



Child Support

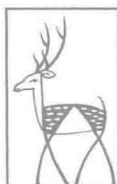
Law and Policy

NICK WIKELEY

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CHILD SUPPORT

Written by one of the UK's leading scholars of welfare law, this book analyses the current child support legislation in its broader historical and social context, synthesising both doctrinal and socio-legal approaches to legal research and scholarship. It draws on the historical and legal literature on the Poor Law and the development of both the public and private law obligation of child maintenance. Modern child support law must also be considered in the context of both social and demographic changes and in the light of popular norms about child maintenance liabilities. The main part of the book is devoted to an analysis of the modern child support scheme. The following key issues are addressed: the distinction between applications in 'private' and 'benefit' cases and the extent to which the courts retain a role in child maintenance matters; the basis and justification for the exception from the obligation for parents with care on benefit to co-operate with the Child Support Agency where they fear 'undue harm or distress'; the assessment of income for the purposes of the formula and the evidential difficulties this entails; the tension between the formula, which ignores the parent with care's income, and the demands of distributive justice; the further conflict between the formula, under which liability is capped only for the very wealthy, and the traditional approach of private law, which is premised on children being entitled to maintenance rather than a share in family wealth; the treatment of special cases under the formula by way of 'variations' (formerly 'departures'); the nature of Agency decision-making and the scope for appeals; and the efficacy of the provisions relating to collection and enforcement. The final chapter explores the factors which impact on child support compliance and considers various models for redesigning the child support scheme.

FOREWORD

No child asks to be born, though few regret it for long. It ought to be self-evident that every child has the right to be cared for and brought up to adult self-sufficiency. It also ought to be self-evident that the corresponding obligation should rest primarily upon the two people responsible for bringing the child into the world. The child has the right to expect what they collectively are able to provide for him. If they are living together, they take it for granted that they should share this task and that the child should share their standard of living. Most parents take great pride and pleasure in doing this. They work out between themselves how to manage their shared responsibilities. One may do more of the actual caring and the other do more to find the money necessary to fund it. As their circumstances change, so will their arrangements change. Little negotiations about who does what happen every day; larger negotiations happen every so often, usually when milestones in the child's or the adults' lives are reached.

But if the parents are living apart, all that sense of a shared enterprise can quickly disappear. If they have never lived together, it may never have developed at all. Everything becomes at once more rigid, more complicated and more formal. The easy interaction which a father had with his children when he came home from work now has to be planned. The shared bank account is wound up, the bills no longer routinely paid, the house-keeping allowance a thing of the past. The caring and financing roles are more sharply divided. Small wonder that, even with the best will in the world, endless opportunities arise for misunderstanding and disagreement. And the best will in the world is not always to be found between parents who no longer live together. Yet the child still has exactly the same needs, and the same rights, as he had before. He also has some new ones. Two households cannot live as cheaply as one. Nor should he be made to suffer because of his parents' differences.

The moral and legal case for parents to go on looking after their children after they separate is taken for granted. Why then have we been so slow to recognise the moral and legal case for parents to go on financing that care after they have separated? We in the courts have not always helped. Perhaps this is because the power to order parents to make meaningful financial payments for the benefit of their children is of remarkably recent origin. Even when we had that power, the courts were for some time content to allow the State to take over or underwrite the main financial burden. We preferred to promote a clean break and preserve the family home for the children and their carer. When we made an order for support, we left

it up to the recipient parent to enforce. We cannot be surprised that the State stepped in to nationalise the assessment and enforcement of this basic obligation. Much reviled though it has been and continues to be, the child support scheme has made a difference. It could make a much bigger difference if it became as effective as similar schemes elsewhere in the common law world.

All this is made very clear by Professor Wikeley's penetrating and scholarly analysis. The days before the Child Support Act 1991 were not a golden age for children and their carers. Nor have the days since then been such a dark age for the parents with whom they no longer live, if they ever did. But there is a great deal to be done in order that the vision of the scheme can be properly recognised and achieved. There is still a great deal to learn from the comparative successes of Australia and the United States. We can still hope that the latest review will lead to a scheme which, if not universally liked, is at least generally thought to be sensible, fair and efficient.

I certainly look forward to the day when the appellate committee of the House of Lords does not have to consider four cases about child support in less than a year.¹ Only one of those concerned a point of universal principle, the treatment of same sex couples in the calculation of child support. The others all arose, one way or another, from frustration with the inefficiency and occasional absurdity of the current system. This is not a conventional legal text book with a little commentary thrown in. In laying bare the precursors, the principles, the practice and the policy, Professor Wikeley has done lawyers, policy-makers, parents and children a great service. It is also timely. He almost makes me believe that we could make things better for the children we are there to serve.

Brenda Hale
House of Lords
30 May 2006

¹ *R v Secretary of State for Work and Pensions ex p Kehoe* [2005] UKHL 48; *Secretary of State for Work and Pensions v M* [2006] UKHL 11, *Farley v Child Support Agency* [2006] UKHL 31 and *Smith v Secretary of State for Work and Pensions* [2006] UKHL 35.

PREFACE

This book examines the law and policy relating to child support. It is widely acknowledged that the Child Support Agency in the United Kingdom, which started operations in such difficulties in 1993, remains in a state of crisis. At the time of writing, the Government is awaiting the recommendations of Sir David Henshaw, who is undertaking a further 'root and branch' review of the child support system. This book offers no easy solutions; rather, it takes a step back and seeks to address a number of fundamental questions—what is the purpose of child support? How did we get where we are today? What is the legal framework of the child support system? What are (and should be) the principles underpinning the current and any redesigned scheme?

At the outset, however, I should make three points about the coverage of child support issues in this book. The first is that this is principally a book about the 'new scheme' which operates under the Child Support Act 1991 as amended, especially by the Child Support, Pensions and Social Security Act 2000. Accordingly, the detailed analysis that follows is centred on the law which has applied since 3 March 2003. As well as the legislation itself, this includes consideration of the jurisprudence developed by the Child Support Commissioners (on the numbering system used in this branch of case law, see pages 431–32 below). It is true that the Child Support Agency's caseload today includes many 'old scheme' cases under the original 1991 Act, which are therefore still governed by the law that applied to child support applications made between 5 April 1993 and 2 March 2003. However, this book is long enough as it is, and time and space do not permit a full account of the finer points of the old scheme legislation. Subject to that rather large proviso, I have sought to state the law as it stands at 1 June 2006. It follows that this book has been written before the publication of the Henshaw Report, as well as before the delivery of the opinions of the House of Lords in *Smith v Secretary of State for Work and Pensions* (discussed at page 353 below).

The second point is that there are in fact two child support jurisdictions in the United Kingdom—one in Great Britain and a parallel system in Northern Ireland. Although the primary focus of the discussion in this book is on Great Britain, there are references to the Northern Ireland case law as the child support regimes are effectively identical. I have also drawn attention in appropriate places to the differences that exist within Great Britain, not least as Scotland has its own legal system and so the child support scheme there operates in the context of a distinctive family law jurisdiction.

The third matter relates to questions of style. I have adopted the usage of referring to the non-resident parent as 'he' and the person with care (or parent with care) as 'she'. Obviously this does not apply in every case, but it reflects the overwhelming majority of arrangements in practice, a point recognised by the terms of the legislation itself (see Child Support Act 1991, section 6(7)). For the avoidance of doubt I should add that I have used 'CSA' throughout as the standard abbreviation for the Child Support Act, rather than for the Child Support Agency (unless an original quote describes the Agency as the 'CSA').

The chapters of this book are divided into three main sections. Part I of the book explores the basis for the child support obligation (chapter 1) and traces its evolution in both public law and private law in the United Kingdom (chapters 2 to 5). Chapter 6 examines the international experience of formula-based child support schemes, principally in the United States of America and in Australia. I would hope that all those interested in child support law and policy, lawyers and non-lawyers alike, would find Part I of interest.

Part II is the heart of the book and consists of a detailed analysis of the 'new scheme' which has been in place since 3 March 2003. Chapter 7 explores the boundaries between the statutory child support scheme and the role of the courts, while chapter 8 defines the personal scope of the 1991 Act—so it considers who is a 'non-resident parent', a 'parent with care' and a 'qualifying child' respectively for the purposes of the legislation. Chapter 9 examines the ways in which an application for a child support maintenance calculation may be made and the role, and information-gathering powers, of the Child Support Agency. Chapters 10 to 12 explain the principles governing the child support formula, the assessment of income and the circumstances in which a variation from the formula may be sought. Chapter 13 analyses the arrangements for complaints, reviews of Agency decisions and appeals, while chapter 14 deals with the collection and enforcement of child support liabilities. Overall, Part II has been designed to provide an authoritative and comprehensive account of the legislative framework, as elaborated by the relevant case law. It may be that only a true 'child support techie' (ie a person who displays an enthusiastic, if not obsessive, interest in the detailed minutiae of child support law) will wish to read Part II from beginning to end. On the other hand, the doctrinal analysis of child support law has been developed with an eye to the policy issues underpinning child support law, and so it is hoped that non-lawyers (and indeed non-techie lawyers) will also find it illuminating.

Part III of the book, which comprises the concluding chapter 15, seeks to bring together the main themes of the book, and to explore ways in which compliance with the child support scheme might be increased in the light of the Government's current review and projected redesign of the child support system. If this book goes into a second edition, it is safe to assume that there will be rather more to say in this final section.

I must also express my sincere thanks to all those institutions and individuals who have made this book possible. First and foremost, I am indebted to the Leverhulme Trust for the award of a Major Research Fellowship to carry out the research for this book, as a result of which I was relieved of teaching and (more importantly) University management responsibilities for two years. Without that very generous assistance, this book simply would not have been written. I am especially grateful to Baroness Hale of Richmond for kindly agreeing to write the Foreword. My thanks must also go to Lisa Young of Murdoch University in Perth, Western Australia, for being such a brilliant research collaborator, correspondent and sabbatical exchange partner. I am also grateful to Murdoch Law School and to Lisa's colleagues for providing such a congenial environment to conduct my comparative research during an extended stay there in 2004.

Many other individuals have helped me in various ways in the course of this project. For their insightful comments on drafts of various chapters, I would like to thank, as well as Lisa Young, the following: Lorie Charlesworth, Ira Ellman, Andrew Halpin, Bernard Harris, Caroline Jones, Emma Laurie, James Pirrie, Rebecca Probert, Allan Shephard, Sally Sheldon and John Stewart. I have also learnt much from conversations with Janet Allbeson, Ed Bates, Natalie Lee, Jonathan Montgomery and Gwynn Davis (although he may doubt this). In addition, I have benefited from discussions with many judicial colleagues, but especially Edward Jacobs, John Mesher and David Williams amongst the Child Support Commissioners and Godfrey Cole, Martha Street, David Teagle, Robin Weare and Penny Wood in the Appeals Service. I should emphasise that none of the views expressed in this book should be associated with any of my judicial colleagues; in my own capacity as a deputy Child Support Commissioner, I must also reserve the right to disagree, on further reflection and in the light of parties' submissions, with any propositions found in this book. I wish to thank those DWP civil servants who have helped me with my various enquiries.

From other parts of the British Isles I am indebted to Conall MacLynn and Kenneth Mullan (Northern Ireland) and David Nichols, Kenneth Norrie, Christopher Smith and Tanya Parker (Scotland). Farther afield, in Australia I had assistance from Karyn Bartholomew, Peter Bath, Peter Cane, Terry Carney, Nick Gye (and his colleagues in the Perth CSA office), John McMillan, Patrick Parkinson, Ruth Pilkinton, Allan Shephard, David Sippel, Mike Spivak and Justice Stephen Thackray. Bill Atkin and Graham Hill helpfully answered queries about New Zealand and Ira Ellman and Tom Oldham about the United States. Paula Cogan provided outstanding research assistance and Miranda Bayliss always managed to find even the most obscure Commissioner's decision. My library and archiving queries were always efficiently answered by Joy Caisley in Southampton, Anne Greenshields at Murdoch and the Public Record Office staff at Kew. Richard Hart and his efficient team at Hart Publishing have been, as ever, a delight to work with. Several cohorts of Southampton University students have enthusiastically

acted as guinea-pigs for testing some of the ideas in this book in the course of the Law School's final year specialist child support law option.

Above all, I would like to thank Clare for her support, not least as at times she must have felt that I was due some first-hand experience of the child support system, and Nigel and Olga Wikeley for all their very practical and personal child support over the years. Finally, as one of the themes of this book is that the child's voice has been absent from child support law and policy, I have been left in absolutely no doubt whatsoever that I must thank Sarah (IT support), Jem (Tottenham support) and Carl (percussion support).

Nick Wikeley
School of Law
University of Southampton
1 June 2006

LIST OF ABBREVIATIONS

AAR	Administrative Appeals Reports
AAT	Administrative Appeals Tribunal
AATA	Administrative Appeal Tribunal of Australia
AFDC	Aid to Families with Dependant Children
AGPS	Australian Government Publishing Service
AIFS	Australian Institute of Family Studies
ALD	Administrative Law Decisions
AMP/NATSEM	Australian Mutual Provident/ National Centre for Social and Economic Modelling
ANAO	Australian National Audit Office
ATO	Australian Tax Office
CCSO	Chief Child Support Officer
CFLQ	Child and Family Law Quarterly
CPAG	Child Poverty Action Group
CSPSSA	Child Support, Pensions and Social Security Act
CSA	Child Support Act
CSCS	Child Support Computer System
CSEAG	Child Support Evaluation Advisory Group
CTC	Child Tax Credit
DEO	Deduction from Earnings Order
DHSS	Department of Health and Social Security
DLA	Disability Living Allowance
DMA	Decision Making and Appeals
DPMCA	Domestic Proceedings and Magistrates' Courts Act
DPO	Departure Prohibition Order
DPTC	Disabled Person's Tax Credit
DVLA	Driver and Vehicle Licensing Agency
DWA	Disability Working Allowance
DWP	Department for Work and Pensions
DSS	Department of Social Security
ECHR	European Convention on Human Rights
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FLA	Family Law Act
FLR	Family Law Reports

FLRA	Family Law Reform Act
FPSC	Family Policy Studies Centre
GMA	Guaranteed Maintenance Allowance
HC	House of Commons
HL	House of Lords
HMRC	Her Majesty's Revenue and Customs
ICE	Independant Case Examiner
IRS	Internal Revenue System
IRLR	Industrial Relations Law Reports
IS	Income Support
ITEPA	Income Tax (Earnings and Pensions) Act
JSA	Jobseeker's Allowance
LCD	Lord Chancellor's Department
LRO	Liabe Relative Officer
MAF	Maintenance Application Form
MASC	Maintenance Assessments and Special Cases
MCA	Matrimonial Causes Act
MEF	Maintenance Enquiry Form
MSS	Ministry of Social Security
NAPs	Non-Agency Payments
NAO	National Audit Office
NACRO	National Association for the Care and Resettlement of Offenders
NCSEM	National Centre for Social and Economic Modelling
NICA	Northern Ireland Court of Appeal
NINo	National Insurance Number
NLJ	New Law Journal
NRP	Non-Resident Parent
NZFLR	New Zealand Family Law Reports
OECD	Organisation for Economic Co-operation and Development
ONS	Office for National Statistics
OSCE	Office of Child Support Enforcement
PAYE	Pay As You Earn
PRWORA	Personal Responsibility and Work Opportunity Reconciliation Act
PWC	Person With Care
QBD	Queen's Bench Division
RPC	Regular Payment Condition
SBC	Supplementary Benefits Commission
SLFA	Solicitors Family Law Association
SLT	Scots Law Times
SSA	Social Security Act
SSAA	Social Security Administration Act
SSCBA	Social Security Contributions and Benefits Act
TANF	Temporary Aid to Needy Families

UIFSA	Uniform Interstate Family Support Act
VSCA	Victoria Court of Appeal
WFTC	Working Families' Tax Credit
WTC	Working Tax Credit

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