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REPORT

ON

THE ONE YEAR RULE FOR ENFORCEMENT OF ARREARS IN MAINTENANCE

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TABLE OF CONTENTS

Page

INTRODUCTION 1

CHAPTER I - APPLICATION OF A "ONE YEAR RULE" IN MANITOBA 1

CHAPTER II - RATIONALE FOR THE APPLICATION OF THE RULE 12

CHAPTER III - RECOMMENDATIONS FOR REFORM 16

(a) The "One Year Rule" and the general power to remit arrears of support payable to the creditor spouse 16

(b) The "One Year Rule" and the general power to remit arrears of support for the benefit of dependent children. 23

(c) Arrears on the death of either spouse . . 27

(d) The power of a court to remit arrears owing pursuant to a separation agreement 30

SUMMARY OF RECOMMENDATIONS 31

FOOTNOTES. 34

INTRODUCTION

Pursuant to section 5(3) of *"The Law Reform Commission Act"*, C.C.S.M. c. L95, the Honourable the Attorney-General requested the Commission to consider and report on two areas of the law relating to the enforcement of family support orders. More specifically, 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. In addition, the Honourable the Attorney-General requested us to 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.

The Commission considered section 9 of *"The Judgments Act"* and its recommendations for the section's improvement and reform are contained in its report entitled *Report on Improved Methods of Enforcing Support Orders Against Real Property*, published in December 1979. This report concerns the second area of the law concerning the enforcement of family support orders: that is, the "one year rule" for enforcement of arrears in maintenance.

CHAPTER I - APPLICATION OF A "ONE YEAR RULE" IN MANITOBA

In Manitoba, it has been referred to as a "practice",[1] a "rule"[2] and a "policy".[3] Whatever nomenclature one wishes to attach, it is clear that the courts in Manitoba will generally not assist in the recovery of arrears in maintenance which have been outstanding for a period in excess of one year.

The practice of our courts generally to limit the enforcement of arrears of support orders is similar to our

courts' application of statutory limitation periods to ordinary civil suits. That is, both provisions are designed to preclude an individual from enforcing his or her rights in our courts of law after the lapse of a period of time. However, there the similarity ends. Limitation periods are creatures of statutes; the "one year rule" is said to be a vestige of the English ecclesiastical courts which historically had jurisdiction over matrimonial causes prior to 1857.[4] Moreover, the rationale for the "one year rule" is founded upon different considerations than the enactment of statutory limitation periods. Consequently, it would be misleading to express any further similarity between these two provisions than that otherwise stated.

The "one year rule" was first introduced into Manitoba case law in 1953 in a case which involved the enforcement of an alimony judgment.[5] Since then it has been applied to limit the enforceability of support orders awarded in all court jurisdictions. More specifically, the practice has been extended to apply to maintenance ordered ancillary to divorce and to maintenance awarded pursuant to summary maintenance legislation.[6]

The rule has been applied by our Canadian courts in all common law jurisdictions with one notable exception. That is, it is the Ontario practice to regard arrears of support ordered ancillary to a divorce decree as fixed and absolute. Consequently, there is no judicial discretion to limit the enforceability of arrears to one year or any other time span; rather, all arrears are payable. This Ontario practice will be discussed in further detail in Chapter III of our Report. Suffice it to mention at this stage that Ontario's treatment of these support arrears creates an important exception to the general application of the "one year rule" in Canada.

In his scholarly effort entitled *"The Enforcement of Support Arrears: A History of Alimony, Maintenance and the Myth of the One-Year Rule"*, Mr. Roman Komar has traced the origins of the "one year rule" in Canada to determine its exact ancestry.[7] After a thorough examination of the decisions referred to in both England and Canada as supporting the "one year rule", Mr. Komar concluded that the "one year rule", in the sense of an arbitrary one year time limit on the recovery of arrears, does not exist, nor has ever existed either in England or in Canada.[8]

While the Commission does not wish to duplicate the efforts of Mr. Komar, in our opinion it is essential to review the history and development of the rule as it has applied in Manitoba to determine its scope and application to support orders. After a thorough analysis, the Commission will then be able critically to assess both the need and the extent of reform required, if any.

We mentioned previously that the first reference to the "one year rule" in Manitoba case law is contained in a 1953 decision; the case is *Fiarchuk v. Fiarchuk*[9]. The facts can be stated quite concisely. The husband was adjudged to pay his wife a monthly alimony award; other than one monthly payment, no other monies were advanced by the husband in satisfaction of the court judgment. Twenty-two years later, the wife successfully moved for leave to issue execution for all sums outstanding during the preceding ten years.[10] The husband then moved the Court of Queen's Bench to have the judgment for alimony discharged or varied and to set aside the writ of execution successfully issued by his wife.

Tritschler, J. (as he then was) reviewed the terms of the alimony judgment and, in addition, section 51 of *"The Queen's Bench Act"*, C.C.S.M. c. C280. That section gives the Court of Queen's Bench the jurisdiction to grant alimony in Manitoba. The judge reviewed that part of the section which provides that alimony when granted "shall continue until further order of the court". He held that the language of this section was "sufficiently wide to include an order reducing or discharging arrears".[11] After considering several legal authorities, Mr. Justice Tritschler concluded that "this court has a discretionary control over arrears of alimony".[12]

The authorities referred to by Mr. Justice Tritschler are derived from English law and refer to the practice of the ecclesiastical courts to exercise continual control over alimony when that court exercised jurisdiction over matrimonial causes prior to 1857. Curiously, none of the quotations from the cases cited, save one from Saskatchewan,[13] refer to any specific period of time as being an arbitrary limitation to the amount of arrears enforceable by either the ecclesiastical or common law courts. Indeed, in his judgment, Tritschler, J. cited a portion of the judgment of Sir Henry Duke, P. in the decision of *Campbell v. Campbell*[14] which reads as follows:

> For the respondent it was suggested here that one year's arrears is the utmost amount that the Court will order to be made up in cases of this kind. I think there is no arbitrary limit, and that if justice requires, the whole amount of any arrears may be enforced.

The Saskatchewan case referred to by Mr. Justice Tritschler which supports a one year rule is *Head-Patrick v. Patrick*.[15] The learned judge cites a portion of the judgment

of Haultain, C.J.S. which reads as follows:

> There is here, in my opinion, as in England, a discretion as to arrears * * * The Ecclesiastical Courts gave alimony from year to year, and, except under special circumstances, would not enforce arrears beyond one year.[16]

Chief Justice Haultain refers to three English decisions, namely *Wilson v. Wilson*,[17] *Re Robinson*[18] and *Kerr v. Kerr*[19] as authority for this statement.

A brief review of the latter two cases cited would reveal that neither state any authority for their enunciation that the ecclesiastical courts would not enforce arrears of alimony beyond one year. Moreover, their propositions are clearly stated in *obiter* and, consequently, are not intended to be binding upon subsequent cases. Furthermore, this statement contained in both of these cases contradicts the practice of the English courts in previous decision to enforce arrears in a manner at variance with any "one year rule".[20]

A discernment of the first decision referred to in *Head-Patrick*, namely *Wilson v. Wilson*, **clearly** shows that this case was misinterpreted. The decision contains no general proposition of any arbitrary limit to the time in which the court may enforce arrears. Indeed, its only enunciation relative to the question of enforcement is that, "as a general rule, therefore, the Court is not inclined to enforce arrears of many years' standing".[21]

The foregoing analysis would support the statement of Sir Henry Duke, P. in the *Campbell* judgment as being an accurate reflection of the approach taken by the ecclesiastical courts in enforcing arrears. The ecclesiastical courts recognized

that they had a continual discretion in enforcing arrears. That discretion was not fettered by any self-imposed time restraints but, instead, arrears were adjudged in accordance with what the court considered to be a just amount in any given case. Indeed, this would seem to be the court's conclusion in the *Fiarchuk* decision as Mr. Justice Tritschler, without referring to or imposing any arbitrary time limit, concludes, without qualification that "this Court has a discretionary control over arrears of alimony".[22]

A review of the cases of our Court of Queen's Bench subsequent to the *Fiarchuk* decision indicates that a very strong reliance is placed upon the three English cases, cited in *Head-Patrick*, as authority for the proposition that there exists a "one year rule", based in ecclesiastical law, which should be applied in enforcing arrears of maintenance. More particularly, statements of the late Chief Justice Williams in the decisions of *Jachowicz v. Bate*[23] and *Re Fleming and Fleming*[24] are supported by Canadian authority which, in turn cite any one of these three English cases as support for the "one year rule". A similar analysis can be made of the statement of Freedman, J. (as he then was) in the decision of *Leslie v. Leslie* where he states "it is further true that it is the policy of the law usually to limit such arrears to the period of one year".[25]

Although the "one year rule" has a very weak foundation in our common law system of *stare decisis* (our legal system of honouring decided cases), it is beyond dispute that our Manitoba courts of both superior and inferior jurisdiction generally limit the enforceability of arrears to those which accrued within the preceding year.

Over a decade subsequent to the *Fiarchuk* decision, the Manitoba Court of Appeal was faced with the issue of whether the Provincial Judges Court (Family Division), like the superior court, had a discretionary control over arrears of maintenance ordered pursuant to *"The Wives' and Children's Maintenance Act"*, now repealed.[26] The case was *Lamontagne v. Lamontagne*[27]. Freedman, J.A. (as he then was), delivered the majority judgment. He held that this inferior court had jurisdiction to remit arrears and again referred to the "one year rule", citing as his authority the English decisions previously referred to, and Canadian cases which relied upon those English cases, as precedents. His Lordship also based his decision on the wording of the statute, referring to section 24 which granted the court the power to "alter, vary or discharge any order". He stated that the term 'discharge' "connotes nothing less than a power to revoke or rescind [arrears]".[28]

In reaching its decision, the court explicitly adheres to the principle that the rights of the creditor spouse to enforce arrears should be identical at all court levels. Freedman, J.A. states at page 330:

> If effect is given to this argument [that arrears are absolute and cannot be reduced in the provincial judges court] it will mean that the rights of a wife in the Court of Queen's Bench are not as advantageous as, and indeed are inferior to, the rights of a wife before a summary conviction court. Such a conclusion is not one I will readily accept.

The Commission is of the opinion that it is sound policy to treat support arrears in an identical manner at all court levels. However, a review of *"The Wives' and Children's Maintenance Act"* would certainly lend sustenance to the

position that its language does not support and, indeed, opposes any concept of a "one year rule" in enforcing maintenance orders pursuant to that statute. The imposition of a "one year rule" effectively releases the debtor spouse from any obligation to maintain, that arose prior to the preceding year. However, a close reading of the enforcement section of the Act substantiates the position that the onus is, at all times, on the debtor spouse to "show cause" for his or her default. Failing that onus, the debtor spouse is subject to any of the penalties provided within that section of the statute, whether that default is with respect to arrears outstanding prior to or within the preceding year.

It has yet to be clearly decided whether the practice of restricting the recovery of arrears to the preceding year will be applied to maintenance ordered pursuant to *"The Family Maintenance Act"*, S.M. 1978, c. 25. However, it is the understanding of this Commission through its conversations with certain judges of the Provincial Judges Court (Family Division) that the practice continues to apply under this new Act at the inferior court level. Moreover, it seems quite likely that an appropriate case of a superior court would conclude that the "one year rule" should continue to apply under the new Act since section 21 provides the appropriate court the power to vary or discharge the original order. Applying the *Lamontagne* decision, the inclusion of the power to discharge would impliedly grant the appropriate court the jurisdiction to remit arrears and, within that context, the discretion to restrict those arrears to one year. However, the Commission is of the similar view in applying the rule to *"The Family Maintenance Act"* as previously expressed in its consideration of the applicability of the rule to *"The Wives' and Children's Maintenance Act"*. That is, it is our opinion for identical

reasons, that a close reading of the provisions contained in Part IV of the new Act, entitled "Enforcement of Orders" and, more specifically, section 1 of *"An Act to Amend the Family Maintenance Act"*, S.M. 1979, c. 38, makes it difficult, if not impossible, for courts to continue to apply the "one year rule" in enforcing support orders that are in default.

Thus far, our Report has reviewed the applicability of "the one year rule" to alimony judgments and to maintenance ordered pursuant to provincial legislation. Very recently, the Manitoba Court of Appeal applied the "one year rule" to enforce arrears of maintenance pursuant to the *Divorce Act*, R.S.C. 1970, c. D-8. The case was *Septon v. Septon*.[29] Very little of the background of the case can be discerned from the reported decision. However, a review of the appeal book indicates that a debtor spouse had successfully moved the Court of Queen's Bench to remit all arrears owing pursuant to a maintenance provision contained in the divorce decree. The Court of Appeal unanimously agreed to overturn the Queen's Bench order by allowing arrears outstanding from the preceding year to be payable to the creditor spouse. The court referred to the Manitoba practice of adopting the "one year rule" in enforcing arrears and, to the Ontario practice, at variance with our own, of treating all arrears of these maintenance orders as fixed and absolute. Freedman, C.J.M., who delivered the decision of the court, states the following, in reference to this dichotomy:

> With respect, we prefer to adhere to the Manitoba practice under which such arrears can be examined and dealt with by the Court, even if, in the exercise of that jurisdiction, the Court may subject itself to certain self-imposed restraints.[30]

The *Septon* case was the first decision in Manitoba to raise the issue of whether the Court of Queen's Bench has the power to remit arrears of support ordered pursuant to section 11 of the *Divorce Act* and, within that jurisdiction, only to enforce those arrears for the preceding year. Unfortunately, the court in *Septon* did not refer to the language of section 11(2) of the *Divorce Act* in reaching its decision. This subsection grants the court the power to "vary or rescind" an award of maintenance ordered ancillary to a decree of divorce. Courts in other jurisdictions have carefully considered this language; the authorities are divided on whether the statutory provision includes the power to remit arrears at all.[31]

Moreover, it is highly questionable whether the "one year rule" should apply to maintenance granted under the *Divorce Act*, given the apparent foundation for the rule. Prior to the enactment of the federal statute, divorce in Manitoba was governed by *"The Matrimonial Causes Act"* of 1857. Section 22 of that Act provides for adherence to the application of ecclesiastical rules and principles when relief is granted under the statute. However, there is no similar provision within the *Divorce Act*. This would lend support to the position that the practice of the English ecclesiastical courts is no longer applicable when relief is granted pursuant to a decree of divorce.

It should be mentioned that section 92(3) of *"The Queen's Bench Act"*, C.C.S.M. c. C280, presupposes that the Court of Queen's Bench has a discretionary power to determine the extent to which payment of arrears of alimony or maintenance should be enforced. That subsection reads as follows:

> Nothing in this section interferes with the court's discretionary control over arrears of alimony or maintenance or the power of the court to alter, vary, and rescind a decree, order, or judgment for alimony or maintenance or to deprive the person in whose favour the decree, order, or judgment has been made, of arrears in whole or in part, or to determine the extent to which payment of arrears of alimony or maintenance shall be enforced.

This Commission is not aware of any decision which has interpreted the subsection since it was passed in 1963. Although it presumes the Court of Queen's Bench has a discretionary control over arrears of both alimony and maintenance, it is doubtful that it would apply to maintenance, ordered ancillary to the *Divorce Act*. Legislation concerning the power to remit arrears pursuant to a divorce decree surely would be beyond the scope of provincial jurisdiction. It might be noteworthy to mention that this subsection was passed prior to the enactment of the federal *Divorce Act*.

In summary, it is clear that the practice in Manitoba generally to restrict the enforcement of arrears to one year is applicable to awards of alimony, to maintenance ordered pursuant to provincial legislation and, finally, to maintenance ordered ancillary to divorce. This practice is not founded in statute; rather, it is said to be derived from the ecclesiastical courts which limited the enforcement of support arrears to one year. A review of the authorities cited as precedents for the rule in Manitoba prove that the "one year rule" has doubtful historical validity. Moreover, the application of the rule to maintenance ordered pursuant to provincial legislation can be strongly challenged, given statutory provisions within *"The Wives' and Children's Maintenance Act"*, now repealed, and more recently within *"The Family Maintenance Act"*, as reviewed. Finally, its application to maintenance

ordered pursuant to section 11 of the *Divorce Act* is dubious, given the lack of statutory recognition to the continuance of ecclesiastical rules and principles within that federal statute.

CHAPTER II - RATIONALE FOR THE APPLICATION OF THE RULE

This Commission is clearly of the view, at this stage of our Report, that at least some statutory reform is required. That is, there exists an apparent dichotomy between the practice of our courts to adopt the "one year rule" and the statutory provisions within the enforcement sections of our summary support legislation. Should the Commission recommend the continuance of the "one year rule" as an arbitrary limit to the enforcement of support arrears, it would be our recommendation that legislation be enacted to eliminate this discrepancy. Before proceeding to discuss whether the Commission should recommend any reform either to revise or eliminate the "one year rule", in our opinion, it would be of some assistance to review the various explanations the courts have devised when they have applied this rule to practice.

At the commencement of our Report, we related the application of the "one year rule" to the institution of statutory limitation periods, explaining that while both provisions had the same effect (of barring the enforceability of a right) the rationale for their application differed. Statutes providing for limitation periods, sometimes referred to as "Acts of Peace", were enacted by Legislatures on the premise that to allow the revival of a long-dormant claim would be harsher than to prevent its being resurrected.[32] As we shall see, the "one year rule" was introduced for quite different reasons.

The traditional rationale expounded by our courts for the application of the rule is founded upon their objective in awarding support orders. The courts have cited that purpose as being one to provide the creditor spouse with an allowance upon which to live; the award is not one meant to be accumulated. As Cotton, L.J. stated in the case of *In Re Robinson*:

> Alimony is an allowance which, having regard to the means of the husband and wife, the Court thinks right to be made for her maintenance from time to time, and the Court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by the order of the Court from time to time to provide for the maintenance of the wife.[33]

It follows from this principle that the court will assume that, unless the creditor spouse intends to enforce the arrears within one year, satisfactory arrangements have been made for that spouse's support and, consequently, to allow the order to be enforced thereafter would be permitting the creditor spouse to hoard support money.

Although the courts in Manitoba have been relatively silent on the rationale for the "one year rule", the cases cited by Trischler, J. (as he then was) in *Fiarchuk v. Fiarchuk*[34] support this approach as being one of the rationales for the application of the rule. Indeed, it is the rationale most often cited by courts for applying the "one year rule".

A further reason offered for its application is based upon the equitable concepts of laches and acquiescence. Laches, quite simply, can be defined as delay on the part of the claimant inconsistent with good faith.[35] Acquiescence, on the other hand, might be defined as acts or conduct of the claimant which lull the other party into believing to

his or her prejudice that no legal claim will be brought.[36] It would appear that these equitable concepts were applied by the ecclesiastical courts when they exercised their jurisdiction to discharge arrears in the cases of *Wilson v. Wilson*[37] and *DeBlaquiere v. DeBlaquiere*[38]. In the latter case, Dr. Lushington states as follows:

> . . . there was a species of acquiescence . . . on the part of Lady H. DeBlaquiere, evidenced by her forebearing to resort to this Court, and by her allowing her husband to be sued for her debts. I am not, therefore, inclined to meddle with the arrears; . . . .[39]

This rationale is not altogether distinct from the first and, indeed, is again primarily based upon the courts' objective in awarding maintenance, as previously stated. That is, as maintenance is awarded to sustain rather than to enrich a party, the court perceives any delay on behalf of the creditor spouse as tantamount to bad faith, it being assumed that if any delay is suffered the creditor spouse has made other arrangements.

A more recent rationale for the rule which has gained acceptance, particularly in Ontario and England, is based upon a practical approach to the enforcement of support arrears. The rationale was first expressed in England just over two decades ago,[40] and was first applied in Canada by Mr. Justice Morrow in the case of *Scott v. Scott*.[41] This rationale is not based upon any traditional concept of maintenance, as previously defined. Rather, it attempts to acknowledge that a large number of debtor spouses simply reduce support payments when, because of illness, unemployment or whatever, they are unable to continue regular payments.[42] Moreover, this approach perceives the enforcement of a large amount of arrears to act as a psychological barrier. It follows that the enforcement of a large amount of arrears

against the debtor spouse would cause difficulty with future compliance of the order. As Mr. Justice Morrow stated in the case of *Scott v. Scott*:

> On the facts before me in the present case, I cannot be sure that the applicant is prepared to go to prison rather than pay; rather the facts suggest he has almost reached a stage of hopelessness where one cay say he sees no way out, with consequent adverse effect on his health. This in itself to me suggests that the respondent, former wife, would be better off to forget about her arrears and seek an allowance she is more likely to receive over a longer period and on a more current basis. In saying this I am not for a moment suggesting that the woman should not receive support, particularly for her children.[43]

In conclusion, courts which have applied this rationale feel that the "one year rule" makes good sense as it provides an arbitrary limitation to the amount of arrears a debtor spouse is probably able to pay. Quite simply, the argument follows that to enforce any greater amount would be of no benefit to the creditor spouse as there would be no realistic possibility of payment. Moreoever it could potentially create a strong disincentive on the part of the debtor spouse to comply with future payments under the order.

The Commission is of the view that, if there is any sound basis for the "one year rule", the most recent rationale applied by certain courts is the most convincing argument in favour of the continuance of the "one year rule". With respect to the rationale first discussed, this Commission is of the view that its basis no longer continues to hold merit. That is, the ecclesiastical concept of alimony and maintenance is founded upon an anachronistic view that the wife, usually in the position of a creditor spouse, is not an equal partner but, instead, a subservient member of the marital regime.

The Commission is of the similar view in regards to the rationale which is based upon the equitable concept of laches and acquiescence. That is, although these concepts still apply in Manitoba to bar the rights of claimants in certain instances,[44] it is generally agreed that their application in Canada is confined to those claimants seeking equitable remedies.[45] Equitable remedies, such as injunctions, specific performance or actions of account, are not generally, if ever, sought by creditor spouses where enforcement proceedings on support orders are taken. Consequently, it is the opinion of this Commission that there is no basis upon which the rationale should continue to be applied.

CHAPTER III - RECOMMENDATIONS FOR REFORM

(a) The "One Year Rule" and the general power to remit arrears of support payable to the creditor spouse

We stated at the commencement of Chapter II that, should we recommend a continuance of the "one year rule" as an arbitrary limit to the enforcement of support orders, we would be in favour of a statutory amendment which would eliminate the discrepancy between the wording of the enforcement provisions in our *"Family Maintenance Act"* and current judicial practice within the province to adopt the rule.

This Commission perceives a possible solution to the discrepancy to be a codification of the "one year rule". This has been the approach taken by legislators in both England and British Columbia. In England, section 32 of *"The Matrimonial Causes Act 1973"* requires leave of the court before the creditor spouse can seek to enforce arrears which became due more than twelve months before proceedings to enforce payment of them are begun. Similarly, section 65

of *"The Family Relations Act"*, S.B.C. 1972, c. 20, provides that, unless the court in its discretion otherwise orders, execution shall not issue for the recovery of more than one year's arrears of maintenance.

This approach has received strong support by some commissions and by certain members of the academic community. The Alberta Institute of Law Research and Reform, in its Report on *Matrimonial Support* has recommended this approach.[46] Much earlier, the Law Commission (England) in its 25th Report entitled *Family Law: Report on Financial Provisions in Matrimonial Proceedings* recommended the adoption of this method; eventually their recommendation was legislated as previously indicated. The codification of the "one year rule" has also received support from academics in Saskatchewan[47] and in Illinois.[48]

The Commission recognizes the statutory enactment of the "one year rule" would eliminate the present dichotomy between Manitoba judicial practice and statutory provisions in our *"Family Maintenance Act"*. However, it is our opinion that a codification of the "one year rule" would be a retrogressive amendment to the enforcement of support orders. It is clear that since the 1940 decision of *Bennett v. Bennett (No. 2)*[49] a creditor spouse has not required leave from the court to issue execution for any amount of arrears within the preceding six years. The *Bennett* case raised the issue of whether a wife under *"The Wives' and Children's Maintenance Act"* required leave to issue execution for arrears. In resolving this issue, Robson, J.A. made the following statement:

> In my opinion a wife having an order, made under "The Wives' and Children's Maintenance Act", made

> of record in the County Court, is as free to issue execution as is any judgment creditor. It cannot be that it was intended that a wife would have to apply for leave each month before issuing execution. If there had been a long period of default she could in my view issue execution for the whole arrears, taking the risk any execution creditor takes of levying for too much. If there should be a bona fide dispute as to amount due I should think an application could be made to the County Court Judge for ascertainment of the true fact.[50]

Moreover, this Commission is of a similar view as that expressed by the Ontario Law Reform Commission towards a codification of a "one year rule". In its Sixth Report on Family Law entitled *Support Obligations*, the Ontario Commission has criticized this approach as being an improper reversal of an onus of proof. The codification of the "one year rule" would place the onus upon the creditor spouse to prove to the court that arrears beyond one year should be enforceable. We agree with the comments expressed by the Ontario Commission where it states that:

> An order reducing or eliminating arrears of maintenance constitutes extraordinary relief and in establishing entitlement to such an order the onus should always be borne by the party against whom the original order was made.[51]

The fact that the rule places an improper onus upon the creditor spouse is especially apparent when one recognizes that in many instances, the debtor spouse is in default of the support order not because of any financial inability to comply with it but, rather, because of a mere unwillingness to do so. Moreover, regardless of how default arises, enforcement can present a real problem both to the court and to the creditor spouse, especially where the debtor spouse constantly

changes residency from one jurisdiction to another. In conclusion, it is this Commission's viewpoint that the codification of a "one year rule" would be a reactionary amendment which would add a further step in the enforcement proceedings when the present aim should be to simplify procedures for enforcement. Moreover, the requirement of leave would unnecessarily curtail the rights of a creditor spouse to enforce support orders made in his or her favour.

The approach that is adopted in Ontario towards maintenance ordered under the *Divorce Act* is the most favourable to the creditor spouse. That is, the Ontario courts have, since the decision of *Lear v. Lear*[52] clearly viewed these maintenance orders as final and conclusive so far as arrears of payment are concerned. Accordingly, arrears under these maintenance orders cannot be remitted by the appropriate court. Hence, no "one year rule" or any other arbitrary time limit restricting the enforcement of arrears exists; rather, all arrears are enforceable. It would appear that the variance of the Ontario approach from other common law jurisdictions in Canada owes its origin to the 19th Century jurisdiction of its Court of Chancery in adjudging and enforcing alimony awards.[53]

The Commission recognizes that there are strong equitable arguments in favour of the Ontario approach. An American article on the subject quite concisely describes those arguments as follows:

> A wife depending for her support upon alimony should be protected in her reasonable reliance upon a right to enforce an obligation which, it must be assumed, was justly imposed under circumstances then existing. If she has obtained credit in the belief that past-due alimony represents a fund rightly hers, she ought not to be prejudiced by her husband's failure, upon a change in

> circumstances, to make timely motions for modification. Even where credit is not involved, there are psychological elements of reliance worthy of protection; her personal plans should not be subject to defeasance without grave reason. Further, if accruals were not final, the husband might deliberately default in the hope that if he were called into court he would be let off lightly; whereas the wife would tend to litigate each instalment which was not promptly paid, when she might otherwise give the husband a period of grace beneficial to both parties.[54]

It is precisely for these reasons that this Commission acknowledges that a remission of arrears constitutes special relief and, consequently, should be granted only in limited circumstances. However, in our opinion the absolute enforcement of all arrears could potentially also result in injustices. It is this Commission's view that there are occasions when the court should have the discretion to relieve against arrears.

The most typical case where a remission of arrears might be considered is where the debtor spouse fails to apply for a justifiable decrease in payments. The Commission has learned that it is a very common occurrence, especially at the Provincial Judges Courts' level, for debtor spouses simply to lower their payments when, because of a change in financial circumstances, they lack the ability to continue regular payments. In most instances, this occurrence takes place because the debtor spouse is not aware that there is a right to apply to the court for a variation of the existing court order.

It is the viewpoint of this Commission that an absolute enforcement of arrears in certain circumstances could lead to a substantial injustice against the debtor spouse. Moreover, having regard to the most recent rationale offered in support of a "one year rule", an absolute enforcement

of past arrears might not in practice be a benefit to the creditor spouse. That is, it is highly unlikely that payment of arrears would be forthcoming if a large amount were outstanding; on a practical basis the debtor spouse would simply be unable to pay. Furthermore, an absolute enforcement of arrears could foreseeably foster a sense of hopelessness on the part of the debtor spouse, reducing the likelihood of compliance with periodic payments in the future.

This Commission would prefer to recommend an approach *towards enforcement which would better balance the rights of* a creditor spouse as against those of the debtor spouse. In our view, it is quite proper and just that a court be entitled to remit arrears in appropriate circumstances. The Commission recognizes,however, that a remission of arrears is essentially a retroactive order and, accordingly, it should be invoked only in special circumstances.

It is this Commission's recommendation that "*The Family Maintenance Act*" be amended to grant the debtor spouse the express right to apply to the appropriate court for a remission of arrears. As in the case of variation, the appropriate court to hear the order would be the one that granted the relief originally. The onus of proof to show cause why arrears should be remitted would be borne by the debtor spouse, as is the case with all individuals who apply to the court for relief. The appropriate factors the court might wish to consider in determining whether arrears should be remitted are a past change in financial circumstances, resulting in the debtor spouse's inability to continue payment, and the extent of financial hardship which would result from an absolute enforcement of arrears.

The Commission wishes to emphasize that, in its view, remission should be granted by the court in those cases where the debtor spouse meets his or her onus of proof; a presumption would otherwise exist in favour of an absolute enforcement of arrears. It is this Commission's opinion that it is essential that the court distinguish between those instances where a debtor spouse is unable to pay and other instances where there is merely an unwillingness to pay; the latter borders on contempt of court. Moreover, should the court not attempt to differentiate between an incapacity to pay and a mere disinclination, it is quite foreseeable that a debtor spouse might deliberately default with the hope that the court would eventually relieve the debtor spouse of his or her past obligations. If this were allowed to occur, it could potentially result in the collapse of our enforcement system.

The Commission acknowledges that the recommendation of this approach would essentially abolish the "one year rule" where relief is ordered pursuant to "*The Family Maintenance Act*". For the reasons we previously cited, it is our view that the "one year rule" unfairly places the onus on the creditor spouse to prove that arrears should be enforceable.

In summary, the Commission recommends that a statutory provision be enacted in "*The Family Maintenance Act*" which would incorporate our recommendations, as previously set forth and summarized at the conclusion of our Report. We acknowledge that our recommendations cannot be applied to relief granted pursuant to the *Divorce Act* as that would be beyond the scope of our provincial jurisdiction. However, it is our view that it would be appropriate to apply our recommendations to the enforcement of alimony judgments and accordingly, we would recommend that legislation be enacted

in *"The Queen's Bench Act"*, C.C.S.M. c. C280, to implement these changes.

Thus far our recommendations have focused on both the need for and the scope of changes required for the enforcement of arrears generally payable to the creditor spouse. In view of the recent concerns expressed in our society which call for the advancement of the legal rights of children, the Commission is of the opinion that the enforcement of support orders payable to dependent children raises somewhat different issues and, consequently, deserves a separate analysis.

(b) The "One Year Rule" and the general power to remit arrears of support for the benefit of dependent children

Not one of the Manitoba cases discussed in Chapter I involved the remission of arrears of support for the exclusive benefit of dependent children. Consequently, there has never been a reported case in Manitoba which has raised the issue of whether the court has the jurisdiction to remit arrears of support where the beneficiaries of the order are dependent children and, moreover, assuming that jurisdiction exists, whether a court should exercise it in favour of a debtor spouse by remitting arrears.

A review of the language of the various statutory provisions allowing the court to review the original maintenance order leads one to inconclusive results on whether there is jurisdiction to remit arrears of these particular support orders. More particularly, a reading of section 73(2) of *"The Child Welfare Act"*[55] (which allows for the variation of an order of support in favour of children of unmarried parents) does not essentially provide assistance in determining whether the court has a discretion to remit arrears

on an application to vary. The particular subsection allows the court to "vary or rescind" the original order, precisely the same language used in section 11(2) of the *Divorce Act*. In Chapter I we mentioned that other jurisdictions are divided on whether the language of that subsection should be interpreted to include a power of remission.

As in the instance of a support order in favour of a creditor spouse, the statutory language of section 24 of *"The Family Maintenance Act"* and, as well, section 118(2) of *"The Child Welfare Act"* would support the jurisdiction of the appropriate court to remit arrears on an application for a variation of a court order. That is, both of these sections enable the court to "discharge" the original order. Applying the *Lamontagne* decision, this term "connotes nothing less than a power to revoke or rescind [arrears]".[56] However, the issue is not clear and it is quite fair to say that, given the fact other jurisdictions have perceived these support orders to involve distinct issues from those in favour of a creditor spouse, the issue is still entirely unresolved.

Prior to the enactment of *"The Family Law Reform Act"*, S.O. 1978 c. 2, the issue was raised on numerous occasions in Ontario and has been, to some extent, discussed in Saskatchewan as well. In the latter jurisdiction, Disberry, J. in the decision of *McIndoe v. McIndoe*[57] admitted over a decade ago that the question of arrears benefitting dependent children raises distinct issues from those arrears outstanding from support orders in favour of a creditor spouse. In briefly assessing the distinction he stated that, "While the mother may be the payee named in the order, the child is the beneficiary thereof, and the mother cannot release the father from his liability thereunder: *Walls v. Hanson* (1964) 49 D.L.R. (2d) 435 (N.B.)".[58]

In Chapter II, the Commission reviewed various rationales adopted by the common law when the "one year rule" was applied to restrict the enforceability of arrears. Two of these doctrines were based upon the concept of maintenance (to sustain not to enrich a claimant), and the consequent practice of the court to restrict arrears to this arbitrary time limit on the basis that to do otherwise would cause hoarding (antithetical to the court's conception of support) or on the principle of laches. As we previously explained, both of these theories have been the ones traditionally expounded by our courts for the application of the rule.

It was this conventional approach to the adoption of the "one year rule" which led certain courts, especially in Ontario, to consider whether the rule should apply to children. The argument against the applicability of the practice has been concisely stated as follows:

> . . . there is absolutely no reason why a child should be penalized for the laxity of his or her parents in moving to enforce an order or penalized for any claim that the wife may come by a windfall and hoard moneys originally earmarked for the child.[59]

This Commission concurs and fully supports this statement. In our view, it is inequitable that the rights of dependent children, essentially in the position of *bona fide* third parties, be affected by the conduct of either the creditor or debtor spouse.

This Commission is also of the view that the most recent rationale expounded for the rule (that is, as a practical guideline to assist the court in determining the sum the debtor spouse is probably able to pay) does not create sufficient reason to apply the rule in favour of these support orders. More particularly, we are of the

opinion that should the debtor spouse be unable to pay the arrears, the onus should be upon that party to prove to the court's satisfaction that a remission of arrears should be granted. Quite simply, the imposition of a "one year rule", based upon any rationale, improperly reverses that onus. A similar opinion was expressed by this Commission in the case of arrears payable to the creditor spouse.

Moreover, it has become the recent objective of our courts to have paramount regard to the best interests of a child in making awards, particularly those pertaining to matters of custody and access. This Commission is of the view that there should be no distinction in the application of the general principle when financial awards are ordered by the court. Consequently, we feel that when a court is resolving the issue of the enforcement of a support order in favour of a dependent child, it should be primarily concerned with the welfare of that child to ensure his or her best interests are being protected.

The Commission acknowledges, however, that there may be circumstances which warrant the court's intervention on the question of arrears. The Commission is of the view that there are cases which would merit a remission, chiefly those we previously cited, dealing with the question of arrears payable to a creditor spouse. That is, a remission might be justified where the debtor spouse is able to prove to the court's satisfaction that the original award was unreasonable owing to a past reversal in that party's financial circumstances. The Commission is of the view that the court should have this jurisdiction as it is imperative that a financial order against a debtor spouse be, at all times,

fair and equitable. Moreover, with the risk of sounding repetitive, this Commission is of the opinion that a court would not necessarily be showing any favour to a child by regarding all arrears as fixed and final. Surely it is in the best interests of all the parties that the court issue an order that the debtor spouse is able to pay.

In conclusion, we recommend that "*The Family Maintenance Act*" and "*The Child Welfare Act*" be amended to grant the appropriate court the express jurisdiction to remit arrears on the application of the debtor spouse. The court's jurisdiction to grant such an order would be limited to those cases where it is satisfied that a remission is in the best interests of the child in whose favour the order has been granted.

(c) Arrears on the death of either spouse

Unfortunately, there has been no case law in Manitoba which has raised the issue of whether arrears owing to the creditor spouse are recoverable against the personal representative of the debtor spouse's estate. While the issue is still unresolved, a review of section 92(1) of "*The Queen's Bench Act*" would support the position that arrears are recoverable against the estate. Section 92(1) reads as follows:

> 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 may be now enforced.

The Commission is aware that a similar provision to this subsection in England persuaded Buckley, J. to comment in

the decision of *Re Hudson*[60] that arrears are recoverable against the estate. A like provision contained in the Alberta Rules of Court, 1969, convinced Morrow, J. to achieve the same conclusion in the case of *Re Sheppharḍ*.[61]

In determining the proper solution to this issue, the Commission has reviewed the legislation of other jurisdictions. It would appear that the position in Alberta[62] and British Columbia[63] is also in favour of the recovery of arrears against a debtor's estate although the issue has not been entirely resolved in these jurisdictions either. While section 19(5) of *"The Family Law Reform Act"* of Ontario provides for the recovery of arrears against this estate, the section limits that recovery to those arrears accumulating within the preceding twelve months.

The approach adopted by the Ontario legislature is similar to the recommendation of the Alberta Institute of Law Research and Reform in its report on *Matrimonial Support*. However, the Institute was in favour of granting the creditor spouse the additional right of applying to the court to declare older arrears a debt as well.[64] The Alberta recommendation was similar to the reform proposed by The Law Commission (England) but the latter tentatively favoured adopting a statutory recovery period of six months, as opposed to twelve months.[65]

This Commission is of the opinion that the enactment of a specific recovery period such as adopted in Ontario would unfairly prejudice the creditor spouse. Moreover, for similar reasons previously expressed, we are unable to recommend the legislation proposed by either the Institute or by The Law Commission. It is our opinion that a creditor spouse

should generally be entitled to arrears owing at the date of death of the debtor spouse. Accordingly, we recommend that arrears be treated as a debt of the estate of the debtor spouse subject to the right of the personal representative to apply to the court which granted the original order for relief against arrears.

The Commission recognizes that pursuant to section 53 of *"The Trustee Act"*, C.C.S.M. c. T160, the onus is upon a claimant to institute judicial proceedings should the personal representative of the estate dispute a claim. However, in our opinion, a support order should be treated with a greater degree of finality by our laws than an unlitigated claim. Indeed, this appears to be the approach of the legislature evidenced by the enactment of section 92(1) of *"The Queen's Bench Act"*.

The issue of whether the personal representative of the estate of a creditor spouse can recover arrears owing by a debtor spouse appears to have been clarified in Manitoba. The decision of *Jachowicz v. Bate*[66] held that a judgment of alimony or an award of maintenance is a personal right which dies with the creditor spouse. However, it is quite possible that the issue is still debatable, given the subsequent enactment of section 92(1) by our legislature and the judicial interpretation of similar provisions in other jurisdictions.

The view that alimony and maintenance are personal rights which die with the creditor spouse is supported by the court's traditional objective in awarding a support order; that is, it is said that it is an order of sustenance, not an order of property. However, the issue is unfortunately

not as definitive as one might initially suspect. The concepts of maintenance and property are, in practical terms, quite interrelated.

It has been correctly pointed out that the disallowance of the recovery of arrears after the death of a creditor spouse could potentially create an additional incentive for the debtor spouse to delay and avoid payment during the lifetime of the other party.[67] Moreover, it is quite feasible that the adoption of this approach could unjustifiably deplete the estate of the creditor spouse. That is, the estate could foreseeably be responsible for debts that would not otherwise have been incurred had maintenance been forthcoming during the life of the creditor spouse.[68]

Based upon the foregoing considerations, the Commission is of the opinion that arrears should be recoverable by the estate of the creditor spouse. Accordingly, we recommend that the estate of the creditor spouse be entitled to recover arrears, subject again to the provision allowing the debtor spouse the right to institute judicial proceedings to move the court to remit arrears on the basis that it would be just and equitable to do so.

(d) The power of a court to remit arrears owing pursuant to a separation agreement

The "one year rule" does not apply to arrears owing under a support provision in a separation agreement in Manitoba.[69] Moreover, the court has no jurisdiction to remit arrears outstanding under the contract.[70] Subject to a limitation period of six years prescribed by section 3(1)(g) of *"The Limitation of Actions Act"*, (which governs actions

based on contract) all arrears are recoverable.[71] It would appear that the rationale for the distinctive manner in which separation agreements are enforced is due to the historical jurisdiction of the Court of Chancery, as opposed to the ecclesiastical courts,over these contracts.[72]

This Commission is of the opinion that the court should continue to lack jurisdiction to remit arrears outstanding pursuant to a separation agreement. Of course, the defendant spouse would continue to have the full opportunity to raise the defence of promissory estoppel or any other defence relevant to a contractual claim in general; this could potentially result in a remission of all or a portion of the claim of arrears sought. However, the concept of a remission of arrears based upon any of the rationales reviewed in Chapter II of this Report should continue to have no application to a private contract, where the parties have determined the rules which shall govern their separation. Accordingly, the Commission recommends no change in this area of enforcement of arrears.

In conclusion, our recommendations, contained within this Report, can be summarized as follows:

1. The "one year rule", in the sense of an arbitrary limit to the enforcement of arrears, should be abolished.

2. "*The Family Maintenance Act*", S.M. 1978, c. 25, should be amended to allow the debtor spouse the express right to apply for a remission of arrears.

3. The Act should also be amended to grant the appropriate court the jurisdiction to order a remission of arrears where the debtor spouse proves to the satisfaction of that court that it is just and equitable to do so; otherwise a presumption in favour of an absolute enforcement of arrears would exist.

4. Similarly, *"The Queen's Bench Act"*, C.C.S.M. c. C280, should be amended to ensure that the recommendations set forth in the preceding two paragraphs apply to the enforcement of alimony judgments as well.

5. *"The Child Welfare Act"*, C.C.S.M. c. C80 and *"The Family Maintenance Act"* should be amended to allow the debtor spouse the right to apply for a remission of arrears of support granted for the benefit of dependent children.

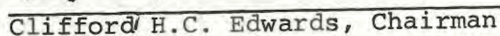
6. *"The Child Welfare Act"* and *"The Family Maintenance Act"* should vest the appropriate courts with the jurisdiction to remit arrears but a remission should only be ordered where the court, having regard to the best interests of the child, is of the opinion that such an order is justified.

7. Arrears of support should be treated as a debt of the estate of the debtor spouse subject to the right of the personal representative to apply to the court which granted the original order for relief against arrears.

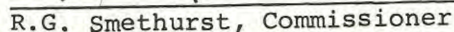
8. Arrears of support should be recoverable by the estate of the creditor spouse, subject to the right of the debtor spouse to apply to the appropriate court for a remission of arrears.

9. Arrears owing pursuant to maintenance in a separation agreement should continue to be governed by the law of contracts and not by any of the rationales which apply to remit arrears owing pursuant to an order of support. Accordingly, we recommend no change in this area.

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"*, dated this 21st day of January 1980.



Clifford H.C. Edwards, Chairman



R.G. Smethurst, Commissioner

Val Werier, Commissioner

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

A. Burton Bass, Commissioner

Evan H.L. Littler, Commissioner

FOOTNOTES

1. *Lamontagne v. Lamontagne* (1964), 47 W.W.R. 321 at 330, 44 D.L.R. (2d) 228 (Man. C.A.).

2. *Leslie v. Leslie* (1959-60), 30 W.W.R. 414 at 419 (Man.Q.B.).

3. *Septon v. Septon* (1978),3 R.F.L. (2d) 26 at 27 (Man. C.A.).

4. *"The Divorce and Matrimonial Causes Act, 1857"* 20 & 21 Vict., ch. 85 transferred jurisdiction over matrimonial causes from the Ecclesiastical Courts to the Court for Divorce and Matrimonial Causes, constituted by this Act.

5. *Fiarchuk v. Fiarchuk*, (1953), 7 W.W.R. (N.S.) 568 (Man. Q.B.).

6. See *Septon v. Septon supra* n. 3; *Lamontagne v. Lamontagne supra* n. 1.

7. (1975) 19 R.F.L. 129.

8. *Id.*, at 130.

9. *Supra* n. 5.

10. Section 3(1)(j) of *"The Limitation of Actions Act"*, C.C.S.M. c. L150 makes provision for a limitation period of 10 years for an action on a judgment or an order for the payment of money.

11. *Supra* n. 5 at 572.

12. *Id.*, at 574.

13. *Head-Patrick v. Patrick* [1922] 1 W.W.R. 825 at 826, 15 Sask. L.R. 304 (Sask. C.A.).

14. [1922] P 187 at 193, 91 L.J.D. 126.

15. *Supra* n. 13.

16. *Ibid.*

17. (1830), 3 Hag. Ecc. 329 n., 162 E.R. 1175 n.

18. (1884), 27 Ch.D. 160, 53 L.J. Ch. 986.

19. [1897] 2 Q.B. 439, 66 L.J.Q.B. 838.

20. *Robinson v. Robinson* (1728), 2 Lee 593, 161 E.R. 451 where arrears of two-years standing were enforced; *DeBlaquiere v. DeBlaquiere* (1830), 3 Hag. Ecc. 322, 162 E.R. 1173 where the court refused to enforce any arrears.

21. *Supra* n.17.

22. *Supra* n. 5 at 574. See also the statement of Miller, C.J.M. in *Lamontagne v. Lamontagne* (*supra* n. 1) at 323 that ". . . [I]n the Fiarchuk case, Tritschler J. made it quite clear that limiting arrears to one year was not a 'hard and fast' rule even in the Court of Queen's Bench".

23. (1958), 24 W.W.R. 658 at 666, 66 Man. R. 174, 14 D.L.R. (2d) 99 (Man. Q.B.).

24. (1959) 19 D.L.R. (2d) 417 at 431 (Man. Q.B.).

25. (1959-60) 30 W.W.R. 414 at 419, 67 Man. R. 230.

26. R.S.M. 1970 c. W170, repealed by *"The Family Maintenance Act"*, S.M. 1978 c. 25 s. 36.

27. (1964) 47 W.W.R. 321, 44 D.L.R. (2d) 228 (Man. C.A.).

28. *Id.* at 331.

29. *Supra* n. 3.

30. *Id.* at 27.

31. See *Ormandy v. Ormandy* (1974), 52 D.L.R. (3d) 369, 6 O.R. (2d) 241, 18 R.F.L. 256 (Ont. H.C.); *Ewert v. Ewert* (1972), 6 R.F.L. 153 (Sask. Q.B.); and *Ramsay v. Ramsay* (1974), 18 R.F.L. 225 at 228 (Ont. H.C.).

32. Williams, J.S. *Limitation of Actions in Canada* (1972) 3-4.

33. (1884) 27 Ch.D. 160 at 164, 53 L.J. Ch. 986.

34. *Supra* n. 5.

35. *Supra* n. 32 at 30.

36. *Id.* at 32.

37. *Supra* n. 17.

38. (1830) 3 Hag. Ecc. 322, 162 E.R. 1173.

39. *Id.* at 1175.

40. *Pilcher v. Pilcher* (No. 2), [1956] 1 W.L.R. 298 at 302, [1956] 1 All E.R. 463 at 465, per Lord Merriman, P.

41. (1972), 23 D.L.R. (3d) 689, [1972] 2 W.W.R. 456, 5 R.F.L. 231.

42. This argument was expressed by the Ontario Law Reform Commission in their *Report on Family Law, Part VI "Support Obligations"* at 119.

43. *Supra* n. 41 at 693-4.

44. *"The Limitation of Actions Act"*, C.C.S.M. c. L150, sec. 61.

45. *Supra* n. 32, at 27-37.

46. Institute of Law Research and Reform, *Report No. 27: Matrimonial Support,* March 1978 at 103.

47. Kloppenburg, C., "The Enforcement of Maintenance", (1976) 40 *Sask. L. Rev.* 217 at 235.

48. "Retroactive Modification of Alimony Decrees" (1954) 22 *University of Chicago Law Review* 246.

49. [1940] 1 W.W.R. 111 (Man. C.A.).

50. *Id.* at 117.

51. Ontario Law Reform Commission, *Report on Family Law, Part VI "Support Obligations"* 1975 at 119.

52. (1975) 17 F.L.R. 136 (Ont. C.A.).

53. *Supra* n. 7 at 143-144.

54. *Supra* n. 48 at 247-8.

55. C.C.S.M. c. C80.

56. *Supra* n. 1 at 331.

57. (1966) 57 W.W.R. 577 (Sask. Q.B.).

58. *Id.* at 586.

59. *Jans v. Page* (1976) 29 R.F.L. 210 (Ont. Prov. Ct.) per Main, Prof. J.

60. [1966] 1 All E.R. 110.

61. (1969) 5 D.L.R. (3d) 458, 69 W.W.R. 153 (N.W.T.T.Ct.).

62. *McLeod v. Security Trust Co.* [1940] 2 D.L.R. 697, [1940] 1 W.W.R. 423 (Alta. S.C.).

63. *Barker v. Westminster Trust Co.* [1941] 4 D.L.R. 514 at 521-22, [1941] 3 W.W.R. 473 at 480-481 (B.C.C.A.). But see *R. v. Murphy, Ex. parte Buckholz* (1969) 1 D.L.R. (3d) 455, 461 (B.C.C.A.) where the court stated the issue was still entirely open.

64. *Supra* n. 46.

65. Law Commission (England) Report, *Family Law: Report on Financial Provision in Matrimonial Proceedings* (Law Com. No. 25) (1969) par. 150.

66. (1958) 24 W.W.R. 658 (Man. Q.B.).

67. *Supra* n. 46.

68. *Ibid.*

69. *Wilson v. Wilson* (1964) 46 W.W.R. 217 (Man. Q.B.); *Yellowaga v. Yellowaga* (1969) 66 W.W.R. 241; *Knapp v. Knapp* May 23, 1975 (Man. Q.B.) Hamilton, J.

70. *Ibid.*

71. *Ibid.*

72. *Supra* n. 8 at 155.