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A GUIDE TO THE LAW IN ALBERTA REGARDING

MAINTENANCE UNDER THE FAMILY LAW ACT

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GENERAL

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THE ALBERTA FAMILY LAW ACT

The Alberta Family Law Act came into effect October 1, 2005, and replaces the Domestic Relations Act, the Maintenance Orders Act, the Parentage and Maintenance Act, and parts of the Provincial Court Act and the Child, Youth and Family Enhancement Act. This Act amended and clarified existing laws, to ensure that Alberta families and children are dealt with fairly and consistently.

WHO IS GOVERNED BY THE ALBERTA FAMILY LAW ACT

The Alberta Family Law Act governs maintenance for non-married parents, adult interdependent partners and married parents not seeking divorce.

Married persons who are seeking maintenance as part of a divorce application must apply under the Canada Divorce Act. Please see our pamphlet on this topic.

WHO ARE ADULT INTERDEPENDENT PARTNERS?

In Alberta, adult interdependent relationships are defined in the Adult Interdependent Relationships Act.

Under the Adult Interdependent Relationship Act, adults are in an interdependent relationship other than marriage when they

- a. have an agreement to that end;
- b. have lived together in a relationship of interdependence for at least three years; or
- c. have lived together in a relationship of interdependence of some permanence (which could be for less than three years) but have a child from the relationship by birth or adoption.

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Adults in an interdependent relationship are able to apply through Provincial Court, or court of Queen's Bench, for child and spousal maintenance. Please also see our 'Parenting Time' and 'Common-Law Property' Pamphlets for other related information.

WHAT IS MAINTENANCE?

Maintenance is a term that refers to the money that is paid by one spouse/parent/partner for the support of his or her other spouse/partner and/or children. Parents are under a legal obligation to provide for the needs of their children. Maintenance is used to pay for such things as adequate food, shelter, schooling, clothing and medical treatment. However, depending on the circumstances, maintenance may include other items. Spousal maintenance (money paid to support a spouse) can also be called alimony.

Maintenance is usually a fixed sum, paid on a regular basis every month. Maintenance may also be paid yearly or, in certain rare cases, in a lump sum. If there is a verbal or written agreement reached between two spouses/partners/parents concerning spousal or child maintenance this will be taken into consideration by the Court, however, Judges will make maintenance orders based on the current economic position of the spouses/partners/parents. If the situation changes, either spouse, partner or parent can apply to vary (change) the maintenance order.

Usually, if a maintenance agreement is made up with the help of a lawyer, the Court will approve the amount payable, as it will likely follow the Child Support Guidelines. An agreement which does not follow the Guidelines will not be approved by the Court.

CHILD MAINTENANCE

1. Who is a Parent?

The Court can make presumptions about who is the parent of a given child. A female person who gives birth to a child is presumed to be the biological mother of the child.

A male person is presumed under the law to be the biological father of a child if:

- a. He was married to the mother of the child when the child was born;
- b. He was married to the mother of the child and the marriage ended less than 300 days before the birth of the child;
- c. He got married to the mother of the child after the birth of the child and acknowledged that he is the father of the child;
- d. He cohabited with the mother of the child for 12 consecutive months during which time the child was born and he acknowledged that he is the father of the child;
- e. He is registered as the father of the child on the child's birth certificate; or
- f. A Court has found him to be the father for any purpose.

These presumptions can be rebutted with appropriate evidence and the Court may request a DNA test to establish parentage. If a person refuses to provide a DNA sample, the Court may draw any appropriate inferences to establish parentage.

2. The Child Support Guidelines

The Alberta Family Law Act formally adopts the Alberta Child Support Guidelines. These guidelines are modelled after the Federal Child Support Guidelines that are used for divorcing parents.

Alberta courts strive to ensure consistency with respect to child support payments regardless of the nature of their parents' relationship.

The Alberta Child Support Guidelines only apply to children under the age of 22. After the age of 18, a child is eligible for support only if he or she is in post-secondary education full-time and is dependant upon the parents for financial support. This is different from the Federal Child Support Guidelines which are used for orders made under Canada's Divorce Act where the age limit is 18 years.

3. Factors the Court Considers when Awarding Child Maintenance

The Child Support Guidelines ensure a base amount for child maintenance depending upon the income of the payor and the number of children involved. The maintenance guidelines can be changed to account for special expenses like:

- a. Child care;
- b. Medical and dental premiums;
- c. Health related expenses that exceed \$100 annually;
- d. Extraordinary school expenses;
- e. Post-secondary education;
- f. Extra-curricular activities.

The Court will also take into consideration any undue hardships such as access costs, high levels of debt, or a legal duty to support other children. It is important to note that the Court will also take into consideration the standard of living for each of the parents.

4. Payment of Child Maintenance Orders

The Court has the option of ordering maintenance to be paid periodically, monthly, or weekly, or ordering that one large lump sum be paid. Maintenance orders usually direct that monthly periodic payments be made from one spouse to the other through

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the Director of Maintenance Enforcement. A parent might ask for a lump sum payment (meaning a large portion, or all of, the maintenance payments are paid at once) because it allows for greater freedom and more options when spending on a child. However, Courts rarely allow lump sum payments because it makes it difficult to change a maintenance order if there is a change in circumstances. Lump sum payments are usually only awarded where the payor has the money available and the payor has refused to obey an order for periodic payments in the past.

5. Duration of Child Maintenance Orders

Under the Family Law Act, parents are under a legal obligation to provide for the needs of their children. This applies until the child turns 18 or voluntarily withdraws from the parent's charge. A parent is also obligated to provide for a child between the ages of 18 and 22 if the child is still under the charge of the parent AND the child is a full time student. This is different from the obligations for divorcing parents under Canada's Divorce Act.

If the child is married or is in an adult interdependent relationship or has voluntarily withdrawn from the parent's charge and is living an independent lifestyle, the parents are no longer obligated to provide for the child's needs. This obligation can extend to step-parents or other people standing in the place of a parent.

6. Maintenance is NOT Tied to Access

Parents must understand that maintenance is not tied to access or contact. Maintenance orders, parenting time and contact orders are separate entities. If one parent does not pay maintenance, the other parent cannot deny contact with the child. Also, if one parent denies the other parent contact with the child, the other parent cannot stop making maintenance payments. Only the Court can vary a maintenance order.

A parent who is not receiving child maintenance can get help from the Maintenance Enforcement Program (MEP). For more on this

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please see the section about the *Maintenance Enforcement Program* which appears later in this pamphlet.

A parent who is paying maintenance but not getting access to his or her children has limited options. There is no governmental agency that can remedy this. A parent in this situation can return to Court to seek enforcement of the access order through a contempt proceeding or through a change in the access order.

Parents who wish to negotiate for access and maintenance may get help from the Edmonton Custody and Mediation Program (Please see the back of this pamphlet for the telephone number of this agency). If parents want to learn more about these issues, they can also attend the Parenting After Separation Seminar offered through the Alberta Courts (Again, see the referral section of this pamphlet for contact information)

SPOUSAL AND ADULT INTERDEPENDENT PARTNERS' MAINTENANCE

Maintenance can be awarded under Alberta's Family Law Act for married spouses that are not divorcing and for adult interdependent partners.

Married spouses who are divorcing are governed by the federal Divorce Act.

1. Factors the Court Considers

In making a spousal or adult interdependent partner support order, the Court can consider the length of time the parties lived together and the functions each party performed during the time they lived together. The Court can also consider support obligations that one of the spouses/partners may already have to any other person. Courts can also look at the new financial situation of the spouses/partners. If one of the spouses has

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entered into a new relationship where they share expenses with their new partner, it can affect the amount of support awarded.

When making a support order, the court does not consider any misconduct of a spouse or adult interdependent partner unless:

- a. It unreasonably prolongs or aggravates the need for support, or
- b. It unreasonably affects the ability to provide support.

2. Objectives of Spousal or Adult Interdependent Support Orders

The support order should recognize the economic advantages and disadvantages of the parties arising from the relationship or its breakdown. It should also spread the financial consequences arising from the care of any child of the relationship between the spouses or adult interdependent partners.

3. Priority of Child Support

The courts give priority to child support obligations over spousal support obligations. This means that child support must be paid before any spousal support. Also, spousal support amounts can be reduced to give priority to child support obligations. Therefore, any change to the child support order can then result in spouses being able to apply for a change in the spousal support order.

4. Types of Support Agreements

Spouses or adult interdependent partners may enter into two types of written agreements:

- a. Where one spouse/partner agrees to pay support for the other spouse/partner.
- b. Where one spouse/partner agrees the other spouse/partner does not have to pay support.

These written agreements cannot vary an already existing Court support order.

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The Court is able vary these written agreements in certain situations. For specific situations of when these agreements can be altered, please speak with a lawyer.

5. Termination of Spousal or Adult Interdependent Partner Support Orders

A spousal or adult interdependent partner support order terminates on the death of the spouse or adult interdependent partner that is receiving support. The termination of a support order does not affect any arrears owing under the order before it is terminated.

GENERAL INFORMATION

1. Taxes

Child maintenance payments made under a Court order which came into effect on or after May 1, 1997 are no longer taxable to the person receiving the payments and are no longer tax deductible to the payor. In other words, the payment will only be taxed once and only the payor will be taxed. Payments made under a Court order which came into effect before this date are still taxable, and tax deductible, unless both parties agree in writing to follow the post-1997 tax rules. A Court order that is varied after that date will fall under the new tax rules.

Spousal Support payments are considered income and are taxable for the person who is receiving the payment.

2. Disclosure of Financial Information

Upon written request, a spouse, parent or adult interdependent partner must provide their current financial information. This written request must be in the correct form. Please see a lawyer for advice. If you fail to comply with this request, a Court may force you to provide the information, find you in contempt, or draw an adverse inference against you. This means the Court can

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provide a calculation of your income in any amount it considers appropriate. Financial information can be requested once a year.

3. Possession of the Home and Property

As part of a support order, a spouse or adult interdependent partner may be given exclusive possession of the family home and the possession of property or household goods. Alternatively, the Court can evict a spouse or adult interdependent partner from the family home. In deciding who gains possession of the home, the court considers many factors including the needs of the children, lease agreements and the financial situations of the parties.

4. The Maintenance Enforcement Program

The parent, spouse or adult interdependent partner who is receiving maintenance payments must decide if he or she wants to get the money directly from the payor, or through the Maintenance Enforcement Program (MEP). Under this program, maintenance is paid to the Director of Maintenance Enforcement. The money is then transferred to the receiving party through a government cheque. MEP does not charge any fees to the person who is receiving the payments. A person who opts out of the program is responsible to enforce the order on their own.

Maintenance orders made by a Court before January 1, 1987 may be filed with the Director of Maintenance if there was a default in payment. The receiving parent must apply for MEP to enforce the order. Maintenance orders made by any Court after January 1, 1987 are automatically filed with Director of Maintenance Enforcement, but in practice they are only enforced when the recipient parent applies. To opt out of the program, the receiving parent should file a notice in writing stating that he or she does not wish to have the order enforced by MEP. If you have an agreement and wish to have the agreement enforced by MEP, the proper form of agreement must be executed by both parties. This

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form is available from Maintenance Enforcement and is also available on the Maintenance Enforcement website.

The Director of Maintenance Enforcement has broad powers to collect maintenance payments. To make sure that a parent, spouse, or adult interdependent partner pays maintenance, the Director may do the following:

- a. Garnish wages or G.S.T. and income tax refunds;
- b. Seize goods and freeze assets;
- c. Suspend a driver's licence, hunting or fishing licence, or passport

The Court has the power to have a payor who tries to leave Alberta to avoid making payments arrested.

The Director has the power to advertise for information or make inquiries about the whereabouts, assets, employment information and financial circumstances of the parent, spouse, or adult interdependent partner who owes payments. The information that is gathered is only used to enforce maintenance payments and is otherwise confidential. As of November 14, 2005, the Maintenance Enforcement Program introduced deterrent penalties:

- a. A \$25 penalty for each month that a payment is late or not made at all.
- b. A \$50 returned item penalty for payments returned for non-sufficient funds or 'stop payments'.
- c. A \$200 penalty for failure to return a Statement of Finances when requested.
- d. A \$50 direct payment penalty to discourage direct payment between debtors and creditors.

Note: The Maintenance Enforcement Program will be introducing new service fees - please contact the Maintenance Enforcement Program for more details (see the contact information on the back).

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If the parent, spouse, or adult interdependent partner who is owed payments is on Income Support, he or she must register with the Maintenance Enforcement Program to receive maintenance payments. In this situation, the government has all the rights to the maintenance payments. Employment, Immigration, and Industry (EII) will apply for a maintenance order for the person and will require that the person cooperate with them. The Director of Maintenance Enforcement will forward maintenance payments to EII. If the maintenance amount is lower than the Income Support benefits, the debtor (or the person who pays the maintenance) owes the government the amount of maintenance. If the maintenance amount is higher than the Income Support benefits, the government keeps the amount of the benefits and forwards the rest to the creditor (or the person who is paid the maintenance). The parties cannot agree to avoid MEP nor can they agree to lower the maintenance amount owed while the parent is on Income Supports. If the debtor does not make these payments, they will continue to owe the government. Once the person who is owed payments is off Income Supports, he or she will directly receive their payments once again. At this point, the person must notify MEP that he or she is no longer receiving Income Support benefits.

5. Non-Payment of Maintenance

Occasionally, orders for maintenance are not paid. Sometimes a parent defaults for financial reasons, such as the loss of employment or other setbacks. In this situation, the defaulting spouse should apply to the Court for a review of the maintenance order. The amount of maintenance which must be paid MAY be reduced if the defaulting parent can show that there has been a change in his or her circumstances that would justify a decrease in maintenance. If a parent who is heavily in debt is ordered to pay maintenance it is possible that the Court may give him or her some time to get his or her finances together before payments begin. The Court may also give a parent some time to get his or her finances in order if he or she acquired debts after the divorce

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as a result of his or her honest efforts to maintain the children's standard of living. If a parent paying maintenance has difficulty making payments because he or she has spent money on things that are solely for his or her own pleasure, the Court will not be very sympathetic and the children's claim for maintenance will take priority.

Some people consider declaring personal bankruptcy to avoid paying maintenance. This is a short sighted solution that is damaging to the children involved, and based on a misunderstanding of Bankruptcy laws. The Canada Bankruptcy Act says:

- 148.1 An order of discharge does not release a bankrupt person from:
- a. any debt or liability for alimony
 - b. any debt or liability under a maintenance or affiliation order
or
 - c. under an agreement for maintenance and support of a spouse or child living apart from the bankrupt.

One reason that a portion of the bankrupt's assets are exempt from creditors is to provide the spouse who is bankrupt with the money necessary to maintain his or her dependants. Therefore, bankruptcy does not eliminate the parental responsibility of providing maintenance for children. Maintenance will still have to be paid. Furthermore, an execution order for the payment of maintenance is an exception under the Exemptions Act. This means that the goods of the paying parent, which normally cannot be seized, can be taken and sold in order to pay maintenance which is owed.

On occasion, one parent may want to recover maintenance arrears by having the other parent declared bankrupt. In theory, this would give most creditors access to the paying parent's assets. However, the ability of a parent to do this will depend on

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the wording of the statute (law) which helped them get the maintenance order. A lawyer is required to do this.

Sometimes, parents without custody try to avoid paying maintenance by selling their personal assets to a third party. If the sale between the paying parent and the third party is not in the best interests of the children, the Court will not allow it. More likely than not, the Court will declare the sale of the property to the third party to be fraudulent on the grounds that it was made to hinder, delay and defraud the children's claim. Generally, the Courts are not sympathetic to people who attempt to avoid paying maintenance when they have the ability to pay.

6. Variation of Maintenance Orders

An application to vary a maintenance order can be made in the Court where the order was originally granted.

When a person's financial situation changes, he or she should apply to the Court to review the maintenance order. The amount of maintenance that must be paid may be reduced if the person can show that there has been a change in his or her circumstances that would justify a decrease in payments. Also, the amount of maintenance that must be paid may be increased if the payer's income increases. If the income of the person receiving maintenance payments changes, the payment amount may also be varied upon application.

If a person is heavily in debt the Court may allow some time to get his or her finances in order before the payments begin. However, if the person who pays maintenance is in debt due to purchasing items solely for his or her own pleasure, the Court is very unlikely to be sympathetic and the claim for maintenance will take priority.

A paying parent who is not a guardian of the child has no say in how the basic maintenance payments are to be spent. The paying parent may have a say in spending for extra-curricular

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activities. If there is clear and convincing evidence that the maintenance payments for the child are being improperly spent, and the child is being improperly provided for, the paying parent may apply to the Court to change the custody order.

A child maintenance order will rarely be changed even though the receiving parent remarries or lives in an adult interdependent relationship. A Court will not allow a parent to escape his or her parental responsibilities simply by remarrying. Nor will the Court allow a child of the first family to live at a significantly lower standard than those of the second. Child support orders are only varied in cases where it is causing undue hardship for the parent who is paying the maintenance. The Courts have a specific test for what may be considered undue hardship. If you believe this may apply to you, contact a lawyer for further information.

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REFERRAL NUMBERS

Court of Queen's Bench [780] 422-2425
www.albertacourts.ab.ca/qb/

Family Mediation Services (Edmonton) [780] 427-8329
www.albertacourts.ab.ca/cs/familyjustice/MediationServices.pdf

Family Court Services [780] 427-8343
www.albertacourts.ab.ca/go/FamilyJusticeServices/tabid/120/default.aspx

Federal Government Child Support Guidelines
www.canada.justice.gc.ca/en/ps/sup/

Lawyer Referral Service 1-800-661-1095
www.lawsocietyalberta.com/publicservices/lawyerReferralService.cfm

Legal Aid Society of Alberta [780] 427-7575
www.legalaid.ab.ca

Maintenance Enforcement Program [780] 422-5554
www.justice.gov.ab.ca/mep/

Parenting After Separation Seminar (Edmonton) . [780] 413-9805
www.the-family-centre.com/pas/pas.html
www.albertacourts.ab.ca/cs/familyjustice/ParentingAfterSeparation.pdf
www.albertacourts.ab.ca/go/CourtServices/FamilyJusticeServices/CoursesSeminarsforParentsandFamilies/tabid/126/Default.aspx

Provincial Court - Family Division [780] 427-2743
www.albertacourts.ab.ca/go.aspx?tabid=430

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Queen's Bench Family Law Information Centre . . [780] 415-0404
www.albertacourts.ab.ca/familylaw/
www.albertacourts.ab.ca/cs/familyjustice/FamilyLawInformationCentre.pdf

Student Legal Services [780] 492-8244
www.slsedmonton.com