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# Community Legal Information Association of Prince Edward Island, Inc.

## Child Support What You Need to Know

### Introduction

**Are you separating or divorcing with children in your relationship?**

**Are you a single parent?**

**Do you now pay or receive support?**

If you are in any of these situations, you can use information about child support.

This pamphlet will explain the law about child support. Support is sometimes called maintenance.

The law says that both parents must contribute to the cost of raising their children. This is true whether you were married, lived together, or have never lived together. This financial contribution is called child support. You cannot bargain away this responsibility.

Persons who stood in place of (acted as) parents to a child may also be eligible for, or required to pay, child support - for example, a person who was a step-parent to a child.

There are child support rules, including the Child Support Guidelines, that must be used by the judge to decide who pays support to whom, how much must be paid, when, and for how long.

### **When can I get a child support order or agreement?**

Support orders or agreements for child support can be obtained at any time, although it is most common when a relationship first breaks down. Support can be determined on its own or it can be in combination with other issues (such as custody, access, spousal support, and property division) as part of your separation agreement or divorce order.

### **What circumstances affect the amount of child support I must pay or will receive?**

The Child Support Guidelines should be looked at carefully in any out-of-court agreement. If you go to court, the Guidelines **must** be used by the judge to determine the amount of child support. There are three types of custody arrangements defined in the Guidelines that affect the amount of child support you will pay or receive.

These definitions are used for determining the amount of child support only, and do not change the arrangements for joint custody or decision making written in your parenting plan, separation agreement or divorce order.

The Guidelines define custody, for the purposes of calculating child support only, as follows:

1. **Sole Custody** - one parent has physical custody more than 60% of the time
2. **Split Custody** - each parent has one or more of the children living with him or her
3. **Shared Custody** - each parent has physical custody of the child at least 40% of the time and pays the child's expenses during that time

There is a basic amount of child support that comes from the tables in the Child Support Guidelines. This monthly amount is determined according to the paying parent's gross income (unless self-employed) and the number of children receiving support. In addition to the basic monthly amount, money may be added for special and extraordinary expenses, which may include:

- special expenses like medical or orthodontic costs
- special extracurricular activities your child is involved in
- childcare expenses to enable you to work

The amount of child support payable may be further adjusted based on the following:

- your custody arrangements according to Guidelines definitions (listed above)
- children over 18 who are receiving post-secondary education
- income over \$150,000 per year for the non-custodial parent
- undue hardship

### **What is Undue Hardship?**

Undue hardship may be claimed in an attempt to lower the amount of child support to be paid. It is a **two-step process**. A claim of undue hardship must pass both steps in order to be allowed.

The Guidelines list the grounds that would allow a claim of undue hardship to be heard by a judge. They include:

- an unusually high debt load incurred during the marriage
- unusually high costs of access to your children, and
- legal obligations to support others.

In the first step of this two-step process, you must apply to have your claim heard based on one of the above grounds. The judge decides whether your claim of undue hardship will be heard.

In the second step, the incomes and standards of living of both households are compared according to a formula. In this case, the total income in both households is taken into account. If the standard of living in the paying parent's household is significantly lower, the amount of child support may be lowered.

## **How do I get a child support order or agreement?**

There are two ways to get a child support order or agreement:

1. If both parents can agree on the amount to be paid and the conditions, a written agreement can be reached and signed out-of-court. The agreement must be signed by both of you and witnessed. Each of you should have independent legal advice and have your lawyer review the agreement to make sure it is correct and complete. Mediation can also be used in this process, if reaching an agreement is difficult, but you would prefer to settle out-of-court. Mediators may ask that you seek legal advice and have a lawyer write up the terms of the mediated agreement.
2. If you can't agree, you can apply to Court for a child support order.

Sometimes the judge deals with child support as part of another court action, such as a divorce. Your divorce order (Divorce Judgment) then includes the terms of your support order too.

Whatever way you choose to arrange for support, it is a good idea to have a lawyer or mediator help you. The Child Support Guidelines office can give you information on the Child Support Guidelines and the court process, but cannot give you legal advice. It is best to ensure that everyone's interests have been considered and that the children are provided for properly.

## **Can a child support order be changed? How?**

Either parent can apply for a change to their child support order. This is called applying for a variation. You do not need the agreement of the other parent to do this. If you are not divorced, six months must have passed since your last agreement or order was made. Some exceptions are made to this - for example, if you have suddenly and unexpectedly lost your income and cannot pay support, you may be allowed to apply for a variation before the six months has passed. This is to prevent your unpaid support (arrears) from accumulating or adding up. If you are divorced, this six-month time restriction does not apply.

There are two grounds for applying for a variation of your child support. These are:

1. There has been a "material change in circumstances" (this means a major change that would result in a different order – for example, the paying parent is laid off or the child moves in with the other parent).
2. The original order was not made according to the Child Support Guidelines.

There are forms that must be completed and a series of steps that must be followed when applying for a variation. It can be done without a lawyer, though consulting a lawyer is a good idea.

You can get information on how to apply for a support order or a variation from the Child Support Guidelines offices in Charlottetown (368-6220) and Summerside (888-8188).

If you have an order or agreement that was made before May 1, 1997, getting a variation may change the way your child support is taxed.

### **What is recalculation?**

Both federal and provincial laws now provide for the “administrative recalculation of child support”. This means that the paying parent must submit income information to the Recalculation Office each year and the basic child support amount is adjusted accordingly. Your order must contain a recalculation clause in order for this to happen and you must register with the Recalculation Office in the Family Law Centre (368-4109).

Recalculation may not apply when

- the paying parent is self-employed, the court has imputed income,
- the parents have shared custody (at least 40% of the time with each parent) or
- the courts have used discretion when deciding child support amounts. Discretion means that the judge makes a decision that varies from the table amount because of specific circumstances that make it fairer to do so.

### **What if the parent paying support doesn't pay?**

If the parent is not paying support as stated in the order or agreement, you can either see a lawyer or ask the provincial Maintenance Enforcement Program for help. Maintenance Enforcement is a free service but you must register with the program to use it. You can reach this program at the Hon. C.R. McQuaid Family Law Centre at 1 Harbourside Access Road in Charlottetown. You can use this service even if the other parent lives or works in another province or country, or if your support order or agreement was written in another province.

Maintenance Enforcement can attempt to collect unpaid support by:

- garnisheeing (taking) a portion of the payor's wages
- asking the federal government to apply some or all of the payor's income tax refund, employment insurance benefits, GST refund, Old Age Security or Canada Pension Plan benefits to unpaid support
- suspending the payor's driver's license
- asking the federal government to suspend the payor's passport
- asking the federal government to suspend certain other licenses, such as commercial seaman's licenses or aviation licenses
- taking the payor to court for a default hearing

The Maintenance Enforcement Program will take steps to enforce your order or agreement - however, they cannot guarantee success in collecting the payments. The decision about how to enforce your order or agreement is the responsibility of the Maintenance Enforcement Program.

If you are the paying parent and have a legitimate reason for not being able to pay, such as losing your job, it is important that you apply for a variation of your support order. If Maintenance Enforcement takes you to court for default (not paying), the judge will usually follow the original or last support order or agreement unless you have applied for a variation.

### **What happens if the parent receiving or paying support is on social assistance?**

If you are the paying parent and receiving social assistance, you can apply to the court for a variation of your support order so payments can be varied or lowered until you are working again.

If you don't yet have a support order, but will be the receiving parent and are receiving social assistance, you should contact your caseworker and the Family Legal Aid Program (Charlottetown – 368-6540 or Summerside 888-8066). If child support is the only issue being dealt with, Legal Aid will refer you on to the Child Support Guidelines Offices.

If you are the receiving parent, with a support order or agreement in place, and are receiving social assistance, there are several things you need to know:

- the Department of Health and Social Services must be informed of any support payments you are receiving.
- if you receive a notice that the other parent has applied to vary your child support, you must notify your caseworker.
- the Department of Health and Social Services has a right to be represented at the hearing.
- a support order may be overturned or cancelled if you agree to accept a lower amount than is listed in the guidelines tables.
- you can have your support payments paid directly to the Department of Health and Social Services through Maintenance Enforcement. This is called assigning your payments. You continue to receive your regular assistance amount from the Department of Health and Social Services. If you are concerned that the support might be late or not paid, it may be a good idea to assign your support.

### **What happens at income tax time?**

Child support cannot be claimed as a deduction by the person paying it and is not declared as income by the person receiving it.

Orders that were made prior to May 1, 1997, under the old tax laws will continue to be taxed as in the past, unless a variation is granted. However, if both parents sign an *Election for Child Support Payments* available from Canada Customs and Revenue Agency, the new tax rules will apply on the date specified by you on the form, but the amount of support does not change.

It is a good idea to consult an accountant or a lawyer before you change your arrangements to see if the changes will benefit you.

### **What is mediation and can it help?**

Mediation is a process you and the other parent may be able to use to develop your own solutions to issues. In mediation, you meet in face-to-face discussions with the other parent and a neutral mediator. Together, you negotiate to reach an agreement that is acceptable to both of you.

If mediation works, it can save time and money, create less family stress, and keep your dispute more private than going to court.

Private mediators will mediate whatever is necessary for you to reach an agreement. There is a fee for their services. Mediators are available free-of-charge through Family Court to help you work out an agreement, but they will mediate only custody and access issues concerning your children.

**Where can I get more information?**

If you need legal information or a lawyer referral, call Community Legal Information Association of P.E.I. at 1-800-240-9798 or 892-0853. A 30-minute lawyer referral appointment will cost \$10. + taxes. Further time with a lawyer will be at the usual rate.

If you need tax information, call Canada Customs and Revenue Agency at 1-800-725-4425.

You can get more information about the Child Support Guidelines and how they might affect you from the Child Support Guidelines Offices in Charlottetown (368-6220) and Summerside (888-8188).

You can find out more about mediation by calling Family Court Services at 368-6928. You can also check the yellow pages of the telephone book under Mediation.

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For more information, you can telephone CLIA at 892-0853 or 1-800-240-9798, visit our website at [www.cliapei.ca](http://www.cliapei.ca) or email us at [clia@cliapei.ca](mailto:clia@cliapei.ca).

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