

MAINTENANCE ORDERS

AND

***FMEA* ISSUES**

**Family Maintenance
Enforcement Program**

PRESENTED BY: RICHARD E. BENWELL
Legal Counsel for the
Director of Maintenance Enforcement

Obtaining the Maintenance Order

While the Family Maintenance Enforcement Program is not involved in obtaining Maintenance Orders, a well drafted maintenance clause will certainly assist both maintenance payors and maintenance recipients when dealing with the Family Maintenance Enforcement Program. If you are speaking to Consent Orders for maintenance, the following considerations should be kept in mind:

a. Include a start date for the maintenance.

This may seem like a trite statement but, surprisingly, many of the Orders I see (and many with counsel involved) do not have a commencement date for the maintenance obligation. If the Maintenance Order is the initial Order between the parties, and the Order is a monthly obligation, and the Maintenance Order does not contain a start date for the maintenance, the Program's policy is to have maintenance payable at the end of each month. This may not be what the parties intend.

If the Order is a variation of a previous Order and no commencement date is specified, the Family Maintenance Enforcement Program will adjust the amount on the next due date under the previous Order.

b. Bi-weekly payments.

Be alert to the fact that if you are phrasing the maintenance as a monthly payment but wanting the maintenance payor to make bi-weekly payments that the bi-weekly payment is not simply one-half of the monthly payments. Again, while this seems fairly obvious, the Program receives numerous Orders that are set out this way.

c. "Automatic" adjustments to the monthly maintenance obligation

Parties often wish to avoid the necessity of returning to Court to re-set their child maintenance because of fluctuating yearly incomes. While the Family Maintenance Enforcement Program will try to accommodate the parties as best as possible, the Program's mandate is limited. The Program enforces an existing maintenance obligation rather than determining what the maintenance amount is.

Most often, I see clauses such as these:

This Court further orders that Mr. Smith provide his Income Tax Return to Ms. Smith by June 30th of each year and the maintenance payable by Mr. Smith will be adjusted accordingly.

Guideline Income. [“The adjusted amount payable”] The adjusted amount payable shall be payable commencing July 1, 2009 and be re-adjusted July 1 of each year thereafter.

This Court further orders that if the maintenance order is enrolled with the Family Maintenance Enforcement Program, in addition to Mr. Smith providing Ms. Smith with a copy of Mr. Smith’s Assessment Notice as aforesaid, either party may provide the Family Maintenance Enforcement Program with a copy of Mr. Smith’s yearly Assessment Notice. Upon receipt of Mr. Smith’s Assessment Notice the Family Maintenance Enforcement Program shall amend its records to the adjusted amount payable.

If either party disputes the adjusted amount payable, the disputing party shall be at liberty to have the child support determined by this Honourable Court.

d. Special and Extraordinary Expenses

This is an area fraught with difficulties for the Family Maintenance Enforcement Program. While Section 7 of the Child Support Guidelines provides that a Child Support Order may “provide for an amount to cover all or any portion of the following expenses”, practice has developed where Orders do not usually have an amount but a formula for determining the amount payable for special and extraordinary expenses.

Time constraints do not allow all of the issues concerning special and extraordinary expenses to be discussed. Some of the issues faced by the Family Maintenance Enforcement Program are set out in the problem clauses below.

Problem Clauses

Mr. Smith shall pay his proportionate share of all special and extraordinary expenses

The Family Maintenance Enforcement Program cannot enforce this clause. The Program cannot determine what are or not special and extraordinary expenses.

The parties shall share equally the [specific extraordinary expense]

The Family Maintenance Enforcement Program has difficulty with these clauses because maintenance payors will take the position that they can pay the expense directly to the source. If this is not what is wanted the clause should provide that

the custodial parent incur the cost and be reimbursed by the maintenance payor.

Upon Ms. Smith providing receipts to Mr. Smith for the [specific special extraordinary expense] Mr. Smith shall reimburse Ms. Smith for his proportionate share of the expense.

If such "receipt based" clauses are being used I suggest there be time frames attached to the receipts being given to the maintenance payor. The Family Maintenance Enforcement Program sees receipts being provided two or three years after the expense was incurred.

Family Maintenance Enforcement Act Issues

Because of time restrictions I will only discuss three *Family Maintenance Enforcement Act* issues which may arise for you. I expect that these may be the most frequent ones you see:

1. **Driver's License**

Many of the maintenance payors you speak to will be anxious to have their driver's license privileges reinstated.

Be aware that the Family Maintenance Enforcement Program's ability with respect to maintenance payor's driver's licenses is the ability to restrict the renewal of the driver's license. The Family Maintenance Enforcement Program cannot give and take away driving privileges. The concern for the Family Maintenance Enforcement Program will be that if the driver's license restriction is lifted, the Program will not be able to "interfere" with that driving privilege for another five (5) years - i.e. when the maintenance payor needs to renew his driver's license again.

Accordingly, the Family Maintenance Enforcement Program will want to obtain something in exchange for lifting the restriction on the driver's license.

Money

Money is always good.

Employer

The Program is aware that most maintenance payors need their driver's licenses to look for/keep work. If an employer can be provided to the Program deals can usually be made. The Program will likely lift the restriction on the ability to renew a driver's license once a Notice of Attachment is in place with the payor's employer.

Driver's License Consent Orders

If the maintenance payor does not have an employer but needs the driver's license to look for work, the Program may agree to enter into a "Driver's License Consent Order". This is an Order wherein the maintenance payor's driver's license renewal privileges will be reinstated but the actual driver's license will stand as security for either future payment or the reporting to the Program when an employer is found. This security provision is pursuant to Section 30.1 of the *Family Maintenance Enforcement Act*. The Order is such that if the future

payment is not made or if the payor does not report as ordered, he/she will be required to surrender the driver's license to the Court at a future Court appearance.

Keep in mind that if the maintenance payor is not offering anything in exchange for the return of the driver's license privileges that the Program will most likely resist. The payor will then have to meet the test set out in Section 29.2 of the *Family Maintenance Enforcement Act* in order to convince the Court to have his driver's license privileges returned.

2. **Setting aside Notices of Attachment on an Employer**

If a maintenance payor is wanting to set aside a Notice of Attachment taking funds from his pay cheque be aware that the *Family Maintenance Enforcement Act* restricts the Courts ability to set aside a Notice of Attachment to instances where there is a material error on the Notice of Attachment. It has been held that the material error has to be an actual error existing at the present time not a potential error i.e. the payor may be successful in a future variation application.

Instead of trying to set aside the Notice of Attachment you may want to consider advising the payor about an Order varying the exemptions available under the Notice of Attachment i.e. reducing the amount being attached from his wages.

Section 13.1 of the *Family Maintenance Enforcement Act Regulations* allows the Court to increase the amount exempt from attachment on wages but only if the increase is necessary to enable the maintenance payor to meet his or her basic needs for food, shelter and clothing. Again the test is restrictive and the Program (and the Courts) will require a detailed financial statement in support of the application.

3. **Stays of Enforcement pending a Variation Application being heard.**

Frequently, in response to enforcement, a maintenance payor will bring on an application to vary the maintenance and/cancel the arrears. The payor will want to "put things on hold" while his application to vary is proceeding. This will often result in an application for a stay of enforcement pending the hearing of the variation application.

It is the position of the Family Maintenance Enforcement Program that there is no general jurisdiction of the Provincial Court to stay Maintenance Orders. Each enforcement mechanism of the Family Maintenance Enforcement Program under the *Family Maintenance Enforcement Act* has a corresponding section regarding applying to set aside/vary that enforcement. While I recognize that there are

Provincial Court Judges who will make general stays of enforcement Orders, be prepared to have the Family Maintenance Enforcement Program argue against such an Order.

If the Program is contacted by the payor, the Program may voluntarily restrict enforcement pending a variation application but each case is individually considered by the Program before such a decision is made. It may well be that the Program will ask for the regular payment to be made in the interim or funds may be held pending the variation application being determined. Again, however, each case will depend on its own facts.