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## Family Maintenance Enforcement Proceedings

This paper was originally written for the 2004 Family Duty Counsel Conference. Since March 2004, there have been few changes to the *Family Maintenance Enforcement Act* (the “FMEA”), its Regulations or the case law. The exception is under s. 29.1 of the *FMEA*. The legislature has increased the discretion given to the court after FMEP declines to direct ICBC to disregard a notice not to issue or renew the payor’s driver’s licence.

### A. Assisting Recipients

In general, Duty Counsel is more likely to deal with the payors in applications to vary support or applications for relief from enforcement. However, it is not mandatory to enroll with the Family Maintenance Enforcement Program (FMEP) and a recipient may wish to enforce the support order on his or her own.

If the recipient or payor wishes to enroll with the Family Maintenance Enforcement Program, the court registry has copies of the “filing kit.” If the recipient provides FMEP with three certified copies of the pertinent orders and his or her paperwork is in order, it will take approximately six to eight weeks for FMEP to enroll the recipient. It will take even longer for enforcement to begin.

Once the support order is enrolled with FMEP, only FMEP can enforce the support order. However, until the order is enrolled and the recipient is sent a Notice of Filing from FMEP, the recipient can enforce his or her own maintenance order.

The first step is to determine whether or not the client has an enforceable order or written agreement:

- If it is an agreement, it must be filed in Provincial Court pursuant to s. 121 of the *Family Relations Act* and the Provincial Court (Family) Rules. If the agreement has been filed under s. 122 of the *Family Relations Act* in Supreme Court and has not been filed in Provincial Court, the client may obtain a certified copy of the agreement from Supreme Court and file that in Provincial Court.
- To be enforceable in Provincial Court, an order must be made in the Provincial Court or Supreme Court of British Columbia or the order must be from a reciprocating jurisdiction as defined by the *Interjurisdictional Support Orders Act (ISO)*. Orders from reciprocating jurisdictions must be registered under *ISO* or they must have been previously registered under the repealed Reciprocal

Enforcement of Maintenance Orders portions of the *Family Relations Act (FRA)*. If the order is made under the *Divorce Act (Canada)* it is governed by s. 20 of the *Divorce Act*.

If a recipient is not enrolled with the FMEP, he or she may still use most of the enforcement provisions contained in the *Family Maintenance Enforcement Act*. The only exceptions are that the recipient cannot obtain a Notice of Attachment, have the payor's driver's licence held by ICBC, report the payor to the Credit Bureau, or apply to deny the payor a federal licence.

A recipient acting on his own or her own may use the following methods to enforce maintenance payments:

### **1. Garnishing Order**

A garnishing order may be made pursuant to s. 18 of the *Family Maintenance Enforcement Act* without notice to the payor. A garnishing order can only attach the amount of the arrears set out in the garnishing order. It cannot attach maintenance payments that become due and owing after the garnishing order is made. The recipient must apply for a new garnishing order to enforce subsequent arrears accruing.

The garnishing order remains in effect for 12 months, unless the court orders that it remains in effect for a shorter period of time. All payments made by the garnishee are to be paid to the court. The garnishee is not entitled to any costs or fees.

Under s. 18 (6) of the *FMEA*, if a copy of the garnishing order has been served on the garnishee and the payor (CHECK S. 9 OF COEA), money paid into court under that order may be paid out of court from time to time to the recipient (or to the director) without an order of the court or without notice to the payer or the garnishee, unless the debtor or the garnishee files with the court, within ten days after the date of service of the order, a notice of intention to dispute any payment out.

The following documents are to be submitted to the registry:

- *Request for Court Enforcement under the FMEA*
- *Affidavit in Support of Garnishing Order*
- *Statement of Arrears*
- *Request for Service of Documents (if sheriffs to serve)*

The registry will prepare the garnishing order, but the client will have to have the garnishing order served on both the payor and the garnishee unless the situation warrants the sheriffs serving the documents.

### **2. Default Hearing**

Pursuant to ss. 19, 20 and 21 of the *FMEA*, the recipient may ask the registry to issue a Summons to a Default Hearing. The following documents are to be submitted to the registry:

- *Request for Court Enforcement under the FMEA*
- *Statement of Arrears*
- *Request for Service of Documents* (if sheriffs to serve)
- *Blank Statement of Finances*
- *Notice of Motion in Maintenance Enforcement Proceedings seeking to shorten time for serving an Affidavit stating that the Statement of Finances has not been filed*

The registry sets a Default Hearing date and prepares a *Notice of Hearing or Conference* and a *Summons to a Default Hearing*. The sheriffs will serve the documents on the payor.

### **3. Committal Hearing**

If the recipient is not enrolled with the FMEP and the payor fails to make payment under a default order (an order requiring the payor to make payments towards the arrears and that, in default of such payment, the payor serve time in prison), then it is up to the recipient to prepare a Statement of Arrears and request the registry to issue a Summons to a Committal Hearing pursuant to s. 23 of the *FMEA*. The sheriffs will serve the Summons.

The following documents are required to be submitted to the registry:

- *Request for Service of Documents*
- *Request for Court Enforcement under the FMEA*
- *Affidavit of Arrears attaching a copy of the maintenance order, a copy of the default order and a copy of the payment record as exhibits.*

### **4. Attachment Order**

After a default hearing or other proceeding, the presiding Judge **shall** issue an attachment order if the court finds that the payor is receiving or entitled to receive wages, salary or other remuneration from a person employing or engaging the services of the payor or is receiving or entitled to receive a benefit under the *Pensions Benefits Standards Act*, unless it would be unfair to the payor to do so. Note that the attachment order is limited as to the types of remuneration it can attach, is not time limited unless the Judge makes it so and will attach future support payments as they become due, unlike a garnishing order.

The *FMEA* Regulation 13 sets out the amounts of the payor's remuneration or benefits which are exempt from attachment.

Once an attachment order is made, the registry will prepare the order and have it served on the attachee. The registry will mail out a copy of the order to the payor. If the payor changes employment, the registry will prepare a new attachment order and serve it on the new employer. The matter does not have to return to court.

### **5. Land Registration**

Whether or not a maintenance order is in default, the recipient or FMEP may have a certified copy of the maintenance order filed at the Land Title Office against a payor's

interest in land. This provision is set out in s. 26 of the *FMEA*. The recipient must file a Form C under the *Land Title (Transfer Forms) Regulation* with the attached certified copy of the maintenance order.

The registrar of titles must not register the discharge or postponement of a maintenance order under this section unless the discharge or postponement is signed by the creditor, if the creditor applied for registration of the order.

## **6. Appointment of Receiver**

Pursuant to s. 29 of the *FMEA*, the recipient may apply to have a receiver appointed over any property of the payor. Pursuant to the definition of “court” under s.1 of the *FMEA*, only the Supreme Court may make such an order.

## **7. Restraining Order**

Pursuant to s. 30 of the *FMEA*, the recipient may apply without notice for an order restraining the payer from disposing of or wasting any property. The recipient must satisfy the court that the payor is likely to evade or hinder the enforcement of a maintenance order by disposing of or wasting the property. Under the definition of “court” in s. 1 of the *FMEA*, only the Supreme Court has jurisdiction to make such an order.

## **8. Arrest of Absconding Debtor**

Under s. 31 of the *FMEA*, the recipient may apply to the Supreme or Provincial Court for a warrant for the arrest of the payor if there are reasonable and probable grounds for believing that a debtor is about to leave BC in order to evade or hinder the enforcement of a maintenance order. The court may also make an order under the default hearing provisions — s. 21 (1), (3) or (11).

## **9. Warrant of Execution**

Only the Provincial Court may issue a Warrant of Execution under s. 27 if the payor defaults on a payment required under a maintenance order. The Supreme Court has similar jurisdiction under Rule 42.

The Warrant of Execution is one way to attach RRSP's, which are not usually attachable by way of garnishing or attachment. The property to be executed upon must be enough to cover the Court Bailiff's fees, the exemptions permitted the payor under the *Court Order Enforcement Act*, and the arrears owed to the recipient. While one year of maintenance arrears has priority over any other unsecured judgment debt the payor may owe (*FMEA*, s. 28), it does not have priority over a debt secured against the property.

The recipient must file the following documents with the court registry:

- *Request for Court Enforcement under the FMEA*
- *Statement of Arrears*
- *Information letter describing assets that the debtor has (optional)*

The Warrant of Execution is made by way of a desk order. The registry forwards the original Warrant of Execution and copies of the Request for Court Enforcement and Statement of Arrears to the Court Bailiff. It is the recipient's responsibility to communicate with the Court Bailiffs and determine if they require a deposit to have the Warrant carried out.

#### **10. Failure to Produce Financial Statement**

Under s. 14 of the *FMEA*, if the payor fails to provide a Statement of Finances as required under ss. 12 and 13, upon application by the recipient, the court may order the payor to file a Financial Statement by a particular date or pay a fine to the recipient in an amount up to \$5000.00. If the payor fails to file the Statement of Finances by the specified date, the court may also order the payor to be incarcerated for up to 30 days.

## **B. Assisting the Parties' Children**

If the Recipient is still alive — There are two lines of cases with respect to the issue of whether or not a child for whom maintenance is payable is able to enforce arrears of maintenance:

1. *Kushner v. Kushner*, (3 April 1987) Vancouver CC861880 (BC Co. Ct.) held that the children of the marriage were not permitted to enforce arrears. Leave to appeal was refused by the Court of Appeal, (1988) 12 RFL (3d) 171 (BCCA); and
2. *Schmitke v. Schmitke*, (1993) 87 BCLR (2d) 377 (SC) determined that “the right to bring an action for the enforcement of child maintenance is the right of the child.” The Court also determined that the child is “a person under a disability” within the meaning of s.7 of the *Limitation Act*, and therefore “the running of time is postponed so long as she is a minor.” This case has been followed by *Duke v. Duke*, [1998] Civ. L.D. 459 (BCSC).

If the Recipient has passed away — Under *Hampton v. Hampton*; *Hampton v. Heich* (1985), 64 BCLR 264 (CA), if spousal support arrears are outstanding upon the death of the recipient, they are extinguished.

## **C. Assisting Payors Administrative Enforcement**

### **1. Notices of Attachment**

#### ***General***

The *Family Maintenance Enforcement Act* has been determined to be “social legislation” in that “it is designed to address the evil of widespread default in payments required to be made by family maintenance payment orders.” Therefore it has a purpose different from the *Court Order Enforcement Act (COEA)* and garnishment cases under the *COEA* should not be applied to attachment or garnishment cases under the *FMEA* without ensuring that “such an application would be consistent with the fairness and with the social purposes of the *Family Maintenance Enforcement Act*.” *British Columbia (Maintenance Enforcement Director) v. I.W.A. Forest Industry Pension Plan (Trustees of)* (1991), 61 BCLR (2d) 264 (BCCA).

#### ***BC Employment and Assistance***

Cheques from BC Employment and Assistance are not attachable from the source, although once the money is placed in a bank account, it is attachable. Generally, FMEP will not take enforcement action against someone on welfare, except to attach the person’s income tax return or their GST rebate.

#### ***Attachment of Federal Benefits (Employment Insurance, Old Age Security and Canada Pension Plan)***

The attachment of federal benefits is dealt with under the *Family Maintenance Enforcement Act* Regulation, ss. 13 and 14.

S. 13 (1) defines the term “federal benefits” as those payable under the above legislation. Please note that the *National Training Act (Canada)* has been repealed and the benefits paid to a province by the federal government for the benefit of a person under the *Employment Insurance Act* are not attachable under these Regulations.

S. 13 (6) specifies that 75% of federal benefits are exempt from attachment under a notice of attachment. Please note that attachment of federal benefits causes a considerable delay in the payor receiving his first cheque. As well, even if the payor receives his cheque with the deduction showing on his pay stub, it is even longer for the Program to receive any money from the federal government on behalf of the recipient. Until the money is actually received by the Program from the Federal government, the Program will have no record of the money being deducted.

Sometimes, enforcement programs from other provinces file attachment or garnishment proceedings against federal benefits payable to a payor who resides in British Columbia. If this is the case, then the Provincial Court of British Columbia has no jurisdiction to deal with those proceedings. The payor will have to contact the enforcement program in the other province.

### ***Attachment of Wages***

The exemptions for attachment of wages are set out in *FMEA Regulations*, r. 13. However, the back of the notice of attachment has an easier explanation of how the exemptions are determined.

### ***Attachment of Other Debts Owed to the Payor***

Debts owed to the payor from other sources, such as ICBC, bank accounts and income tax refunds, are fully attachable. There are no exemptions.

### ***Setting Aside a Notice of Attachment***

The payor may apply to set aside a notice of attachment, but only if it is based on a material error, such as the amount of arrears stated is incorrect or the person identified in the notice of attachment is not actually the payor. Often, even if the payor is successful on this type of application, FMEP will simply withdraw the attachment proceedings and file a corrected application or notify the attachee of the correction required. They may even just write a letter to the attachee noting the corrections required if the corrections are not considered a “material error”.

Under s. 16(2) of the *FMEA*, the payor must first apply to the FMEP to withdraw the Notice of Attachment. If FMEP refuses to withdraw the Notice of Attachment, the payor may then apply to court under s. 16(4).

The following documents must be submitted to the registry:

- *Notice of Motion in Maintenance Enforcement Proceedings*
- *Affidavit in support of motion (optional)*

### ***Changing the Amount Attached***

Regulation 13.1 of the *FMEA Regulations* allows FMEP or the Court to change the amount attached. First the payor must request the change from FMEP and, if FMEP declines to make the change requested, then the payor may apply to the court by way of a Notice of Motion in Enforcement Proceedings.

FMEP will not usually agree to reduce the amount attached so that it is less than the regular monthly maintenance order, although they will sometimes temporarily suspend the attachment so that the payor can make an application to the appropriate court. FMEP cannot change a maintenance order, they can only enforce the existing order. Therefore, if the payor cannot afford to pay the regular maintenance order and if there has been a change of circumstances, the payor must make an application to the appropriate court to reduce the regular maintenance and reduce or cancel the arrears.

In order to request a change in the amount attached from FMEP, the payor will have to complete a Statement of Income and Expenses. Under *FMEA Regulations*, r. 13.1(3), he or she must show that, as a result of the Notice of Attachment, he or she is unable to obtain the necessities of life (i.e., food, clothing and shelter). Once the Statement of Income and Expenses has been completed and the relevant documents attached, it must

be sent to FMEP with a letter explaining the payor's financial situation and setting out any proposal that payor wishes to make.

If FMEP refuses to agree to the proposal suggested by the payor, then the payor may apply to the Court for an increase of the exemptions set out in s. 10 of the *FMEA* Regulations.

The following documents must be provided to the registry:

- *Notice of Motion in an Enforcement Proceeding*. (Be sure to tick the box beside "an order changing the amount exempt from attachment" rather than "an order setting aside an attachment order or notice of attachment.")
- *Statement of Income and Expenses* or *Statement of Finances (suggested)*
- *Affidavit in support (optional)*

## **2. Notice Not to Issue or Renew Driver's Licence**

Under s. 29.1 of the *FMEA*, FMEP is entitled to file a notice with ICBC advising ICBC not to issue or renew a payor's driver's licence if the payor is in default in the sum of \$3,000 or more. If it is not impractical, FMEP may give the payor 30 days' notice that action under this section will be taken.

The payor must first make a request to the FMEP to return his driver's licence before making an application to court for its return: *K.J.K. v. P.B.K.*, 2002 BCSC 1340.

Under s. 29.2, if a notice has been given by FMEP to ICBC, FMEP must direct ICBC to disregard a notice given under s. 29.1 if the payor satisfies FMEP that:

- a. the notice is based on a material error,
- b. the lack of a driver's licence will significantly reduce the payor's ability to pay under the maintenance order and the payor has entered into an arrangement that is satisfactory to FMEP to report his or her financial circumstances from time to time, or
- c. The payor has entered into a payment arrangement that is satisfactory to FMEP.

FMEP may require the payor to give FMEP security in the amount totalling four months of maintenance payments in addition to the total amount of the arrears.

If FMEP does not direct ICBC to disregard a notice not to issue or renew the payor's driver's licence, then the payor may apply to court for a determination as to whether the refusal was unreasonable. If it is found that the Director acted unreasonably, then the court may order the Director to file a notice with ICBC advising ICBC to disregard a notice not to issue or renew the payor's Driver's licence.

The payor must provide the following documents to the court registry:

- *Notice of Motion in an Enforcement Proceeding*
- *Statement of Income and Expenses or Statement of Finances (suggested)*
- *Affidavit in support (optional)*

### **3. Registration in Personal Property Security Registry**

Pursuant to s. 26.1 of the *FMEA*, the director may register a maintenance order that is in arrears under the *Miscellaneous Registrations Act, 1992*, against the personal property of a payor, which creates a lien. The lien secures the amount of any arrears of maintenance which accrued before the claim was registered and while the claim is registered.

The lien continues until the claim is discharged in accordance with the *Miscellaneous Registrations Act, 1992*, or until the arrears are paid. It appears that the Supreme Court of British Columbia is the only court with jurisdiction over the matter as the *Personal Property Security Act* defines “court” as the Supreme Court and there is no provision for the Provincial Court to hear such matters: *The Director of Maintenance Enforcement and Heather Joan MacNeill v. Kenneth Paul Morrison*, April 14, 2000, Courtenay Registry, Docket E0241.

### **4. Passports and Other Federal Licences**

Only the Family Maintenance Enforcement Program can apply to the Federal Government for denial of certain federal licences to payors who are in “persistent arrears.” The provisions governing licence denial are under Part II of the *Family Orders and Agreements Enforcement Assistance Act of Canada* (FOAEA).

“Persistent arrears” are defined under s. 62 of that Act as “(a) arrears in any amount where the arrears are due to the failure to make in full the payments required in respect of any three payment periods, within the meaning of the support order . . . or (b) accumulated arrears of \$3000 or more.”

The federal licences that may be denied are Canadian passports and various licences under the *Aeronautics Act* and *Canada Shipping Act*. They are set out in a schedule to FOAEA. The Family Maintenance Enforcement Program may apply to the Minister of Justice asking that no new licences be issued to the payor, that all licences held by the payor be suspended and that licences held by the payor not be renewed.

Under s. 76 of FOAEA, where a person has been notified that his or her passport has been suspended and who fails to return the passport forthwith to a Passport Office or who subsequently uses the passport after being so notified, is guilty of an offence.

Under s. 72 of FOAEA, the Family Maintenance Enforcement Program is required to request termination of all such actions where the Program is satisfied that the payor:

- “(i) is no longer in arrears under all support orders and support provisions against the [payor] that have been enforced by a licence denial application,
- (ii) is complying, in respect of all support orders and support provisions against the [payor] that have been enforced by a licence denial application, with a payment plan that the provincial enforcement service considers reasonable, or
- (iii) is unable to pay the amount in arrears and that the application of this Part against the [payor] is not reasonable in the circumstances.”

The Program must also immediately request that denial of a federal licence be terminated where the Program ceases to enforce all support orders and support provisions against the payor that have been enforced by a licence denial application.

If the Program refuses to request termination as set out above, then the only remedy for the payor is to apply to court by way of Judicial Review. There is no provision in FOAEA or in the FMEA for the judge to order that the denial of licence be terminated. Such a request is effectively an appeal which flies in the face of s. 71 of the FOAEA: *Go v. Go*, S.C., Stewart J., Doc. Vancouver D106304, October 2, 2002. A new action for judicial review must be commenced in the Supreme Court of BC under the *Judicial Review Procedures Act*, not the existing family file.

#### **5. Credit Bureau Report**

Under s. 43(3) of the FMEA and r. 21 of the *FMEA Regulations*, the Program may disclose to a reporting agency the fact that a payor is in arrears under a maintenance order if the payor is in arrears \$2,000 or more under a maintenance order on the date when the first report is made, and the payor is in arrears on the date when any subsequent reports are made.

Any corrections or explanations that the payor wishes reflected on his or her credit rating would have to be done pursuant to the *Credit Reporting Act*. The Courts do not have any jurisdiction under the FMEA or FRA to deal with a report under the *Credit Reporting Act*.

#### **6. Interest Charges**

Section 11.1 of the *FMEA* and rr. 6.1 to 6.5 of the *FMEA Regulations*, sets out how interest is to be calculated. All interest payments go to the recipient.

Under r. 6.4, no interest is to be calculated during a time that the payor was in receipt of benefits from BC Employment and Assistance. If interest has been charged during a period where the payor is in receipt of social assistance benefits, the proper procedure is to provide the necessary information to the FMEP.

Under r. 6.5 (1), FMEP is not to enforce interest on arrears except arrears under the most recent maintenance order filed with them, unless the most recent maintenance order fixes and includes interest in that order.

Under s. 96 (3.1 and 3.2) of the *Family Relations Act*, if a court reduces or cancels arrears under a maintenance order, the court may reduce or cancel interest that has accrued on the arrears. The court must be satisfied that it would be grossly unfair not to cancel the interest charged, taking into account the efforts the payor has made to comply with the maintenance order, the payor's explanation for any delay in applying for variation of the maintenance order and any special circumstances that the court considers relevant.

If the payor is making an Application to Change or Cancel an Order by cancelling or reducing arrears, an application to reduce or cancel interest should be included.

## **7. Annual Default Fee**

Under s. 14.4 of the *FMEA*, if the payor is late with or misses two payments within the same calendar year, the FMEP will charge an annual default fee in the amount of the monthly maintenance order up to a maximum of \$400.00 (the specific formula is set out in *FMEA Regulations*, r. 18). The annual default fee does not go to the recipient. It is paid to the provincial government to defray the costs of operating the FMEP.

Default fees are not collected by FMEP until after all of the maintenance is paid to the recipient, pursuant to s. 32 of the *FMEA*.

There are only three ways to have the annual default fee reduced or rescinded:

- a) Pursuant to s. 14.4 (4)(a) of the *FMEA*, the notice was issued in error;
- b) Pursuant to s. 14.4(4)(b) of the *FMEA*, the payor was receiving income assistance, a youth allowance or a provincial disability allowance at the time the second default occurred, and
- c) Pursuant to s. 14.4(6) of the *FMEA*, in a proceeding where the court reduces or cancels arrears under a maintenance order, the court may order that the annual default fee be reduced or cancelled or under s. 14.4(6)(c), the court may reduce or cancel the fee if it is satisfied that special circumstances exist.

Under s. 14.4(4), the proper procedure is to send FMEP proof that the notice was issued in error or that the payor was receiving the benefits set out. FMEP sends the information provided to their Default Fee Officer in Victoria to decide if the fee should be reduced or cancelled.

Under s. 14.4(6), the proper procedure is for the payor to file an Application to Change or Cancel an Order to reduce or cancel the arrears and to ask specifically for the annual default fee to be reduced or cancelled.

## **8. Land Registration**

Section 26 of the *FMEA* allows registration of a maintenance order in the land title office. The charge it creates is deemed to be a judgment under the *Court Order Enforcement Act*. The maintenance order may be registered in the LTO whether or not arrears have accrued. The registration secures the payment of future obligations and therefore will not

be discharged on the basis that there are no arrears owing: *Harvey v. Gould* (1959), 28 WWR 329 (BCSC).

Both the Provincial Court and the Supreme Court have been given jurisdiction to make an order discharging, partially discharging or postponing the registered order under s. 26 (10) of the *FMEA*. The court is also given the power under s. 26 (12) to impose “conditions as to security or otherwise it considers necessary and reasonable.”

To make application for a registered order to be discharged or postponed, the payor must provide the registry with the following documents:

- *Notice of Motion in Maintenance Enforcement Proceedings*
- *Affidavit in support (optional)*

### **Court Enforcement**

In general, the FMEP prefers administrative enforcement to court enforcement. The Program will use court enforcement if administrative enforcement is ineffectual. However, FMEP can and often does take multiple actions to enforce the maintenance order.

### **9. Statement of Finances**

This form is different than the Financial Statement under the *Family Relations Act* and also requires more extensive documentation to be attached. Als, disclosure of a spouse’s income is required pursuant to s. 21 of the *FMEA*.

Under s. 12 of the *FMEA*, FMEP may serve a notice on the payor requiring him to file a Statement of Finances with the FMEP. The payor must file a sworn Statement of Finances with the prescribed documentation not more than ten days after he or she is served with such notice.

Under s. 14 of the *FMEA*, if the payor fails to properly provide the Statement of Finances, an order may be made requiring him to file it by a specified date, the recipient may be granted an order that the payor pay the recipient up to \$5,000.00 as a fine, and the payor may be imprisoned for up to 30 days.

### **10. Default Hearings**

Under ss. 19, 20 and 21 of the *FMEA*, a payor may be summoned to court for a default hearing. There are three possible outcomes:

- a) The court is satisfied that there are no arrears owing under the maintenance order, which should result in dismissal of the application.
- b) The court is satisfied that the payor is unable for valid reasons to pay the arrears in full and makes an order under s. 21(3) that the payor temporarily pay periodic payments in an amount less than the maintenance order with the amount by which the payments are reduced being added to the arrears and (i) the payor

report by filing a statement of income and expenses, (ii) the payor report changes of residential, employment or business addresses, (iii) the payor make specified payments towards the arrears, (iv) the payor be imprisoned if he or she fails to make the specified payments towards the arrears or (v) the payor post security.

- c) The court is not satisfied of either of the above and orders that the payor (i) reports by filing a statement of income and expenses, (ii) reports any change in residential, employment or business address, (iii) either pays a specified amount or is immediately imprisoned for up to 30 days, (iv) discharges the arrears as specified, (v) will be imprisoned for up to 30 days each time he or she fails to make a payment towards the arrears as set out by the court, or (vi) provides security. The court can make more than one of these orders.

S. 21 (10) of the *FMEA*, specifies that the payor must pay his regular support (or the reduced amount under s. 3(a)) and the amount specified to be paid towards the arrears in order to avoid imprisonment.

Generally, if the payor's circumstances have changed such that the regular maintenance ordered should be varied, it is better to ask the court for an adjournment so that the payor may file an Application to Change or Cancel an Order rather than relying upon s. 21(3).

If the payor's financial situation has not changed since the last maintenance order was made, it is likely to his or her advantage to try to work out some type of arrangement with FMEP rather than going ahead with a hearing. Depending on the payor's payment history, FMEP will usually insist on a consent order containing a clause that the payor be imprisoned if he fails to make the agreed upon payment. Another way to ensure that the payor is making his or her payments is to adjourn the default hearing for a few months. If the payor is not paying, FMEP can ask the court for an order he be imprisoned at that point.

Sometimes the best solution for the payor is to borrow money from friends or family members to pay off the arrears or to make a deal with the recipient (if she is not on social assistance) to make a lump sum payment in exchange for a reduction in the arrears. At least the payor's family members or friends won't be looking to put him or her in jail for lack of payment and the creditor may be happy not to see the payor again.

### **11. Failure to Report**

Section 22 of the *FMEA* permits the enforcement of reporting orders.

### **12. Committal Hearings**

If the payor defaults under an order made under s. 21 (a "default order"), he or she may be summoned to a Committal Hearing, which is the payor's chance to explain to the court why he or she should not be imprisoned. Generally the default orders are drafted so that imprisonment for each failure to pay is to be consecutively served up to a maximum period of 90 days.

The test for imprisonment is set out in s. 23(4), has there “been a change in the circumstances of the debtor since the [default] order was made . . .and the change has resulted in the debtor’s inability to pay the full amount required . . . or . . [would] it would be a grave injustice to order the imprisonment of the debtor.”

If the court is satisfied the debtor has met the test, under s. 23 (7), the court may vary the default order without reducing or cancelling the aggregate of arrears required to be paid under that order or set a date for hearing an application to vary the default order.

Legal Services Society does provide counsel for payors facing a committal hearing because there is the likelihood of imprisonment. If the person would qualify financially for legal aid, they should ask for an adjournment to get counsel.

## **D: Defences**

### **Bankruptcy**

Neither child and spousal support payments and arrears are claims provable in bankruptcy. Therefore, they will continue to be payable by the bankrupt.

### **Limitation Periods**

Most decisions are following the case of *Schmitke* and the limitation period only starts running when the child turns the age of majority. Under s. 3 (3) (f) of the *Limitation Act*, the limitation period is ten years if the person is not under a disability. Under s. 7 of the *Limitation Act*, as long as a person “is a minor, or . . . is in fact incapable of or substantially impeded in managing his or her affairs” the running of time against the person is postponed. Once the person ceases to be a minor or substantially impeded in managing his or her affairs, the limitation period begins to run and the person has ten years to commence action: *Carlson v. Carlson*, 2001 BCSC 0157.

For maintenance payable after the child turns 19 years old because of schooling, each maintenance payment would have a 10 year limitation period commencing with the date it was defaulted upon.

Under s. 5 of the *Limitation Act*, any payments or acknowledges made by the payor before the limitation period runs out re-sets the beginning of the limitation period.

The limitation period would likely only be a defence if no payments or acknowledgements were made for the ten years following the date that the last maintenance payment was due and the recipient had made no effort to collect arrears during that ten years.

### **Reconciliation**

If the parties reconcile after a maintenance order is made, the maintenance during the period of reconciliation would likely not be enforceable. The order would, however, continue in effect after the parties separated for the second time. (See *Wolf v. Wolf* (1992), 41 RFL (3d) 391 (BCSC)).

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## SOURCES

*Family Court Manual* distributed by Court Services, Ministry of Attorney General

*FMEP Legal Manual* (last updated October 17, 1996).

## SUBMITTED BY:

Kathryn J. Ferriss, Barrister & Solicitor

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