 to the 1989 Act (without limiting in any way the powers to make orders for other purposes) to order a lump sum to be paid to meet liabilities or expenses incurred in connection with the birth of the child or in maintaining the child, reasonably incurred before the making of the order. NB Hale J in *J v C (Child: Financial Provision)* [1999] 1 FLR 152 excluded from the allowable items on the mother's list of past expenditure disposable nappies, baby cleansing material and baby food, on the basis that they were day-to-day living expenses that should have been met by income provision, and to order a sum for their repayment would run counter to the principle decided by Johnson J in *Phillips v Pearce* (above).

4.6 International jurisdiction

4.6.1 Sched 1 contains no specific provisions limiting jurisdiction to cases where the child or the parents are domiciled or habitually resident in the UK.

4.6.2 A revised Brussels II is in the pipeline which may extend the scope of Brussels II to deal with Sched 1 applications.

4.6.3 Para 14 of Sched 1 provides that where one parent lives in England and Wales, and the child lives outside England and Wales with (a) another parent; (b) a guardian; (c) a person who has a residence order, the court has the power to make, on an application by (a) to (c), a periodical payments or secured periodical payments order against the parent living in England and Wales. Eg M lives in France with child, F lives in England. The court can only make order for periodical payments or secured periodical payments against F, and not any lump sum or settlement/ transfer of property orders.

4.6.4 However, where M lived in England, and F lived in Sudan and had wrongfully retained the child in Sudan (such that the court had declared that the child

remained habitually resident in the UK), the court retained jurisdiction to make capital orders against F (*Re S (A Child)* [2004] EWCA 1865).

5 Outright capital/ property transfer for children?

5.1 The court has the power under Sched 1 to transfer a secure tenancy outright into the sole name of the caring parent. Such an order is for the benefit of the child, even though the child has no legal or beneficial interest in the property so transferred: see *K v K (Minors: Property Transfer)* [1992] 2 FLR 220.

5.2 Now it is better, where the parties have cohabited, to use the powers under Sched 7 to the Family Law Act 1996 (the order itself transfers the tenancy, and there are no issues relating to unauthorised assignments etc). The powers under Sched 1 to the 1989 Act would only be necessary where, for instance the parties were married and divorced but the applicant has subsequently remarried (see *B v B* [1994] Fam Law 250: claim failed on its merits, and *Re S* (above)), or where the parents never lived together.

5.3 Apart from the transfer of periodic tenancies (which are impractical in any event to be held subject to a trust), it is now clear law that the purpose of what is now Sched 1 was to ensure that the children of unmarried parents should not be worse off than the children of married or divorcing parents. 'Equally of course they should not get **more**. There is a long line of authority ... that children are entitled to provision during their dependency and for their education, but they are not entitled to a settlement beyond that, unless there are exceptional circumstances such as a disability, however rich their parents may be' per Hale J in *J v C* [1999] 1 FLR 152, 155. *Re P* was the first case under Sched 1 to be considered by the Court of Appeal. No outright transfer of property was sought, either at first instance, or in the Court of Appeal, and Thorpe LJ specifically stated that the appropriate mechanism was a settlement of property order, with

the respondent entitled to the reversion ([2003] 2 FLR 865, 875, para [45]). Attempts to justify outright transfers by analogy of the special circumstances provision relating to the term of child maintenance orders have, in the absence of the children having any disability, been consistently rejected (eg *T v S (Financial Provision for Children)* [1994] 2 FLR 883, and *A v A* [1994] 1 FLR 657).

5.4 Accordingly, the provision of a home for the child will invariably have the following features:

5.4.1 a property transferred to trustees, usually nominees for each parent, to hold the property on trust for the child and thereafter for the respondent;

5.4.2 the respondent will usually be entitled to the reversion when the child reaches the age of 21 or finishes full-time tertiary education (including a gap year), although a different term may be appropriate on the facts. Some judges have granted a period of grace of six months after the above to allow the child to find her feet and arrange her affairs (eg *A v A*);

5.4.3 whilst the child is in the care of the applicant, the applicant should have the right to occupy the property to the exclusion of the respondent and without the obligation to pay rent;

5.4.4 the applicant's cohabitation or remarriage would not result in the automatic reversion of the property to the respondent, although the court would be able to consider the position on the occurrence of those events (*J v C*);

5.4.5 the trustees should have the power to sell the original house and purchase a new one on the same terms (*J v C)*;

5.4.6 the applicant should have the right to buy the reversion at the end of the term (*J v C*);

5.4.7 the respondent, or his trustee, must have power to veto an unreasonable investment (eg consent required, such consent not to be unreasonably withheld).

5.5 The settlement approach with two trustees is workable, if potentially expensive, in a big money case. Where there is a modest property subject to mortgage in

the name of the father which is to be transferred for the use of the mother and child during the child's minority, this approach creates problems. Is a professional trustee likely to be willing to assume liability under a mortgage? An alternative may be a modified *Mesher* style transfer to M with a charge back to F, with M giving the usual undertakings re mortgage and upkeep of the property.

6 Factors relevant to quantum

6.1 The child's welfare.

6.1.1 This is not specifically mentioned in Sched 1! It is not the court's first or paramount consideration (*J v C (Child: Financial Provision)* [1999] 1 FLR 152), but it is clearly of relevance.

6.1.2 Greater emphasis has been given to the child's welfare by *Re P (Child: Financial Provision)* [2003] 2 FLR 865. Bodey J described the welfare of the child whilst a minor, although not paramount as 'naturally a very relevant consideration as one of "...all the circumstances ..." of the case' (at para [76], p 882). Thorpe LJ at para [44], p 874 stated:

"I would only wish to amplify by saying that welfare must be not just 'one of the relevant circumstances' but, in the generality of cases, a **constant influence on the discretionary outcome**. I say that because the purpose of the statutory exercise is to ensure for the child of parents who have never married and who have become alienated and combative, support and also protection against adult irresponsibility and selfishness, at least insofar as money and property can achieve those ends."

6.1.3 Welfare concerns will usually enable the court to require the respondent, where means allow, to provide a sum for housing the child which also allows the child's siblings to be housed: *J v C*: child had two siblings: four bedroom house reasonable: reasonable for child to have her own bedroom, and 'wrong, from her point of view, to treat her much more favourably than the other children in the household' (at p160). Similarly, in *A v A (A Minor: Financial Provision)* [1994] 1

FLR 657, Ward J rejected claimed deduction from maintenance of sums which might not be of exclusive benefit to the child in question but which might also benefit her sisters: ‘were she to live her life treating her sisters as Cinderella, then she would live her life most unhappily’).

6.2 Considerations as to the length and nature of the parents' relationship and whether or not the child was planned are generally of little if any relevance, since the child's needs and dependency are the same regardless: per Hale J in *J v C (Child: Financial Provision)* [1999] 1 FLR 152 at 154B, approved by both Thorpe LJ and Bodey J in *Re P*.

6.3 The child is entitled to be brought up in circumstances which bear some sort of relationship with the father's current resources and the father's present standard of living (Hale J in *J v C*, approved in *Re P*). The father’s argument in *J v C* that the mother was already housed in rented accommodation with the rent paid for by housing benefit did not wash, where he had won £1.4m on the lottery some 18 months after the birth of the child and he himself had moved from rented accommodation to live alone in a newly purchased five bedroom house. “There is a further point of public policy that, where resources allow, the family obligation should be respected in such a way as to reduce, or even eliminate, the need for children to be supported by public funds. The purchase of a house would remove the need to rely on housing benefit” (per Hale J at p160). This argument must be even stronger where the child’s mother is residing in accommodation provided by the local authority or a housing association.

6.4 Nevertheless the court must guard against unreasonable claims made on the child’s behalf but with the disguised element of providing for the applicant’s benefit rather than for the child (*J v C*, again approved in *Re P*).

6.5 The statutory checklist

6.5.1 Under para 4(1), the court is required to have regard to all the circumstances of the case, including:

6.5.2 the income, earning capacity, property and other financial resources which each parent (or other applicant) has or is likely to have in the foreseeable future;

6.5.3 the financial needs, obligations and responsibilities which each parent (or other applicant) has or is likely to have in the foreseeable future;

6.5.4 the financial needs of the child;

6.5.5 the income, earning capacity (if any), property and other financial resources of the child;

6.5.6 any physical or mental disability of the child; and

6.5.7 the manner in which the child was being, or was expected to be, educated or trained.

6.5.8 There is a checklist in para 4(2) similar to that contained in s 25(4) of the MCA 1973 in relation to provision claimed against a person who is not the natural parent of the child concerned.

6.6 'Missing' factors

6.6.1 The following factors are present in s 25(2) of the MCA 1973 but not specifically referred to in the checklist under para 4(1) of Sched 1:

6.6.2 the standard of living enjoyed by each parent and by them during their relationship/ any period of cohabitation. Historical factors less important than child's present needs and need to reflect parents' current standard of living (see *J v C*: F had won £1.4m on lottery 18 months after birth of child);

6.6.3 the age of each parent and the duration of their relationship/ cohabitation: as to the latter, see above;

6.6.4 any physical or mental disability of either parent;

6.6.5 any contribution made or likely to be made by either parent to the welfare of the family, including by looking after the home or caring for the family;

6.6.6 **conduct** if inequitable to disregard: conduct will not be ignored, but unlikely to have major impact. For instance, in *A v A*, Ward J stated: 'The child with whom

I am concerned, A, will not get less because [of the father's alleged misconduct] and she will not get less because her mother has concocted a disgraceful story to conceal her adultery. I am wholly unaffected by this evidence one way or the other. What is material to me is the fact that the mother has lost her credibility and that requires me to approach this case cautiously to ensure that there is no exaggeration in the items of expenditure which evidence the need for periodical payments and generally to be vigilant, that, to adopt Mr Blair's colloquialism, a 'gold digging' claim shall not succeed. Conduct, or more accurately, misconduct, which is not a specific factor in the para 4 checklist as it is in the Matrimonial Causes Act, s 25, checklist, is therefore material only as a hazard light which will flash throughout my journey down the rest of para 4' at p 664. Contrast, *W v J* (below) where the court would have refused M's claims on the merits even if there had been jurisdiction because of M's previous conduct relating to legal proceedings. Conduct will perhaps be of more relevance the less direct the benefit to the child the item claimed for, and the more the claim relates to matters in the 'grey area' (see below re the carer's allowance).

6.6.7 All of the above will be aspects of 'all the circumstances of the case' but their impact is necessarily limited when considering the needs of the child.

6.7 Child maintenance to include carer's allowance?

6.7.1 The Act allows payments to be made 'for the benefit of the child'. Is it permissible to include within a maintenance order under Sched 1 an element to meet expenses of the child's carer, and if so to what extent?

6.7.2 The answer is yes: 'it is well established that a child's need for a carer enables account to be taken of the caring parent's needs' per Bodey J in *Re P* at p 882, para [76].

6.7.3 In *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657, Ward J ordered the father to pay maintenance of £20,000 pa plus school fees, in a case where the father was very wealthy. Some £8,000 pa was allowed as an allowance for the mother (at pp 665-6):

"(c) The financial needs of the child. She has a financial need to be able to remunerate the full-time staff that would have to be employed to look after her, 24 hours a day. Her mother does this, for nothing. It is now well established that the amount of maintenance for the child can include an allowance for the mother: *Haroutunian v Jennings* (1980) FLR 62. I was surprised that no mention of this element was made until late in the day. I am satisfied that the father is not taken by surprise. There is no evidence before me to enable me to quantify this precisely. I am driven to do my incompetent best. I bear in mind a broad range of imprecise information from the extortionate demands (but excellent service) of Norland nannies, to au pair girls and mother's helps, from calculations in personal injury and fatal accident claims and from the notice-boards in the employment agencies I pass daily. I allow £8000 under this head. It is almost certainly much less than the father would have to pay were he to be employing staff, but to allow more would be – or would be seen to be – paying maintenance to the former mistress who has no claim in her own right to be maintained."

6.7.4 This statement was strongly **disapproved** by both Bodey J and Thorpe LJ in *Re P*. Thorpe LJ's judgment on this issue was prolix ([43], [47]-]49]).

"I cannot agree with that reservation. I believe that a **more generous** approach to the calculation of the mother's allowance is **not only permissible but also realistic**. Nor would I have regard to calculations in either personal injury or fatal accident claims. It seems to me that such cross-references only risk to complicate what is an essentially broad-brush assessment to be taken by family judges with much expertise and experience in the specialist field of ancillary relief. ...

"... the judge can proceed to determine what budget the mother reasonably requires to fund her expenditure in maintaining the home and its contents and in meeting her other expenditure external to the home, such as school fees, holidays, routine travel expenses, entertainments, presents, etc. ... in my judgment, the court should discourage undue bickering over budgets. What is required is a **broad common-sense assessment**. What the court first ordains

may have a comparatively brief life before a review is claimed by one or other party.

"In making this broad assessment how should the judge approach the mother's allowance, perhaps the most emotive element in the periodical payments assessment? The respondent will often accept with equanimity elements within the claim that are incapable of benefiting the applicant (for instance school fees or children's clothing) but payments which the respondent may see as more for the benefit of the applicant than the child are likely to be bitterly resisted. Thus there is an inevitable tension between the two propositions, both correct in law, first that the applicant has **no personal entitlement**, secondly, that she is entitled to an allowance as the child's primary carer. Balancing this tension may be difficult in individual cases. In my judgment, the mother's entitlement to an allowance as the primary carer (an expression which I stress) may be checked but not diminished by the absence of any direct claim in law.

"Thus, in my judgment, the court must recognise the responsibility, and often the sacrifice, of the unmarried parent (generally the mother) who is to be the primary carer for the child, perhaps the exclusive carer if the absent parent disassociates from the child. In order to discharge this responsibility the carer must have control of a budget that reflects her position and the position of the father, both social and financial. On the one hand she should not be burdened with unnecessary financial anxiety or have to resort to parsimony when the other parent chooses to live lavishly. On the other hand whatever is provided is there to be **spent** at the expiration of the year for which it is provided. There can be **no slack** to enable the recipient to fund a pension or an endowment policy or otherwise to put money away for a rainy day. In some cases it may be appropriate for the court to expect the mother to **keep** relatively detailed **accounts** of her outgoings and expenditure in the first and then in succeeding years of receipt. Such evidence would obviously be highly relevant to the determination of any application for either upward or downward variation."

6.7.5 Bodey J expressed the view that there was no easy formula to ensure that the distinction is maintained between mother as carer and mother as applicant in her

own right. There will be grey areas, where the need asserted is of no direct benefit to the child, but is (or is arguably) of legitimate indirect benefit in helping to sustain the mother's physical/ emotional welfare. "This will be most pronounced when the father is very wealthy and able without difficulty to provide for living costs of no clearly identifiable direct benefit to the child, but which would indirectly promote the mother's care of the child by allowing her such a lifestyle as not to feel 'out of place' in the society of the parents of the child's friends" at para [81], p 884.

6.7.6 Hence broad-brush, discretionary, and thus unlikely to suffer attack on appeal, although this did not stop the Court of Appeal effectively doubling the level of maintenance in *Re P* (whilst rejecting M's claim for £170,000 pa): the result was to increase the maintenance of £35,360 pa (reducing by £9,333 on the child's 7th birthday) to £70,000 pa. This was done, it appears, merely because the court differed in its conclusions because of its different experience: 'the parties, or at least one of them, are members of an exceptionally affluent cosmopolitan society with which much of my professional life has been concerned' (para [66], p 880).

6.7.7 But in *W v J (Child: Variation of Financial Provision)* [2004] 2 FLR 300, Bennett J held as a matter of law that there was no power to include within a child maintenance order provision for the mother's future legal costs for contested residence, leave to remove and Sched 1 applications. Such provision was simply not 'for the benefit of the child', but solely for M's benefit. M would have lost on the merits in any event (claiming an increase of £146,000 pa, from £32,400 to cover the forthcoming applications against a history of prolific litigation, including many tactical applications, orders for costs against M, many changes of solicitors etc).

6.7.8 However, in *Re S (A Child)* [2004] EWCA 1865, the Court of Appeal held that it was open to the court to make provision for M to be able to travel to Sudan to see the child and enforce her rights under an order of the Sudan court granting residence to M. The court also appeared to be attempting to explain away *W v J* as a case on discretion not jurisdiction.

6.8 The starting point for capital provision

6.8.1 Again, this is now to be found in the judgment of Thorpe LJ in *Re P* at paras [45]-[46], pp 874-5:

"I would like to offer my opinion as to the method by which a judge should determine a case similar to this, in that one or both of the parents lie somewhere on the spectrum from affluent to fabulously rich. Such cases may be more likely to be litigated, partly because where the parents are of more modest means financial liabilities will be conclusively settled by the administrative process under the Child Support Act 1991, to which the judicial process is only supplementary, and secondly, because the affluent and the very rich may be less deterred by the costs of litigation. The starting point for the judge should be to decide, at least generically, the **home** that the respondent must provide for the child. The value, the size, and the location of the home all bear upon the reasonable capital cost of furnishing and equipping it as well as upon future income needs, directly in the case of outgoings but also indirectly in the case of external expenditure such as travel, education, and perhaps even holidays. The home will ordinarily be transiently required during the child's minority or until further order. The appropriate legal mechanism is therefore a settlement of property order. Since the respondent is entitled to the reversion, which in certain circumstances may fall in before the child's majority, the respondent must have some right to veto an unsuitable investment.

"Once that decision has been taken the amount of the lump sum should be easier to judge. For the choice of home introduces some useful boundaries. In most cases the lump sum meets the cost of furnishing and equipping the home and the cost of the family car."

6.8.2 On the facts in *Re P*, the court considered a three bedroom property in Central London to be reasonable, even though M lived alone with one child (see [50] at p 876).

6.8.3 In summary, the approach of the court must be:

6.8.4 what do the child's reasonable needs require for his or her home in terms of size, location and value;

6.8.5 what further capital needs are there, for specific items, eg furnishing and equipping the home, and providing a car.

6.8.6 Note that the resources of the applicant will be relevant to the order to be made. If the applicant mother also has free capital, there is no reason why she should not also contribute to housing the child and/or the specific capital items required for the child. However, M may need to devote a significant part of her income and capital to provide for her own future.

7 Procedure

7.1 An application under Sched 1 is commenced by filing forms C1 (application form), C10 supplement for application for financial provision for child, and C10A statement of means.

7.2 The application forms must be served on the respondent, together with a blank C10A, at least 14 days before the return date.

7.3 The respondent must file an acknowledgment of service in form C7.

7.4 The parties can of course give pre-action disclosure by way of form E, and the court can direct that the parties file forms E or narrative statements as appropriate, as well as questionnaires etc.

7.5 Note that the procedure is governed by Part 4 of the Family Proceedings Rules 1991, and not Part 2 which governs applications for ancillary relief on divorce etc. There is no FDR procedure etc.

7.6 There is no equivalent of s 37 of the MCA 1973, but injunctive relief may be sought to preserve a property which is the subject-matter of the application, or a freezing order obtained in an appropriate case.