

Family Lawyers' Association

Submission to Child Maintenance Review Group

The Executive Committee of the Family Lawyers' Association requested Ragnal O'Riordan S.C. to chair a Sub-Committee on the issue of the Review of Child Maintenance in order to prepare a Submission for the Group. The Sub-Committee comprised the following members: *Mary-Jo Butler B.L., Erica Coughlan B.L., Paula Duffy, Solicitor, Dr. Sarah Fennell B.L., Paul McKnight Solicitor and Ursula Regan, Solicitor.*

The aims of the Maintenance Review Group envisage that the Department is to make recommendations on three matters which are as set out below:-

“The purpose of the Child Maintenance Review Group is to consider and make recommendations on:

- The current treatment within the Department of Employment Affairs and Social Protection of child maintenance payments;*
- The current provisions relating to the liable relatives regarding child maintenance; and*
- The establishment of a State Child Maintenance Agency.*

The Sub-Committee agreed that the remit is quite defined. It is about the calculation and enforcement of child maintenance orders and the relationship with State payments. The background to the issues above is stated to be:

“Under existing Family Law legislation, parents are obliged to maintain their children. In cases where the family unit has broken down these obligations continue to apply. Relevant maintenance payments can be arranged either directly between the parties themselves, or with the assistance of supports such as the Family Mediation Service and the Legal Aid Board, or ultimately through the Courts.

Social Welfare legislation provides that where certain welfare payments are in place (specifically, One-Parent Family Payment) a 'liable relative' may be required to make a contribution in respect of the cost of this payment. In every case where the One-Parent Family Payment is awarded, the Department of

Employment Affairs and Social Protection seeks to trace the other parent or liable relative in order to ascertain whether they are in a financial position to contribute towards the cost of the One Parent-Family Payment.”

Research was done for the Committee looking at comparative systems in the jurisdictions of the United Kingdom, Canada and New Zealand.

United Kingdom

It is clear that the United Kingdom has had a difficult history dealing with the relationship between social welfare and child maintenance obligations since the introduction of a system under the Child Support Act, 1991, leading to the creation of the somewhat infamous *Child Support Agency*. The goal had been that CSA would ensure that parents were financially accountable for the upkeep of their children thereby lifting the burden from the State and the taxpayer. The payment of maintenance awards by non-custodial parents was intended to go to the State to defray the cost of social welfare which, together with stronger enforcement mechanisms, would reduce public expenditure. It appears the mandatory nature of the system overwhelmed the Agency as well as problems with the assessment of the level of maintenance and issues with enforcement. Ultimately the system failed and required reform.

A fundamental point arose here for the Committee about the question of who should decide the issue of the level of child maintenance. Should maintenance always be by a court order or could officials set it in light of a test or formula where the claimant is receiving social welfare for child support? The aim of the CSA system was to avoid “clean break” agreements or low awards of maintenance by agreement which did not reflect a fair contribution by the non-custodial parent.

The first reform of the CSA, known as the 2003 scheme, was not a success and it also ran into difficulties. It was devised to look at maintenance on a percentage basis of the income after certain deductions and was mandatory in various ways. The first £10 of any maintenance paid was retained by the claimant and the remainder paid to the State to off-set the cost of the social welfare. The problem appears to have been, amongst others, that the claimant received little benefit and the payer was not incentivized to pay where a child did not directly benefit. Arrears mounted to several

billion which had to be written off over time. The system also apparently suffered from over complexity.

The final reform led to a more voluntary system being adopted in 2012. The automatic rule to assess maintenance where social welfare was applied for was ended and a service to encourage agreements was put in place. Where the new system applies, there is a set formula outlined in the legislation to calculate maintenance using the Inland Revenue for information as to income. If there is a maintenance assessment made then there is an enforcement mechanism procedure available for a fee. There is a complicated appeals' process for the maintenance payer after a calculation is made and it appears there is a high rate of success in awards being changed or overturned which is concerning. There are various enforcement measures set out in the legislation including, for instance, deductions from earnings or bank accounts and taking control of goods.

An important success of the reform was to de-couple the issue of child maintenance from social welfare benefits. The current scheme, being a non-judicial administrative child maintenance scheme with enforcement powers, appears to have a greater success in achieving the objective ensuring payment by non-resident parents. The administration of the scheme from an economic point of view would have to be considered when considering its viability.

The drawbacks of the current scheme would appear to be a clash between the administrative body (CMS) making orders and a court, the bottle neck in the appeals' system and voluntary agreements not being binding without court order.

Canada

In Canada judicial discretion has been constrained by the introduction of strict rules regarding the assessment of the payment of maintenance based on set criteria. There are wide powers of enforcement which apart from financial penalties and garnishee orders include suspension of certain licenses and passports.

Interestingly, many State benefits are not taken into account in the assessment of child maintenance, these payments to the custodial parent are ignored. Canada changed to a similar tax treatment as the Irish system of the tax treatment of child maintenance, having had a system where child maintenance was taxed and could be claimed back by the maintenance payer like spousal maintenance in Ireland. Now it is neither taxed nor capable of being claimed back. The Canadian system is somewhat criticized for its favourable treatment of the custodial parent where a non-custodial parent does not

get credit for direct spending on a child no matter how substantial the time spent with the child. The guidelines for the assessment of maintenance have also been criticized for undue inflexibility.

New Zealand

The Child Support Scheme: The two main objectives of the scheme introduced in New Zealand in 1992 was to provide (1) an alternative to court proceedings for the assessment, collection and enforcement of child support payments and (2) the recovery of State expenditure in the provision of financial supports to children and their custodians through a collection of a contribution from non-custodial parents.

There is a formula set out in the Scheme to assess maintenance. Parents are obliged to apply for such a calculation when applying for State benefits save for exceptions e.g. where there is a risk of violence. All payments are received and retained by the Inland Revenue unless there is an excess over the State benefit which is then paid to the claimant parent. In 2019, the financial sanctions by way of reductions against the parent receiving benefits who refuses to identify the other parent were repealed since they were perceived only to harm children. The scheme also has an enforcement aspect to collect from defaulting parents by direct deductions and imposition of penalties. This aspect was made more lenient in recent times to improve compliance. There are various sanctions including the issuing of warrants for non-payment. There is an appeal system to the courts and a reciprocal agreement with Australia.

Considerations of the Committee members.

1. Clearly the schemes in other jurisdictions have considered a non-court assessment of maintenance to be a more efficient way of calculating a non-custodial parent's liability for a child. Whatever legal or constitutional aspects this might give rise to in this jurisdiction, the Committee was of the view that the retention of a court involvement would be important even to approve assessments or review them where there is disagreement.
2. The Committee agreed that enforcement was the most challenging aspect of maintenance awards and that a State enforcement mechanism which took the burden off the hard-pressed maintenance recipient to chase enforcement would be welcome.

The Committee also felt it would be important that the receipt by a parent of State benefits would not be affected by any non compliance of a parent with an Order or assessment and this position should be retained.

3. Most Members of the Committee were of the view that if a new body were set up to assess and fix maintenance that an input by a court (probably the District Court) should be retained. The discretion was seen as important.
4. It was noted that some systems have adopted a formula to assess maintenance to be paid of which the New Zealand example in Section 30 of the Child Support Act, 1991, is an interesting one. The Committee did not analyse the different formulas used under various systems but believes some clarity of expectations in the calculation of maintenance, subject to fairness, might be useful. Some members felt the current system is somewhat arbitrary and a set formula, subject to flexibility, would be welcome.

In summary, the Sub Committee welcomes this Review and recommends that the Review Group would consider the following issues:

- Recommend some set criteria or formula for guidance in setting maintenance awards for children in the context of this Review. The current system can be arbitrary due to pressure on court time and there can be a lack of consistency. More exacting proofs could be mandatory regarding income.
- Retain some court involvement to approve awards where there is dispute and for appeals. Some members are concerned about a bureaucratic body being set up with no court oversight. Most members feel some judicial oversight would be necessary to give any such system credibility.
- Introduce serious reforms in the enforcement of maintenance awards which should be undertaken by the State, together with wider sanctions; for instance, the current attachment of earnings system is cumbersome and if a maintenance

payer changes employment, it does not follow him or her. This should be automatic until the order is discharged or expires.

- Protecting the child social welfare claimant is considered to be extremely important since this may be the main source of income and is for the benefit of the child.
- One member felt that the taxation system could be reviewed.
- Recommend that the array of enforcement procedures and sanctions in other jurisdictions be studied and, where appropriate, copied.

The Family Lawyers' Association hopes this Submission may assist the Review Group in its important work.

On the 24th of March, 2021, the Bar Council of Ireland endorsed this Submission and adopted it as its own Submission to this Review Group.

24th March, 2021

Raghnaid O'Riordan S.C. Chair.

Sub-Committee on Child Maintenance Review

Family Lawyers' Association.