**Checklist for using the precedents**

As we finally reach towards an agreement over the capital, pensions and spousal maintenance aspects on our cases, it is so easy to breathe a sigh of relief and polish off the drafting of our consent order/heads of agreement quickly before the whole thing starts to collapse under a tirade of concerns about sentimentally valuable contents or the court staff start looking to lock up with our FDR judge impatient to rise for the day.

However, the process of fixing the question of child maintenance so that it will be robust, efficient and fairly share the risk of changes that the family may undergo, is a complex one. Increasingly it may make sense to try to agree the structure of the court order in advance of our FDRs so that we are in better shape to carry out this work safely and in a way that will not subsequently leave our clients complaining that they did not understand the risks they faced in their position and were not advised of the options that might have ameliorated the problem.

The reality is that we can, in the way we draft our orders, profoundly influence our clients’ ability to manage difficulties that may start to arise far over the horizon from the first consent order, and we may face claims where we have not done so and things do not turn out for our clients for the best. The checklist that follows aims to bring together the various considerations that may impact upon our client and enable us to manage more safely the finalisation of their case.

There are three main types of order provided in this section:

* Those orders that embrace the CMS award and seek to help it work well;
* Those that seek to minimise the impacts of a CMS intervention; and
* The raft of other orders relating to children for where the CMS jurisdiction is an irrelevance.

**The CMS problem**

Primacy of the administrative service over the court

Through the Child Suport Act 1991, Parliament imposed the policy that the administrative system would be the overarching determinant of child support. From March 2003, the administrative formula would even trump the agreed order (once that order had been running for twelve months), through operation of CSA ’91 s4(10(aa). This intervention cannot be excluded by agreement (CSA ’91 s9(4) ) nor can it be excluded by a court order (other than by a substantive periodical payments order for the child or children concerned, which will exclude such jurisdiction for 12 months after the order is made).

A cruder scheme creating particular risks

This policy has operated particularly harshly under the current crude iteration of the scheme (created by changes to CSA 91 by the Child Maintenance and Other Payments Act 2008, which became operative by stages from December 2012). That scheme (variously “the gross income scheme”, “the 2012 scheme”), has seen a wide range of paying parties given the power to control - or even manipulate - the variables that are the primary determinant of the award, resulting in a raft of recipients facing devastating reductions in the levels of provision for children. Other families have the challenge of yo-yoing in and out of the court’s “top-up” jurisdiction under CSA ’91 s8(6).

Shared care families yo-yoing too

The 2012 scheme also holds particular problems where care is equal or nearly equal. Regulation 50 of the Child Support Maintenance Calculation Regulations 2012 (“CSMRC’12”) makes clear that the CMS has no jurisdiction unless one parent provides “day to day care to a lesser extent than” the other. This woolly definition is variously interpreted by different child support officers. Parties might enter a financial regime on the assumption that there will be no award only to find a few months on, a slight tweak to the parenting arrangements has opened the door to CMS involvement and the unexpected intervention of a calculation to upset the otherwise carefully calibrated needs-based arrangements of the court’s regime. Legal advisors should be vigilant about agreements, for example those reached in mediation and intended to relate only to parenting matters, unintentionally affecting the finances.

International cases manufacturing CMS jurisdiction

The scheme is intended to be for domestic cases. But there may be difficulties too for the international family’s assuming that they are untouchable by the CMS. Where child and parent with care are in the UK, a paying party resident abroad may manufacture an employment of a UK-registered company (s44(2A)(c) CSA’91) and thus bring themselves within the jurisdictional rules and within a position to ambush the receiving parent with a CMS application.

Resistance from the courts to help

Despite these difficulties, the courts have sought to honour the assumed intention of parliament in the way that they address the cases coming before them. Most recently in December 2017, in AB v CD [2017]EWHC 3164, per Mrs Justice Roberts at para 48:

48. *In my judgment, the decision in CCS 316/1998 properly reflects the manner in which courts have historically operated in terms of engaging the jurisdiction conferred by s 23 of the 1973 Act to make provision for the benefit of a child or children of the family who are not yet the subject of a maintenance support assessment … Their legitimacy derives from the fact that they do not challenge or seek to oust the jurisdiction of any statutory agency which from time to time fulfils the function imposed on it by Parliament to assess the level of child support and the liability of the payer*.

The response of the legal advisor

In short, even though the legal advisor may be concerned as to the way that the CMS will serve the needs of the client and family they may be powerless to provide proper protection against its unwelcome intervention. The opportunities to exclude the CMS are narrow and generally require agreement between the parties. (The court is often powerless to impose them however much it may want to help) The legal advisor’s duty will often be:

* To explore the options
* To warn the client of the risks; and
* To craft the court’s order, so far as possible, to protect the client from the vicissitudes of CMS involvement, but acknowledging that certainty is not possible.

The problems for advisors and their clients are obvious as they seek to create a coherent financial scheme when there is a significant wildcard element that cannot easily be accommodated. The client is often left in the unenviable position of:

* Seeking the adoption of arrangements by agreement which may have some efficacy as regards excluding the CMS;
* Hoping that the costs and difficulties often involved in operating the CMS scheme (particularly where variations under part 5 of the CSMRC’12 are in prospect) leave each side wanting to avoid the CMS’ involvement; or
* Seeking an order that will stand alongside the unpredictable jurisdiction of the CMS and hoping for the best.

The legal advisor’s job will often stretch no further than making these options clear and it is a task best carried out well in advance of seeking to wrap up those FDR negotiations, when all parties are likely to be tired and the recording of the advice given may be less than perfect.

Guidance note:

The problems have tended to be more profound for the receiving party as it is the paying party who has the capacity to change the variables to reduce the child support due under the order. It is therefore that predicament that is the primary focus of this note.

**The popular menu choices**

Cutting to the chase, the main options as regards controlling the imapcts of an unpredictable CMS award are likely to be as follows:

|  |  |  |
| --- | --- | --- |
| ***Order and intent*** | ***Residual problems*** | ***prec*** |
| The Global Order  This melds together spousal and child periodical payments – the recipient (in particular) is insulated from manipulation of the child support variables by the paying party because a reduction in child support is met by an automatic and equivalent increase in spousal periodical payments. | * Can’t be used by the never married claimant (schedule 1 cases) or by the parent who will remarry. As such, it must be treated as a flawed long-term solution. * Can’t be used unless there is an authentic spousal claim. Given the law’s current drive towards termination of spousal payments, the numbers of those with a legitimate spousal claim are bound to reduce, thus also reducing the availability of this option. | 2&3 |
| The Christmas Order  Has still not been tested at court but is theoretically effective in excluding CMS jurisdiction by creating a chain of sub-one-year orders until the end of the jurisdiction of the CMS. | * It may not be accepted by the judge making the order, though some judges appear to have embraced the scheme with enthusiasm. * Particular warnings should be given to the parties that in the absence of agreement, variations will (of course) require a court application and cannot be conducted through the low cost option of a CMS application. | 5 |
| The contractual solution  The impacts of engaging the CMS are neutralised by creating an obligation on the part of the benefitting party to repay the advantage. | * The application to the CMS cannot be stopped, simply the potential advantage can be managed. Enforcement is bound to be a problem in some cases. | 6 |

**Information exchange between court and administrative systems**

Whilst there is likely to be a duty to disclose CMS information in our court-cases, we must warn our clients as to s2(2) Contempt of Court Act 1981) and the contents of FPR 9.46 & PD9B.

FPR PD9B permits (subject to the court’s direction) communication of information from financial remedy proceedings to the other parties and /or their representatives etc in connection with a Tribunal appeal connected to Child Support arrangements under the CSA ’91. NOTE that this requires an appeal and so (presumably) information may not be released unless and until the parties have passed the stage of mandatory review. Be vigilant to draft to ensure permission for disclose the order / D081 or form E or other financial information to the CMS, where this may be needed (see precedent 17).

**Checklist**

|  | Prc | Section/ Regulation |
| --- | --- | --- |
| Jurisdiction   1. Can the CMS have jurisdiction? Bear in mind:    1. Geographical requirement (broadly that within the UK)    2. The age and stage requirements (university children are out)    3. The parents must be the birth or adopting parents of the child … so step-children are never dealt with by the CMS    4. Requirement that the parties are not living in the same home.    5. Is there an order already in place (pre 2003 or within the last 12 months, which will lock out the CMS?)    6. Is care equal   If the statutory requirements are met then either side will usually be free to make an application to the CMS after 12 months.   * + Does the client know this?   + What are the likely implications for any consent order (will the CMS provision be higher or lower?)   + Will variation directions be an issue?   + In particular, is there a chance that the client will end up locked into a long and complex legal process fired by dissatisfaction with the first order? Where will the client be able to turn for help? |  | s44CSA’91  s55CSA’91  s54CSA’91  s3CSA’91  s4(10(aa)CSA’91  r50CSMCR’12  s4(10)(aa)CSA’91 |
| 1. Even if there appears to be no jurisdiction, consider what changes might take place, eg the child or NRP relocating back to the UK. Which of the above are going to change are susceptible to manipulation in a way that might expose our client to risk? |  |  |
| 1. Conversely, if there is currently CMS jursidiction and the parties are comfortable with this, what changes should be anticipated as circumstances change – for example as the children get older? |  |  |
| 1. Can decisions be made about provision for the child eg at university or because of “special circumstances” (such as disability). If not is the client aware that this may require further consideration at a later date. |  | S29(3)MCA’73 |
| Parties in the CMS application   1. Remember that the parent providing day to day care to a greater extent should be identified as the PWC by the CMS and entitled to pursue support, regardless of whether that household has all the income already!   The parent with child benefit it assumed to be PWC |  | R50CSMCR’12  R50(3)CSMCR’12  R50CSMCR’12 |
| 1. If care is equal then there would be no CMS jurisdiction – but how easy is it to manipulate a change to that by either side? Does this make the client vulnerable? |  |
| Income figures for CMS calculations   1. Bear in mind that the court findings (eg as to income) are not exportable to the CMS process.    1. Get the last tax return and assess the likely level of award    2. Check is there a 25% change that would permit either party to apply to convert the case to current income from historic income.    3. Record pension contributions – this might protect against a variation on the basis that they are a diversion    4. Record position as regards equal care if possible 2. Incorporate authority to release information to the CMS into the court order where there is any chance that this might be needed. | Prc1  Ord1 | Part IVCMSCR’12  R71CMSCR’12  FPR 9.46 & PD9B |
| Variations   1. Is your client at risk from an application for a variation    1. Pushing figures down       1. School fees       2. Contact costs       3. Illness or disability       4. Debt / mortgage    2. Pushing figures up       1. Other income       2. Diversion |  | PartV CSMCR’12 |
| 1. Consider recording the parties’ agreement that a variation would not be just and equitable – it won’t bind but might help. |  | s28F(1)(b)CSA 1991 |
| Complexity   1. Keep in mind the importance of assessing whether the CMS is likely to be able to accommodate the complexities of the NRP’s circumstances. The CMS was designed for routine earners and some sets of circumstances are bound to leave it floundering, making an incorrect decision more likely and raising the risk of a long tail of corrective litigation through the tribunal system. |  |  |
| Administration & Enforcement   1. Keep under review and provide guidance as regards the capacity of the CMS to deliver. |  |  |
| 1. Consider drawing up a pros and cons table for your client to assess which system they want to adopt.   Share information (create a standardised pack?) to help your client make an application to the CMS or deal with any application that is made. Ensure you have links to organisations able to assist if you are not intending to assist if the case progresses in this way. |  |  |
| Sneeky applications   1. Remember to ask whether either parent has made an application to the CMS already (ie just before the order is signed off).    1. If they have, then any work structuring a court-regulated system is likely to be in vain: the CMS will progress this application and in due course an assessment will be made – even though at the time of the negotiations, the respondent to such an application may have been unaware that an assessment was in the pipeline.    2. Its effective date will be the date of making communication with the NRP. The CMS’s target is to make contact within four weeks after the date of application.    3. Of course an application immediately after the making of the court’s order by consent should be rejected by the Service because of s4(10) of the CSA 1991. |  | s4(10(aa) CSA 1991 |
| Easing intake   1. If the CMS is being used, it may not be easy to create an arrangement that avoids missed periods or double-payment. But if possible consider:    1. At what level?    2. From what start date?    3. On what day of the month?   Insert it as an agreement rather than an order – an order will lock the parties out of using the CMS if an application has not already been made.  Consider using an order anyway. It will create a cleaner and more predictable start date. If the order is working well the parties may be content for that arrangement to continue. | Prc1 | s4(10)(aa) & s8 CSA 1991 |
| 1. Consider working up an agreement:    1. As to the timescale for either side to submit documentation to the CMS.    2. As to what payments will be brought into account against any calculation (especially where an application was made some time ago but has not yet been processed, so there are likely to be pending arrears). | Prc1 |  |
| Future changes   1. Be aware of the possibility of termination of CS jurisdiction (eg as the payer or child departs abroad). A maintenance order may be needed to kick in at this juncture. | Prec  10 |  |
| 1. Consider whether, in addition, payment will be made for activities undertaken by the child and how this obligation should be recorded – agreements and recitals should not be affected (discharged) by a subsequent CMS calculation but consider enforcement issues. |  | *Dark v Strout* [2003] EWCA Civ 176 |
| University   1. Consider provision whilst at university:    1. Perhaps no arrangement is made as it is too distant and you know that your district judge is unwilling to make a contingent arrangement.       1. Perhaps only broad reassurance is set out on the face of the order that the parties intend to agree an appropriate arrangement. But given the current legal uncertainties better will be the detailing of the commitments (or warning the client of the risk of not doing so).       2. Consider a split order so that there is support if the parent continues to provide a home for the child during the vacation and perhaps providing for payment direct to the child of a fair share of the support s/he requires at university. | Prec  15 |  |
| Gap year   1. Consider provision for the child’s costs during his/her gap year. This is likely to be addressed by undertaking/ agreement. There is probably no jurisdiction for such provision if the view is taken that the circumstances of a gap year are neither ‘educational’ within s29(3)(a) of MCA ’73 or “special” within s29(3)(b) |  | MCA ’73 s29 |
| Disability   1. Are there disability costs that should be specifically provided for?   But take care of the restricted interpretation given the word disability in this context.  Note restrictions on court’s powers as to duration. | Prec  11 | s8(8) CSA’91  s8(9) CAS ‘91  s29(3)(b) MCA 73 |
| Medical cover   1. Should medical cover be provided? |  |  |
| Life cover   1. Generally research should be undertaken in good time to establish the costs of providing for the child during the remainder of his/her dependency. Often the providing parent will be able to provide the reassurance that such costs are met relatively cheaply through a family income benefit policy. Although in circumstances where the estate will pass entirely or largely to the child in any event, this may be thought unnecessary. |  |  |
| **FOR THOSE NOT USING CMS** |  |  |
| 1. Here the terms of the maintenance award will move centre stage:    1. What level?    2. From when?   (Commencement no earlier than application  … but note complexities where a CMS interface)   * 1. (Is this backdating? Will it create immediate arrears? By when will they be paid?)   2. Monthly payments? What date of the month for payment?   3. In arrears/ advance?   4. Currency?   5. Indexation to meet inflation costs?   6. Additional indexation to reflect growing costs as the child ages? |  | S29(2)MCA’73  S29(5)-(8)MCA’73 |
| 1. Will the CMS case be closed and any arrears terminated? | 16 |  |
| 1. How will this arrangement be rendered secure?    1. Because the CMS does not and will not have jurisdiction    2. Through a global maintenance order?   (Depending on drafting) Warn the client of the need to apply to the CMS in good time before any remarriage.   * 1. Through a *V v V* lump sum arrangement?   2. Through a Christmas order?   3. Use an agreement to repay? Consider a charge to secure it.   4. None of the above? Think again… the case may be en route to the CMS in 12 months time and your scheme will be undermined. | 7  2/3  4  5  6 |  |
| 1. Consider how robust are the arrangements to exclude the CMS and that if a calculation is made then there may be a period during which no payments are made, whilst the Service’s calculation comes on stream. Should an agreement to pay on account be incorporated? |  |  |
| 1. Top-up order? Bear in mind additionally:    1. Is the top-up order intended to incorporate the child support payments and provide a global figure or be a slice on top of a child support award so that the overall payments might change, for example as amount of contact changes and so the level of child support alters?    2. We are not aware that this has been pursued but bear in mind that there is clear opportunity for an argument in the wording reg 3(2)-(3) of the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992 that the top-up order is discharged every time that a new calculation is made. This may be a reason for cases that would be top-up to endeavour to avoid the CMS scheme entirely, eg through a Christmas order. | 12 |  |
| **OTHER CONSIDERATIONS** |  |  |
| 1. Bankruptcy Bankruptcy should not interfere with the order or the paying party’s capacity to pay unless an income payments order is made. |  |  |
| 1. Enforceability: are difficulties with payment anticipated? Should a secured payments order be considered? What else can be done to assist? |  |  |
| 1. International Pay particular attention to the case with an international dimension (or where a departure out of the UK is likely) given the interface between:    * CMS jurisdiction (which is likely to terminate).    * Whether arrears under any CMS jurisdiction would be enforceable; and    * The operation of the lis pendens rules of the EU Maintenance Regulation (EC No. 4/2009) |  |  |

**The orders – an introduction**

Our aspiration in this section is to get practitioners quickly towards the right precedents and the information that will be useful to them.

The needs these precedents aim to meet:

* There is a first category of family: those who are content to work within the Service’s rules and seek no further assistance from the court – though clearly they need good information and guidance as to:
  + the likely amount of the child support arrangement
  + its variability
  + the likely cost and demands of the processes of appeal etc
  + guidance on likely efficacy of the Service to secure payment of the funds due.
* Others will work within the Service (perhaps regarding the difficulties of excluding it as prohibitive) but may seek to have some of the rougher edges of the child support structures rubbed off by agreements made within the court order.
* There is also a further group of clients who seek our help to exclude the CMS as best we can.

These precedents aim to offer help with each group – as well as with the group who, because they are living abroad, or providing for step-children or older children, don’t need to worry about the CMS at all, because the Service will not have jurisdiction in relation to the family.

In preparing these notes, we have brought out our founder, John Cornwell’s favourites, “Winnie” and “Humphrey” … they have children Charlie and Charlene. Apologies for tedious stereotyping - the aim is to improve readability.

The precedents are arranged as follows:

**Section A: precedents to assist the better working of the CSA**

1. Package of suggested arrangements

**Section B: those looking to create an arrangement to minimise the impacts of the CSA:**

1. The global order
2. Time limited global order
3. The *V v V* order
4. The Christmas order
5. The solution in contract
6. The interim order

**Section C: other orders**

1. Child maintenance order (eg for use where the CSA does not have jurisdiction)
2. Index-linking maintenance order
3. Order to pay by standing order
4. The delayed commencement order, designed in particular to protect arrangements for support at university where application to the CSA may be made to discharge any existing order. It is important also where the CSA is going to lose jurisdiction at a future date - perhaps because the PWC and child are moving abroad.
5. Orders for costs of disability
6. Top-up order
7. School fees order
8. Agreement and orders for those attending university
9. Closing down the existing CMS case.

Any suggestions for improvements will be gratefully received

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June 2018

# **Trying to get the CMS to work**

# **Precedent 1: agreement and orders where the Agency is being relied upon**[[1]](#footnote-1)

# **Definitions**

# “CMS” refers to the Child Support Agency and/ or the Child Maintenance Service or such similar body as may replace either of them.

# “CS Calculation” refers to the sum that the CMS declares is due for payment from one parent to the other.

# “Charlie” refers to Charlie born 1/1/2001 and Charlene refers to Charlene born 2/2/2002, together called “the Children”

**Recitals**

Humphrey and Winnie record that they seek this order:

1 Assuming that [for the foreseeable future] [for the period of [four] years from the date of this order], the calculation issued by the CMS for the Children will be within 15% of the figure of [ ]. [[2]](#footnote-2)

2 Recording that they are aware of no circumstance that would justify the making of a variation under s28 of the Child Support Act 1991 save for:

a)

b)

3 Agreeing that for the period set out in para 1 above, and whilst the calculation remains within the bracket there set out, they would not regard the making of a child support variation direction just and equitable (s28F(2) CSA ’91 applied); and that in particular:

1. Winnie confirms her view that it would not be reasonable for the CMS to conclude that Humphrey’s unearned income from [ \*\* ] should be taken into account nor that there is the basis for a finding of a diversion, within R71Child Support Maintenance Calculation Regulations ‘12.
2. Humphrey confirms that he would not regard the making of a variation on the basis of any of a) contact costs; b) illness or disability of a relevant other child, prior debts or boarding school fees as being just and equitable.

**Undertaking**

Humphrey and Winnie undertake to the court and agree:

1. to take such steps as will enable the Child Support Agency to issue a calculation as quickly as possible.

2 that until the issue of the Calculation, Humphrey will pay to Winnie periodical payments at the rate of £[ ] per annum, for the benefit of [the Children] [Charlie] and [Charlene].

Payments will be made monthly in advance, with a first payment on [ ]

They will continue monthly thereafter on the corresponding day of each month.

Winnie will give credit in respect of payments so made, and the credit will be calculated by adding together all the payments made by Humphrey after the date of this order until the date of the issue of the Calculation and apportioning them on a daily basis.

Humphrey’s obligations under this agreement and undertaking will continue until the first to occur of:

a) the issue of a calculation by the CMS, or

b) both of the children completing full-time tertiary education to the end of their first degree course, or

c) the court releasing Humphrey from this provision. [[3]](#footnote-3)

**Clauses for clients looking for independence from the CMS**

## Introduction

Many families will welcome the certainty of the formula as it applies to them. They will welcome its low cost. For others, the system will not produce certainty and clients may fear manipulation and ongoing dispute within the CMS labyrinth. Here practitioners may face the job of shoe-horning their settlements around the calculation that seems likely to be provided by the Service. In brief:

1. The court still has power to make an order for general main­tenance for children (eg by consent or where the CMS does not have jurisdiction).

2. If a calculation is subsequently made by the CMS then this will discharge the court order.

3. An application to the CMS will be successful when there is jurisdiction and any hurdles to protect the court order can be leaped.

4. Section 4(10)(aa) permits an application to the CMS:

a. where there is no order; or

b. there is an order dated after 3 March 2003 and it has been running for more than a year.

(The effective date of the CMS’s calculation will be two months after the date of the application to the CMS; see s10(1) CSA 1991, reg 3(2) Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992 and reg 26(2) Child Support (Maintenance Calculation Procedure) Regulations 2000.

**How far can the court go?**

In preparing these drafts, we have taken particular account of the view of Nicholas Mostyn QC, who wrote in *Childs Pay* (3rd ed) that the court should be wary of accepting any order which had the effect of hobbling a parent’s right to make application to the CMS. However, he also expressed the view that parties were perfectly at liberty to agree contractual arrangements that would nullify the advantages of taking such a step. We have taken this to permit parties recording on the face of the order an agreement to indemnify. A similar approach is taken by Mrs Justice Roberts in AB v CD [2017] EWHC 3164(Fam)

**If the solution in contract is adopted**

Of course when clients move from a structure that is built on orders to a structure based on rules of contract, there will be a raft of further considerations on which they must be advised. For example:

* Security: should security be taken for obligations that are undertaken, eg a mortgage?
* Enforceability:
  + Keep in mind that there may be difficulties in enforcement.
  + In any event, there will be delays and costs in enforcing agreements which may be given lesser respect by debtors than an order
  + These difficulties will be compounded where the debtor moves abroad.
* Bankruptcy: in extreme cases a claimant may be looking to resolve issues in bankruptcy proceedings with all the uncertainty, cost and probably poor recovery that this generally involves.

We acknowledge that it may not be possible to create an entirely robust set of structures. Clients who are intent on guerilla tactics will always be able to generate difficulties in the interface between the two systems. However, others simply want good enough structures to provide reasonable disincentive, enabling them better to trust in the arrangements that have been agreed between them.

**Precedent 2 Global order [[4]](#footnote-4)**

[order]

1. Humphrey will pay to Winnie maintenance pending suit until decree absolute and then periodical payments in the amount set out below:

The amount shall be whatever payments, when added to

* + the payments (if any) made by Humphrey to the CMC pursuant to a calculation; and
  + order 2

total £[ ] a year

Payments will (unless the court makes an order to end them sooner) end on the first of

* + Winnie’s remarriage
  + the death of either party

1. Humphrey will pay to Winnie, in addition
   * for the benefit of Charlie periodical payments in the sum of £[ ] each year; and
   * for the benefit of Charlene periodical payments in the sum of £[ ] each year; and

Payments will end when the children respectively

* + reach the age of 18; or
  + end their full-time tertiary education, whichever is later.

The court may (prior to these events or subsequently) order a longer period of payment.

3 Payment on both orders shall start with the payment on [ ] in the sum of [] for the period of the subsequent month and continue monthly in advance thereafter.

4 The figures in paragraphs 1 and 2 will stand increased on the anniversary of this order and at yearly intervals afterwards (“the Variation Date”).

The amount of the increase shall be the change (if any) between the retail prices index for the period 15 months before the Variation Date and 3 months before that date.

**Precedent 3: the time-limited global order[[5]](#footnote-5)**

1. If Winnie makes an application for child support under s4 of the Child Support Act then she will indemnify [[6]](#footnote-6) Humphrey for any sum he is required to pay beyond those provided under order [ 2 ] below prior to the date in para 3.

The court may make order releasing Winnie from this obligation.

2. Humphrey will pay to Winnie maintenance pending suit until decree absolute and then periodical payments in the amount set out below:

Until the date in para 3the amount shall be whatever payments, when added to

* + the payments (if any) made by Humphrey to the CMC pursuant to a calculation; and
  + order 4

total £[ ] a year

Payments will (unless the court makes an order to end them sooner) end on the first of

* + Winnie’s remarriage
  + the death of either party

3. Upon the 4th anniversary of the order, the sum in para 2 shall stand varied to the sum of £[ ]p/a[[7]](#footnote-7)

4. Humphrey will pay to Winnie, in addition

* + for the benefit of Charlie periodical payments in the sum of £[ ] each year; and
  + for the benefit of Charlene periodical payments in the sum of £[ ] each year; and

Payments will end when the children respectively

* + reach the age of 18; or
  + end their full-time tertiary education, whichever is later.

The court may (prior to these events or subsequently) order a longer period of payment.

5 Payment on both orders shall start with the payment on [ ] in the sum of [] for the period of the subsequent month and continue monthly in advance thereafter.

6 The figures in paragraphs 1 and 2 will stand increased on the anniversary of this order and at yearly intervals afterwards (“the Variation Date”).

The amount of the increase shall be the change (if any) between the retail prices index for the period 15 months before the Variation Date and 3 months before that date.

**Precedent 4: The *V v V* order*[[8]](#footnote-8)***

1. Winnie will indemnify Humphrey for any sum he is required to pay beyond those provided in Order 1 below if she makes an application for child support under s4 of the Child Support Act prior to the [fourth] anniversary of this order.

However, the court may release Winnie from this obligation before then and the parties may agree such release by a document in writing recording the fact that the parties have had the opportunity to take legal advice on the step.

[Order]

2 Humphrey will pay to Winnie for the benefit of each of the Children periodical payments in the sum of [£7,500] each year until the children respectively 1) reach the age of [18]; or 2) end their full-time tertiary education, whichever happens last.

The court may (prior to these events or subsequently) order a longer period of payment.

3 Payment on both orders shall start with the payment on [1st January 2019] in the sum of [£] for the period of the subsequent month and continue monthly in advance.

4 Humphrey shall pay to Winnie a lump sum for the benefit of the children on [31 December 2019] and for the following [3][[9]](#footnote-9) years afterwards.

The amount of the lump sum shall be [£7,500] per child less the total payments made by Humphrey, referable to the 12-month period immediately preceding the due date:

A to the CMS pursuant to a calculation; or

B paid pursuant to order 2

5 Winnie may not recover payments from Humphrey in excess of [£7,500] per child per annum.

6 The figures in paragraphs 2 and 4 will stand increased with effect from 1st January 2020and at yearly intervals afterwards (“the Variation Date”).

The amount of the increase shall be the change (if any) between the retail prices index for the period 15 months before the Variation Date and three months before that date.

**Precedent 5: The Christmas Order[[10]](#footnote-10)**

1 Humphrey will pay to Winnie for the benefit of each of the Children periodical payments at the rate of £[ ] a year

They shall commence on the 25th of [*the start month*] and end a moment less than 12 months later.

2 A further order for the same amount shall commence immediately after termination of the preceding order and run for less than one year, terminating on the following 25th December, whereupon an order in similar terms will commence.

3 However, these provisions will not require payments to continue beyond the later of the children respectively 1) reaching the age of 18; or 2) ending their full-time tertiary education, whichever is later, though the court may (prior to these events or subsequently) order a longer period of payment.

4 The figures in paragraphs 1 and 2 will stand increased on the anniversary of this order and at yearly intervals afterwards (“the Variation Date”).

The amount of the increase shall be the change (if any) between the retail prices index for the period 15 months before the Variation Date and 3 months before that date.

**Precedent 6: Agreement to repay the difference: the solution in contract**[[11]](#footnote-11)

The parties record their wish to be able each to plan their future relying on the level of child maintenance provision set out in this order (“the Child Maintenance”). To this end they have entered into an agreement, a copy of which is annexed, in which they respectively undertake a liability in the event that an application to the CMS results in alteration to the Child Maintenance, it being their intention to adhere to the provision set out in this order unless this court makes further order varying it.

[The order as in precedent 8 below.]

**6B Deed for use with Precedent 6**[[12]](#footnote-12)

THIS DEED is made [date] between [ ] ("Winnie") and [ ] (“Humphrey”)

WHEREAS

1. Winnie and Humphrey have agreed to the amount of maintenance that Humphrey should pay for the general maintenance of their child[ren] [ ] [and [ ]]
2. Winnie and Humphrey regard it as in the best interests of the child[ren] that they have certainty as regards the level of provision that is to be made for the child[ren] and that where issues cannot be resolved between them that this be addressed within the legal process applying the principles of the Matrimonial Causes Act 1973 or other equivalent provision rather than by application to the Child Maintenance Service.
3. Pursuant to that agreement they have applied for an order to be made for Humphrey to pay general maintenance to Winnie for the benefit of the child[ren] and this deed is entered into upon the basis that such an order will in due course be made.

*(Where the parents are endeavouring to avoid a return to the court as well, they might add:)*

1. Whilst Winnie and Humphrey do not intend to oust the jurisdiction of the courts and recognise that regardless of the terms of this agreement the court will retain jurisdiction to consider an application by either of them to vary the maintenance provision, they wish to provide a scheme so that they are each free to provide for their respective independent futures to the greatest extent possible, without the risk of having to fund the costs of a variation application and for this reason have provided for an escalation of the maintenance provision beyond simply indexation in line with the changes to retail prices, to the intent that this will obviate any application for variation.

NOW THIS DEED WITNESSETH

1 Humphrey will pay to Winnie such sum if any as will amount to Winnie’s Entitlement on the Due Date or on the date of his death if earlier.

2 Winnie will pay to Humphrey such sum if any as will amount to Humphrey’s Entitlement on the Due Date or on the date of her death if earlier.

3 Winnie’s Entitlement will be the amount by which the Actual Payments are less than the Agreed Payments plus Interest [following an application for a calculation under the CSA 1991 as amended made by Humphrey].[[13]](#footnote-13)

4 Humphrey’s Entitlement will be the amount by which the “Actual Payments” are more than the Agreed Payments plus Interest [following an application for a calculation under the CSA 1991 as amended made by Winnie].

5 The Agreed Payments is the total of the amounts due upon the assumption, if not a fact, that the provision for maintenance of the child[ren] set out in a minute of order dated [ ] and signed by Winnie and Humphrey will continue until the provision respectively terminates for them as therein provided as varied by the court from time to time.

6 The Actual Payments will be each amount paid by Humphrey to Winnie or to a third party on Winnie’s behalf, to or for the benefit of the child[ren] of the family by way of a periodical payments order or child support calculation or similar made pursuant to:

s23 of the Matrimonial Causes Act 1973

s27 of the MCA 1973

ss35 and 36 of the MCA 1973

Schedule 1 to the Children Act 1989

Maintenance Orders (Reciprocal Enforcement) Act 1972

Matrimonial and Family Proceedings Act 1984

Inheritance (Provision for Family and Dependants) Act 1975

Domestic Proceedings and Magistrates Court Act 1978

Any other such legislation whether in this or any other jurisdiction

By way of an assessment or calculation under the Child Support Act 1991.

7 Interest will be calculated at [ ]% per annum on each such difference calculated from the date of payment of the same (or each composite part thereof) to the date on which repayment of the sum due in consequence of this deed is made.

8 The Due Date will be the day on which [the][both] child[ren] complete full-time education to the end of their first degree course [and ].[[14]](#footnote-14)

[9 It is expressly recorded that any payment by Humphrey in respect of the education of the child[ren] as is envisaged at clause[ ] of the minute of order dated [ ] which is intended to be put before the court for the making of an order will not impact upon the calculations made under this deed][[15]](#footnote-15)

**6C Optional charge for use with 6B**

*Charge to back up recital and agreement to repay CMS differential*

H M LAND REGISTRY

COUNTY AND DISTRICT

OR LONDON BOROUGH:

TITLE NUMBER:

PROPERTY:

DATED:

In pursuance of the terms of a minute of order that are expected to be put before a Judge in the [Principal Registry] [[ ] County Court] dated the [ ] in proceedings bearing matter number [ ] and conditional upon an order being made as requested:

1. I, [ ] of [ ] ("Winnie") promise to pay to [ ] of [ ] (“Humphrey”) the sums that I contracted to pay as provided in a Deed of the same date as this charge and made between us of which a draft is annexed (“the Sum”)
2. Humphrey will not call in the whole or any part of the Sum (provided that the power of sale applicable to this Mortgage will for the protection of Humphrey be deemed to arise six months from the date hereof) until the first date upon which there will be no child under the age of 21 living at the property or the death of Winnie, whichever is earlier.
3. Winnie with full title guarantee HEREBY CHARGES by way of legal mortgage the property comprised in the above title number ("the Property") with payment of the Sum and other money hereby covenanted to be paid by Winnie SUBJECT TO the charge dated [ ] in favour of [ ] and registered on the [ ] day of [ ] 20[ ] ("the First Mortgage").
4. Winnie promises that she will:
   1. pay the sums due in respect of the First Mortgage punctually;
   2. keep the Property insured with a reputable insurance company;
   3. keep the Property in good repair and condition;
   4. not increase the amount or extent of the First Mortgage without Humphrey’s consent in writing;
   5. not grant or agree to grant any lease, licence or tenancy of the Property (or any part of the Property) without Humphrey’s consent in writing;
   6. pay to Humphrey a sum amounting to the total of the sums properly paid by Humphrey in connection with enforcing this charge (together with interest at the rate specified in the schedule) AND until payment those amounts will be added to the Sum charged on the Property;
   7. respond to Humphrey’s reasonable requests for information about the Property and will produce copies of orders, directions, requisitions, permissions or other matters likely to affect Humphrey’s security under this charge.
5. The statutory power of sale will apply with the extension that Humphrey may exercise it immediately without giving notice if:
   1. Winnie becomes bankrupt or has a receiving Order made against her or enters into any arrangement or composition with Winnie’s creditors;
6. a receiver of the Property or any part thereof is to be appointed under the First Mortgage;
7. any step is taken or proceedings instituted by way of sale or otherwise for the purpose of enforcing the security constituted by the First Mortgage.
8. Humphrey may settle and pass the accounts of any person in whom the First Mortgage is for the time being vested and all accounts so settled and passed will as between Humphrey and his assigns and Winnie be conclusive and binding on Winnie.

IN WITNESS WHEREOF the parties have signed this instrument as their deed in the presence of the persons mentioned below.

**Precedent 7 Interim Child Periodical Payments Order for top-up cases[[16]](#footnote-16)**

**Whereas**

The parties have agreed that this court should determine what level of child support provision should be made by the Respondent and have agreed to the provision below set out without prejudice to their differing views as to the level at which the court should order provision at the final hearing of this matter

**Order**

1 Humphrey will pay interim periodical payments to Winnie for the benefit of each of the Children, Charles at the rate of £[ ] a year and for the benefit of Charlene at £[ ] a year

Payments will continue until further order or (if later) the children respectively 1) reach the age of 18; or 2) end their full-time tertiary education, whichever happens last.

The court may (prior to these events or subsequently) order a longer period of payment.

2 Payment on these orders will start with the payment on [ ] in the sum of [ ] for the period of the subsequent month and continue monthly in advance, pending the final hearing of the application for periodical payments.

3 *[Usually there will be no indexation provision on the basis that by the time a year has gone by the matter will probably be before the court for further consideration and be replaced by a different sort of order.]*

**Precedent 8 Child Periodical Payments Order[[17]](#footnote-17)**

1 Humphrey will pay periodical payments[[18]](#footnote-18) to Winnie for the benefit of each of the Children, Charles at the rate of £[ ] a year and for the benefit of Charlene at £[ ] a year.

Payments will continue until the children respectively 1) reach the age of 18; or 2) end their full-time tertiary[[19]](#footnote-19) education, whichever happens last.[[20]](#footnote-20)

The court may (prior to these events or subsequently) order a longer period of payment.

2 Payment on these orders will start with the payment on [ ] in the sum of [] for the period of the subsequent month and continue monthly in advance.

3 The figures in paragraph 1 will stand increased on the anniversary of this order and at yearly intervals afterwards (“the Variation Date”).

The amount of the increase shall be the change (if any) between the retail prices index for the period 15 months before the Variation Date and 3 months before that date.

**Precedent 9: Indexation Order**

On “the Variation Dates” (which will be on the date of the payment due in [month] [year] and at yearly intervals afterwards, the periodical payments set out in clause [ ] *(spousal periodical payments)* and clause [ ] *(child periodical payments)* of this order shall stand varied automatically.

The change in the payments shall be the change, if any, between the retail prices index for [month] *[15 months before the date of the first variation]* which stands at [ . ] and the retail prices index for the month three months before the variation date.[[21]](#footnote-21)

[Additionally the payments will increase by 3.75%][[22]](#footnote-22)

**Precedent 10**: **Payment of Maintenance by Standing Order[[23]](#footnote-23)**

Humphrey will make payment of the sums due under clause [ ] *(spousal periodical payments)* and clause [ ] *(child periodical payments)* of this order by standing order to the following account:

|  |  |
| --- | --- |
| Bank |  |
| Sort code |  |
| Account number |  |
| Name of account holder |  |

**Precedent 11: Delayed Commencement Orders [[24]](#footnote-24)**

This order shall only start to have effect when the Child Support Agency ceases to have jurisdiction for [ child ] because s/he:

* are no longer in full-time, non-advanced education as set out in the Child Support Act 1991 s 55
* are excluded from jurisdiction of the agency owing to the habitual residence of the parties or the children

*[and then continue as with format for periodical payments order set out above eg at precedent \*]*

**Precedent 12: Order for Costs of Disability**

1 Humphrey shall pay periodical payments to Winnie for the benefit of Charles at the rate of £[ ] per annum to meet the costs of his disability.

2 Payments will continue until Charles 1) reaches the age of 18; or 2) ends his full-time tertiary education, whichever lasts longer.[[25]](#footnote-25)

The court may (prior to these events or subsequently) order a longer period of payment.

3 Payment will start with the payment on [ ] in the sum of [ ] for the period of the subsequent month and continue monthly in advance.

4 The figure in paragraphs 1 will stand increased on the anniversary of this order and at yearly intervals afterwards (“the Variation Date”).

The amount of the increase shall be the change (if any) between the retail prices index for the period 15 months before the Variation Date and three months before that date.

5 This order is made pursuant to s8(8) Child Support Act 1991.[[26]](#footnote-26)

**Precedent 13: Top-up Order**[[27]](#footnote-27)

1 Humphrey will pay periodical payments[[28]](#footnote-28) to Winnie for the benefit of each of the children Charles and Charlene

The Amount will be the sum, which, when added to the payments (if any) made by Humphrey to the Child Support Service pursuant to a calculation totals the following:[[29]](#footnote-29)

|  |  |
| --- | --- |
|  | £ p/a |
| Whilst both children are being paid for through the CMS: | £ |
| When there is only one such child: | £ |

Payments will continue until the Children respectively 1) reach the age of 18; or 2) end their full-time tertiary education, whichever is later.[[30]](#footnote-30)

The court may (prior to these events or subsequently) order a longer period of payment.

2 Payment will start with the payment on [ ] in the sum of [ ] for the period of the subsequent month and continue monthly in advance.

3 The figures in paragraph 1 will stand increased on the anniversary of this order and at yearly intervals afterwards (“the Variation Date”).

The amount of the increase shall be the change (if any) between the retail prices index for the period 15 months before the Variation Date and three months before that date.

4 In the event that by operation of r3 Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, this order shall be treated as discharged following the making of a maintenance calculation, there shall, immediately upon discharge be a new order corresponding to this and in like terms, including this provision for renewal. [[31]](#footnote-31)

**Precedent 14: School Fees Order [[32]](#footnote-32)**

1 Humphrey will pay periodical payments to Winnie for the benefit of children arising from Charles’ attendance at [school] and Charlene’s attendance at [school] or at such other schools they attend provided that Humphrey has agreed in writing to that attendance.

2 The payments shall be:

* the school fees
* any interest charged on the account for late payment
* extras charged on the bill
  + up to the total of £[ ] each term for each of them
  + or such greater sum as is agreed in writing between parties.

3 Payments shall be made in three instalments paid not less than one month before the beginning of the term to which they relate directly to the person indicated on the accounts as recipient for the school, from whom a receipt shall be a good discharge. [[33]](#footnote-33)

OR

3 Payments shall be made monthly by standing order to the account set out below and receipt by the school shall be as agent for Winnie.

|  |  |
| --- | --- |
| Bank |  |
| Sort code |  |
| Account number |  |
| Name of account holder |  |

4 This order is made pursuant to of the CSA 1991 section 8(7) as amended. [[34]](#footnote-34)

**Prec 15: University Fees Order and other arrangements**

#### Recital

[gap year arrangement]

1 Humphrey agrees to pay to [Winnie for the benefit of Charles / Charlene] [to Charles and Charlene] an allowance at the rate of [£] a month payable [monthly][3 monthly][as appropriate].

a) Payments shall commence on the first Monday in September following their respectively completing their A-levels and continue for the period of 13 months afterwards (the final payment being the following September) or for such shorter period as the children shall maintain their intention to attend University commencing in the academic year commencing in the second September afterwards.

b) However, during such period as Humphrey continues to be assessed for Child Support, in respect of each of the children no such payments shall fall due. [[35]](#footnote-35)

**Order**

[university fees payment

2 Humphrey shall pay periodical payments to [child] [and child].

a) The payments will be the sum equating to the fees charged by the University attended by the child[ren].

b) Payments will be made as and when they become due to the University, directly to the University as agent for the child.

c) This order shall stand discharged (in the absence of further order)

1) in the event that the child shall end attendance at the university (any repayment of fees belonging to Humphrey); or in any event

2) once [three] years’ fees have been paid.

[home element]

3 Humphrey shall pay periodical payments to Winnie for the benefit of the children during the periods that they shall continue in tertiary education to the end of their first degree course [[36]](#footnote-36)

Payments shall be made monthly in advance in the sum of £ [ ]

[direct support to child element]

4 Humphrey shall pay periodical payments to [child] and [child] during the period that they respectively continue in tertiary education to the end of their first degree course

Payments shall be made monthly in advance in the sum of [£ ]

##### [Administrative arrangements]

5 The payments at order 3 and 4 shall commence on the later of:

* the 1st Monday in October in the year in which they respectively commence attendance at university; and
* the end of any period during which Humphrey is being assessed for child maintenance

6 Those payments shall end on the earlier of:

* the children respectively leaving their course prior to its being completed; and
* the first Monday in the September [[37]](#footnote-37) following the children respectively completing their first degree course, with the final payment being made 30 days before that date for the calendar month ending on that date.

7. In the event that by operation of r3 Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, this order shall be treated as discharged following the making of a maintenance calculation, there shall, immediately upon discharge be a new order corresponding to this and in like terms, including this provision for renewal**. [[38]](#footnote-38)**

**Prec 16: Terminating CMS involvement [[39]](#footnote-39)**

**Recitals**

1. The parties have compromised proceedings between them as regards support for Charles under the Child Support Act 1991, as amended (“the CMS Case”).
2. Humphrey has claimed child support from Winnie. Winnie has appealed that application on the basis that she was not the non-resident parent as care for Charles was equal.
3. A compromise has been agreed whereby
   1. \*\*\* and
   2. that no further claims whatsoever would be made by Winnie against Humphrey or by Humphrey against Winnie in relation to Charles on the basis of this order and its agreements and undertakings.
4. In the event that further sums shall be taken from Winnie, pursuant to the calculation that the CMS has raised, Humphrey will take such steps immediately as shall be required to ensure its repayment.

**Declaration of intention not to apply to the CMS etc**

1. Although the parties accept that the jurisdiction of the CMS cannot be excluded for more than one year, neither party has any intention of applying to the CMS for a CMS calculation.
2. The parties have made application to terminate the tribunal proceedings between them relating to the CMS Case and to close the CMS Case and this order is made upon the basis that the parties will continue to do what is needed to achieve that termination as quickly as possible at their respective cost.

**IT IS ORDERED**

1. Unless Winnie is released from this indemnity by further order of this court, she shall indemnify Humphrey in relation to any claim (including costs or proceedings) that may be brought against him by the CMS.
2. Unless Humphrey is released from this indemnity by further order of this court, he shall indemnify Winnie in relation to any claim (including costs or proceedings) that may be brought against him by the CMS.
3. Liberty to apply

**Prec 16A: Terminating CMS tribunal proceedings**

Order made BY CONSENT under rule 32 Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 by Tribunal Chair [ ].

1. Upon reading the documents of the parties upon an appeal by the Appellant (“Winnie”) in relation to whether there is a non-resident parent (and if so their identity) under regulation 50 of the The Child Support Maintenance Calculation Regulations 2012
2. Upon the parties recording that £\* has been paid by Winnie to the 1st Respondent (“the CMS”) and that this sum is accepted by the CMS and the 2nd Respondent (“Humphrey”) as discharging in full the order below.
3. Upon Humphrey undertaking to the tribunal and agreeing with Winnie to take such steps as shall terminate with immediate effect this application (and any other that may have been issued by him).
4. Upon Winnie undertaking to terminate any application that she may have made to the 1st Respondent prior to the date of this order (she declaring that there is no such application).
5. Upon Winnie and Humphrey each undertaking to take such steps if any as shall enable any such application made by the other to be terminated forthwith.
6. This order is made upon the basis of an agreement to obtain an order from the Family Court sitting at \*\* making certain provision for the Child.

IT IS ORDERED:

1. By admission of Winnie and with agreement of the 1st Respondent and Humphrey, the tribunal finds that shared care shall be deemed to have existed on such date as shall generate a liability of the sum of £.
2. The Tribunal declares the case to be closed. No order as to costs.

**Prec 16: Disclosure permissionTerminating CMS involvement [[40]](#footnote-40)**

1. Leave to the parties to produce information disclosed in these proceedings to the CMS provided always that the parties will take on an immediate and ongoing basis such steps as will ensure that such information shall remain private to the parties of the CMS proceedings.

1. Ensure that definitions page is also used when using this precedent with its definition of “CMS” “CS alculation” and “Children”. [↑](#footnote-ref-1)
2. When financial arrangements are agreed at court, they will generally be part of an inter-dependent package. Parties may want to be able to rely upon a certain level of child support maintenance (“CSM”) and so feel vulnerable to steps being taken that may alter the anticipated level of provision. Parties will often want to record the level of CSM that exists or that they anticipate. They may want to record changes that they anticipate, for example the likelihood of a reduced income on the part of the NRP or their increasing their pension contributions or moving in to live with a person who has children, all of which would reduce the likely level of CSM. However, the enforceability of these provisions must be kept in mind. A court is unlikely to want to set aside its order on capital and spousal maintenance on the basis that there is an unexpected outcome as to child maintenance. Accordingly, perhaps the better approach is to accept that what will be will be as regards the Agency and simply focus on restricting the parties being able to pursue the potentially highly impactful variation application unless the calculation starts to fall outside this bracket.

   The Family Proceedings Rules, as amended by the FP (Amendment No 4) Rules 2005 regulated the release of information that was provided in proceedings relating to the maintenance of children. Originally there was a prohibition on the release of any information relating to the proceedings apart from the order itself. This stopped, for example, the wife who might want to copy the contents of her former husband’s form E to the CSA. She needed an order permitting her to do so. The FP (Amendment) (No 2) Rules 2007 reversed the assumption. There is blanket permission to release unless the court imposes a restriction, which practitioners may wish to seek from the court, eg where there is to be no variation for a period of years and the fear is that such information carries a risk of prejudice without the benefit of material assistance. (See now r11 FPR 1991.) [↑](#footnote-ref-2)
3. Note considerations discussed in Birch v Birch [2017] UKSC 53 as regards the variability of undertakings. [↑](#footnote-ref-3)
4. The global order cannot be used as a device to manage the unpredictable nature of a CMS award. Only if the recipient has an authentic claim in their own right to a spousal award (applying ordinary principles) can a spousal periodical payments order be made. (Dorney-Kingdom [2000] 2FLR 855. [↑](#footnote-ref-4)
5. This is a more sophisticated version of precedent 2. Whilst precedent 2 aims to exclude CSA application, this aims to time-limit that arrangement. Many clients are likely to find this a more appropriate arrangement, though it may be hard for them to think far into the future in this way, when they are managing the pressures of settling the other aspects of their case.

   This precedent aims to reserve the case to the jurisdiction of the court for, say, four years but then it will enable the parties to float free, perhaps to involve the CMS as circumstances may well have changed by this time and the CMS determination will of course often be completed for relatively nominal charge. [↑](#footnote-ref-5)
6. Note CH v WH [2017] EWHC 2379 (Fam) for logic permitting the court to order an indemnity rather than simply relying on the party’s agreement to do so. “Under the new s31E(1)(a) MFPA 1984 in any proceedings in the family court, the court may make any order which could be made by the High Court if the proceedings were in the High Court. The High Court has power to order or decree an indemnity. This is an equitable remedy originally vested in the Court of Chancery which was subsumed into the High Court by the Supreme Court of Judicature Act 1873. It was the very relief initially ordered in Salomon v A Salomon and Co Ltd [1897] AC 22 (but which was later set aside by the House of Lords as offending the rule about the separate legal personality of companies). As to mortgage and other outgoings in my view the power to order A to make payment to B plainly includes the power to order A to make payments on behalf of B.  The greater includes the lesser. It was necessary to spell out the power to order the payment of mortgage and other outgoings in Part IV FLA 1996 proceedings (see s40(1)(a)) because the wider direct power does not exist in those proceedings. It would be anomalous if the power to order payment of outgoings only existed in Part 4 but not FR proceedings. It is necessary in my view for the court to have these powers if only to cover the position if someone is not prepared to give the necessary undertakings or is not participating in the proceedings.”

   Where an order *can* be made, the usual approach is to make an obligation an order rather than merely an agreement and this approach is adopted here. [↑](#footnote-ref-6)
7. Ie the spouse-only element of the order. [↑](#footnote-ref-7)
8. This is not of course the form of the order made in the classic case of *V v V (Ancillary relief; Power to order child maintenance)* [2001] 2 FLR 799 but it takes a leaf out of (as he then was) Wilson J’s book, by policing the payment with a lump sum arrangement, bearing in mind that the court has power to make orders for lump sums for children at any time (s23(4) MCA 1973.

   So the court has power to make a series of lump sum orders. Either the payer makes the periodical payments ordered or he elects to make an application to the CMS, when this order seeks to remedy that betrayal of intent, because he will still have the obligation to pay the differential as a lump sum.

   The order also seeks to protect the payer against opportunistic application by the recipient as the PWC indemnifies the payer if he is landed with an increased liability beyond the agreed amounts.

   Bear in mind too that accounting difficulties may crop up. The Service may not recover sums referable to a particular time frame until later. Hearing of CMS appeals may retrospectively vary the levels of CSM liability. It may be hard to know precisely what payments should refer to the 12-month period.

   Ensure that definitions precedent is also used when using this precedent with its definition of “CSA” and “Calculation”. [↑](#footnote-ref-8)
9. There is no need to impose a time limit but one may be sought for the same reason as discussed in the footnote to the time-limited global order precedent. [↑](#footnote-ref-9)
10. Various district judges around the country have started to make use of this order as being the route which most effectively restores the family to the position under the old rules before the “one-year rule” appearing as s4(10)(aa) CSA 1991, introduced by the Child Support, Pensions and Social Security Act 2000 (creating the possibility of individuals committing to one level of payment one year and opting out the next by the simple expedient of an application to the CMS). It also carries the advantage of being succinct and less prone to misunderstanding than some of the other arrangements in this pack.

    Explanation of the scheme:

    * s4(10)(aa) reads, “no application [to the CSA] may be made at any time under this section with respect to a qualifying child... if a maintenance order made on or after the date prescribed for the purposes of paragraph a) is in force in respect of them but has been so for less than the period of one year beginning with the date on which it was made”.
    * The purpose of this order is to create a situation where there is:
      + no occasion where there is **no** order for the child; and
      + no occasion where the order that does exist for the child is more than a year old.
    * The court has powers to make more than one order with respect to the child - s23(4) Matrimonial Causes Act 1973 provides for periodical payments orders to be made “from time to time”, so the court has power to make a chain of orders at the outset that will meet these requirements and it is submitted that there are occasions where the considerations under s25 MCA 1973 require the court to consider this device.

    See the discussion as to its merits in *Child’s Pay* (3rd ed) page 142 - Mr Mostyn QC, as he then was, did not like it. But see also James Pirrie “Time for the courts to stand up to the Child Support Act? — An address to district judges”, [2002] Fam Law 114.

    Either party would have the ability to vary the order under s31 MCA 1973, as permitted by s8(3A) Child Support Act 1991. Effectively the application would be for the court to vary the entire chain of orders. [↑](#footnote-ref-10)
11. This series of precedents follows the view expressed in *Child’s Pay* by Mostyn J and others that solving the problem by ancillary contract is an acceptable way of proceeding. Authority for the arrangement may also be found in Smith v McInerney [1994] 2FLR 1077 as discussed by Mrs Justice Roberts in AB v CD [2017] EWHC 3164 at para 43.

    Those making use of this arrangement will usually:

    set out their intention by way of recital;

    provide the usual child maintenance order (see precedent 7); and

    have a separate agreement setting out the obligations to pay.

    They may also consider backing up the arrangement with a charge over the property of the PWC or NRP or both.

    Their advisors will raise the points discussed at page 13 above. [↑](#footnote-ref-11)
12. This agreement is designed to create a compensating debt to equate to any advantage secured by either party seeking to involve the CMS – it will need to be thought through carefully to ensure that it is appropriate to the circumstances of the case. For example,

    Should there be an interest clause?

    Should the debt emerge immediately for [re]payment or should this await the children’s departture from the home?

    Should the scheme be time-limited (on the basis that over time it may become wrong to hold the parties to an agreement made so much earlier).

    The arrangement may even be used, with appropriate warnings as to the risks to the husband/wife, to back up an arrangement for minimal child maintenance payments (eg where a substantial lump sum has been paid instead). What should be the quantum of the maintenance payment? The court may be disinclined to make a nominal maintenance order as the arrangement must be regarded as maintenance and there is surely a risk that a nominal order may be challenged as not really being maintenance at all.

    Bear in mind that unless further amended, the documentation will charge on the PWC’s property payments made following the child’s own application under Schedule 1 to the Children Act even if without the approval of the PWC.

    Parties may want to go further and bolster the obligations by a charge back – see next section. A charge back will be appropriate where either party has concerns about enforcement but is otherwise likely to be cumbersome and expensive to operate (eg if there is a wish to move primary lender where there is a commercial mortgage on the home). [↑](#footnote-ref-12)
13. The words in the bracket in paragraph 4 are likely to be required, to protect the innocent party. Otherwise, the opportunistic spouse might pursue a calculation from the CSA, knowing that it would produce a figure worse than the periodical payments arrangement and that they could then “cash in” on the penalties provided for by this agreement. [↑](#footnote-ref-13)
14. Consideration will need to be given to the appropriate trigger events for the date for repayment under paragraph 8. [↑](#footnote-ref-14)
15. Paragraph 9 will be used in the situation where the husband/wife pays a lump sum to secure freedom from future periodical payments but is content to continue to pay for schooling costs. [↑](#footnote-ref-15)
16. Practitioners may want to obtain this sort of order at directions appointments, in particular where higher earners are involved.

    * The parties may both agree that child support should be awarded at above-maximum figures.
    * The applicant may be concerned that the respondent will withdraw his consent before a final hearing.
    * The respondent may be content to purchase the applicant’s co-operation in not involving the CSA as the matrimonial case advances.

    What is needed therefore is an interim order that can then be varied at the final hearing. Of course the 12-month clock is likely to be ticking from the earlier (interim) date, unless the parties draft their order to terminate the old and create a new order. However, at least having this interim order will ensure a foot in the door as regards an above-maximum award (if the court agrees) for whatever period of the 12 months remains and, during this time, the applicant can pursue her maximum award with the CMS. [↑](#footnote-ref-16)
17. This is the standard order though the circumstances in which the court will have jurisdiction to make it are limited to where the CMS does not have jurisdiction, namely:

    * step-parent orders: the payer is not the natural or adoptive parent (eg the court order is against a party to the marriage who has treated the child as a child of the family (s23(d) Matrimonial Causes Act 1973)
    * foreign residence: on grounds of geography of the parents or child (s44 Child Support Act 1991)
    * university children: on grounds of the age of the child (s55 CSA 1991)
    * pre-separation orders: because the parents have not separated (s3(2)(a) CSA 1991); or
    * agreement: the circumstances of the case qualify under s8(5) CSA 1991 so the court is permitted to make the order.

    Note the wide range of persons who can make application as provided for in r2.54(1) Family Proceedings Rules 1991. [↑](#footnote-ref-17)
18. The order might be expressed as “interim” where there has been no final figure set but an immediate stream of income is sought or the court is going to vary the order to an appropriate level at a later hearing. [↑](#footnote-ref-18)
19. There may be good reason for replacing “tertiary” with “secondary”:

    The move to university will often be an occasion to change the arrangements for payment, perhaps with a split order, some payments going to the parent to help with vacation costs etc and some going to the child.

    Some district judges are reluctant to make awards for university where the children are young and the pre-conditions of s29(3) to the making of the order are seen as an obstacle: easier then to have the offensive order in a contained part where it can be red-lined out.

    If the order ceases to have effect following an application to the CSA then it is discharged for all purposes and would not revive to provide support for the child at university. However, a separate university fees order would not be susceptible to attack in this way.

    Please see precedents below for suggestions as regards university provision. If this scheme is adopted, then the order will be changed, but will be kept in line with the CMS scheme so as to fit well with the university arrangement which has been designed with the possibility of CMS provision for the children in mind. The following wording will be used to define the end date:

    *Payments will continue until the children respectively 1) reach the age of 18; or 2) end their full-time secondary education (being the first Monday in the September following completion of their secondary education), whichever happens last.* [↑](#footnote-ref-19)
20. Where there is a child with disabilities it may not be appropriate to provide for the maintenance to cease - see *C v F (Disabled child: Maintenance orders)* [1998] 2 FLR 1. [↑](#footnote-ref-20)
21. Think about which index: one that excludes variations in mortgage payments might be selected as more appropriate where the residential parent is purchasing without a mortgage. International cases will cause particular problems in index selection. (Do you use the index of the country in which the PWC is, which is likely to reflect her increasing costs? Or do you use the index of the country where the NRP is, which is likely to have some bearing upon his changed ability to provide? Or an average of both which may spread the problem if anyone is capable of managing the maths?) Note too that retail prices indexation will mean a slower rate of increase than a link to the average earnings index and the latter may be more appropriate if there is a desire to avoid the recipient’s income beginning to lag behind the levels to which the payer’s income is more likely to rise.

    Do you have upwards-only variations or is it fully variable up or down if the RPI heads downwards? If there is a ratchet, then is there catch up if the economy changes between the different years? A fully variable indexation may be fairest and simplest. [↑](#footnote-ref-21)
22. An additional indexation may be adopted by those who are aiming to avoid having to revisit the legal process again (unless an unexpected change of circumstance crops up) and who seek a scheme with automatic increases to reflect increased costs as children grow older. The Fostering Network’s statistics are discussed in the FLBA’s *At A Glance.* Smoothing the increases across the years, a 3.75% annual increase (on top of any inflationary change) is arrived at. [↑](#footnote-ref-22)
23. When making a maintenance order, or in later proceedings for its variation or revocation, the court may order payment to be made by standing order or some other similar method (s1(4) -(5) Maintenance Enforcement Act 1991).

    A defaulting party (but note that the court must be satisfied that the debtor has failed without reasonable excuse to open an account) may be ordered to open an account for the purpose of paying maintenance by standing order or other similar method (s1(6) MEA 1991).

    [↑](#footnote-ref-23)
24. These animals are rarely seen in orders but perhaps should be more common. The problem arises through the wording of the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992 (SI 1992/2645) reg 3, which provide that court orders “cease to have effect” when a calculation is made.

    We are not aware of the problem being argued routinely but it must follow that an order made for the 14 year old, intended to carry him through his university education is effectively dead when, the following year, his father makes application to the CMS. This was certainly the view taken in *Askew-Page v Page* [2001] Fam Law 794, where the judge held that “cease to have effect” means extinguish irrevocably — as such it is *not rendered* dormant to revive when the Agency’s jurisdiction expires.

    We suggest that the solution is for there to be a separate order – if it has not started to be effective at the time of the CS calculation then it can’t “cease” to have effect and so this “delayed commencement order offers secure arrangements for provision for the child eg as s/he enters university.

    Pedants would insist on separate orders for each child for fear that the first child would render the order effective whilst the second child offered the opportunity for a CS application to discharge the order.

    [↑](#footnote-ref-24)
25. Disabilities will often involve an open-ended order. See *C v F (Disabled child: Maintenance orders)* [1998] 2 FLR 1, with liberty to the paying party to apply for discharge. [↑](#footnote-ref-25)
26. Section 8(8) of the Child Support Act 1991 provides that the court is not prevented:

    *“from exercising any power which it has to make a maintenance order in relation to a child if*

    *a) a disability living allowance is paid to or in respect of him; or*

    *b) no such allowance is paid but he is disabled.*

    *and the order is made solely for the purpose of requiring the person making ... periodical payments ... to meet some or all of any expenses attributable to the child’s disability”.*

    Only certain disabilities can be provided for in this way. The terms of s8(9) are restrictive, providing: *“a child is disabled if he is blind, deaf or dumb or is substantially and permanently handicapped by illness, injury, mental disorder or congenital deformity or such other disability as may be prescribed”.*  No further prescription has been made at the time of going to print in June 2018.

    It is probably particularly important to include this clause if there is intention to make use of the CMS immediately afterwards. The logic from *Secretary of State for Social Security v Foster* (Unreported, 4 Dec 2000), (2001) 161 *CPAG Welfare Rights Bulletin* 12, might otherwise be applied here – see discussion in footnote to precedent 14 below. [↑](#footnote-ref-26)
27. The order can only be made where a maximum assessment is in place, not merely because one is anticipated (s8(6) Child Support Act 1991). A maximum assessment is where the NRP’s net income exceeds a threshold set out in para 10(3) of Sch 1 to the amended Act, currently gross income of £3,000 per week.

    * Charles J took the view obiter at para 4 of *CF v KM* [2010] EWHC 1754, that the court could adopt jurisdiction where a maximum assessment was likely;
    * This view was dismissed by Holman J at para 30 of Dickson v Rennie [2014] EWHC 4306 (Fam)

    [↑](#footnote-ref-27)
28. The order might be expressed as “interim” where there has been no final figure set but an immediate stream of income is sought or the court is going to vary the order to an appropriate level at a later hearing. [↑](#footnote-ref-28)
29. Particular care will be required in drafting this order where there is more than one child; there are two difficulties with which to contend:

    * Children will drop out of CMS jurisdiction at the end of secondary education and this may mean that the CMS calculation changes.
    * Under CMS regulation, assessments are made for the family unit whereas under the MCA, payments are made for the benefit of the child.

    Say, for example, there are two children, aged 17 (and about to leave school) and 12, and it is desired to bump the payments up to £25,000 for the children between them. The father earning £105k net will be paying £20,400, so the difference of £4,600 sounds simple enough with payments of £2,300 per child. However, in six months’ time, say, the CSA calculation will have dropped to £15,300. The “simple” solution may be to provide for payments of £4,850 per child but then what distortions take place when the elder child goes into work instead of university? The problem needs to be unwrapped carefully and the thresholds of change assessed and dealt with by way of the table that we have shown. [↑](#footnote-ref-29)
30. Where there is a child with disabilities it may not be appropriate to provide for the maintenance to cease. See *C v F (Disabled child: Maintenance orders)* [1998] 2 FLR 1. [↑](#footnote-ref-30)
31. Although it is not a problem which we are aware has cropped up in practice, note the provisions of s10(1) CSA 1991 and reg 3 Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, which appear to be insufficiently thought through so far as top-up orders from the court are concerned. These provisions set out that where a calculation is made then any order (apart from ones made under s 8(7) [education] or s8(8) [disability] CSA 1991) ceases to have effect.

    So that would suggest that on the anniversary of each order, when matters are reconsidered, if a new calculation is issued then this would, each year discharge the top up order.

    This problem may be acute in cases of Schedule 1 Children Act claims where what is at stake may be significant and where, if the paying parent has relocated abroad, real issues of enforcement might emerge.

    This rather wordy clause is provided in an endeavour to address the problem. We would welcome practitioners sharing any experience they have had in this area ( [jp@flip.co.uk](mailto:jp@flip.co.uk) ) [↑](#footnote-ref-31)
32. As practitioners focus upon their negotiations, they must also remember to bear in mind who is actually liable on the school fees account. A Husband may wish to have no exposure beyond the court order. The Wife is likely to want him to be directly liable to the school. In the latter case and in the event of the husband becoming unable to pay the school fees, he will need not only to apply to vary the court order but also give notice to end his contractual liability in accordance with the terms issued by the school. [↑](#footnote-ref-32)
33. For many years we have been deeming such individuals “agents” for one parent; Birkett’s Oliver Gravell points out that s23(1)(c) permits the court to make orders “*to such person as may be specified in the order* for the benefit of a child of the family … such periodical payments” [emphasis supplied], clearly no such device is needed. [↑](#footnote-ref-33)
34. The s 8(7) CSA 1991wording is incorporated to lake account of the logic applied in the case *Secretary of State for Social Security v Foster* (Unreported 4 Dec 2000), (2001)161 CPAG Welfare Rights Bulletin 12. An Order was made by consent in June 1988 for Mr Foster to pay one half of the school fees. No other forms of maintenance were provided for.

    * Was this a maintenance order within the meaning of the s 4(10) of the 1991 Act, which therefore prevented Mrs Foster from making an application to the Child Support Agency?
    * Mrs Foster argued that the order for payment of the school fees was not general maintenance but was clearly akin to the educational Order under CSA 1991 s 8(7), which does not transfer jurisdiction for general child maintenance to the Child Support Agency.
    * “No” said a strong Court of Appeal. The duty to maintain the child includes a duty to cause the child to be educated and so payment of school fees are part of a child’s general maintenance and so did operate as a bar to Mrs Foster applying to the CSA by operation of s4(10) CSA 1991.

    This is a catch that may crop up regularly: court order first and CS jurisdiction afterwards is likely to be the norm as very often parents will be making financial orders, including school fees orders, to enable them to move on, purchase new accommodation and separate. It is only when they do separate that they can then approach the CSA. It will be important that they do not unexpectedly find the Agency refusing to take on their case upon the basis that there is a maintenance order (within the meaning of CSA 1991 s 8(11), which prevents the Agency’s involvement by operation of CSA 1991 S 4(10).

    Whilst the wording of this precedent makes the intention absolutely clear, it may not provide protection and the CSA may still refuse to become involved. The PWC then falls into a gap: the court can only make an order for edu­cational costs and the CSA cannot make any provision at all. Alternatives include:

    Refuse to have any educational order until an application to the CSA has actually been made and accepted.

    Express the obligation in relation to schooling costs in contract or by way of undertaking between the parties

    Ensure the father is directly contractually liable to the school and rely on that

    Of course, such courses may be the better course in any event. Many parents who feel that they are providing generously for their children may feel somewhat taken aback to see responsibility that they fully embrace the subject of a court order … as if they ever had any intention of failing to pay the sums.

    Here the following wording might be adopted:

    *Humphrey and Winnie agree*

    *1 That Humphrey will pay*

    * *the school fees*
    * *any interest charged on the account for late payment*
    * *extras charged on the bill*
      + *up to the total of £[ ] each term for each of them*
      + *or such greater sum as is agreed in writing between parties.*

    *2 Payments shall be made in three instalments paid not less than one month before the beginning of the term to which they relate directly to the school and notifying Winnie when the payment has been made.* [↑](#footnote-ref-34)
35. Bear in mind the provisions of Maintenance Calculation Procedure Regulations 2000 sch 1 para 5 that CS liabilities continue until the 1st Monday in September following the completion of A-levels. However, this provision aims to ensure that there is no double payment. [↑](#footnote-ref-35)
36. In appropriate cases, an agreement by the residential parent to keep the paying parent informed as regards decisions to leave the course might be imposed. [↑](#footnote-ref-36)
37. Depending on whether support is to be extended for a period for the child to get themselves on their feet after the end of the degree course. Some will regard the June or July payment as appopriate. [↑](#footnote-ref-37)
38. Although it is not a problem which we are aware has cropped up in practice, note the provisions of s10(1) CSA 1991 and reg 3 Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992, which appear to be insufficiently thought through so far as top-up orders from the court are concerned. These provisions set out that where a calculation is made then any order (apart from ones made under s 8(7) [education] or s8(8) [disability] CSA 1991) ceases to have effect.

    So that would suggest that on the anniversary of each order, when matters are reconsidered, if a new calculation is issued then this would, each year discharge the top up order.

    This problem may be acute in cases of Schedule 1 Children Act claims where what is at stake may be significant and where, if the paying parent has relocated abroad, real issues of enforcement might emerge.

    This rather wordy clause is provided in an endeavour to address the problem. We would welcome practitioners sharing any experience they have had in this area ( [jp@flip.co.uk](mailto:jp@flip.co.uk) ) [↑](#footnote-ref-38)
39. There should – of course – be a simple procedure for this. Whatever clarity might have existed in the statute disappeared with amendment to para 16 of schedule 1 of the Child Support Act 1991. It is still possible but this seems to me a matter of practice rather than rule. Thus practitioners should be careful in their orders to spell out

    the basis of the agreement

    giving clear undertakings and agreement on both parties sides to do whatever is needed; and ideally

    introducing a mechanism so that overpayments beyond the intended agreement are brought into account.

    The circumstances in which this may be done are varied and so this precedent must be treated as an indication and very much one to be formed around the particular circumstances of the case.

    Where a tribunal appeal is underway, usually an order by consent will be needed in those proceedings, making use of rule 32 Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. [↑](#footnote-ref-39)
40. See FPR 2010 PD 9B <https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-9b-communication-of-information-from-financial-remedy-proceedings> for the rules.

    However, note that r30 Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) rules provide that generally hearings are held in public. Often at the point of disclosure, the tribunal will not be seized of the case (such that directions that the hearing is in private as is provided for at r30(3) could be made). [↑](#footnote-ref-40)