

LAW REFORM COMMISSION



MANITOBA

COMMISSION DE RÉFORME DU DROIT

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REPORT

ON

IMPROVED METHODS OF ENFORCING SUPPORT ORDERS
AGAINST REAL PROPERTY

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Report #36

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The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

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In June, 1979, the Hon. the Attorney-General requested that the Commission review two areas of the law governing the enforcement of family support orders. More particularly, the Commission was asked to review section 9 of "*The Judgments Act*", C.C.S.M. c. J10, to make recommendations for its improvement and reform. As well, the Hon. the Attorney-General requested that the Commission consider and report on the general practice of our courts in Manitoba, not to enforce arrears of support orders beyond a period of one year.

This report concerns the first area previously referred to: that is, section 9 of "*The Judgments Act*". Section 9 reads as follows:

9. An order or judgment for alimony or maintenance may be registered in any land titles office in Manitoba, and unless the registration is vacated or partially vacated under section 21, the registration, so long as the order or judgment registered remains in force, binds the estate and interest of every description which the defendant has in any lands in the land titles district where the registration is made, and operates thereon in the same manner, and with the same effect, as the registration of a charge by the defendant of a life annuity on his lands.

Quite simply, the section makes provision for the registration of an order or judgment for alimony or maintenance in any land titles office within the province. Once registered, the order is to bind any estate and interest the defendant¹ has within the appropriate land titles district and moreover, act in the same manner, and with the same effect, as if the defendant had charged his lands with a life annuity in favour of the plaintiff.

This section was enacted by the Legislative Assembly in 1895. It was copied from section 30 of the Ontario "*Judicature Act*"² and, accordingly, it was originally introduced into our legislation as a section in "*The Queen's Bench Act*".³ In 1931, it became section 8A of "*The Judgments Act*" where, for the first time, it provided for the registration of a maintenance order, in addition to a judgment of alimony.⁴

This 1931 amendment expanded the scope of the section by allowing the registration of maintenance orders granted pursuant to divorce and summary maintenance legislation. Previously, the section had been drafted so that registration was limited to alimony adjudged in a judicial separation or in a claim for the restitution of conjugal rights.

The procedure for filing an order awarded pursuant to summary maintenance legislation has varied. The practice prior to the repeal of "*The Wives' and Children's Maintenance Act*"⁵ was to allow a creditor spouse the right to register a certified copy of the order in the appropriate land titles office. Alternatively, regardless of whether the order was granted by a provincial court judge or a county court judge, a certificate of judgment could be issued from the county court in a similar form to a section 3 or 4 registration under "*The Judgments Act*" but which bore a notation that the judgment was an order for maintenance.⁶ The present practice under "*The Family Maintenance Act*" is to register a certified copy of the support order in the land titles office; a certificate of judgment from the county court is no longer issued.

The procedure for filing a decree *nisi* or a judgment

of alimony has remained unchanged. As in the case of an order of maintenance under "*The Family Maintenance Act*",⁷ a certified copy of the *nisi* or judgment is registered in the appropriate land titles office. Accordingly, the present registration procedure for all types of support orders is identical.

Where the order for maintenance or judgment of alimony is registered in the appropriate land titles office pursuant to section 9, it is entered in the general registry against the name of the debtor spouse. As such, the order or judgment binds any land or interest in land owned by that debtor spouse within the particular land titles district in which the order or judgment is registered, rather than forming a charge against any specific title. The propriety of this manner of registration will be analyzed later in this report.⁸

Although section 9 has been part of Manitoba statute law for well over 80 years, its effect has never been clearly enunciated by our judiciary. More particularly, whether such a registrant has the right to commence judgment sale pursuant to section 3(2) of "*The Judgments Act*" has received contradictory responses.⁹

The late Chief Justice Williams, in the case of *Jachowicz v. Bate*¹⁰ delivered the first written decision concerning the effect of a section 9 registration. The case was decided in 1958 when the appropriate statute governing judicial separation and divorce was the English *Divorce and Matrimonial Causes Act, 1857*, and the various amending Acts which came into force in England on or prior to July 15, 1870. In his decision, the late Chief Justice reviewed the general

provisions in Manitoba for enforcing alimony judgments and maintenance orders granted pursuant to the statute. He concluded that neither award constitutes a legal debt but rather only an equitable one and, as such, the only means of enforcement are writ of attachment and perhaps writ of *fi.fa. de bonis*.¹¹ Although he did not specifically address himself to the issue whether section 9 affords the registrant a right of judgment sale, he answered the question indirectly by stating that "[t]here is no provision in the Judgments Act for enforcing the 'annuity'".¹²

A little over a year later, Freedman, J. (as he then was) granted an order of judgment sale pursuant to a maintenance order registered under Section 9 of "*The Judgments Act*". The case was *Leslie v. Leslie*.¹³ In the course of his judgment, Freedman, J., did not refer to the comments of the late Chief Justice Williams in *Jachowicz* but based his authority to grant sale on the general provisions of "*The Judgments Act*" (presumably, section 3(2)) and Queen's Bench Rule 511 and following.¹⁴

Section 9 was more recently considered by Wright, J. in the case of *Canadian Imperial Bank of Commerce v. McFadzean and Ennis*.¹⁵ Within his decision, Mr. Justice Wright commented on the remedies of enforcement available to an individual who had registered a judgment or order under section 9. He questioned whether a section 9 registrant might have the same right of enforcement as an encumbrancer who had registered an annuity pursuant to section 93(1) of "*The Real Property Act*", R.S.M. 1970, cap. R30, and hence the availability of commencing notice of sale proceedings pursuant to section 125(1) of that Act.¹⁶ Although His Lordship held that it was unnecessary to

decide this issue, he expressed his inclination to follow the comments of Williams, C.J.Q.B. in *Jachowicz*: that the only remedies of enforcement are attachment and possibly writ of *fi. fa. de bonis* and consequently neither judgment sale nor notice of sale proceedings are open to a section 9 registrant.¹⁷

It is interesting to note that the learned judge did not refer to section 92(1) of "*The Queen's Bench Act*"¹⁸ in reaching this tentative conclusion. This subsection was passed by our Legislative Assembly in 1963, without debate.¹⁹ It reads as follows:

92(1) A decree, order, or judgment for alimony or maintenance may be enforced in the same or the like manner as any other decree, order, or judgment of the court may be now enforced.

Although there has not been any jurisprudence interpreting this subsection, it would appear to give maintenance and alimony awards the status of legal debts, and, accordingly, allow either to be enforced as any other judgment or order. Assuming this interpretation to be correct, the subsection would overrule the comments of Williams, C.J.Q.B., in *Jachowicz*: that is, that either award constitutes only an equitable debt, limiting its enforcement to one of the two equitable remedies noted previously.

While Mr. Justice Wright has stated his inclination to support the comments of Williams, C.J.Q.B., concerning section 9, the approach taken by Freedman, J. in *Leslie* was followed by our Court of Queen's Bench in July of this year. In the case of *Beaudoin v. Beaudoin*, Mr. Justice Morse granted judgment sale pursuant to a registration of a decree *nisi* under section 9 where default had occurred for a period in

excess of one year.²⁰ Unfortunately, however, no reasons for judgment were given.

To multiply confusion, statutory amendments passed by our Legislative Assembly have clearly presumed that a registrant under section 9 has the remedy of judgment sale. Since 1936, our summary maintenance legislation has contained a section specifying that the exemptions contained in "*The Judgments Act*" do not apply where an individual enforces a maintenance order pursuant to that legislation.²¹ The question of whether any exemption applies under "*The Judgments Act*" only arises where an order of sale is granted against the actual residence of the judgment debtor.²² Moreover, "*The Family Maintenance Act*" was amended in June of this year.²³ One particular paragraph within the amended Act, namely section 31.1(10)(c) grants to the designated officer appointed under the Act the right to take proceedings under "*The Judgments Act*" in pursuance of a section 9 registration. Of course, the only procedure available under that Act is the right to institute judgment sale proceedings under section 3(2) to realize upon a registered judgment. Accordingly, our Legislature has presupposed that section 9 gives the right of judgment sale, evidenced by the enactment of these particular sections.

Given the apparent confusion surrounding section 9 in Manitoba, the Commission has examined the experience in other provinces where similar or identical legislation has been enacted. The experience in Ontario, Saskatchewan and Alberta, where similar legislation has been passed²⁴ would suggest that our section 9 does not disclose to such a registrant the remedy of judgment sale, at least by itself in its present form.

We mentioned previously that section 9 was derived from section 30 of the Ontario "*Judicature Act*". After Manitoba adopted this section, Ontario later expanded theirs by adding two subsections.²⁵ Thereafter, their section, in its entirety, read as follows:

81(1) An order or judgment for alimony may be registered in any registry office in Ontario, and the registration, so long as the order or judgment remains in force, binds the estate and interest that the defendant has in any land in the registry division in which the registration is made, and operates thereon in the same manner and with the same effect as the registration of a charge by the defendant of a life annuity on his land.

(2) The order or judgment may also, on the application of the plaintiff, be registered as a charge against any land of the defendant registered under *The Land Titles Act*.

(3) The court may direct the sale of the land upon a summary application in the alimony action upon notice to all persons interested in the land.²⁶

One can surmise that the Legislature in Ontario was of the opinion that giving a support order the status of a life annuity did not include the right to commence sale proceedings upon default, unless a statutory provision was enacted which provided for some means of enforcing this type of charge; hence, the need for additional legislation. The jurisprudence in Alberta and Saskatchewan (or rather, the lack thereof) would support this conclusion as well. Although both of these provinces have enacted almost identical legislation to our section 9, we could not find any reported cases where land was sold pursuant to their statutory provisions which allow registration of support orders to take place. Articles concerning this legislation in these two provinces

concur with this finding to the extent that they list the rights which accrue from registration and the right to institute sale proceedings is not listed amongst them.²⁷

An historical approach would support this position as well. The concept of a life annuity is well imbedded in our English legal history. Provision for its registration was created in the 18th century;²⁸ it was effected by registering the deed which created the annuity.²⁹ The traditional remedy available to a registrant of a life annuity to enforce arrears was not the sale of the land charged but rather the distress of chattels located on the property.³⁰ In most cases this remedy was created by the deed itself but it also became "superadded by statute".³¹

The framework of "*The Judgments Act*" also supports the position that there is no remedy of sale where a support order is registered under section 9. Although section 4 is inserted subsequent to section 3(2) which grants the right to proceed to sale, there is a specific direction in section 4 that the judgment "when registered has the same effect as a registered judgment". Similar wording could have been used in section 9 if the intention was to provide such a registrant the remedy of sale pursuant to section 3(2). Furthermore, it is doubtful that the definition of "judgment creditor" in section 2(c) includes a creditor spouse since, other than a plaintiff in an alimony action, a creditor spouse is neither a "plaintiff" nor a "defendant" which is the terminology used in this definition. The right to institute judgment sale proceedings is, of course, limited in section 3(2) to such a judgment creditor.

The Commission is also of the opinion that the filing

of an order under section 9 does not entitle the registrant to the same rights and remedies as an encumbrancer who has registered an annuity under "*The Real Property Act*". Section 9 states that the registration of an order is to operate "in the same manner" as the registration of a charge of a life annuity. Yet, in many instances, an annuity registered under "*The Real Property Act*" is clearly treated in a different manner from that of a section 9 registration. For example, the statute provides that it can be discharged by memorandum (section 101(1)) or by application to the district registrar (section 102). However, a section 9 registration can only be discharged by court order pursuant to section 21(1) of "*The Judgments Act*".³² This dissimilar treatment would support the position that a section 9 registration does not entitle its registrant to the same rights and remedies as an annuitant under "*The Real Property Act*" and hence the right to commence notice of sale proceedings.

Principles governing section 9 registration

Thus far we have reviewed section 9 in essentially negative terms: that it does not disclose to the registrant the power of sale under "*The Judgments Act*" or under "*The Real Property Act*". Before discussing whether a power of sale should be granted to a registrant of a support order and, if so, in what form, other features of a section 9 registration should be reviewed.

Whatever may be the effect of section 9, it is clear that it does provide that party with some protection. The protection arises in this manner: where a debtor spouse wishes the support order postponed or vacated to allow for the prior

registration of a security instrument or the sale of his property within that district, an order permitting him to do so must be obtained from the court which granted the maintenance order originally.³³ To be successful, the debtor spouse must prove that the support order is in good standing so that the withdrawal or postponement of its registration will not unfairly prejudice the position of the creditor spouse. In this way, the registration acts as a catalyst, inducing the spouse to honour the support payments or, if payments are outstanding, to pay all enforceable arrears prior to such an application being made.

Section 6 of *"The Judgments Act"* requires a certificate of judgment to be re-registered every two years in order for it to remain effective. It has long been held by our courts that this provision does not apply to a section 9 registration.³⁴ The judgment or order continues to remain in effect until it is vacated or postponed by the appropriate court, as previously described. This was the reason why a certificate of judgment issued pursuant to the old *"Wives' and Children's Maintenance Act"* required a special notation that the judgment was an order for maintenance. Otherwise the land titles officials would have struck these orders from the general registry after the expiry of the two year period, as is the practice with section 3 and section 4 registrations.

We had previously mentioned that an order, so registered, could be postponed or vacated by the court which ordered the maintenance or alimony initially. It cannot be discharged by filing an instrument to that effect and, in this respect, it differs from a certificate of judgment registered pursuant to section 3 or section 4 of *"The Judgments Act"*. Whether the

present legislation should be amended to allow for the discharge or postponement of an order by the registration of an instrument will be discussed later in this report.³⁵

Finally, a section 9 registration differs materially from a certificate of judgment in the quality of the order itself. In the case of an ordinary civil judgment registered under section 3 or section 4, the debtor need only pay the amount of the judgment and the registration will be removed. Admittedly, where a lump sum order of maintenance is awarded, this is also the case. But where maintenance is awarded on a periodic basis, the amount is usually indefinite; the obligation to pay may terminate should the creditor spouse remarry or should the means or circumstances of the parties change substantially. Alternatively, the order could remain in effect until the death of either party. In any event, where an order is registered under section 9 it could conceivably immobilize the property of the debtor spouse for several decades.

Moreover, in an ordinary civil judgment, the creditor is granted the automatic right to take almost any enforcement procedure, without further order from the court. That right is given to the creditor because a judgment remains unsatisfied and the law quite rightly perceives there to be an enforcement problem. This may not be the case where a support order is awarded. The order remains unsatisfied not necessarily because of an enforcement problem but because of the nature of the order itself. That is, it is incapable of being satisfied unless the creditor spouse becomes financially independent.

Recommendations for reform

It is our opinion that section 9 is in need of

legislative reform, if only to remove the confusion regarding its effect, as previously described. We have examined the reports of other law reform commissions in this area and the legislation of several other jurisdictions, both in Canada and in England. We have also communicated with lawyers in this area of practice to elicit their viewpoints on a proper enforcement procedure.

In considering the extent of reform required to section 9, the Commission is of the opinion that sensitive consideration should be given to the rights of both the creditor and the debtor spouse. It is crucial that enforcement measures are perceived as operating not only efficiently but fairly. If a balance is not created between these two principles, the parties that may be most adversely affected are children. In an inefficient enforcement system, they may be economically deprived; in a system perceived as being too harsh, they may be emotionally deprived if the law compels the debtor spouse to move to another jurisdiction to avoid payment. Unfortunately, there is a fine balance between the two extremes.

In Canada, the procedure for registering and enforcing support orders against land varies from one province to another. We have attached an Appendix to this report which sets forth in greater particularity the specific system adopted in each province (Appendix A). Essentially, however, there are three different systems of registering and enforcing support awards. One of these systems is operative in Manitoba, Saskatchewan and Alberta and needs no further examination: that is, the system of granting the support award the status of a life annuity by registering the order itself in the general

registry under the present system of land registration. The other two systems, however, have not thus far been examined and consequently need to be described and evaluated.

In British Columbia, all maintenance and alimony orders awarded by either a superior or provincial court may be registered in any or all of the land registry offices within the province. Registration is accomplished by filing a certificate of judgment issued by the court which awarded the support. Provision for this registration is contained in section 60 of "*The Supreme Court Act*"³⁶ and within section 64 of "*The Family Relations Act*".³⁷

Once registration takes place, the support order is treated like an ordinary civil judgment. That is, the effect of the registration is to create a charge against any interest in land owned by the debtor spouse within the appropriate registry district. Where arrears are outstanding, the creditor spouse has the right to apply for judgment sale. There is no requirement within the legislation that the creditor spouse need await any period of time before proceeding for sale as there is in Manitoba.³⁸ Rather, the debtor spouse is entitled to be served and to appear at the motion to show cause why the land should not be sold.³⁹

A similar provision is contained in Prince Edward Island by virtue of section 67 of "*The Children's Act*".⁴⁰ The legislation differs from the British Columbia legislation in one respect: the order of support may be registered only with the written consent of the judge who granted the order. It follows British Columbia, however, in granting the creditor spouse the right to apply for sale in the same manner as any

other judgment creditor. Likewise, Nova Scotia has similar legislation but the right of registration and execution extends only to alimony judgments.⁴¹

The Commission is not aware of any study directed specifically at the efficacy of this remedy vis-à-vis support orders.⁴² It is our view, however, that there are certain disadvantages inherent in a system which enforces maintenance orders in the same manner as any ordinary civil judgment. In treating a support order as any other civil judgment, this type of system presupposes that an enforcement problem exists. Accordingly, it grants the creditor spouse the automatic right to register a support order even where it is evident at the hearing that the debtor spouse is able and quite willing to honour his or her maintenance payments. Furthermore, this type of registration has the effect of immobilizing any legal interest in land which the debtor spouse owns within the appropriate land titles district. It is quite conceivable therefore that several parcels of land might be charged by an order or judgment, far in excess of the amount required adequately to secure a support order. The Commission is accordingly of the opinion that this type of enforcement procedure unfairly prejudices the debtor spouse. It discriminates against a party who is quite willing to comply voluntarily with a support order, without enforcement. In those situations where enforcement is required, it could conceivably prevent the debtor spouse from freely dealing with several parcels of land, when registration against only one would provide ample security.⁴³

Moreover, where a certificate of judgment is registered in Manitoba, it is entered in the general registry.

This registry is an anomaly in the Torrens System which embraces the principle that a certificate of title should reflect all of the relative rights and interests attached to any title of property. The Commission would prefer to recommend a system of registration which would not have the effect of perpetuating the existence of the general registry. In expressing this opinion, the Commission is aware of the report of our Registrar General which recommends the abolition of the general registry.⁴⁴

A more recent method of enforcing these orders has been adopted by the Ontario legislature and is contained in section 19(1)(k) of *"The Family Law Reform Act"*, S.O. 1978, chap. 2. This method has also been recommended by the Alberta Institute of Law Research and Reform in their Report entitled *"Matrimonial Support"*, published in March, 1978.

This system of enforcement essentially grants the court the discretion to order that the support payment be secured by the execution and registration of a security instrument against a title of land owned by the debtor spouse, i.e. a mortgage or registered encumbrance.

This technique of enforcement has been used by our superior courts to enforce maintenance ordered ancillary to a divorce pursuant to section 11(1) of the *Divorce Act*. That subsection grants the court the discretion to "secure" periodic or lump sum payment awards.⁴⁵ A similar provision has been part of the English statute law since 1907 and is currently contained in section 23(1)(b) of *"The Matrimonial Causes Act, 1973"*.⁴⁶

The Commission views this system as superior to the

one previously discussed. The disadvantages posed in the previous system of enforcement do not exist. That is, the security is only ordered where an enforcement problem is perceived. Moreover, the instrument forms a charge against only one title of property rather than immobilizing all of the debtor spouse's land within the appropriate land titles district.

There are serious drawbacks to this method of enforcement, however. One of the more serious problems is a constitutional one. Historically, jurisdiction over security instruments such as mortgages and encumbrances has belonged solely to superior courts. Presumably for this reason, Ontario has limited the jurisdiction of their family court to order security where the order is for the provision of necessities or in those situations where it would prevent the dependant from becoming a public charge.⁴⁷ Alberta has recommended their system to be implemented only at the superior court level.⁴⁸ The Commission would prefer to recommend a system which could be applied with equal force at all court levels.

Difficulties could also arise under this system where the debtor spouse falls into arrears. Where an order is secured by a mortgage or an encumbrance registered pursuant to *"The Real Property Act"*, enforcement proceedings would fall under section 125 of that Act. A minimum six-month period of delay would ensue where foreclosure proceedings were necessary. Moreover, this system of enforcement is a complex one, not conducive to enforcing support orders. It is the Commission's view that a proper system to enforce support orders should entail a relatively less complicated yet more proficient procedure.

Other problems exist with this type of security. Where a support order was secured by a mortgage, spouses would find themselves subject to the provisions of "*The Mortgage Act*".⁴⁹ Pursuant to this Act, the debtor spouse, as mortgagor under the instrument, might be obliged to furnish the creditor spouse with a statement of account on an annual basis.⁵⁰ If a support order was varied by the court at some time in the future, the parties would have to enter into a memorandum to amend the mortgage or encumbrance in accordance with Schedule "Q" of "*The Real Property Act*". Moreover, that memorandum would have to be registered in the land titles office. Although this method of enforcement erases the disadvantages posed in the previous system, it is the opinion of this Commission that its complexity far outweighs any of its advantages.

A better system of enforcement would combine the element of simplicity inherent in the procedure, as outlined, in British Columbia with the concept of total fairness implied in the method of registering support orders within Ontario. It is our recommendation that a system be implemented which would grant superior and provincial courts alike, the discretion to allow registration of a maintenance order against a specific certificate of title. This system would not radically differ from the present. Essentially, it would deviate from a section 9 registration in two respects. First, it would prevent the automatic registration of a support order; this method of enforcement could only be accomplished by order of the court. Secondly, the order would not be registered in a general registry and thus form a charge against all property owned by a debtor spouse within the appropriate land titles district. Instead, the order would recite the legal description of the particular certificate of title against which it

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is to be charged. Consequently, the order would form a lien and charge against one specific title rather than potentially several.

The mechanics of such a system would be relatively simple. Once registered, a memorial of the order would be endorsed on the back of the certificate of title. Similarly, should the order be postponed or vacated, a suitable endorsement would also be made on the back of the title. We have discussed the substance and the mechanics of this method of registration with the Registrar General and he is in agreement with our recommendation.

The Commission strongly recommends that the court be given jurisdiction to determine whether registration should be granted in any particular case. It is our opinion that a system of automatic registration would unfairly prejudice the debtor spouse who is able and willing to honour the maintenance award. Important factors the court might wish to consider in determining whether registration should be permitted would be the likelihood of a debtor spouse failing to honour the maintenance payments and the possibility of enforcing the order through more suitable measures.⁵¹ This recommendation conforms with the present practice of enforcing support awards under section 25 of "*The Family Maintenance Act*" in that this section also requires a court order before any security provisions will apply.

The Commission recognizes that this method of registration would require that the creditor spouse have knowledge of the existence and location of a parcel of land owned by the debtor spouse. However, the creditor spouse would have

several means available to obtain that information. Where proceedings were instituted under "*The Family Maintenance Act*", this information could be acquired where the respondent filed a financial statement pursuant to Form 141 of the Queen's Bench Rules.⁵² Part III of that form requires the market value of any real estate owned by that spouse to be specified. *The location of this real estate could be obtained by either a demand by the party or a court order that particulars be given on this matter.* This information could also be obtained where examinations for discovery were conducted by the parties involved. Where no pre-trial proceedings took place, disclosure of the existence and location of land owned by the respondent could result by examining the respondent should he or she be present at the trial.

Where this knowledge was not available to the creditor spouse at trial, for whatever reason, and the support order came into arrears, further means would be available under "*The Family Maintenance Act*". The designated officer has the power available under the Act to investigate the assets of the debtor spouse.⁵³ Furthermore, "*The Family Maintenance Act*" should be amended to grant the designated officer the right to apply to the appropriate court for registration against a specific title after maintenance was awarded, where this method of enforcement was later found to be required. This latter procedure would be available where a support order was awarded pursuant to the *Divorce Act* or to a judicial separation and enforcement procedures were later found to be required. Section 31.3 of "*An Act to Amend the Family Maintenance Act*" makes these enforcement measures applicable to all support orders, including maintenance ordered ancillary to a divorce or alimony adjudged in a judicial separation.

The Commission feels there is no purpose in establishing

a minimum monetary claim such as in the case of civil judgments (where \$40 is established)⁵⁴ or in the case of mechanics' liens (where \$20 is the minimum).⁵⁵ As registration would require court approval, the value of the maintenance order would be a factor the court could fully consider in assessing the efficacy of registration in any given case. The establishment of a statutory minimum requirement would needlessly interfere with the full discretion of the applicable court.

Section 73 of "*The Real Property Act*" makes provision for the lapsing of registered liens ten years after they have been in effect. The Commission is of the opinion that the principle governing the duration of section 9 registrations should continue to apply to the type of registration we have recommended. That is, the support order should continue in full effect until it has been discharged, without any automatic expiry date. Accordingly, we recommend that the definition of "lien" be amended in section 73(1)(a) to provide for the exclusion of maintenance orders and alimony judgments.

Priority of the support order would continue to be determined by the time of registration⁵⁶ subject to the equitable discretion afforded to the district registrar under section 72(a) of "*The Real Property Act*".⁵⁷

Thus far we have outlined our recommendations concerning the registration of support orders, and, more specifically, the manner and effect of registration. We must now address ourselves to the issue on whether the Court of Queen's Bench should be vested with the power to order a sale of the property charged where maintenance payments are in arrears.

We mentioned previously that we sought the opinion of solicitors engaged in this field of practice on a proper method of enforcing support orders. Of those solicitors who responded, all, save one, were in favour of granting the power of sale where maintenance payments are in arrears. The general opinion expressed was that the threat of sale itself would provide a strong inducement on the part of the debtor spouse to keep maintenance payments up to date. The one negative response the Commission received was critical of the general charge (as opposed to a specific one) created by a section 9 registration and disfavoured a power of sale on the presumption that such a charge would continue to be in effect.

We also stated that the system of registration in British Columbia made provision for the right of sale where arrears were owing under a support order. We have discussed this provision with the Law Reform Commission of British Columbia and, more specifically, with Mr. Arthur Close, a member of the Commission. Although the Commission has not conducted a study concerning the right of sale vis-à-vis support orders specifically, they have published a report dealing with the general right of execution against land.⁵⁸ It was the principal conclusion of the Commission that the right to apply for sale was seldom used by a creditor but, the threat of sale was in those cases sufficient to induce payment of sums owing.⁵⁹ Mr. Close expressed the opinion that this principal conclusion applied with equal force to maintenance orders.

It is our recommendation that the Court of Queen's Bench be vested with the power to order a sale of the property charged where maintenance payments are in arrears. We agree

with the general comment previously expressed that without such a vesting of power, there would be no continual inducement on the part of the debtor spouse to avoid falling into arrears.

The right to apply for sale would extend to any case where a support order had been registered, whether pursuant to a provincial court or superior court, and where arrears are outstanding. The application for sale would be analogous to proceedings instituted pursuant to section 3(2) of *"The Judgments Act"* and to Queen's Bench Rules 511 and following. However, the Commission recommends that there be no requirement on behalf of the creditor spouse to postpone the application for sale until the order has been in arrears or has been registered for a period in excess of one year. The requirement of such a delay would unfairly prejudice the creditor spouse and any children involved who are dependent upon support payments for their livelihood. The Commission does recommend, however, that there be no right to make an application for sale until default continues for a space of 30 days. We also recommend that the debtor spouse be served with the application and be entitled to appear at the hearing to respond to the motion for sale.

In addition to the power of sale, the court should be vested with the express power to direct that any surplus from the proceeds of sale, or any portion thereof, be paid into court as security for future payments. Otherwise, the sale of the property would result in a relinquishment of any security for future support.

In conclusion then, our recommendations would involve

the repeal of section 9 of "*The Judgments Act*" and, correspondingly section 27 of "*The Family Maintenance Act*". Although the implementation of our recommendations is properly left to the skill of legislative draftsmen, the Commission perceives "*The Judgments Act*" and "*The Family Maintenance Act*" to be proper statutes in which to introduce all of our recommendations. The insertion in those statutes would ensure that our recommendations would apply to enforce all support orders, that is, in those cases where alimony is adjudged pursuant to a judicial separation or where maintenance is ordered pursuant to either "*The Family Maintenance Act*" or section 11 of the *Divorce Act*.

Postponement and discharge of a support order

Presently, a support order can only be postponed or vacated by court order, pursuant to section 21 of "*The Judgments Act*" and correspondingly, section 28 of "*The Family Maintenance Act*". It was recently clarified in the case of *Dubowski v. Dubowski*,⁶⁰ that the only court which has jurisdiction to vacate, either partially or fully, or to postpone a support order is that which granted the maintenance originally. The requirement of a court order to vacate or partially vacate a registration is, of course, unusual. In most other instances where a security instrument is registered in the land titles office, it can be discharged, either fully or partially, by instrument signed by the party in whose favour it is registered.

One can surmise that the Legislature, when it enacted this section, was of the opinion that a court order should be required to prevent any improvident discharge of the security. The Commission appreciates the reasons for this special provision. Unlike other registrations, the postponement or

discharge of a support order could have an effect on innocent third parties, namely dependent children. In all other instances, however, the requirement appears to be without reason other than save perhaps a paternalistic one premised on the idea that a creditor spouse requires special protection by our courts. We are of the opinion that such an attitude lacks both acceptance and merit in our contemporary society.

The Commission accordingly concludes and recommends that, except in a situation where children are being maintained by a support order, that the parties be entitled to discharge or postpone the support order by registered instrument, signed by the creditor spouse. The instrument to discharge the support order would be in a similar form to that which discharges a certificate of judgment as set forth in Schedule C to "*The Judgments Act*". Where the debtor spouse wishes the order to be postponed to allow for the registration of a mortgage or registered encumbrance, a form similar to that provided for in Schedule J of "*The Real Property Act*" would be suitable.

We have already stated that it is our recommendation that an exception be made to this proposed procedure where children are being maintained by a support order. In such an instance, it is our recommendation that the support orders continue to be discharged or postponed only by the court which granted the order originally. In order to ensure that this practice continues, the Commission recommends that all registered instruments directing the district registrar to postpone or discharge a support order contain an affidavit by the creditor spouse declaring that there is no support provision for children within the maintenance order.

In conclusion, our recommendations can be summarized as follows:

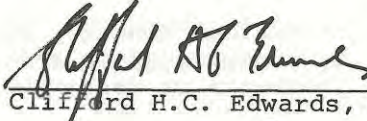
1. Section 9 of "*The Judgments Act*" and, correspondingly, section 27 of "*The Family Maintenance Act*" should be repealed. (p.23)
2. Provision should be made within these two statutes for the registration of a support order against a particular certificate of title, thereby creating a lien and charge against a specific parcel of land. (p.17-18)
3. Registration would be accomplished by registering the maintenance order or the alimony judgment, both of which would recite the full legal description of the certificate of title against which it is to be registered. (p. 17-18)
4. Registration would only be accomplished where the court, within its full discretion, determined that such an enforcement measure was required, having regard to the likelihood of default and the possibility of enforcing support orders through another more suitable measure. (p. 18)
5. "*An Act to Amend the Family Maintenance Act*", S.M. 1979, cap. 38, should be amended to allow the designated officer the right to apply for the registration of a support order in the case of default. (p. 19)
6. No minimum monetary claim should be established by statute, as in the case of ordinary civil judgments or mechanics' liens. (p. 20)
7. Section 73(1)(a) of "*The Real Property Act*" should be amended to exclude specifically alimony judgments and maintenance orders from the provisions regarding the expiry of liens. (p. 20)
8. The Court of Queen's Bench should be vested with the power to grant the sale of the property so charged, where arrears are owing under the maintenance order or alimony judgment. (p. 21-22)

9. The application for sale would be similar to the proceedings instituted pursuant to section 3(2) of "*The Judgments Act*" and Queen's Bench Rule 511 and following. (p. 22)

However, there would be no requirement to postpone proceedings to allow for arrears to accumulate for a period in excess of one year but no right to proceed for sale would arise until default had continued for a space of 30 days. (p. 22)

10. The court should be granted the power to direct that the excess proceeds of sale, or any portion thereof, be paid into court for future security. (p. 22)
11. Parties should be granted the statutory right to discharge or postpone a support order by registering an instrument to that effect, signed by the creditor spouse. Support orders which contain provisions for children should continue to be discharged or postponed by the court which granted the support originally. (p. 23-24)

This is a Report pursuant to section 5(3) of "*The Law Reform Commission Act*" dated this 19th day of November 1979.



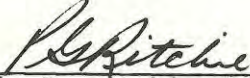
Clifford H.C. Edwards, Chairman



R.G. Smethurst, Q.C., Commissioner



Val Werier, Commissioner



Patricia G. Ritchie, Commissioner

David G. Newman

David G. Newman, Commissioner

A. Burton Bass

A. Burton Bass, Commissioner

Evan H.L. Littler

Evan H.L. Littler, Commissioner

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FOOTNOTES

1. The section uses the word "defendant" in reference to the debtor spouse. This is proper terminology insofar as alimony is concerned; the action is instituted in Manitoba by statement of claim. The section should also use the word "respondent" as it applies to maintenance orders as well as alimony judgments.
2. Presently, R.S.O. 1970, c. 228, s. 81, repealed in part "The Family Law Reform Act", S.O. 1978, c. 2, s. 81.
3. S.M. 1895, ch. 6, s. 31.
4. S.M. 1931, ch. 27.
5. R.S.M. 1970, c. W170, repealed "The Family Maintenance Act", S.M. 1978 c. 25, s. 36.
6. *Id.*, s. 28(5)
7. *Supra* n. 5.
8. p. 15, 17.
9. See Appendix B where section 3(2) is set forth.
10. (1958) 24 W.W.R. 658 (Man. Q.B.).
11. *Id.*, at 666. A writ of *fi. fa. de bonis (ecclesiasticis)* is an ancient writ issued, in certain circumstances, to a bishop commanding him to seize the goods and chattels belonging to the defendant within his diocese.
12. *Id.*, at 669.
13. (1959-1960) 30 W.W.R. 414 (Man. Q.B.).
14. *Id.*, at 420. See Appendix B where Queen's Bench Rule 511 is set forth in full.
15. [1978] 5 W.W.R. 750 (Man. Q.B.).
16. See Appendix B for a reading of these sections.
17. *Supra* n. 12, at 755.
18. C.C.S.M. c. C280.
19. Legislative Assembly of Manitoba, Vol. 2, "Debates and Proceedings" 1st Sess. 27th Leg. Nos. 46-74, 1963 pp. 1891, 1919, 1959.

20. Suit No. 1413/79; Thurs., July 12, 1979 (Man. Q.B.).
21. "An Act Respecting the Maintenance and Protection of Wives and Children", S.M. 1936-7, c. 53, s. 25(2).
22. "The Judgments Act", C.C.S.M. c. J10, s. 13.
23. "An Act to Amend the Family Maintenance Act", S.M. 1979 c. 38.
24. Ontario: "The Judicature Act", R.S.O. 1970, c. 228, s. 31 (now repealed "The Family Law Reform Act" S.O. c. 2, s. 81(1)). Saskatchewan: "The Land Titles Act", R.S.S. 1978, c. L-5, s. 130. Alberta: "Domestic Relations Act" R.S.A. 1970, c. 113, s. 21, as am. S.A. 1977, c. 64, s. 8.
25. Subsection 2 was enacted in 1913, 3-4 Geo. V, c. 19, s. 73(2), subsection 3 was enacted in 1927, 17 Geo. V, c. 29 s. 14.
26. *Supra* n. 2.
27. Klappenburg, C. "The Enforcement of Maintenance", (1976) 40 *Sask. L. Rev.* 217, The Institute of Law Research and Reform of Alberta, Report No. 27: "Matrimonial Support" pp. 89-92. See however p. 130 of the Alberta Report where it is stated that land can be sold to satisfy a judgment through issuing a writ of execution; the right extends to a creditor spouse to satisfy arrears, but is rarely used. The right to sell land via a writ of execution was abolished in Manitoba by s. 19 of "The Judgments Act", C.C.S.M. c. J10.
28. Megarry & Wade, *The Law of Real Property*, (4th ed. 1975) at 1037.
29. *Abraham v. Abraham* (1890), 19 O.R. 256 at 259 (Q.B.D.).
30. *Id.*
31. *Sollory v. Leaver*, L.R. 9 Eq. at p. 25. The statute is 4 Geo. II, ch. 42, s. 5.
32. This subsection is set forth in Appendix B.
33. This procedure is contained in s. 21(1) of "The Judgments Act" and in s. 28 of "The Family Maintenance Act". Both sections are fully set out in Appendix B.

34. *Leslie v. Leslie*, loc. cit. supra, n. 13.
35. p. 23.
36. R.S.B.C. 1960, c. 374.
37. S.B.C. 1978, c. 20 (part of this Act, including section 64, was proclaimed on March 31, 1979).
38. C.C.S.M., J10, s. 3(2).
39. "Execution Act" R.S.B.C. 1960, c. 135, s. 38(1).
40. R.S.P.E.I. 1974, c. C-6.
41. "Alimony Act", R.S.N.S. 1967, c. 7.
42. In 1978, however, the Law Reform Commission of British Columbia published a report entitled "*Execution Against Land*". This report dealt with the right of a "judgment creditor" (including a creditor spouse) to enforce his rights against an interest in land. The principal conclusion of the report is set forth on p.21 of this report.
43. A similar criticism was made by the Institute of Law Research and Reform of Alberta, with respect to the first system which creates a charge of a life annuity. See Report No. 27 "*Matrimonial Support*" p. 91.
44. "*Manitoba Land Titles System: Report on the General Register*", January, 1979.
45. *Gilbert v. Gilbert* (1972), 7 R.F.L. 188 (Ont. S.C.); *Switzer v. Switzer* (1969), 7 D.L.R. (3d) 638 (Alta. S.C. App. D.); *Ceiko v. Ceiko* (1969), 5 D.L.R. (3d) 360, 69 W.W.R. 52 (Man. Q.B.) are examples of cases where either periodic or lump sum awards have been secured under the *Divorce Act*.
46. 1973, c. 18. The provision "to secure" periodic maintenance orders was first introduced by 7 Edw. 7, c. 12, s. 1(1) in England in 1907.
47. "*The Family Law Reform Act*", supra n. 2, s. 19(2).
48. Supra n. 43 at 129.
49. C.C.S.M. c. M200.
50. *Id.*, s. 25.
51. Similar principles are considered by the English courts in

determining whether a support order should be secured pursuant to sec. 23(1)(b) of "*The Matrimonial Causes Act, 1973*". See Halsbury's Laws of England, Vol. 13, 4th ed., para. 1098, p. 511.

52. The notice in form 140 of the Queen's Bench Rules requires the respondent to file a Financial Statement (Form 141) along with an answer if the applicant so attaches a Financial Statement with his or her application. Rule 775 requires an applicant to file such a Financial Statement if a claim for maintenance is advanced in the application.
53. "*An Act to Amend The Family Maintenance Act*", S.M. 1979, c. 38, s. 31.1(9).
54. "*The Judgments Act*", C.C.S.M. 1979, c. J10, s. 3(1).
55. "*Report on Mechanics' Liens Legislation in Manitoba*", August 13, 1979, recommends a minimum claim of \$300 rather than the present minimum of \$20.
56. "*The Real Property Act*", C.C.S.M. 1979, c. R30, s. 64.
57. *Id.*, s. 72.
58. *Supra n. 36.*
59. *Id.* at p. 10.
60. Unreported as of yet, Man. C.C., March 20, 1976, Lockwood, J.

APPENDIX A

TYPE OF CHARGE USED TO ENFORCE SUPPORT ORDERS AGAINST LAND
(pursuant to provincial legislation in common law jurisdictions)

	<u>Life</u> <u>Annuity</u>	<u>General</u> <u>lien and</u> <u>charge</u>	<u>Security</u> <u>Instrument</u>
<u>British Columbia</u>			
a) Alimony	-	x	-
b) Maintenance-separation	-	x	-
c) Maintenance-divorce	-	x	-
<u>Alberta</u>			
a) Alimony	x	-	-
b) Maintenance-separation	x	-	-
c) Maintenance-divorce	-	-	-
<u>Saskatchewan</u>			
a) Alimony	x	-	-
b) Maintenance-separation	x	x	-
c) Maintenance-divorce	x	-	-
<u>Ontario</u>			
a) Alimony (abolished)	-	-	-
b) Maintenance-separation	-	-	x
c) Maintenance-divorce	-	-	-
<u>New Brunswick</u>			
a) Alimony	-	-	-
b) Maintenance-separation	-	-	-
c) Maintenance-divorce	-	-	-
<u>Nova Scotia</u>			
a) Alimony	-	x	-
b) Maintenance-separation	-	-	-
c) Maintenance-divorce	-	-	-
<u>P.E.I.</u>			
a) Alimony	-	-	-
b) Maintenance-separation	-	x	-
c) Maintenance-divorce	-	-	-
<u>Newfoundland</u>			
a) Alimony	-	-	-
b) Maintenance-separation	-	-	-
c) Maintenance-divorce	-	-	-

APPENDIX B

EXCERPTS FROM RELEVANT MANITOBA LEGISLATION

"The Judgments Act"

Registered judgment a lien on lands.

3(1) Immediately upon a judgment for payment of money being entered or recovered in the Court of Queen's Bench, or in a County Court, or in a Surrogate Court, or in the Federal Court of Canada, for a sum exceeding forty dollars, a certificate of the judgment in the form set out in Schedule A, or to the like effect, under the seal of the court and signed by the prothonotary, a deputy clerk of the Crown and pleas, a clerk of a County Court, or a registrar of a Surrogate Court or by the Registrar of a Deputy Registrar of the Federal Court of Canada, as the case may be, may be registered in any land titles office in the province; and, from the time of the registration thereof, the judgment, except as hereinafter mentioned, binds and forms a lien and charge on all lands of the judgment debtor in the land titles district in the land titles office of which the certificate is registered, whether or not the lands are registered under The Real Property Act, the same as though charged in writing by the judgment debtor under his hand and seal.

Am. S.M. 1957, c. 34, s. 1; am.

Am. S.M. 1978, c. 49, s. 58.

Proceedings on registered judgment.

3(2) After the registration of the certificate of judgment, the judgment creditor may, if he elects to do so, proceed upon the lien and charge thereby created; but no proceedings to realize upon a registered judgment shall be commenced until after one year from the date of the registration of a certificate in respect thereto.

Vacating and postponing judgments by court order.

21(1) A certificate of judgment registered in a land titles office, or a judgment for alimony or maintenance so registered, may be vacated or partially vacated by the district registrar, or may be postponed to allow registration of a mortgage, lease, or encumbrance, specified in the order, with priority over the judgment, in so far as it affects lands described in the order, and to the extent necessary to give effect to the order, upon the registration in the proper land titles office of an order made

(a) in an action or other proceeding in the court in which the judgment was given; or

(b) upon application to a judge in chambers of the court in which the judgment was given; or

(c) in the case of a certificate of judgment based on an order made under The Wives' and Children's Maintenance Act, or an order made under that Act,

(i) if the order was made by a judge of a County Court, upon application to a judge of that County Court, and

(ii) if the order was made by a magistrate, upon application to a magistrate in the judicial district in which the order was made;

discharging or partially discharging the judgment, or postponing the judgment to allow registration of a lease, mortgage, or encumbrance with priority over the judgment, or a certified copy of such an order.

R. & S., S.M., 1963, c. 39, s. 1; am.

"The Family Maintenance Act"

Filing order in Land Titles Office.

27 An order for support and maintenance or other payments made under this Act may be registered in any Land Titles Office in the province and, if so registered, is an order to which section 9 of The Judgments Act applies.

S.M. 1973, c. 25, s. 27.

Discharging order filed in Land Titles Office.

28 Where an order made under this Act is registered in a Land Titles Office under section 27, or a certificate of judgment based on an order made under this Act is registered in a Land Titles Office under The Judgments Act, the court that made the order, upon the application of any person interested and upon notice in such manner including service by mail or by public advertisement as the court may require to the person in whose favour the order was made, if satisfied that it is reasonable and proper to do so, may make an order

- (a) discharging or partially discharging the original order or the judgment in so far as it affects certain lands described in the order; or
- (b) postponing the original order or the judgment in so far as it affects certain lands described in the order to allow registration of a mortgage, lease or encumbrance specified in the order with priority over the original order or the certificate of judgment, as the case may be.

S.M. 1978, c. 25, s. 28.

"The Queen's Bench Rules"

(vii) Lands.

511 (1) In this rule:

- (a) "judgment creditor" includes a person entitled to money under a judgment of this court or of any county or surrogate court;
- (b) "judgment debtor" includes a person liable to pay money under such a judgment.

Am. Man. Reg. 56/57.

511 (2) Where a judgment creditor, who has registered a certificate of judgment, alleges that the judgment debtor:

- (a) has made a conveyance or any other disposition whatsoever of any of his lands in the registration district or land titles district in which such certificate of judgment is registered, which is void as being made to delay, hinder, or defraud creditors, or a creditor; or
- (b) has or is entitled to an interest in any land which might be sold under the registered certificate of judgment or other legal process, or could be rendered available in proceedings by way of equitable execution.

the court may, without the institution of an action, on originating notice, order the land, or a competent part thereof, or the interest of the judgment debtor therein, to be sold by the master, or otherwise as the court may direct, to realize the amount payable under the judgment.

London and Canadian Loan v. Connell 11 Man. R. 115

Bank of Montreal v. Condon 11 Man. R. 366

Messey Harris Co. v. Warener 12 Man. R. 48

Can. Supply Co. v. Robb 20 Man. R. 33

Slobodian v. Harris 25 Man. R. 74

Bejke v. Robson 42 Man. R. 214

Re Brooklands Lumber and Simcoe 64 Man. R. 1

Re Judgments Act; R. v. Hamilton (1962) 39 W.W.R. 545

"The Real Property Act"

New system mortgage or encumbrance.

93(1) Where any land, mortgage, or encumbrance, under the new system is to be charged or made security in favour of a mortgagee, the owner shall execute a memorandum of mortgage in the form contained in Schedule F; and, where land is to be charged with or made security for the payment of an annuity, rent charge, or sum of money in favour of an encumbrancer, the owner shall execute a memorandum of encumbrance in the form contained in Schedule G, and every mortgage or encumbrance shall contain an accurate statement of all prior mortgages, encumbrances, or other registered instruments, affecting the land.

Notice of sale on default.

125(1) Where default is made in the payment of the principal sum, interest, annuity, or rent charge, or any part thereof, secured by a mortgage or encumbrance registered under this Act, or in the observance of any covenant expressed or implied in the mortgage or encumbrance, if the default is continued for the space of one month, or for such longer period of time as is therein for the purpose expressly limited, the mortgagee or encumbrancer may forthwith give a written notice, a copy of which shall be filed in the land titles office, to the mortgagor or owner of land subject to an encumbrance, and to every other person appearing at the time of filing the notice to have any mortgage, encumbrance, or lien upon, or estate, right, or interest in, the lands subsequent to his mortgage or encumbrance requiring the mortgagor or owner of land subject to an encumbrance and the other persons to be served with the notice to pay, within a time to be specified therein, the money then due or owing on the mortgage or encumbrance or to observe the covenants therein expressed or implied, and stating that in case default is made in so doing, all remedies provided in this Act will be resorted to, to remedy the default.

Am. S.M., 1964. (1st Sess.), c. 44, s. 1.