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Promoting parental responsibility and enforcement simultaneously in the child maintenance system; are these policy aims consistent?

The UK's child maintenance system has been a breeding ground for criticism. The reforms under section 136 of the Welfare Reform Act 2012, which seek to charge users of the Child Support Agency (CSA) in order to encourage more parents to opt for making private arrangements, have been the latest target of critics of the UK's child maintenance system. Since the introduction of the CSA in 1993, the government has continually reformed the system, changing the name, structure and goals of whichever body it has, at that time, allocated to deal with these matters, so it is no wonder that academics, journalists and users of the system, alike, have so vehemently opposed yet more change. Whilst reforms have moved in the direction of promoting parental responsibility, meaning that less people will be reliant on government services, they have also sought to establish a rigorous enforcement system. This begs the question, what is the point in creating such a tough enforcement system if it is not applicable to private agreement cases? I propose that despite the apparent inconsistency in policy aims, this is not inconsistent on a closer inspection. Whilst affording responsibility to some parents to make financial arrangements for their children in some instances can have positive effects, it cannot be denied that some parents simply will not co-operate. It is only in *these* cases that it is essential that the enforcement system will be used, to protect the welfare of their children. As the state must be aware, from having implemented these enforcement regulations, that these cases *do* exist, it is foolish that they are dissuading couples from using assistance from statutory bodies, not only by promoting private agreements generally but by introducing these seemingly punitive charges under the latest reforms.

In this essay I seek to demonstrate that parental responsibility and effective enforceability can co-exist as policy aims in the UK's child maintenance system. I shall begin by outlining how the current child maintenance system came about, and why these policy aims, as they are, might appear to be inconsistent. I shall then go on to explain how this supposed inconsistency could be overcome, and examine in more detail the importance of maintaining these two objectives.

The UK's current policy aims and how they came to be

The idea that where the parents are able to take responsibility for their child, that the parents, as opposed to the State, *should* take responsibility for the child, has been of growing importance since

the 1980s. In the case of *Re G,* Baroness Hale drew on Blackstone's idea that parents have an obligation to maintain their children as a matter of natural law. When the CSA was created in 1993, its purpose was to ensure that those formally liable to support children *were* doing so, and that single mothers had an incentive to assist benefit authorities in giving details of the father of the child which previously did not exist, leaving many single parents relying on the State. As this system suffered administrative difficulties, following Sir David Hernshaw's 2006 report, a new body promoting responsibility further by empowering parents to make their own maintenance arrangements and radically reforming enforcement methods was created; the Child Maintenance and Enforcement Commission (C-MEC). However, in 2011 it was decided that C-MEC would be disbanded, and their work would be taken up by the Department for Work and Pensions (DWP), alongside the former CSA and new Child Maintenance Service (CMS), in order to strengthen accountability and efficiency[1] and implement the latest reforms under the Welfare Reform Act 2012.

The two predominant policy goals behind current legislation, in addition to ensuring children are paid maintenance, are promoting parental responsibility and maintaining a system that allows action to be taken through an effective enforcement regime. It might also be argued that there is an inherent inconsistency between these two additional aims. On the one hand the government wish to give utmost responsibility to parents in making private maintenance arrangements, but on the other hand the government want to ensure parents are paying maintenance where due, thus making it necessary for third parties to intervene and thus revoking the responsibility parents are being given to make their own private arrangements in the first place. For instance, if a private arrangement agrees that the non-residential father will pay no child maintenance to a child, the government would find this suspicious and want to enforce that child maintenance must be paid. It is not doubted that parental responsibility should be promoted, however it might be that this should only be in certain instances. In either instance, it is questionable whether the recent reforms achieve this result. The more controversial issue is the issue of enforcement, and whether the Child Maintenance and Other Payments Act 2008(CMOP) goes too far on this matter.

<u>What *should* the current child maintenance system be seeking to achieve?</u>

It is submitted that both parental responsibility and enforcement are important goals in their own right, in order to supplement the main goal of providing financial support for the child. These can both be valid policy aims of the system, although they must not be confused. For them to make

[1] Government response to consultation on the abolition of CMEC, March 2012, http://www.dwp.gov.uk/docs/cmec-abolition-consultation-response.pdf

sense, they must be separated, so that if parental responsibility is given, it is assumed that parents will not need enforcement. If parental responsibility cannot be given, it is *then* that we need a good enforcement system.

I shall now examine the importance of each of these aims in more detail:

1. Promoting parental responsibility

Although in the past the idea of a 'clean break', in receiving upfront capital rather than income based support, has been put forward as a favourable option for parents, in that their children will not be subject to a hostile environment, it is now the preferred option that parents are made to negotiate private agreements, and co-operate together not for the sake of their own relationship but for the sake of their children. Although hostilities may be created amidst making these agreements, the idea is that the best option for the child will be made. It is the *CMOP 2008* that encourages parents to use private maintenance arrangements first, rather than resorting to the State. The idea behind this came from a combination of two of Hernshaw's report recommendations. Firstly, was the Thatcherite idea that the State should only get involved when parents were unable to come to agreements themselves, or when intervention was necessary as one party was not cooperating or evading their financial responsibilities. Secondly, was the idea that if parents are encouraged to make their own arrangements this will lead to higher satisfaction. One of the main advantages of private agreements, under the CMOP 2008, is the flexibility it gives. The guidelines that the CSA would otherwise enforce would be much more rigid, as it is not bureaucratically possible to take into account all applicants' current earnings. Instead, the system used under the CSA is that designed by Hernshaw, whereby the CSA calculates maintenance payments by looking at the the gross income of the last year of the non-residential parent. Under this system, an extreme change in circumstances will only be taken into account if the non-residential parent can show that their income has fluctuated by more than 25% in the current year, meaning that those falling just short of this cut-off point can be left disadvantaged. Using a private maintenance agreement makes it likely that these sorts of problems will be avoided, as parents are able to discuss and negotiate any current financial problems they are having or might be likely to endure in the future.

The CMOP allows that if an agreement cannot be reached or turns out to be unsatisfactory to one or both parties, the parents are *then* given the option to make an application to CSA for a child maintenance calculation in accordance with section 4 of the Child Support Act 1991 (CSA 1991), or soon exclusively the CMS under the Welfare Reform Act 2012. Two questions must be addressed concerning the empowerment of parents in making their own decisions, even if they do appear to be

capable of making these sorts of decisions themselves. Firstly, is the question of whether this system promotes parental responsibility for those parents who may be pressured into making unfavourable decisions or not. This may be a problem particularly in cases where there has been domestic violence, as one party may feel that due to being pressured into an arrangement they are not satisfied with they feel less inclined towards asserting their parental responsibility. In giving an option for non-intervention at all, the state risks not protecting some of the most vulnerable parents. Secondly, the question arises, does this empowerment actually promote parental responsibility, or are we just encouraging parents who are already responsible to come forward? Whilst vulnerable parents may have to suffer for a year in an unfavourable agreement, those parents who are capable of negotiating a private agreement have their parental responsibility undermined by further legislation. If a couple wish to enshrine their private agreement they can file for a consent order, which makes the agreement binding. However, this is only for one year, after which either party are free to go behind the other parties' back and apply for a maintenance calculation from the CSA. Despite the advantages of a state safety net being available to both parties to the agreement, it undermines any certainty that may result from a private agreement and does not necessarily mean both parents can plan ahead for the child, especially if they are dependent on certain maintenance provisions.

It must be remembered that although the government should continue to encourage parental responsibility and private agreements, they should not go as far as imposing it on all families. An argument in favour of encouraging as many couples as possible to resort to private agreements is that evidence has shown that these sorts of agreements have turned out to be more successful, in that enforcement methods have, ultimately, not needed to be used. However, considerations must be given to the self-selecting nature of these arrangements. Couples who have ultimately agreed to take parental responsibility and use their own financial agreement will most likely get on with each other in the first place, which will have been the sole reason they did not need to revert to using the CSA, and they are thus more likely to keep to their arrangements. On the contrary, it is logical that evidence suggesting that compliance rates with CSA arrangements are not as successful as those made privately due to the nature of the couples having to use the service. As the CSA has stated, a substantial proportion of the client base were found to have had 'difficult relationship circumstances with the other parent' with 49% reporting they had either no contact, or a poor relationship with their ex-partner.[2] In these cases, the CSA (until 2014[3]) and the CMS should help make provisions for

[2] Child Support Agency client insight research conducted by PwC, 2007-8, http://research.dwp.gov.uk/asd/asd5/summ2007-2008/471summ.pdf

[3] When regulation governed by the CSA is suspended in 2014, couples will be redirected to use the CMS which is currently operating to be used on all cases from 2012

couples, rather than continue to persuade separated couples to adopt a private agreement, as the new section 136 reforms do, without putting obstacles in the way.

The latest reforms under section 136 of the Welfare Reform Act 2012 have also been designed to promote private ordering further, and will come into force entirely by 2014 when all CSA cases will be transferred to the CMS. The government has said that not only will this make separated couples consider private agreements more seriously, but it will save the taxpayer money.[4] These reforms would impose a £20 application fee on the parent with care, if that parent wished for their case to continue to be handled by a statutory body; this would only be waived if the parent declared they are a victim of domestic violence and had reported this to a relevant body. An additional percentage of the maintenance payments, proposed at 7%, would be kept by the CMS, if the parent required the CMS to collect these payments for them. Although the DWP predicts this will reduce the annual running expenses of the service, the reforms have evoked great criticism. Charities supporting single parents like *Gingerbread* have suggested that these payments will discourage parents to continue using child support systems, leaving a government estimated figure of 100,000 families unlikely to receive any child support payments. If these parents are forced together to make a private agreement, this may result in more disputes, animosity towards the child, or even violence.

As a private financial agreement may allow for more attractive arrangements to one or both parties to be made, or even more money going to the child than would do under the state system, they are a preferable option which releases pressure from the CSA and CMS in dealing with more cases than it can cope with, and the government should continue to encourage these agreements, but only where possible.

2. The question of enforcement

As has already been discussed, in order not to contradict giving parental responsibility, state enforcement should only be used if state arrangements are being followed. In these instances, state arrangements have been turned to because the risk of non-compliance is thought to be higher than if a private arrangement had been made. There is no question that the enforcement of the child maintenance system in these instances needs to be effective; otherwise there would be no point in its existence. For that reason it is important that the methods available for enforcement are flexible and take account of different circumstances. Enforcement methods are wide-ranging now which include the DWA using information provided by the tax authorities, collecting payments from employers of the parents or from the parents themselves, right through to the ability of the DWA to

[4] The government has said that it costs the current CSA 40p for every £1 collected for child maintenance. http://www.gingerbread.org.uk/content/577/Why-charge-for-a-new-child-support-service

take personal property (under the CSA 1991 s35), make debt and charging orders, and take the culpable parent to court as in *R (Sullivan) v Luton Magistrate's Court* 1992 after they wilfully refuse or culpably neglect to pay the maintenance required. Problems have arisen from specific groups of people, namely poor groups who the tax authorities are less likely to follow up and search for the details of, and the self-employed whom the CSA cannot collect payment off of via the method of a 'deduction from earnings order'.

The most controversial enforcement method which was introduced, despite initial objections in 2008, was the 2009 introduction of ss39 B-E amending the CSA 1991, allowing for the DWA to exercise a new power to disqualify a parent from driving or to confiscate their passport. At the time of these statutory implementations, the C-MEC justified these powers as both 'necessary' and 'proportionate' to enforcing child maintenance to be paid under article 8(2) ECHR, with the government claiming that these actions are not meant to punish the parent but rather to encourage them to pay their debts. Human rights activists, as well as the Joint Committee on Human Rights have condemned these provisions saying that these sorts of enforcement methods should be at the disposal of the court rather than at that of an administrative body. Another controversial issue regarding enforcement is that following the decision in *R (Kehoe) v Secretary of State for Work and Pensions* 2005, individuals are unable to enforce payment themselves by way of court order, as this is the role of the CSA. The case went to the European Court of Human Rights who asserted that the decision of the House of Lords did not violate the applicant's human rights, and said the mother wishing to invoke the payment could have spent time applying for judicial review on the basis that she had the time to enforce the payment herself.

Conclusion

We can conclude that these policy aims are consistent. However, if the government are committed to their aim of parental responsibility, they need to adhere to this and not intervene, as is currently the case. Whilst parental responsibility should be encouraged, it should only be given where *both* parties independently elect to make a private arrangement. In these instances it will be assumed that the only involvement by the state might be periodical monitoring, under the guise of time-limited consent orders. It is in cases where parents are unable to negotiate with each other, be it for reasons of animosity or domestic violence, which a tough and effective enforcement regime may ensue. In these cases couples should *not* be forced into making private negotiations, which might create more problems either for the couple, or for the child, when they ultimately lose out on receiving any maintenance payments at all. For this reason, reforms like those under section 136 of

the new Welfare Reform Act should be abandoned. Whilst the current scheme does not solve all of the issues facing the child maintenance system, which may include some mothers being pressured into undesirable private arrangements behind closed doors, it continues to provide help to those who need it. It is imperative that the government do not push these reforms any further in the direction of making private agreements compulsory for all.