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MAINTENANCE AND RECOVERY AND ENFORCEMENT

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MAINTENANCE AND RECOVERY AND ENFORCEMENT

I

INTRODUCTION

The Maintenance and Recovery Branch forms a part of the Department of Social Services and Community Health. The philosophy behind this section of the department is that the husband has a financial responsibility towards his wife and children and that this responsibility should be pursued by the department if it is providing its services to the dependants of that person. Up until four years ago, the department did not actively pursue errant husbands unless the wife made it known that she was willing to cooperate. This policy changed at that time and since then the department is much more active in the area of maintenance and recovery. Prior to the change all workers were involved with maintenance and recovery. Today, there are a few specialized workers who do nothing but maintenance and recovery work. This has enabled the department to collect a great deal more money from husbands than they were able to previously.

II

ADMINISTRATIVE PROCEDURE WITH REGARD TO ORIGINAL ORDERS OR AGREEMENTS

When the department is seeking to obtain maintenance from a spouse then can proceed by one of two methods.

A. Voluntary Agreements

Quite a large number of persons never get into family court for maintenance orders. Often times the man will agree to pay his family or the department a monthly sum. These sums form a substantial amount of the money that the department collects each month. These voluntary agreements are specifically mentioned in the Maintenance and Recovery Act in

section 55 and 56 which states:

55. (1) A person who applies for or is receiving a social allowance under *The Social Development Act* may be required by the Minister to enter into an agreement with the Director to repay the Province the total value or any portion thereof of the social allowance provided for that person and that person's dependants.

(2) The provisions of this Part apply to an agreement made under subsection (1) as if the amount due under the agreement were an overpayment.

[R.S.A. 1970, c. 223, s. 55; 1973, c. 70, s. 2 (8)]

56. (1) Where the parents of a child fail to provide adequate maintenance for their dependent child for whom a social allowance is being or has been paid under *The Social Development Act*, either or both parents may enter into an agreement with the Director to pay maintenance for the child in a manner agreed upon.

(2) If no agreement to pay is entered into by a parent or upon the failure of a parent to comply with the terms of an agreement, the Director may make an application to a magistrate for an order for maintenance and sections 27 to 30 of *The Domestic Relations Act* apply *mutatis mutandis* and all proceedings shall be conducted in the same manner and to the same effect as if the application in respect of maintenance were made by a wife where the application is restricted to the maintenance of a child.

(3) Where no agreement to pay is entered into by a parent and the parent is resident outside Alberta, the Director may, on behalf of the dependent child apply under section 5 of *The Reciprocal Enforcement of Maintenance Orders Act* for a provisional maintenance order against that parent. [R.S.A. 1970, c. 223, s. 56; 1971, c. 67, s. 13]

As long as the person continues to make these payments they will never enter the court room. If he defaults in the payments the social worker will then take it to court. The amount set by the judge will then be an original order which will then be enforced by the family court.

It should be noted that payments made under a voluntary order are not tax deductible. It would appear then that voluntary agreements are not as advantageous to the man as court orders which are tax deductible. However, in such cases the husband is generally claiming his wife and children as dependents which puts him in the same position as he would be were he only deducting the maintenance payments.

B. Original Court Orders Upon Separation

Court action will generally be taken if the husband is unwilling to enter into a voluntary agreement. This action can be taken in one of two ways

(1) By the Women Herself

Where the woman herself is willing to initiate the action, she may do so under the authority of the Domestic Relations Act - section 27. Section 27 deals with two situations. Firstly, if the woman is deserted by her husband, she can apply for maintenance for herself and her children. According to 27(1) the meaning of deserted is:

27(1) A married woman shall be deemed to have been deserted within the meaning of this Part, when she is, in fact deserted by her husband, or living apart from her husband, whether on account of cruelty on the part of the husband, or on account of the refusal or neglect by the husband without sufficient cause to supply her with food and other necessaries when able to do so.

She applies for maintenance by filing an affidavit with the family court. The husband will then be issued a summons to appear before the judge. At the hearing, the judge will question the man as to his liability for maintenance and his financial situation. If liability is found, the judge will then proceed to make an order, ordering him to pay a fixed sum for the maintenance of his wife and children. This order will then be filed with the Family Court in order to enable enforcement at a future date should he default on the payments.

Secondly, if the woman either states that she was not deserted but has care of the children or the judge finds the woman not to have been deserted the order will be restricted to maintenance for the children only. Authority for this is found in section 27(5) and 27(6) which states:

27(5) Where a married woman has not been deserted by her husband, if she has their children in her care she may apply to a magistrate for an order of maintenance restricted to the maintenance of the children and the application may be dealt with in every other respect as an application under subsection (2) by a deserted wife.

27(6) Where a married woman makes an application for herself and children under subsection (2) and it is held that she is not a deserted wife the court may make an order for maintenance restricted to the maintenance of the children.

Again where such an order is made it is filed with the family court to enable enforcement of the order in case of default.

Such orders may be made payable either to the wife or the department. If it is made payable to the woman herself, then the sum will be deducted from her social assistance. If, the amount is made payable to the department by her signing a maintenance authorization, she will receive the full amount of social assistance and she will not have the worry whether or not he has paid. Authorization to allow the department to collect is set out in section 27(4) which states:

2) (4) If the husband admits liability, or if the husband denies liability and the magistrate after due hearing finds the husband does have liability, the magistrate may order that the husband pay to the applicant personally, or for her use to a third person on her behalf and named in the order, such weekly, semi-monthly, or monthly sum for the maintenance of his wife or his wife and children, as the magistrate considers reasonable having regard to the means of both the husband and wife.

(2) Third Party Applications

Sometimes the woman is reluctant to initiate action for an order of maintenance by herself. This reluctance may be due to fear of reprisal by her husband or fear that such an action will deter any possibility of a future reconciliation.

In such cases the department will initiate the action themselves on her behalf. As already mentioned in the introduction, until recently such third party applications were rare. Mr. Bob Lane, a maintenance and recovery worker, with the department, told me that in the twelve years prior to the change he'd only done half a dozen applications. Since the change, in policy, the third party application is extremely common. Authorization for third party applications is found in section 7 of the Family Court Act which states as follows:

7. (1) Where a wife is receiving economic assistance

(a) from the Province, or

(b) from a municipality in the Province,

in respect of herself or a dependent child, any application that she can make to the Family Court in respect of a maintenance order may be made on behalf of her or the child by a welfare worker of the Province or the municipality, as the case may be.

(2) On an application authorized under subsection (1), all proceedings shall be conducted in the same manner and to the same effect as if the application in respect of maintenance were made by the wife. [R.S.A. 1970, c. 133, s. 7]

Procedure on third party applications is similar to that of the former discussion. The maintenance and recovery worker will file an affidavit setting out the material facts. The husband will then be served and a court hearing will be held. The wife is told that she may or may not be present at the hearing, but that it is preferable and in her interest to come. The woman's attendance acts as a check to the husband's story. In court the department worker is asked to state the position of the department which includes the amount the woman is presently receiving from social assistance. The husband is then asked his position. The judge will question him as to his financial status. If it is found that he is currently unemployed an adjournment will be given in order that he be allowed the time to find gainful employment. After examining the entire situation, the judge will make an order. This order will again be filed with the family court. Again in

such situations, the order may be made payable either to the department or the woman herself.

It should be noted that generally in third party applications maintenance will not be asked for, for the wife rather maintenance will only be asked for the children. If there is a medical reason as for example, the woman is in hospital, the department may ask for maintenance for the woman also. The policy is however that if the woman requires maintenance she must ask for it herself. It should also be noted that the department will not make a third party application if the woman is seeing a lawyer about a divorce or a separation agreement. The reason for that is obvious.

The increase in the use of third party applications has allowed the department to collect an ever increasing amount of money from husbands. Unfortunately, the amount collected will never equal the amount paid out by the department to assist these women.

C. Orders Upon a Judicial Separation

Although the maintenance and recovery section is not involved in obtaining such orders, they also form a part of the collections. When a woman has received a judicial separation, the court may order either a cash settlement or regular maintenance payments or both. This order is made in the Supreme Court and therefore must be enforced there and must be varied there. Section 23 of the Domestic Relations Act authorizes the making of such an order.

23. (1) Where a decree of divorce or declaration of nullity of marriage has been obtained, the Court may order that either party, to the satisfaction of the Court, secure to the other party such annual sum of money for any term not exceeding the lifetime of the other party as the Court considers reasonable having regard to the fortune, if any, of that other party, the ability to pay of the party against whom the order is made, and the conduct of both parties.

(2) If it thinks fit, the Court may in addition to or in the alternative order that one of the parties pay to the other during their joint lives such monthly or weekly sum for the other party's maintenance and support, as the Court thinks reasonable.

(3) On a decree of divorce, an order may be made in favour of either party, notwithstanding that the party has been guilty of adultery.

[R.S.A. 1970, c. 113, s. 23; 1973, c. 61, s. 5(13)]

Arrears however, can be enforced in the family court. When a woman applies for social assistance and such an order is in existence, the order will be filed with the department. The woman can then inform the department if there has been a default in payments and action can then be taken to enforce the order or to obtain the arrears.

D. Orders Made Upon Divorce

Against such orders are Supreme Court orders, and can only be enforced and varied in the Supreme Court. However, the family court can enforce arrears. These orders will be filed with the department in order that the department can keep track of payments. The woman who is on social assistance will have the amount ordered deducted from the total amount she is entitled to.

It should be noted that under section 27(7) a divorced woman who does not have an order for maintenance for her children may apply to the Family Court for such an order to be made. This application will be treated in the same manner as an order made for a deserted wife. The section states:

27 (7) Where a divorced woman has in her care or custody legitimate children of herself and her divorced husband and there is no order of the court for maintenance of the children, she may apply to a magistrate for an order for maintenance restricted to the maintenance of the children and the application may be dealt with in every respect as an application under subsection (2) by a deserted wife.

These types of orders can be enforced in the same method as ordinary maintenance orders granted by the Family Court.

III

ADMINISTRATIVE PROCEDURE WITH REGARD TO ENFORCEMENT

A. Enforcement of a Family Court Order

Obtaining an order for maintenance is only part of the battle in this complex area. Once an order is obtained, it is important that these orders be respected by the persons required to pay. To women who are relying on the money in order to survive it is especially important. However to women who are on social assistance it is not as crucial as they are receiving their money anyway whether or not he pays. The Maintenance and Recovery Branch of the Social Services Department are not the enforcement agency. Their job is to get the order in the first place. The family court is then responsible for enforcement of such orders and enforcement of any arrears which may have accumulated during the time the order was in effect. The maintenance and recovery workers do however maintain up to date files as to whether or not a person has paid. A Collection Account Card is opened which keeps track of all payments made.

Most orders are made payable to the clerk of the court. If the department is to receive the payment, it will be forwarded to them. Very few orders are made payable directly to the woman. This is to provide a better enforcement system. Records of payments are kept on a ledger card. It then becomes quite easy to see if there has been any default.

The procedure in Edmonton is that if a man is in default of one month a show cause summons is sent out setting a date for hearing. Accordingly to the Domestic Relations Act, a summons may be sent after 21 days. The authorization is set

out in section 28 of the Domestic Relations Act.

28. (1) A married woman or any other person on her behalf may procure from a magistrate a summons against her husband

- (a) if the sum so ordered to be paid is not paid together with costs, if any, before the expiration of 21 days from the making of the order or such lesser period as may be provided in the order, and
- (b) when and so often as the payment so ordered is in arrears.

(2) The summons may be served either personally or in such manner as the magistrate may in writing direct, and shall

- (a) require the husband to attend at the time and place mentioned therein, to show cause why the order should not be enforced as hereinafter provided, and
- (b) be returnable on a date which shall be at least 10 days after the service thereof.

(3) The applicant and all witnesses whom the Court thinks proper may be examined on oath touching the inquiries to be made on the return of the summons.

(4) If the husband having been duly served does not attend as required by the summons, or does not show a sufficient reason for his non-attendance, or does not satisfy the magistrate that he is unable to pay the sum ordered to be paid, the magistrate may enforce the order by any of the means provided by Part XXIV of the *Criminal Code* for the enforcement of an order by a justice of the peace for the payment of a fine or penalty.

(5) The magistrate may from time to time vary the order on the application of either the husband or the wife upon proof that the means of the husband or the wife have altered in amount since the making of the original order or a subsequent order varying it.

The woman is told the date of the hearing. She is also told what she may or may not attend. Generally if she is on social assistance she won't bother attending as it is of no interest to her.

At the hearing, the man has the onus to show why he has not paid. If circumstances have changed the judge may well vary the order in order to accommodate the change in circumstances. If he cannot show why he has not paid he will be ordered to pay the arrears and continue making the future payments. The judge may sometimes order that the arrears be

paid in a lump sum smaller than the original amount. A number of judges will also include a default clause after a number of defaults. What this clause does is state that in the event of a default the man is to be jailed for 30 days or until he pays whichever is less. Upon default, a warrant is immediately issued for the man's arrest. The police then serve the warrant which states on it that he is to be detained until he pays. Usually he pays immediately in order to avoid being arrested. These clauses seem to be effective, but their effectiveness is based on the terror of being jailed. It is a jurisprudential question as to whether such a method is a legitimate one.

B. Enforcement of a Supreme Court Order

As has already been stated Supreme Court Orders must be varied and enforced by the Supreme Court. The Family Court only has the jurisdiction to enforce arrears on Supreme Court orders. Section 6 of the Family Court Act gives an authorization to this. It states:

6. (1) A person entitled to alimony or maintenance under a judgment or order of the Supreme Court of Alberta may file a copy of the judgment or order in the Family Court and when so filed it is enforceable in the same manner as an order made by a magistrate under Part 4 of *The Domestic Relations Act*.

(1.1) Where the person entitled to file and enforce a judgment or order under subsection (1)

(a) receives economic assistance from the Government of Alberta or a municipality in Alberta on his or her behalf or on behalf of a dependent child, and

(b) refuses to file or enforce the judgment or order, a welfare worker of the Government or municipality, as the case may be, may file and enforce the judgment or order.

(2) A person entitled to maintenance under a judgment or order of the Supreme Court within the meaning of subsection (1) includes a child entitled to maintenance under any such judgment or order.

(3) The judge of the Family Court may not vary the amount of any alimony or maintenance ordered to be paid by a judgment or order of the Supreme Court filed in the Family Court under this section.

[R.S.A. 1970, c. 133, s. 6; 1971, c. 32, s. 2]

The procedure for enforcement of arrears is the same as Family Court Orders. Although the Family Court may not vary the orders, they often do so in an indirect fashion. This is done by making the husband pay a smaller amount in arrears than the amount actually owed. It would probably be best if the Family Court were to receive the authority to enforce the orders directly rather than continuing a rather left handed method.

IV CONCLUSION

In summary, the Maintenance and Recovery Branch of the Social Services and Community Health is responsible for obtaining original orders. The responsibility for the enforcement of such orders is then left to the Family Court. In order to conclude it may be worthwhile to consider some of the problems mentioned by the persons involved with this mechanism at the workshop held June 2, 1977. Most of the people attending agreed that there was a great need for a uniform method of obtaining and enforcing orders throughout the province. At present there appears to be many variations in methods especially in the area of enforcement. Other remarks that were made included: a more efficient method of tracing the errant spouse; more teeth needed in the enforcement system; and better and faster service. These are all things which must be looked at. However, perhaps the overall question, is whether the system as it stands now is really performing a valid function.