

CHILD SUPPORT, PENSIONS AND SOCIAL SECURITY ACT 2000

EXPLANATORY NOTES

Part 1: Child Support

Commentary on Sections

Applications for a variation

Section 5: Departure from usual rules for calculating maintenance

71. The new child support rates set out in Part I of Schedule 1 to the Child Support Act 1991, substituted by Schedule 1 to this Act, are intended to provide a fair maintenance calculation in the vast majority of cases. Nevertheless, the Government recognises that there will be exceptional cases where the child support rates do not properly reflect a non-resident parent's ability to support his children. For example, a non-resident parent may need to spend an exceptionally large amount of money keeping in touch with the children, or the net income used in working out his liability may not properly reflect the resources available to him.
72. Accordingly, the Government has decided to allow for the variation (both upwards and downwards) of the rates payable under the replacement scheme in certain exceptional cases. However, the Government is concerned to avoid simply re-introducing the complexity of the existing formula by another route. The exceptional cases in which a variation will be possible will therefore be clearly defined.
73. The structure of the new legislation follows the broad lines of the departures scheme which was introduced by the Child Support Act 1995. In particular:
 - the consideration of a non-resident parent's application for a variation may depend on his continuing regular payment of maintenance (section 28C); and
 - maintenance liability will only be varied if it is just and equitable to do so.
74. However, unlike the provision for departures, an application for a variation may be made before the maintenance calculation has been completed, and the revised legislation is drafted to deal specifically with an application made in these circumstances. Regulations made under section 28G of the 1991 Act, as inserted by section 7 of this Act, will provide the rules for handling an application for a variation made after the maintenance calculation has been completed. Where the maintenance calculation is made without taking account of the variation application, liability will initially be based on an *interim maintenance decision*. Section 12(2), substituted by section 4 of this Act, provides for this decision.
75. This section provides the general rules governing the application for a variation before a final maintenance calculation has been made, and how the application is to be considered and decided.

76. *Subsection (2)* replaces sections 28A, 28B and 28C of the 1991 Act.

New section 28A: Applications for variation of usual rules for calculating maintenance

77. This section provides the rules governing applications for a variation. It specifies who can apply, and in what circumstances and in what manner the application can be made. The substituted Schedule 4A, introduced by section 6 of this Act, supplements this section.
78. *New section 28A(1), (2) and (3)* provide that the person with care and the non-resident parent (or, in Scotland, either of them or the child) can each make an application for a variation at any time, once an application for a maintenance calculation has been made and before a maintenance calculation decision under section 11 (a normal calculation) or 12(1) (a default decision) has been made.
79. *New section 28A(4) and (5)* provide that, unlike applications for departures, applications for a variation need not be in writing unless, exceptionally, the Secretary of State considers this to be appropriate (for example, having regard to the complexity surrounding the case). When making an application, the applicant will be required to state the ground on which they are applying. The Secretary of State may impose other conditions. Where appropriate, he may, for example, require a dedicated application form to have been completed properly before he will accept that an application has been made.
80. *New section 28A(6)* cross-references to the substituted Schedule 4A (see section 6 and Schedule 2 of this Act) which provides additional regulation-making powers relating to the handling of variation applications.

New section 28B: Preliminary consideration of applications

81. This section provides for a preliminary consideration of the application. This is intended to sift out at the earliest possible stage those applications which have no prospect of success.
82. *New section 28B(1)* provides that, having received an application, the Secretary of State may carry out a preliminary examination (known as a “preliminary sift”) to check that it merits further consideration.
83. *New section 28B(2)* provides, in particular, that an application from any source will be rejected where it has not been made on one or more of the recognised grounds, or where a default maintenance decision (substituted section 12(1) of the 1991 Act) would be made. A partial list of the criteria which the Secretary of State will consider under the preliminary sift is in substituted Schedule 4B of 1991 Act and the rest will be prescribed in regulations. The intention is to sift out applications from non-resident parents in the circumstances where, for example, at the date from which any variation agreed in response to the application would take effect, they had either a nil liability, or a flat-rate liability, or a liability which has been reduced to the equivalent of the flat rate on account of any shared care adjustments. In these circumstances, the non-resident parents could not benefit from the effect of a variation.

New section 28C: Imposition of regular payments condition

84. This section provides for the imposition of a regular payments condition. This condition requires a non-resident parent who has made an application for a variation to continue paying maintenance regularly while the application is being considered. This is intended to ensure that children receive maintenance regularly and reliably and that unnecessary debts are not built up during the variation process.
85. *New section 28C(1)* provides that, where the Secretary of State has made an interim decision pending the determination of a non-resident parent’s variation application, and

has not rejected the application at the preliminary sift stage, he may require the parent in question to make regular, ongoing payments of maintenance as a pre-condition of having the application considered. This is called a “regular payments condition”.

86. *New section 28C(2)* provides that the rate may either be at the rate of the existing interim decision or at a lesser rate which might anticipate the effect of a successful variation application.
87. *New section 28C(3)* provides that, in these circumstances, the Secretary of State will notify all the persons with care (and child, if the applicant for the maintenance calculation) concerned, and the non-resident parent, of the imposition of the condition and the effect of failing to comply with it.
88. *New section 28C(4)* provides that the regular payments condition will cease to have effect either when, in response to the variation application, the Secretary of State replaces his interim maintenance decision with a decision under section 11 (whether he agrees to variation or not) or where the variation application is withdrawn.
89. *New section 28C(5), (6) and (7)* provide that, if the Secretary of State determines that the non-resident parent has failed to comply with the regular payment condition, the Secretary of State may refuse to consider the variation application and proceed to replace the existing interim decision on the basis that the variation application has failed. Regulations will provide for deciding what constitutes a “regular payment”. For example, there will need to be scope for taking some account of occasions where payment is unavoidably late, for example, where a bank fails to operate a direct debit. It is intended that where the Secretary of State is not satisfied that the regular payments condition has been met, progress on the variation application may be suspended to allow the non-resident parent the further opportunity to comply. If within the period of a further calendar month, he has still failed to do so without good reason, the application will fail. In this event, the Secretary of State will not vary the maintenance calculation and will notify all the persons with care (or child) and the non-resident parent accordingly. In these circumstances, the non-resident parent will have to make a fresh application if he again wishes to have special circumstances considered.
90. *Subsections (3) and (4)* of section 5 of this Act make amendments to the wording of sections 28D and 28E of the 1991 Act (which deal with determination of applications and matters to be taken into account, respectively), substituting references to departure directions with references to variations. With respect to section 28D, the intention is that where the variation application has not failed, been withdrawn, or been rejected at any preliminary stage, the Secretary of State may elect either to determine the application himself or, exceptionally, to refer it direct to the appeal tribunal for determination. This represents no change from the options available to the Secretary of State under the departures scheme. Cases which the Secretary of State might refer to the tribunal are those which are particularly complex or contentious and which he feels unable to resolve.
91. *Subsection (5)* substitutes section 28F of the 1991 Act (which relates to the determination of departure applications) with equivalent wording – with some modifications – relating to the determination of applications for variations.

New section 28F: Agreement to a variation

92. *New section 28F(1)* provides that a variation may be allowed only if it has been made on one or more of the recognised grounds, and if, having regard to all the circumstances, it would be just and equitable to allow a variation in any particular case.
93. *New section 28F(2)* provides that, in determining whether it would be just and equitable to vary the normal rules in any particular case, the Secretary of State must have regard to the welfare of any child who would be affected by the variation, and such other factors as may be prescribed in regulations. The Secretary of State will need to consider, for

*These notes refer to the Child Support, Pensions and Social Security
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example, whether any variation in the amount of child support liability would be likely to result in either parent giving up work.

94. *New section 28F(3)* reaffirms that an application from any source will not be agreed to where the Secretary of State has insufficient information to enable him to make a decision as to maintenance liability under section 11 of the 1991 Act, such that he has to make a default decision under section 12(1) of that Act. The full list of the other circumstances that will automatically prevent agreement to a variation will be prescribed in regulations. In particular, the intention is to disallow applications from any source where a non-resident parent was in receipt of (or was the partner of someone in receipt of) a prescribed income-related benefit at the date from which any variation given in response to the application could take effect.
95. *New section 28F(4)* provides that, where the Secretary of State agrees to a variation, he has to determine the basis on which the child support maintenance is to be calculated, and proceed to make a decision under section 11 on that basis.
96. *New section 28F(5)* provides that where the Secretary of State has made an interim maintenance decision and subsequently makes a decision under section 11 (whether or not he agrees to a variation), the interim maintenance decision is to be treated as having been replaced by his decision under section 11. Any appeal which has previously been lodged against the interim decision will lapse, other than in prescribed circumstances. Any outstanding activity under section 16 (revision) or section 17 (supersession) relating to the interim decision itself will be dealt with, as part of the final decision. There will be a right of appeal against the final section 11 decision.
97. *New section 28F(6)* requires the Secretary of State to comply with any regulations made under the powers of Part II of the substituted Schedule 4B, which is provided for by section 6 of this Act, in considering whether to agree to a variation.