

## THE RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

### Note by the Commonwealth Secretariat

1. A paper for Law Ministers (LMM(99)3) examines current steps to reform the rules governing jurisdiction and the enforcement of foreign judgments. This Note alerts Senior Officials to possible action in a closely related area, that of the reciprocal enforcement of maintenance orders.

2. Within the Commonwealth, the situation has many similarities to that outlined in respect of money-judgments in paper LMM(99)3. Almost all Commonwealth countries have legislation dealing with the reciprocal enforcement of maintenance orders, and most of the legislation is derived from one or other of two United Kingdom statutes, the Maintenance Orders (Facilities for Enforcement) Act 1920 and the Maintenance Orders (Reciprocal Enforcement) Act 1972. The legislation provides not only for the enforcement of final orders made in other Commonwealth countries designated for the purpose, but also (as its most characteristic feature) for the making of provisional orders by a court in the claimant's country of residence and their confirmation after a further hearing in the respondent's country. The resulting position was examined in the report by Professor David McClean and Professor Keith Patchett referred to in LMM(99)3, and the discussion at the ensuing regional meetings led to the development of a Model Bill, the final version of which was published by the Commonwealth Secretariat in 1981. A number of countries have more recent legislation, and Canada has a modern Uniform Act using the same basic techniques in its legislation for the inter-Provincial enforcement of maintenance orders.

3. The growing mobility of workers has led to an increase in the number of

cases in which maintenance claims are made across national boundaries, but a Special Commission of the Hague Conference on Private International Law held in April 1999 noted that existing international arrangements seemed not to address the problem adequately. There is a New York Convention on the Recovery Abroad of Maintenance negotiated under the auspices of the United Nations in 1956, which provides for the enforcement of final orders and for the transmission of maintenance claims for trial in the respondent's country, and no less than four Hague Conventions of which the two agreed in 1973, one dealing with the enforcement of final orders and the other with the applicable law, are the most important.

4. From the point of view of most Commonwealth countries, the Hague Applicable Law Convention is of no interest, as the common law tradition is that the law of the forum country is always applied to maintenance issues. Of Commonwealth countries, only the United Kingdom is a party to the Hague Enforcement Convention, which has little "added value" as compared with the Commonwealth's own legislative arrangements. Some Commonwealth countries are party to the New York Convention, but the text of that Convention has not proved very satisfactory as the nature of the assistance to be provided by states is unclear; the United Nations seems to lack the capacity to do further work in this area, and the Hague Conference is *de facto* responsible for monitoring the United Nations Convention.

5. The April Special Commission of the Hague Conference (at which Professor McClean acted as Observer for the Commonwealth Secretariat) identified a

number of issues which the present international texts fail to address, adequately or at all. Many of the issues arise from modern developments in national practice and are as relevant to the Commonwealth legislation as they are to the international conventions.

6. These issues include:

- the increasing use in some countries of administrative rather than judicial processes to deal with child and spousal support (e.g. the Child Support Agency of the United Kingdom and similar agencies elsewhere); most texts do not enable administrative decisions to be enforced across national boundaries;
- many texts do not allow public bodies which may have made payments for the maintenance of a wife or child to recover internationally such payments from the absent husband;
- although many countries now provide for the automatic "indexation" of maintenance payments by reference to annual movements in a cost of living index, the international arrangements accommodate this practice only with difficulty if at all;
- there is a lack of clarity on the extent to which a country can and should provide assistance in locating the maintenance-debtor or respondent to a maintenance claim;
- there are issues surrounding the provision of legal aid in a maintenance context;
- outside the Conventions, enforcement may depend upon reciprocity: the Commonwealth practice has revealed difficulties caused by the need (in all but the most modern versions of the

legislation) for the Commonwealth countries whose orders will be recognised to be specifically designated;

- the international texts are deficient in failing to accommodate the orders made under the Commonwealth procedure of provisional orders confirmed elsewhere, a serious matter as the Commonwealth jurisdictions are the largest group of any in terms of parties to particular arrangements;
- and there is the major issue of the disparity in economic standards, and so the level of awards, between different countries, a problem which the Commonwealth legislation partially solves by allowing a provisional order to be modified on confirmation whereas other texts are defective in dealing inadequately with modification or subsequent variation.

7. For all these reasons, the Special Commission decided to recommend that the development of a new and improved international instrument for the enforcement of maintenance orders be undertaken by the Hague Conference. This recommendation will be considered by the Commission on Policy and General Affairs of the Conference early next year.

8. Senior Officials will wish the Commonwealth Secretariat to monitor the consideration of this recommendation, and if a new instrument is developed to assist the Hague Conference in ensuring that there is sufficient flexibility in the new text for the needs and practice of Commonwealth countries to be accommodated. Senior Officials may wish to consider whether the issues identified in the recent discussions and listed in part at paragraph 6 above do not need to be addressed in the context of Commonwealth legislation, either independently of other international developments or as a contribution to the

international effort. This might eventually require decisions by Law Ministers, for example on a new version of the Model Bill referred to in paragraph 2 above, or the possible development of a Commonwealth Scheme incorporating best modern practice in a way which recognises the varying needs and legal resources of Commonwealth countries.

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