HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Child maintenance: variations, including the new notional income criterion (GB)

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Contents:

Contents

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Summary

This House of Commons Library briefing note sets out the rules on variations under the "2012 scheme" administered by the Child Maintenance Service (CMS). From a policy standpoint, it compares the current variation rules to those for the legacy "2003 scheme", and notes criticism of the changes and parliamentary debate of them.

Variations allow for the inclusion of factors not otherwise included in the standard method of calculating child maintenance (i.e. a variation from the standard formula).

Either the non-resident parent (known as the "paying parent" in CMS literature) or the person with care (known as the "receiving parent") can apply for a variation.

A non-resident parent can apply for a variation in respect of special expenses, contact costs, and mortgage and debt costs, among others.

Under the current 2012 scheme, a person with care can seek a variation if they believe the non-resident parent has additional income, including "unearned income" of £2,500 a year or more or, since December 2018, "notional income" where the non-resident parent has a one or more non-income yielding assets each worth more than £31,250. Additional grounds include the diversion of income, or where the non-resident parent is on the nil or flat rate of child maintenance (in certain cases) but has gross weekly income in excess of £100.

Under the 2003 scheme (which is closed to new applicants), if a non-resident parent had either a "lifestyle inconsistent with their income" or assets in excess of £65,000, these were grounds for a variation. The Work and Pensions Select Committee called in May 2017 for the reinstatement of "provisions for parents to challenge child maintenance awards on the grounds of assets and lifestyle inconsistent with income", and there have been two Private Members' Bills tabled since April 2017 that have, to date, unsuccessfully sought to implement such a change. The Government's position is that it has "no plans to reintroduce this provision", although it did say that it would "consider how we can strengthen our ability [to] ensure all sources of income are included in the calculation" of child maintenance. As noted above, following a consultation the Government introduced in December 2018 the new "notional income" ground for a variation to the 2012 scheme.

This note applies to Great Britain only.

A list of additional House of Commons Library briefing papers on child maintenance can be found at the end of this note.

1. Background information

1.1 The different statutory child maintenance schemes

There are currently three statutory child support schemes operating in Great Britain under the Child Support Act 1991. The 1993 and 2003 schemes are both legacy schemes closed to new applicants and administered by the Child Support Agency (CSA).

The 2012 scheme is open to new applicants while those with existing CSA cases have been asked if they wish to transfer to it. This scheme is administered by the Child Maintenance Service (CMS).

The Department for Work and Pensions (DWP) is the responsible Government department.

1.2 Quick introduction to child maintenance terminology used in this note

- "Non-resident parent" – also referred to as the "paying parent" in CMS literature, is a parent of the child. A non-resident parent does not live with the child for the majority of the time, if at all;
- "person with care" – also referred to as the "receiving parent" in CMS literature, is the person who "actually and usually" provides day-to-day care of the child. The person with care does not have to be a parent of the child or someone with legal "parental responsibility" for the child. It could, for example, be an older sibling or a friend of the child that the child is living with. It cannot be a local authority or someone with whom a local authority has placed a child (e.g. a local authority foster carer);
- the "qualifying child" – the child for whom child maintenance is payable. For child maintenance purposes the child has to be either aged:
  - under 16 years, or
  - 16 to 19 years inclusive and either Child Benefit is payable in respect of them, or they are receiving full-time, non-advanced education (e.g. A-levels).

  A young person does not count as being a qualifying child if they are or have been married or in a civil partnership.[1]

[1] Child Poverty Action Group, Child Support Handbook 2018/19, 2018, pp8–15

2. Why are variations needed?

A non-resident parent's child maintenance liability is calculated as either a weekly flat rate of £7 for those on a gross income below £100 a week, or as a proportion of their income if their gross income is over £200 a week, or a hybrid of the two if the non-resident parent's gross weekly income is between £100 and £200. In some cases, a nil rate is payable.[2]

The methodology can take account of a limited number of factors beyond the level of gross weekly income, including the number of children the non-resident parent supports through child maintenance, whether they have any other children that they are financially responsible for (e.g. step-children), and also any shared care arrangements where the child stays with the non-resident parent for at least 52 nights a year.

However, the formula alone is not suitable for more complex cases – for some of these, a "variation" from the formula can be applied for by either the non-resident parent or the person with care. Only those situations prescribed by statute can form grounds for a variation, as set out below.

For further information on the formula, see the Library briefing paper, Child maintenance: how it is calculated under the 2012 CMS scheme.

[2] If the non-resident parent is a "child; a prisoner; receiving an allowance for work-based training for young people; or resident in a care home or independent hospital, or is being provided with a care home service and/or independent healthcare service and receiving one of the qualifying benefits for the flat rate or has the whole or part of the cost of her/his accommodation met by a local authority, or has gross weekly income of less than £7 per week". [Child Poverty Action Group, Child Support Handbook 2018/19, 2018, p59]

3. How to request a variation

The CMS states that "you can apply for a variation at any time".

An application for a variation can be made by telephone, or in writing and the CMS states that "it is very important that the application contains as much information as possible. The person applying must say why they are applying for a variation, or give us enough information for us to be able to see why they are applying".[3]

[3] Child Maintenance Service, Variations explained: a guide for receiving parents, October 2013, p1

4. Grounds for a variation by the non-resident parent

There are a number of grounds on which a non-resident parent can ask for other payments (called "special expenses") to be taken into account, and so reduce the amount of child maintenance they pay:

- contact costs, such as the cost of fuel to visit a child, train tickets and accommodation, although the minimum cost must be £10 per week. The costs can be incurred by either the non-resident parent or the child, and also a travelling companion. Contact costs are included even if they arise in relation to contact that is also counted as part of a shared care arrangement (unlike the 2003 scheme);[4]
- costs connected with supporting a child with either a long-term illness (i.e. one expected to last at least 52 weeks, or be terminal), or a disability;[5]
- repaying debts from a former relationship of at least £10 per week that were incurred during the relationship, for example repaying a car loan for a car that the person with care has retained. Only certain loans count, for example from a bank or building society, whereas credit card repayments do not;
- making payments on a mortgage, loan or insurance policy of at least £10 a week for the home that the non-resident parent and the person with care used to share, provided the non-resident parent has no legal or 'equitable' interest, and the person with care and the child (or children) continue to reside in the home;
- boarding school fees for a child (or children) the non-resident parent pays child maintenance for, although only the everyday living costs or "boarding" part of the fees count and must be at least £10 a week.

If the CMS accepts a variation for special expenses, then the gross weekly income of the non-resident parent is reduced by the amount of the special expense(s). This, in turn, reduces the amount of child maintenance that the non-resident parent has to pay.

However, the CMS notes that "you can't ask us to take special expenses into account if your gross income is less than £7 a week or if you are getting benefits".[6]

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4 Child Poverty Action Group, Child Support Handbook 2018/19, 2018, pp93–94

5 Where disability is defined as meaning that either (a) the care component of Disability Living Allowance (DLA), the daily living component of Personal Independent Payment (PIP) or armed force independence payment is paid for the child or (b) the DLA care component of PIP daily living component would be payable but the child is in hospital, or (c) the child is registered blind [Child Poverty Action Group, Child Support Handbook 2018/19, 2018, p95].

6 Child Maintenance Service, Variations explained: a guide for paying parents, October 2013, p1

5. Grounds for a variation by the person with care

A person with care can seek a variation on the grounds that the non-resident parent has "additional income" – this can be either unearned income, "notional income" from non-income producing assets, income that is not taken into account because the non-resident parent is on the flat or nil rate of child maintenance, or income which has been diverted.

5.1 Unearned taxable income

Criteria

If the person with care believes that the non-resident parent has taxable unearned income of at least £2,500 a year, then they can request a variation on the grounds of unearned income.

Unearned income can include "rental income the paying parent gets from property or land, or dividends and interest from savings and investments" according to the CMS. As the Child Support Handbook 2018/19 notes, "the definitions of the different types of income that are classed as unearned for this purpose are complex and rely on how the sources of the income are treated for income tax purposes".[7]

Onus on the person with care to inform the CMS of possible unearned taxable income

Although HM Revenue and Customs (HMRC) collects information on unearned income, for example through self-assessment returns, it does not share information with the CMS unless specifically requested to do so. In turn, the CMS does not request this information from HMRC unless the person with care requests a variation on the grounds of unearned income (and the CMS accepts their request).

Therefore, the onus in on the person with care to inform the CMS that the non-resident parent may have unearned taxable income in excess of the £2,500 threshold. This requires them to have knowledge of the non-resident parent's financial situation which might not always be the case if the parents have been separated for some time, or if all contact between them has stopped due to e.g. domestic violence.

In July 2018, the Government said that it had "begun to explore with HMRC how to enhance our existing client communications and case worker training to raise awareness across the two departments [DWP, which has responsibility for CMS, and HMRC] about unearned income". It added that:

> Our aim is to ensure clients understand what constitutes unearned income, the affect it can have on a child maintenance liability, and the importance of raising the issue at the start of the case. We

[7] Child Poverty Action Group, Child Support Handbook 2018/19, 2018, p99

> believe this, along with enhancing our procedures, will help factor unearned income into the initial calculation in more cases.[8]

However, seamless data sharing in regards to unearned taxable income, without the need first for a request from the person with care, does not seem to be on the horizon.

Indeed, the Government confirmed in July 2018 that in order to "automatically request information about unearned income from HMRC, in the same way as we currently do for historic income [which forms the basis for the child maintenance calculation in most cases] … would require both a change to primary legislation[9] and changes to our current IT system, which are unlikely to be possible in the near future".[10]

Child maintenance adjustment

If a variation is made on these grounds, the annual unearned income amount is divided by 52 to make it a weekly amount, and then added to the non-resident's parent gross weekly income. Child maintenance is then calculated on the basis of this adjusted figure of gross weekly income.

5.2 Notional income from non-income generating assets

From December 2018, the CMS has been able to calculate notional income from a non-resident parent's assets that are not generating income; the CMS uses an assumed rate of interest of 8 per cent in the calculation of notional income.

The Government has said that "this variation will be useful in a range of scenarios including where we believe paying parents have made an effort to use complex financial arrangements to evade their responsibility".[11]

The Government explained that this approach would "bring into the [child maintenance] assessment notional income from assets like coins and gold, income derived from capital and any foreign income",[12] after deductions have been made for any charges or mortgages on the asset(s).[13] Regulation 69A of the amended Child Support Maintenance Calculation Regulations 2012 provides a full list of the asset types that can, and cannot be included for these purposes, and notes that "'asset'

8 Department for Work and Pensions, The Child Maintenance Compliance and Arrears Strategy – Government response to the consultation, 12 July 2018, p19, para 73
9 Primary legislation is an act of Parliament (e.g. the Child Support Act 1991), which can usually only be amended by another Act of Parliament.
10 Department for Work and Pensions, The Child Maintenance Compliance and Arrears Strategy – Government response to the consultation, 12 July 2018, p18, para 72
11 As above, p10, para 26
12 Department for Work and Pensions, Child Maintenance: A New Compliance and Arrears Strategy – Public Consultation, December 2017, pp12–13, para 41
13 Department for Work and Pensions, The Child Maintenance Compliance and Arrears Strategy – Government response to the consultation, 12 July 2018, p10, para 29

includes any asset which is subject to a trust where the non-resident parent is a beneficiary".[14]

As noted above, the interest rate applied to any such assets is eight per cent, and the CMS can apply this variation where one or more non-resident parent has a non-income earning assets, the value of each is in excess of £31,250. The Government explained that in order for the use of the new power to be "proportionate", it had set:

> a minimum single value of £31,250 below which we would not use this power. This is to prevent large numbers of low value assets being targeted, as this would be difficult to administer (although, to be clear, where for example the NRP [non-resident parent] has a number of gold bars or a number of shares, these will be treated as one asset).[15]

The use of the £31,250 threshold means that the notional annual income calculated from such assets will (using the eight per cent interest rate) be a minimum of £2,500 – the same threshold as for the inclusion of unearned taxable income (see section 5.1 above).

The Government said that it would introduce a number of safeguards in regard to the new rules, including so as to "not require the paying parent to pay more maintenance where this would mean that assets would have to be sold and this would cause hardship to the paying parent or any child of the paying parent".[16]

Further information on the rationale for the introduction of this variation, including the choice of the eight per cent interest rate, can be found in a separate Library briefing paper.[17]

It appears that – as for unearned taxable income (see section 5.1) – the onus will be on the person with care to bring to the CMS's attention that the non-resident parent has assets for which a notional income could be calculated, rather than the CMS automatically taking such assets into account e.g. because they are on the HMRC IT system.

Child maintenance adjustment

If a variation is made on these grounds, the annual unearned income amount is divided by 52 to make it a weekly amount, and then added to the non-resident's parent gross weekly income. Child maintenance is then calculated on the basis of this adjusted figure of gross weekly income.[18]

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14 See regulation 2 of the Child Support (Miscellaneous Amendments) Regulations 2018 (SI 2018/1279) which amended the 2012 regulations in this respect.

15 Explanatory Memorandum to the Child Support (Miscellaneous Amendments) Regulations 2018 2018 No. 1279, p4, para 7.7a

16 Department for Work and Pensions, The Child Maintenance Compliance and Arrears Strategy – Government response to the consultation, 12 July 2018, p10, paras 29 and 30, and p11, paras 32–33

17 House of Commons Library, Child maintenance: new steps to improve compliance and to allow arrears to be written off (UK excluding NI), CBP 7778

18 For a worked example, see Department for Work and Pensions, The Child Maintenance Compliance and Arrears Strategy – Government response to the consultation, 12 July 2018, p10

5.3 Gross weekly income in excess of £100 of a non-resident parent on the nil or flat rate

Criteria

A variation can be requested if a non-resident parent has gross weekly income of £100 or more which would normally be taken into account in the calculation of child maintenance but for the fact they are either on the nil rate under certain circumstances[19] or are paying the flat rate because they receive a qualifying welfare benefit (e.g. because they are in receipt of a war disablement pension).[20]

Again, this gross weekly income data is not routinely passed by HMRC to the CMS – it is only when a variation request on this ground is made by the person with care that the CMS seeks the data from HMRC.

Where the data is provided, historic income information for the latest available full tax year is usually obtained by the CMS from HMRC. However, if the non-resident parent's current income varies by at least 25 per cent (higher or lower) from the historic income figure then the current income figure can be used for the variation.[21]

Child maintenance adjustment

When a variation is made on this ground, the non-resident parent is treated as having the whole amount of income for the purpose of calculating child maintenance. This additional child maintenance liability is then added to the nil or flat rate of £7 (as appropriate).[22]

5.4 Diversion of income

Criteria

The CMS explains that a variation can apply where "the paying parent is controlling the amount of income they get by diverting it to another person or another purpose, which means it is not being included in the figure we use to work out child maintenance".[23]

The diversion can be direct or indirect, and does not have to be specifically arranged to avoid or reduce child maintenance liabilities. It might include diversion to a new partner or family member, or a business.

Payments by a non-resident parent to a pension can also be considered as "diversion of income". Child maintenance is calculated on the basis

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19 If they are a "child; a prisoner; receiving an allowance for work-based training for young people; or resident in a care home or independent hospital, or is being provided with a care home service and/or independent healthcare service and receiving one of the qualifying benefits for the flat rate or has the whole or part of the cost of her/his accommodation met by a local authority". [Child Poverty Action Group, Child Support Handbook 2018/19, 2018, pp102–103]

20 For a list of the qualifying benefits, see pages 23 and 24 of the CMS's How we work out child maintenance (November 2013)

21 Child Poverty Action Group, Child Support Handbook 2018/19, 2018, p103

22 As above, p103

23 Child Maintenance Service, Variations explained: a guide for receiving parents, October 2013, p1

of the non-resident parent's gross salary i.e. before deducting Income Tax and National Insurance. However, the CMS definition is not simply the gross salary figure, but rather that figure after occupational or personal pension scheme contributions have been deducted. The Child Support Handbook notes that:

> If a person with care is aware of the amount of contributions and consider them to be excessive, or that arrangements have been set up deliberately to reduce liability for child support (eg, if the non-resident parent has made a salary sacrifice arrangement in return for increased employer contributions), s/he can apply for a variation of the grounds of diversion of income.[24]

For more information on the diversion of income and pension payments, see section 11 of the Library briefing paper on gross income in the CMS formula.

Again, if diversion of income is happening, it is the responsibility of the person with care to ask the CMS to make a variation.

Child maintenance adjustment

The non-resident parent's gross weekly income is adjusted to include the full weekly equivalent amount of any diverted income, and the adjusted figure is used to calculate the child support liability.

[24] Child Poverty Action Group, Child Support Handbook 2018/19, 2018, pp67–68

6. The role of the DWP's Financial Investigations Unit

Where a non-resident parent is suspected of concealing their true income (either under the 2012 or earlier child maintenance schemes) then the Financial Investigations Unit (FIU) can be tasked with looking into the matter. The DWP explained that the Unit considers "more complex" cases, and "work[s] on identifying financial assets held by the self-employed and company directors that have been beyond our reach".

The then Parliamentary Under-Secretary of State for Welfare Delivery at the DWP, Caroline Noakes, told the Work and Pensions Select Committee in December 2016 about the work of the FIU:

> We will work off HMRC records. We will also work off records from a wide variety of sources, including land registry, including what finance agreements people have, including their bank accounts. We can demand that banks provide us with individuals' up to date bank statements. That is quite an intrusive power I think we would all agree, but sadly necessary. Our own FIU currently has 35 people working in it. That is being increased to 50, so we are adding another 15 in the new year [i.e. 2017].[25]

In December 2017, the Government said that in order to "deal with potential evasion more effectively" it would "increase the number of staff in the Financial Investigations Unit (FIU) so we have increased capacity to look into complex cases and ensure that maintenance is not being evaded".[26]

Further, in July 2018, the DWP added:

> We have also been working with HMRC to see what more we can do together to tackle child maintenance cases with complex earners. We are currently jointly exploring:
>
> - The additional information HMRC can make available to our FIU to help assess a paying parent's income, such as self-assessment tax data for multiple tax years.
> - Improved channels of communication between the FIU and HMRC's Fraud Investigation Service (FIS), including a formal process for referring cases investigated by the FIU to FIS where there may be tax irregularities that require investigation.[27]

In May 2018, the Government said that, for the period of April 2017 to March 2018, the FIU:

- received 5,746 referrals;

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25 Work and Pensions Committee, Child Maintenance Service – oral evidence, 7 December 2016, Q100

26 Department for Work and Pensions, Child Maintenance: A New Compliance and Arrears Strategy – Public Consultation, December 2017, p12, para 41

27 Department for Work and Pensions, The Child Maintenance Compliance and Arrears Strategy – Government response to the consultation, 12 July 2018, p19, para 74

- undertook 3,802 investigations "relating to total Income/Assets investigations";
- current Work on Hand is 2,872 (figure as of 1 May 2018), "many of which will relate to total Income/Asset Investigations".[28]

[28] PQ 141842 15 May 2018

7. Other sources of information and assistance

The CMS has number of leaflets and factsheets on the 2012 statutory child maintenance scheme, available at:

https://www.gov.uk/government/collections/child-maintenance-service-guidance

In particular, there are CMS factsheets on variations:

- Variations explained: a guide for paying parents;
- Variations explained: a guide for receiving parents.

It should be noted that these particular factsheets were published in 2013 and have yet to be updated in regard to the new provisions for a variation based on notional income from non-income generating assets (see section 5.2).

It might be helpful for either a person with care or a non-resident parent to discuss the circumstances of a particular case with an organisation such as Gingerbread, which is a single parent charity; their helpline is: 0808 802 0925.

Some organisations may charge for providing advice and information; it is advisable to ask at the outset if a service is free.

8. Policy background and comparison with the 2003 CSA scheme

8.1 Approaches under the 2012 and 2003 schemes for "additional income" variations

2012 scheme

As described in sections 5.1 and 2.5, the amount of annual taxable unearned income, or annual notional income from non-income generating assets has to be in excess of £2,500 for a variation to be made.

2003 scheme

Under the 2003 statutory child maintenance scheme, which was based on net weekly income, the equivalents to the "unearned income" and the "notional income" grounds for a variation of the current 2012 scheme were that the non-resident parent had:

- assets in excess of £65,000 (excluding the value of their home, and subject to certain other exclusions), or
- a lifestyle that suggested that they had access to more money or a higher income than the income the CSA used to calculate child maintenance.[29]

In terms of the definition of an "asset", this was set out in the Child Support (Variations) Regulations 2000,[30] and the Child Support Handbook 2016/17 noted that it had a broad meaning, including money, legal estate and stock and shares among others, whether or not the asset was in Great Britain. Any mortgage or charge on an asset was deducted from its value.[31]

Where a non-resident parent had assets eligible for a variation, then their "weekly value" was calculated by multiplying the value of the assets by the statutory rate of interest (i.e. in England and Wales the statutory rate prescribed for a judgment debt, namely 8%)[32] and dividing this by 52. This notional amount was then added to the non-resident parent's net weekly income and the calculation of child maintenance applied to this combined figure.

For the lifestyle variation, the Child Support Handbook 2016/17 explained that where it was found that the non-resident parent had a

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29 Child Support Agency, How is child maintenance worked out?, October 2013, pp29–30
30 SI 2001/156
31 Child Poverty Action Group, Child Support Handbook 2016/17, 2016, p172
32 As stated in section 17 of the Judgments Act 1838 as amended, further to regulation 5 of the County Courts (Interest on Judgment Debts) Order 1991 (SI 1991/1184)

lifestyle inconsistent with their declared income, then the CSA calculated the additional income as follows:

> The amount of income taken into account is the difference between:
>
> - the amount the non-resident parent needs to support her/his overall lifestyle; *and*
> - the amount taken into account (or which would have been taken into account) in the child support calculation.[33]

This additional income is added to their declared income, and the child maintenance liability is then calculated on this basis.

8.2 Why the change to unearned taxable income?

When the 2012 child maintenance scheme was introduced, the only similar ground to the "assets" and "lifestyle inconsistent with income" variation grounds under the 2003 scheme was "unearned income" – the "notional income" ground was only introduced in December 2018.

The then Child Maintenance and Enforcement Commission (CMEC)[34] explained in a technical consultation on the 2012 scheme that, because under the 2012 scheme the CMS would have access to HMRC data about non-resident parents, this would give the CMS "access to a much wider range of income types".

This, it was argued, would allow "the new variations scheme [to] have a greater emphasis on trying to obtain actual unearned income figures rather than carrying forward the current practice of applying notional amounts based upon a non-resident parent's assets and lifestyle".

This move to actual unearned income meant that "the lifestyle inconsistent with declared income and assets grounds [for a variation] will not be carried forward".[35]

However, the document proposed that information on unearned income would not be shared by HMRC with the CMS as a matter of course, but only when a variation application was made: "'Unearned Income' … information will be available to the Commission [now the DWP] on request, but only following an application for a variation".[36] This approach has since been introduced.[37]

8.3 Criticism

At the time of the proposal it was subject to criticism, for example from the single parent charity, Gingerbread. Arguing that the proposals in general were being driven by "cost cutting" and that "ease of

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33 Child Poverty Action Group, Child Support Handbook 2016/17, p176
34 Now subsumed into the Department for Work and Pensions.
35 Child Maintenance and Enforcement Commission, The Child Support Maintenance Calculation Regulations 2012 – A technical consultation on the draft regulations, 1 December 2011, para 89
36 As above, para 88
37 Child Poverty Action Group, Child Support Handbook 2016/17, p126, based on regulation 20 of the Child Support (Variations) Regulations 2000 (SI 2001/156).

administration appears to have trumped money for children in a way which is unacceptable", one particular example cited by Gingerbread was the unearned income grounds for a variation, which it said:

> will result in a blind eye being turned to available information concerning the unearned income of the latter [i.e. the non-resident parent]. The result is a risk of fundamental unfairness to many children who will lose out on much needed financial support for their upbringing from one parent (unless the parent with care understands and pursues the little-known and little-used procedure of applying for a variation.)[38]

While Gingerbread had "no objection" to capturing the actual income of an asset, it foresaw "a problem arising where non-resident parents possess an asset or assets capable of producing an income which they then choose not to take full advantage of", and also cautioned of situations where "wealthy non-resident parents have significant income from ISAs [tax-free Individual Savings Accounts] or other non-taxable savings which would not otherwise be counted" as taxable unearned income, and therefore not included in the calculation of child maintenance under the "unearned income" grounds for a variation.[39]

On the lifestyle variation, Gingerbread said that it had:

> … the tremendous advantage that it does allow parents with care to bring to the attention of the Agency [now the CMS] and to a Child Support Tribunal, cases where there is a clear and inexplicable discrepancy between declared income and lifestyle. Whilst this does not always result in a variation on lifestyle grounds, it can often lead to proper scrutiny of a non-resident parent's actual financial situation and a variation on other grounds, such as diversion of income.[40]

Because the onus is on the person with care to initiate closer scrutiny of a non-resident parent's financial situation through making a variation application and, as Gingerbread noted, "given the limited powers available to a parent with care to obtain full disclosure of a non-resident parent's declared income", the lifestyle ground for a variation was, they said, "an important tool for parents with care with legitimate concerns that the non-resident parent is seeking to evade paying proper child maintenance".[41]

8.4 Parliamentary scrutiny and debate

Private Members' Bill regarding self-employed non-resident parents (April 2017)

In April 2017, David Burrowes sought to introduce a Private Members Bill[42] that would "equalise the assessment and enforcement of child

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38 Department for Work and Pensions, Organisation responses received: Child Support Maintenance Calculation regulations 2012 – Gingerbread submission, 1 December 2011, p1, para 5 [on page 21 of the document]

39 As above, 1 December 2011, p5, paras 25–27

40 Department for Work and Pensions, Organisation responses received: Child Support Maintenance Calculation regulations 2012 – Gingerbread submission, 1 December 2011, p6, paras 29–30 [on page 26 of the document]

41 As above, p1, para 5

42 The Bill was tabled using the 10-minute rule. No Government response was made.

maintenance arrangements of children of self-employed parents with that of children of other employed parents", and noted that while the 2012 statutory child maintenance scheme "works" when the non-resident parent is paying tax through the PAYE – Pay As Your Earn – HMRC scheme:

> It works less well where the paying parent takes income in other forms, such as dividend or rental income. It does not work at all where the paying parent's living costs are met from income that does not show up at HMRC—for example, income from ISAs, or from venture capital trust fund dividends. There are also some non-resident parents who do not support their lifestyle from income at all—they may have substantial assets, such as from capital gains or property transactions, but no apparent income—and such paying parents may have no child maintenance liability at all.

Mr Burrowes said his Bill would "reform the CMS to correct its current failure to cater for the children of traders, company directors and those with financially complex affairs":

> The variation ground previously available in the CSA scheme, whereby a notional income could be assumed where a paying parent's lifestyle was inconsistent with income, should be made available in the new CMS scheme. A new variation ground should be made available in the new scheme whereby a notional income at a fair rate of interest can be assumed from an asset or assets capable of producing a reasonable level of return, where a paying parent has chosen to forgo such income without good reason, bearing in mind their maintenance responsibilities for their children. My Bill will also grant the court jurisdiction where the non-resident parent has assets or a lifestyle inconsistent with income and the CMS is unable to determine, or incapable of determining, the child maintenance and support.[43]

The Bill had its First Reading, but did not progress any further before the 2015–17 Parliament ended. Mr Borrowes lost his seat at the 2017 General Election.

Work and Pensions Committee report (May 2017)

In May 2017, the Work and Pensions Select Committee published a report on the CMS, and noted that in evidence submitted to the Committee's inquiry the DWP had told it:

> where a non-resident parent has a lifestyle which it does not appear could be supported purely from their earnings, we [the DWP] are confident that such funds will be identified through the "unearned income" variation ground in the CMS, providing the paying parent has not failed to disclose any other sources of income.[44]

The DWP said that this was "more effective than the lifestyle approach", and argued that it had "removed the need for 'subjective decision-making' necessary in the old scheme".[45]

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43 HC Deb 19 April 2017 cc677–680

44 Work and Pensions Committee, Child Maintenance Service, 2016–17 HC 587, 2 May 2017, p30, para 79

45 Work and Pensions Committee, Child Maintenance Service– written evidence from the Department for Work and Pensions (CHM103), April 2017

On the other hand, the Committee noted that:

> James Pirrie [a Board Member of Resolution and Director of Family Law in Partnership] told us that, ultimately, the reinstatement of the inappropriate lifestyle challenge was necessary to address NRPs [non-resident parents] diverting income: "You can't hide lifestyle but you can definitely hide capacity to pay behind a tax return" … He told us that capacity to investigate complex cases had been diminished with the loss of the lifestyle challenge.[46]

The Committee went on to "recommend that the Department reinstate provisions for parents to challenge child maintenance awards on the grounds of assets and lifestyle inconsistent with income".[47]

Government response to the Work and Pensions Committee's report (September 2017)

In September 2017, the Government's response to the Child Maintenance Service report was published by the Committee. Addressing the Committee's recommendation in this area, the DWP said that it recognised "some parents have complex income arrangements" and that "it is vital that the CMS has the right powers to ensure that a fair assessment of child maintenance liability can be made in these cases".

It noted that under the 2012 scheme, "having access to income information reported by HMRC allows the CMS to capture a much wider range of income types received by non-resident parents than under previous [statutory child maintenance] schemes". Also, "at any time" either parent can request that the CMS takes into account additional income received by the non-resident parent through a variation request, and that it would refer cases that require further investigation to the Financial Investigations Unit, or FIU (see section 7). The DWP stated:

> If either parent is unhappy with the calculation they can first ask us to look at it again and we will swiftly amend any incorrect calculations or investigate further if appropriate. If parents remain dissatisfied after the decision has been reviewed, they can appeal to Her Majesty's Courts and Tribunals Service.

But the DWP did not accept the Committee's recommendation to reinstate the grounds for a variation based on lifestyle inconsistent with income, explaining:

> We have no plans to reintroduce this provision, which was difficult for parents to use and uncertain in effect. The onus to prove that grounds for a variation existed lay with the applicant, typically the parent with care, and it was often difficult to obtain such details. As a result, very few applications for 'lifestyle' variations resulted in changes to the existing liability. The decisions on these grounds also involved a degree of subjectivity and a large proportion of such decisions were challenged or appealed, delaying the receipt of a steady maintenance amount.

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46 Work and Pensions Committee, Child Maintenance Service, 2016–17 HC 587, 2 May 2017, p30, para 80

47 As above, p31, para 82

However, it did say that "as part of the consultation on the new Arrears and Compliance Strategy, we will consider how we can strengthen our ability [to] ensure all sources of income are included in the calculation".[48]

Further Private Members' Bill (November 2017)

In November 2017, the Child Maintenance (Assessment of Parents' Income) Bill had its First Reading. The Bill was sponsored by Heidi Allen, a member of the Work and Pensions Committee.

Ms Allen explained that her Bill's purpose was to "equalise the assessment and enforcement of child maintenance arrangements of children of self-employed parents with those of children of other employed parents; and for connected purposes".

Ms Allen highlighted that her Bill was "following in the steps of David Burrowes", and highlighted how, "if paying parents want to avoid paying, they can do so all too easily—and all too often—by hiding behind self-employed status … The purpose of the Bill is to ensure that the statutory child maintenance system works for as many families as possible by closing that loophole".[49]

Although the Bill was scheduled to have its Second Reading on 23 February 2018, it was not called before time ran out for that day's business. The Bill has since been withdrawn.[50]

8.5 Change to allow notional income of assets to be included in the child maintenance calculation

As noted above in section 5.2, from December 2018 changes to the regulations underpinning the statutory child maintenance scheme have allowed the CMS to assume that assets of a non-resident parent that are not generating a return have an assumed notional income of 8 per cent per annum (if a particular asset's value is greater than £31,250).

The single parent charity Gingerbread described this step as "reintroducing the 'assets variation'" of the 2003 child maintenance scheme.[51]

However, there remains no equivalent under the 2012 scheme to the grounds for a variation based on "lifestyle inconsistent with income" that was permitted under the 2003 scheme. The DWP continue to argue against its reintroduction, saying in December 2017:

> It has been suggested that we should re-introduce an approach from the 2003 scheme, where receiving parents could apply for a variation to increase the maintenance calculation on the basis that

48 Work and Pensions Committee, Child Maintenance Service: Government Response to the Committee's Fourteenth Report of Session 2016–17, 2017-18 HC 354, 22 September 2017, p6

49 HC Deb 28 November 2017 c192

50 www.parliament.uk, Child Maintenance (Assessment of Parents' Income) Bill 2017-19, webpage accessed on 8 March 2019

51 Gingerbread, Government U-turn on child maintenance avoidance is "welcome but not enough", webpage, 12 July 2018

> the paying parent's lifestyle was inconsistent with their reported earnings. In many cases the lifestyle of the paying parent was supported by debt rather than income and many other such applications were unsuccessful due to insufficient information. We have no plans to reintroduce this approach as it proved ineffective in the past.[52]

However, the Government contended that the introduction of the notional income grounds for a variation "will be particularly appropriate in situations where an individual has an affluent lifestyle, and a source of income cannot be identified but ownership of significant assets can be".[53]

[52] Department for Work and Pensions, Child Maintenance: A New Compliance and Arrears Strategy – Public Consultation, December 2017, p12, para 40

[53] Explanatory Memorandum to the Child Support (Miscellaneous Amendments) Regulations 2018 2018 No. 1279, p4, para 7.5

Other Library briefings on child maintenance

- Child maintenance: how it is calculated under the 2012 CMS scheme
- Child maintenance: income in the CMS formula (including why gross income is used, and annual reviews)
- Child maintenance: inclusion of earnings from "special occupations" in the 2012 CMS scheme
- Child maintenance: enforcing payment of arrears
- Child maintenance: cases when someone lives overseas (England & Wales)
- Child maintenance: the multi-billion pound write-off of arrears on Child Support Agency cases (GB)
- Child maintenance: fees
- Child maintenance: new steps to improve compliance and to allow arrears to be written off

Please note that the above briefings relate to the statutory child maintenance scheme for Great Britain unless otherwise stated.

Version control

1.0	21/6/17	Published
2.0	25/10/17	Content check to ensure it is up-to-date and typos corrected, new section on the DWP response to the Select Committee's report added and list of other child maintenance CBPs added
3.0	19/3/18	Inclusion of Heidi Allens' Bill, and tidying up.
4.0	8/3/19	New sections 5.2 and 8.5 added, minor editing and switch to different template

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