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# **A GUIDE TO THE LAW IN ALBERTA REGARDING**

## **SUPPORT FOR MARRIED PERSONS AND THEIR CHILDREN UNDER THE *DIVORCE ACT***

version: 2010

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**CHILD SUPPORT**

Both parents are under a legal obligation to provide for the needs of children of the marriage. Child support is the right of the child to be financially secure. Support is used to pay for such things as adequate food, shelter, schooling, clothing and medical treatment. It may even include special expenses for extracurricular activities, post-secondary education, orthodontics etc. These special expenses may be shared by the parents, in proportion to their incomes.

It should be noted that a Judge will not allow a Divorce Judgment if the amount of child maintenance that the paying spouse has agreed to give the custodial spouse is not reasonable given their circumstances. So even if the parents agree on an amount for child maintenance, the Court will not give the spouses a divorce until they make reasonable arrangements for the support of the child. What qualifies as “reasonable arrangement” will depend on the circumstances of the spouses and generally, Judges follow the Federal Child Support Guidelines to determine proper maintenance.

**1. Child of the Marriage**

Under the *Divorce Act*, children of the marriage are entitled to support. A child of the marriage is a child of the spouses who is under 18 years of age or over the age of majority but is unable by reason of illness, disability or other cause to withdraw from their charge or obtain the necessaries of life. The Court has found that children over the age of majority who are enrolled in full time studies are entitled to support.

It is important to note that a Court might order child support even if one of the divorcing spouses is not the natural parent of the child. For example, if the child is the biological child of the wife from a previous marriage, and if the husband had taken on the

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role of father to the child (although not adopting the child), the step-father might be ordered to pay child support. In these circumstances, the Court will look at the nature of the relationship between the step-parent and child. They will consider things like whether the step-parent intended a permanent relationship with the child and the feelings of affection between the step-parent and child. A person standing in the place of a parent cannot simply decide to terminate a relationship with the child as a result of the divorce. If the Court finds that a step-parent stands in the place of a parent, they have the same obligations to provide child support as a biological parent.

### **THE FEDERAL CHILD SUPPORT GUIDELINES**

The Federal Child Support Guidelines contain the Child Support Tables which judges must use to determine the amount of monthly support. While there is a possibility that spouses can agree to an amount other than what is in the Guidelines, the Court must be satisfied that the children will be financially supported despite not following the Guidelines. The Court does this to protect children and to make sure that parents do not bargain away their children's right to support.

When a child resides primarily with one parent, the other parent who pays support is called the 'payor'. The Guidelines allow for two types of child support. The first is the base amount or Section 3 amount and it is meant to ensure a base amount for child support depending upon the income of the payor and the number of children involved. The second is the special expenses or Section 7 amount. In order to claim for special expenses, the costs must be reasonable, based on the child's best interests, consistent with the financial means of the parents and spending patterns of the family prior to separation. If the cost existed before the breakdown of the marriage, it is up to the person disputing the expense to show why the expense is unfair or unreasonable.

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Extraordinary expenses are shared by the parents in proportion to their incomes. Some of the common extraordinary expenses are:

- a. Child care;
- b. Medical/dental premiums;
- c. Health related expenses that exceed \$100 annually (e.g. glasses);
- d. Extra-ordinary school expenses;
- e. Post-secondary education;
- f. Extra-curricular activities.

In assessing these special expenses, the Court will take into account the physical and emotional condition of the children, and the standard of living the children were used to during the marriage. Children of the marriage who are over the age of majority may be responsible for contributing to some of their own expenses.

The table amount from the Guidelines and special expenses can be adjusted to account for any undue hardship on the part of the payor such as high access costs, high levels of debt, or a legal duty to support other children. The Court tries not to create hardships for the spouse's second family because of heavy maintenance payments to the first family. However, a Court will not allow a parent to escape his or her parental responsibilities simply by re-marrying. Nor will the Court allow the children of the first family to live at a significantly lower standard than those of the second. The Court tries to balance the rights of all the parties. Undue hardship is a very hard claim to make out.

### **1. Calculating Child Support**

Each spouse must disclose their financial information for the purpose of calculating child support. This is sometimes done by serving a "Notice to Disclose". If one spouse refuses to reveal his or her finances, the Court may impute their income. This means

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the Court will determine a fair value of what the spouse's income is believed to be.

The calculation of child support can be quite complicated. The method of calculating the amount may change depending on the custody arrangement. It is recommended that parents see a lawyer or go to the Family Law Information Centre (FLIC). They will have the computer software necessary to calculate the amount of child support. Spouses may also attend Child Support Resolution in order to come to an agreement on child support (see FLIC referral number below).

Note that the obligation of parents to exchange financial information is ongoing as the amount of support changes with any change in income. Parents should exchange financial information every year at an agreed upon date. Parents may also register in the Child Support Recalculation Program (RP). RP recalculates future monthly child support based on the *Child Support Guidelines* tables, as well as proportionate shares special of expenses. Either a recipient or payor of child support can choose to register with RP. The service costs \$75 per year for each parent. RP uses income tax information to set the new child support amount. If there is only a small change in child support (less than \$10 per month or less than a 10% change in the proportionate share of special expenses) then the RP will not change the child support amount and there will be no service fee. This avoids the need to go to the Court for yearly recalculations. To participate both parents must live in Alberta and the original order must have been based on the *Child Support Guidelines*.

For more information visit [www.recalculation.gov.ab.ca](http://www.recalculation.gov.ab.ca).

### 2. Federal Child Support Tables

To view the Federal Child Support Guidelines and the appropriate Tables, please see [www.justice.gc.ca/en/ps/sup/grl/glp.html](http://www.justice.gc.ca/en/ps/sup/grl/glp.html). This

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information can also be obtained in printed form from the courthouse. Make sure that you use the table applicable to the province in which the payor lives.

### 3. Payment of Child Support

The Court has the option of ordering that support be paid periodically, monthly or weekly, or ordering one large lump sum. Most support orders are monthly payments from one spouse to the other through the Director of Maintenance Enforcement. A parent might ask for a lump sum payment because this type of payment allows greater freedom and more options to control affairs. This type of payment also removes the worry which comes from collecting payments. However, the Courts rarely allow lump sum payments because they make it hard to change a support order if there is a change in circumstances. The Court will usually allow for a lump sum payment only if the parties are rich and there is a strong possibility that periodic payments cannot, or will not, be made. The Court will look at the following facts to decide whether a lump sum payment should be made:

- a. The parent's ability to raise money for the payment;
- b. The need of one parent to set up a home for the kids;
- c. Concern that the payments will not be used to promote the child's best interests; AND
- d. Whether or not it is likely that periodic payments would be paid.

This is not an exhaustive list.

### 4. Support is NOT Tied to Access

Parents must understand that support and access are not tied together. If a spouse does not pay support, the other spouse cannot deny access. This also means that even if the spouse without custody is intentionally denied access, they cannot stop making support payments. If the spouse with custody is not allowing access, they are in breach of the Court order. Where a

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parent is paying support, but not getting access, they should go to Court and seek to enforce access.

Note that the personal misconduct of either spouse will not be considered by the Court unless it relates to that parent's ability to care for the child and will not affect the amount of child support payable to the recipient spouse.

### 5. Duration

In a divorce, there is usually no fixed time period for terminating support because children are entitled to financial assistance so long as they are dependant. Most commonly, the payment of support is required until:

- a. The child gets married or becomes an adult interdependent partner;
- b. The child is 18 years old or until they finish their first post-secondary program; and/or
- c. The child is able to support themselves without assistance.

## SPOUSAL SUPPORT

Spousal maintenance (money paid to support a spouse) can also be called alimony. A spouse does not automatically have a right to support. This means that they do not have the right to be maintained in the lifestyle they have been accustomed to. However, the Court may order spousal support where one spouse has suffered a disadvantage either as a result of the marriage or its breakdown, the financial consequences of the care of any child(ren) and the possibility of the spouse becoming self-sufficient. It is important to note that child support is always given priority over spousal support.

Under the *Divorce Act*, the Judge decides if a spouse is entitled to support and the amount and the duration of support. For long marriages and where one spouse has given up their career to

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care for children, the Court is more likely to find entitlement to support for an indefinite period of time. For shorter marriages, a spouse may receive support for a specific period of time while he or she is trying to get a job or upgrade any skills or education. This type of support order is called a fixed term order because support is only given for a set length of time before it will end. When deciding how long a spousal order will last, the Court will base its order on the amount of time a spouse will need before they could reasonably achieve self-sufficiency. Self-sufficiency, however, is only one factor the Court will consider and is not always reasonable to expect in cases where one spouse is disabled or chronically ill. It should be noted that if one spouse is receiving Social Assistance and that spouse is not going to receive spousal support, the Judge will likely ask the spouses to explain the situation.

In allowing spousal maintenance, the Court **MUST** consider the following factors: the condition, means, needs and other circumstances of each spouse, including the length of time they lived together **AND** the work each spouse performed while they were living together. Condition of the spouse includes such things like the health of the spouse. The means of the spouse refers to the spouse's ability to support themselves without assistance. When looking at the spouse's function, the Court will consider whether or not the spouse earned an income during the marriage or whether the spouse remained at home to raise children. The Court will not consider a spouse's misconduct, such as adultery or cruelty, when it decides a support award. In other words, a spouse will not be denied support or given less assistance because he or she committed adultery. Conversely, a spouse will not be automatically entitled to support because his or her spouse committed adultery.

The Federal government has drafted Spousal Support Advisory Guidelines. However, these guidelines are informal and only

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advisory in nature - they are not legally binding (unlike the Federal Child Support Guidelines). The formula for calculating the amount and duration of support is complicated and it is suggested that spouses seek legal advice.

### **1. Types of Payment**

Support is usually ordered as a fixed sum, paid on a regular basis every month. It 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 concerning support, this will be taken into consideration by the Court. However, Judges will make support orders based on the current economic position of the spouses/parents. If the situation changes, either spouse or parent can apply to vary (change) the order. Both spouses will need to disclose their income information in order for the Court to determine the amount and type of order they will make.

### **2. Variation**

Sometimes a parent or spouse defaults on support payments for financial reasons, such as the loss of employment or other setback. In this situation, the defaulting spouse should apply to the Court for a review of the support order. The amount of support 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 support payments. If a parent who is heavily in debt is ordered to pay support, it is possible that the Court may give them some time to get his or her finances together before payments begin. The Court may also give a parent some time to get their finances in order if they acquired debts after the divorce as a result honest efforts to maintain the family's standard of living. If a parent paying support has difficulty making payments because they spent money on things that are solely for their own pleasure, the Court will not be very sympathetic. Child support will take priority over spousal support.

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If the circumstances do change, the parents or spouses could agree between themselves for the payment of a lesser amount. Any such agreement should be in writing and drawn up into a consent order of the Court. However, the Court has the final say even if both spouses have consented.

If the maintenance order was made through the Court of Queen's Bench, it is best to get a lawyer because varying this type of order is complicated. A Notice of Motion must be filed and affidavits must be sworn and filed.

Under the *Divorce Act* an application to vary or change the maintenance order can be made where the two former spouses are ordinarily residents of Alberta. Generally, a spouse is considered to be an ordinary resident of a province if he or she has lived in that province for at least 1 year. If the spouses are not ordinarily residents of the same province, they must follow the Provisional Order procedure outlined in the *Divorce Act* regarding the variation of maintenance when the parties live in two different jurisdictions. This procedure requires the spouse or parent in Alberta to submit their application to the Court in Alberta and obtain a Provisional Order without having to give the other spouse or parent notice of the application. The Provisional Order will not take effect until it is sent to the jurisdiction where the other person lives and the Courts there confirm the Alberta order. This process can be complicated and it is recommended that you obtain the services of a lawyer if this is your situation.

### **3. Interim Support Orders under the *Divorce Act***

A parent/spouse can apply to the Court of Queen's Bench for an interim support order. This allows for support while waiting for a final order by the Court. This could be because some of the issues are contested (for example, custody) or because the parties must wait to establish the ground of marital breakdown.

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**4. Appealing a Support Order under the *Divorce Act***

If a spouse does not feel that the Justice's decision is correct, he or she can appeal to the Court of Appeal. The ordinary appeal period is within 30 days of the date that the order granted by the Judge. Generally, the Appeal Court will be reluctant to change the Trial Judge's decision if the amount of support is the only thing being challenged. However, each case will depend on its facts. For appeals, a lawyer should be consulted.

It should also be noted that if there is an existing order from Family Court or a previous separation agreement concerning support, the Court of Queen's Bench may make an order similar to these if the support amount is still satisfactory to both parties. However, the Court is not bound by any previous agreement or order.

**NON-PAYMENT AND THE MAINTENANCE  
ENFORCEMENT PROGRAM (MEP)**

MEP is designed to ensure that individuals meet their child and/or spousal support obligations. Either the recipient or payor parent can register to have payments made through the Maintenance Enforcement Program (MEP). While orders are automatically filed with MEP, the payor or recipient must register for MEP to get involved.. The parents may, if they wish, opt out of the MEP and get their money directly from the paying spouse. If they do, they are responsible for the enforcement of the support order on their own, including seizure, garnishment or the holding of a default hearing. If the receiving spouses choose to participate, the collection of support payments will be handled by MEP. In this system, support paid by one spouse goes to the Director of Maintenance Enforcement and the Director then makes out a government cheque for the amount the other spouse is owed.

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

- a. Make deductions from wages (maximum of 40% gross wage);
- b. MEP can take money payable to the debtor from bank accounts, mutual funds, rent or contract fees;
- c. Garnish income tax refunds, GST rebates, Canada Pension Plan income, and Employment Insurance payments;
- d. The debtor may be prevented from transferring any property he or she wishes to sell, and allows MEP to seize assets including vehicles, shares and bonds;
- e. The debtor may have his or her driver's licence, registration, licence plates, or abstracts restricted or suspended;
- f. Recreational licences for fishing and hunting may be restricted;
- g. MEP may cancel current driver's licences for account more than 60 days in late payments;
- h. Passports can be revoked;
- i. MEP may prevent an owner from re-mortgaging or selling real estate without first making payments. In some cases MEP may force sale of real estate;
- j. Failure to make child support payments may be registered as bad debt and affect credit;
- k. If assets are being kept in the name of a company, MEP can apply for a court order allowing the company's assets to be used to pay for the debt;
- l. MEP may seize assets the debtor tries to sell; and/or
- m. If assets are being put in someone else's name to avoid collection, MEP can apply for a court order allowing for their seizure.

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The Court has the power to have a payor who tries to leave Alberta to avoid making payments arrested. Photographs and names of debtors may also be posted on the Maintenance Enforcement website. The information that is gathered is only used to enforce maintenance payments and is otherwise confidential. The Maintenance Enforcement Program has also 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;
- e. \$50 service fee for substitutional service on a debtor or creditor by serving MEP;
- f. \$200 re-registration service fee for a client who asks MEP to re-open a file that was closed due to that client's lack of cooperation; and/or
- g. Interest collection on late payments (4.25% in 2008)

Parents who wish to have support collected by the MEP do not have to know where their former spouses are living. The Director can enforce the order even if former spouses do not provide this information because the Director has the power to look at motor vehicle registrations and Alberta Health Care records to find out where the non-paying spouses live. However, it is helpful to provide MEP with as much information as possible about the debtor spouse, including his or her address, SIN, driver's licence number, the name of his or her employer, and his or her bank account number and branch location.

If the parent who has custody of the children is on Social Assistance, he or she **MUST** register with the Maintenance

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Enforcement Program to get maintenance. Alberta Family and Social Services will apply for a maintenance order for the parent and will require the parent to cooperate with them. If the parent receiving assistance does not cooperate with Alberta Family and Social Services he or she could lose benefits. Once the maintenance order is in place, Social Services will take all or part of the maintenance money paid by the non-custodial parent to help lower their costs. A social worker will handle this for the parent who is receiving assistance. The payment or non-payment of maintenance by a non-custodial spouse will not affect the amount of social assistance the custodial spouse receives. The MEP is available to all Albertans.

If a person tries to leave Alberta because he or she wants to avoid paying support, the Court has the power to have that person arrested or have the payments enforced interprovincially. There are no limitation periods for the collection of arrears (debts).

### **1. Payment Arrangements**

When there is money for support, a payment arrangement can be made to allow the debtor to pay the monthly support amount, plus make payments toward arrears. This helps children get the support they need and the debtor avoids new collection actions, default penalties and interest charges. These arrangements with MEP are based on a debtor's financial circumstances and require full financial information. MEP will review the income, assets, employment and expenses of individuals and negotiate a monthly payment. If the arrangement is followed through, MEP can reduce or remove collection actions.

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REFERRAL NUMBERS

Child Support Recalculation Program (Edmonton)  
..... [780] 401-1111 (toll-free: 310-0000)

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

Family Law Information Centre ..... [780] 415-0404

Lawyer Referral Service ..... 1-800-661-1095

[www.lawsocietyalberta.com/publicservices/lawyerReferralService.  
cfm](http://www.lawsocietyalberta.com/publicservices/lawyerReferralService.cfm)

Legal Aid Society of Alberta ..... [780] 427-7575  
[www.legalaid.ab.ca](http://www.legalaid.ab.ca)

Maintenance Enforcement Program ..... [780] 422-5555  
[www.justice.gov.ab.ca/mep/](http://www.justice.gov.ab.ca/mep/)

Parenting After Separation Seminar (Edmonton) . [780] 413-9805  
[www.the-family-centre.com/pas/pas.html](http://www.the-family-centre.com/pas/pas.html)  
[www.albertacourts.ab.ca/cs/familyjustice/ParentingAfterSeparatio  
n.pdf](http://www.albertacourts.ab.ca/cs/familyjustice/ParentingAfterSeparation.pdf)

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(Civil and Family Office) ..... [780] 492-8244