



ISSUES UNDER THE CHILD SUPPORT GUIDELINES

The Federal Child Support Guidelines have been in force since May 1, 1997 for divorce actions, and since December 1, 1997 for support orders under provincial legislation. Although the Guidelines have assisted in the settlement of many disputed child support cases, there are significant issues relating to the application of the guidelines in all but the simplest of cases.

Contracting Out of the Guidelines

The parties to a matrimonial dispute, can decide on the amount of child support payable pursuant to a written separation agreement. Such agreements are subject to the ultimate review by a Court if either of the parties later became dissatisfied with that agreement or if either of the parties subsequently applies for a divorce. The Court will uphold an amount that is different from the Guidelines if it can be satisfied that "special" provisions have otherwise been made to benefit the child and that the application of the Guidelines would be inequitable given those special provisions. A good example would be the postponement of the sale of the matrimonial home to permit the custodial parent and child to remain in the home. This comes at a significant cost to the non-custodial parent which can be reflected in a decreased child support award.

What is the "Income" of the Payor?

The Guideline amount of child support is based entirely on the payor's income. The starting point is the figure for "total income" on the payor's tax return for the most recent year. Just like under the Income Tax Act, it has been necessary to establish a lot of rules to take into account the many possible scenarios and loopholes. Schedule III to the Guidelines lists numerous adjustments to income relating to matters like employment expenses, social assistance, capital gains and losses, etc. Particularly in self-employment situations, there are provisions that attempt to cover diversion of salary and the deduction of unwarranted expenses. Subject to an overall test of reasonability, the parties themselves can agree in writing on the annual income of a spouse.

Special Expenses

The guideline amount is not the end of the story when there are special or extra-ordinary expenses incurred by the custodial parent. The most significant is child care expense necessitated by the custodial parent's employment. The custodial parent may also have to incur extra expenses for education for the children or even extra curricular activities. An amount to compensate for these expenses is added to the guideline amount determined under the Guideline tables.

Disclosure

The disclosure requirements for the Guidelines are quite onerous. Both parties have to produce copies of their tax returns for the previous three years, and proof of recent income such as pay stubs or financial statements for their business. That is not, however, the end of it. The parties have a continuing obligation year by year to produce their income tax returns and proof of income.

Imputing Income

In situations where a spouse is intentionally under employed, or lives outside the country with lower tax rates, or where it appears that income has been diverted, the Court can impute income to the payor spouse. The Court can also do this where the spouse's property is not reasonably utilized to generate income or where a spouse has failed to provide income information. Another circumstance is the use of deductions from income which the Court considers unreasonable, even if such deductions are allowed under the Income Tax Act.

When Does the Obligation End?

The Divorce Act stipulates that child support obligations terminate on a child's eighteenth birthday unless circumstances prevent a child from withdrawing from parental charge or obtaining the necessities of life. Case law has interpreted this to mean that children who continue to post-secondary education must still be supported by the parents if it is shown that they are unable to withdraw from parental charge. Under Ontario's Family Law Act (applicable to support orders other than those in a divorce), the test is "enrolled in a full time program of education". In a nutshell, the Guidelines have not changed the law as to entitlement to child support.

Summary

We hope that this memorandum increases the awareness in our clients that the Child Support Guidelines are not so "simple" as it is generally believed.