CREATIVE ENFORCEMENT OF FAMILY LAW ORDERS

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As lawyers we tend to focus on our client's rights and responsibilities. Whether negotiating a settlement or litigating a case we devote much of our time to calculating the right equalization payment or divining the proper quantum of spousal support using whatever mystical skills or information technology required for the latter task in 2006. From the client's perspective all this is a completely wasted effort unless it leads to an enforceable deal. In many routine cases the parties may have a dispute but both are essentially honest and will comply with the ultimate result although it may not accord with their wishes. A certain number of spouses will turn out to be enforcement risks, individuals who will avoid financial disclosure, frustrate, undermine and willfully breach parenting orders and refuse to pay money orders voluntarily, or at all. It is often difficult to know at the opening of a case if it involves one of these rogues. The prudent approach is to keep in mind at all times the tools available to compel a spouse to comply with the orders of the court and his or her obligations. These tools are not new but in the last year a number of cases have demonstrated effective uses of the contempt power, receiverships, striking pleadings and piercing the corporate veil, or some combination of these enforcement methods.

1. The Contempt Power

a. Formal Requirements

A court's ability to find a party in contempt is circumscribed by the *Family Law Rules*, R. 26(4)(b) and R.31. As civil contempt carries with it the potential for imprisonment the remedy invokes the criminal onus of proof and the process has its own formal requirements. To establish a finding of contempt, a party must show beyond a reasonable doubt that the other party willfully disobeyed or disregarded the clear terms of a court order. Not only must the order of which a breach is claimed be clear but the notice of motion seeking contempt relief must set out in concrete, specific particulars the nature of the breach. R. 31 provides for a special Notice of Contempt Motion in Form 31 which must be served personally on the alleged contemnor.[1] Many contempt applications, particularly those arising from alleged or actual breaches of parenting orders, fail because of the criminal standard of proof. As an example in *Leonard (K.) v. Teara G.*, Madam Justice Wildman refused to find contempt when a mother denied access in the face of a court order on the advice of her counsel and the Children's Aid Society during an investigation of alleged abuse. Wildman J. also refused to find contempt for denial of an access visit provided by court order where that order did not specify the time of the visit. With no certainty of the date of access denied, there can be no contempt.[2]

A Notice of Contempt Motion should be served with a supporting affidavit. That affidavit should be drafted in light of the criminal onus of proof. The Rules expressly

[1] R. 31 (2) of the *Family Law Rules*
[2] *Leonard K. v. Teara G.* (2006) CarswellOnt 3503 (Ont.S.C.J.) at 7 - 8

provide that although hearsay evidence may be submitted on a contempt motion, this should be restricted to evidence which is unlikely to be in dispute.[3] A contempt hearing may be heard on affidavit evidence but a party may seek a *viva voce* hearing given the potential sanction of imprisonment.

b. The Bahamian Gambit: *Dickie v. Dickie*

Breaches of orders for the payment of money are expressly exempted from the contempt sanction. The *Family Law Rules* provide that an order other than a payment order may be enforced by a contempt order.[4] This restriction is designed to relegate debtor's prison to the Dickensian past. In *Forrest v. Lacroix Estate*, the Ontario Court of Appeal confirmed that breaches of support orders are not an exception to the rule prohibiting the use of the contempt power to enforce money orders.[5]This restriction undoubtedly provides a refuge for rogues. Precisely which orders can be characterized as

[3] R. 14(19) and 31(3)

[4] R. 26(4) and 31(1) of the *Family Law Rules*. Note that a "payment order" is defined in R. 2(1) as:

"payment order" means a temporary or final order, but not a provisional order, requiring a person to pay money to another person, including,

(a) an order to pay an amount under Part I or II of the *Family Law Act* or the corresponding provisions of a predecessor Act,
(b) a support order,
(c) a support deduction order,
(d) an order under section 60 or subsection 154(2) of the *Child and Family Services Act*, or under the corresponding provisions of a predecessor Act,
(e) a payment order made under rules 26 to 32 (enforcement measures) or under section 41 of the *Family Responsibility and Support Arrears Enforcement Act, 1996*,
(f) a fine for contempt of court,
(g) an order of forfeiture of a bond or recognizance,
(h) an order requiring a party to pay the fees and expense of,
    i. an assessor, mediator or other expert named by the court, or
    ii. a person conducting a blood test to help determine a child's parentage, an
(i) the costs and disbursements in a case.

[5] *Forrest v. Lacroix Estate* (2000), 48 O.R. (3d) 619

payment orders is currently being tested with an appeal pending before the Supreme Court of Canada in *Dickie v. Dickie*.[6]

In *Dickie v. Dickie* the parties separated after a long term marriage with three children. Mr. Dickie practiced as a plastic surgeon in Thunder Bay. The parties entered into a separation agreement in 1994 and were divorced. In 2001 Ms. Dickie commenced an application for spousal support after the initial term under the separation agreement had expired. She also sought child support under the *Guidelines*. On an interim motion Kiteley J. ordered that Mr. Dickie pay increased child support and spousal support pending trial. Mr. Dickie responded by fleeing the jurisdiction. He moved to the Bahamas which not coincidentally has no reciprocal enforcement with Ontario. Before leaving he took the precaution of selling his house and cashing in his RRSPs leaving no assets in the jurisdiction. After his move Madam Justice Greer ordered that he provide an irrevocable letter of credit in the amount of $150,000 to secure his child and spousal support obligations. She further ordered that he pay $100,000 as security for costs to be held in an interest-bearing account by Ms. Dickie's solicitors. Mr. Dickie breached this new order.

Mr. Dickie was noted in contempt for the breach on a motion before Madam Justice Stewart who sentenced him to 45 days in jail which he served. He appealed from that order to the Court of Appeal on the basis that the orders that he post a letter of credit and that he pay security for costs were both essentially money orders precluding the use of the contempt power. Ms. Dickie argued that his appeal should be dismissed on two

[6] *Dickie v. Dickie* [2006] O.J. No. 95 (Ont.C.A.), leave to appeal to the Supreme Court of Canada granted June 22, 2006

counts: first that he had willfully failed to pay the support orders and second that neither of the orders for which he was found in contempt were truly money orders. Mr. Dickie succeeded on his appeal in persuading the majority of the Court of Appeal. Mr. Justice Laskin wrote a strong dissent to that decision and Ms. Dickie's appeal is now pending before the Supreme Court of Canada.

Mr. Justice Juriansz writing for the majority in *Dickie* rejected the wife's submission that the Court of Appeal should exercise its discretion to refuse to hear Mr. Dickie's appeal because of his willful failure to pay the support orders. The wife cited as authority for that submission the Ontario Court of Appeal's decision in *Brophy v. Brophy* in which Laskin J.A. then writing for the majority concluded that the Court has a discretion to stay or dismiss an appeal in such circumstances unless the payor shows an inability to pay or seeks an adjournment to make arrangements to pay.[7] Mr. Justice Juriansz commented that the *Brophy* principle was in fact *obiter* although he affirmed that a payor must at least show a genuine issue as to whether he or she can pay a support order before being permitted to proceed with an appeal of that order. Juriansz distinguished *Dickie*, however, as Mr. Dickie was not challenging the underlying support orders but rather the contempt order itself. His failure to pay the support orders was not sufficient reason to refuse to hear or to adjourn his appeal. Juriansz J.A. held that a party must be permitted to bring an appeal to challenge the jurisdiction of a court to grant a contempt order and on that basis determined the appeal should be heard.

[7] *Brophy v. Brophy*, [2004] O.J. No. 17 (C.A.)

On the substantive issue, Juriansz J.A. accepted Mr. Dickie's submission that the true nature of the underlying orders for an irrevocable letter of credit and the posting of security is that of a money order. Juriansz J.A. noted that an irrevocable letter of credit becomes identical to cash at its full face value the moment that it is given. He placed weight on the fact that Greer J. 's order put no restrictions on when Ms. Dickie could call on the irrevocable letter of credit. Presumably she could have done so as soon as arrears accumulated without any further court order. Similarly, Juriansz J.A. characterized the posting of security with Ms. Dickie's solicitors as nothing more than an order to pay money to a person, in this case the solicitors. He reserved without deciding the question of whether an order to pay security for costs into court would also constitute a payment of money. In the lower court decision of *Coletta v. Coletta*, Mr. Justice Quinn held that payment of funds into court is not payment to another person and does not fall within the definition of "payment order" found in the *Family Law Rules*.[8] *Dickie v. Dickie* was decided under the *Rules of Civil Procedure* but Juriansz J.A. stated that the analysis under R. 60.11 must be consistent with the application of Rule 31 of the *Family Law Rules*. Juriansz J.A. refrained from addressing whether *Coletta* had been correctly decided. His decision does leave open the possibility that the contempt power may be used to enforce orders to pay security for costs into court and, perhaps, to post irrevocable letters of credit if there are conditions on the access by the recipient spouse to the letter of credit, such as requiring further order of the court.

Laskin J.A.'s dissent pointedly contains a much more detailed review of the facts of the case. He focuses on the refusal by Mr. Dickie to pay support to his former wife and

[8] *Coletta v. Colett*, [2003] O.J. No. 81 (Ont.S.C.J.)

children as a result of which his two older children stopped their education because they could not afford it, the children were denied tutoring and extra-curricular activities and their mother lost all her savings. The evidence showed that meanwhile Mr. Dickie lives a luxurious life in the Bahamas, drives a Porsche, has a jet boat and a "sea doo," and frequents resorts and bars. As Mr. Dickie decided to become judgment proof in this jurisdiction and earn his income in a non-reciprocating jurisdiction the contempt power is the only tool left for this court to impose its will on him. Without it, court orders such as those of Greer J. apply only to those who choose to comply with them. Given Mr. Dickie's flagrant and systematic disregard for orders of the court and the impact of his defiance on Ms. Dickie and the children, Laskin J.A. would have adjourned his appeal until he had satisfied the support orders, purging his contempt. On the substantive issue, Laskin J.A. took a more narrow approach to the definition of a money order. He concluded: "Where money is ordered to be paid not to the creditor but into court – or its functional equivalent, to a solicitor to be held in trust – and where the effect of the order is not to create a fixed debt obligation but to secure a debt obligation, then the order is not an order for the payment of money under rule 60.11(1). [9] Laskin J.A. agreed with the majority that Rule 60.11 should be interpreted consistently with Rule 31(1) under the *Family Law Rules*. He accepted the analysis of Quinn J. in *Coletta* that the posting of security is not an order requiring a person to pay money to another person and hence does not fall into the definition of a payment order found in the *Family Law Rules*. Laskin J.A. found no meaningful distinction between an order that security be paid into court and an order that funds be paid as security into a solicitor's trust account.

[9] *Dickie, supra* at 17-18 with reference to the English authorities on the issue.

The appeal to the Supreme Court of Canada is pending. The result will clarify the usefulness of the contempt power in policing rogue litigants.

c. Innovative Penalties

Courts have an extensive open-ended menu of penalties to impose on a finding of contempt. The purpose of civil contempt law is to pressure the contemnor into complying with court orders to uphold the legitimacy of the system. The penalty should be tailored to the particular facts of the case. Some recent examples are:

i. *Belittchenko v. Belittchenko*[10]

Ms. Belittchenko commenced divorce proceedings in Ontario to which Mr. Belittchenko attorned. Approximately 18 months later Mr. Belittchenko commenced family law proceedings in Russia, where they had formerly resided. Ms. Belittchenko brought an emergency motion in Ontario and obtained an interim order restraining Mr. Belittchenko from proceeding with his Russian applications. This order was then continued as a consent term to a number of adjournments obtained by the husband as he changed counsel twice. In defiance of the restraining order Mr. Belittchenko continued his application in the Russian courts and obtained an order annulling his marriage. Ms. Belittchenko moved in contempt and was successful. Madam Justice Backhouse granted two penalties for the contempt. She ordered that Mr. Belittchenko pay to Ms. Belittchenko $75,000 as a penalty. $25,000 of this was allocated as compensation for Ms. Belittchenko's Russian legal fees and $50,000 was allocated as compensation for her

[10] *Belittchenko v. Belittchenko* (2006) CarswellOnt 6015 (Ont.S.C.J.) upheld in part [2006] CarswellOnt 5894 (Ont.C.A.)

stress, anxiety and trouble. In addition Backhouse J. ordered that the decision by the Russian court should not be recognized in the Ontario proceeding. As a separate matter Backhouse J. ordered that Mr. Belittchenko pay his wife $150,000 towards her legal costs to prepare the case for trial. On appeal, the Court of Appeal set aside the prohibition against the use of the Russian judgment, leaving the issue of its admissibility and weight to be considered by the trial judge. The Court of Appeal upheld the other orders. There is no indication in the record of the specific evidence that Ms. Belittchenko led to substantiate a recovery of $50,000 for stress, anxiety and trouble. In an appropriate case it is obviously worth pursuing such recovery given this precedent.

ii. Penalties for Contempt in Parenting Cases

There is a general reluctance to find contempt for breaches of parenting orders which are often vague in their terms and to impose harsh penalties which may further harm the children indirectly or antagonize them against a parent. Where contempt is found courts struggle to craft penalties that reflect the seriousness of the conduct without further damaging the family. One example is the decision of Gauthier J. in *Korwin v. Potworowski* in which the court found that the mother willfully breached a custody and access order by withholding the children from their father. At an earlier stage in the proceeding the mother had been found in contempt for similar conduct and the court had ordered police enforcement of the parenting order. Gauthier J. commented that he would have ordered the imprisonment of the mother but for his concern that it would harm the children's emotional well-being. Gauthier J. also declined to suspend access as requested by the father to compensate him for the lost time with the children as that merely

punishes the children for their mother's conduct. Gauthier J. imposed a financial penalty that the wife pay $5000 into the children's RESP and that she pay $5000 into court to be held as security against any further failure to return the children to their father in accordance with the parenting order. [11]

Another option is for courts to make no order for incarceration but to order payment of a financial penalty and put the miscreant on notice that any future breach will receive such punishment.[12] Courts will use the power to incarcerate in severe breaches of parenting orders, however. In *Tilkeridisova v. Shanab*, the mother was a dual citizen of Canada and the Czech Republic. She took the children to the Czech Republic ostensibly for a visit and refused to return them to Canada. She returned on her own to visit her boyfriend in Canada and was arrested. At the time of the contempt hearing the mother had kidnapping and extortion charges pending in Canada and a Hague Application pending in the Czech Republic. Madam Justice Rogers found contempt and ordered that the mother be incarcerated for 210 days to be served after the mother completes any sentence ordered for the criminal charges and not concurrently. Rogers J. ordered that if the mother purges her contempt by returning the children she may approach the court for relief from imprisonment. The father had asked the court to order the mother incarcerated indefinitely until the return of the children to Canada. Rogers J. declined to do so on the basis that an indefinite sentence would breach the *Charter*.[13]

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[11] *Korwin v. Potworowsk, [2006]* O.J. No. 2251 (Ont.S.C.J.)

[12] *Dool v. Jorge* (2006), CarswellOnt 3984 (Ont.S.C.J.), *Fluet v. Ramage* (2006) CarswellOnt 6-58 (Ont.S.C.J.)

[13] *Tilkeridisova v. Shanab* (2006) CarswellOnt 1766 (Ont.S.C.J.)

2. Receivership

Courts have the power to appoint a receiver over the assets of one of the parties in a family law proceeding. This may be of particular assistance where one party has control over a commercial asset and there is a risk of the dissipation of that asset before trial. The extensive litigation history of *Mgrdichian v. Mgrdichian* provides examples of almost every conceivable enforcement mechanism including use of the contempt power and striking pleadings. The most effective enforcement order was the imposition of an interim receiver on the husband's major Ontario asset. This case concerned a couple with a long term marriage who had four children together. They emigrated to Canada in 1997 and separated in 2004. The husband had business interests in Ontario and also in Iraq, his country of origin. In Ontario he had an interest in a restaurant and incorporated a company ("Haig Investments Inc.") which purchased the plaza in which the restaurant operated. He also had an import/export business based in Iraq.

In May of 2004, the wife visited Iraq for a vacation. She discovered while there that a house she owned had been transferred into her brother-in-law's name without her knowledge. She managed to persuade her brother-in-law to transfer the property to her sister. This incident seems to have concerned the husband who consulted family law counsel in Ontario. After his consultation he transferred his interest in Haig Investments Inc. for $50 to one brother and also transferred his interest in a shareholder's advance to another of his brothers. Within months the husband commenced the family application. The husband put forward a story in the subsequent matrimonial litigation that he had never owned Haig Investments Inc. beneficially because he had borrowed all the funds

for the initial purchase of the plaza. This story was riddled with inconsistencies and unsupported by financial disclosure. The husband resisted financial disclosure in the face of court orders and he also failed to pay spousal and child support. The husband breached four financial disclosure orders after which he was found in contempt and incarcerated for 60 days. His application was dismissed at the same time. In January of 2005 the husband made an assignment into bankruptcy, listing as the bulk of his debts the unpaid support orders. The wife obtained an order in the bankruptcy permitting her to maintain her proceedings against her husband as the intention of the bankruptcy was to defeat her claims.

The husband's brothers, Haig Investments Inc. and a numbered company operating the restaurant had been added as parties to the application ("the added parties"). In June, 2005, the wife brought a motion for summary judgment for an order declaring the share purchase agreement for Haig Investments Inc. be declared void. The motion proceeded under Rule 20 of the *Rules of Civil Procedure* as it concerned a commercial matter. The added parties made a failed attempt to transfer the hearing of the motion to the commercial court. Madam Justice Backhouse heard the motion.[14] She reviewed in her decision the extensive conflicting evidence much of it related to credibility. Although the evidence was sufficient to persuade Backhouse J. that were she the trial judge she would find that the disposition of the shares was implemented as part of a conspiracy to deprive the wife of her rights under the *Family Law Act* and the *Divorce Act* she could not conclude that there were no issues for trial given the centrality of credibility to a final determination. Unable to grant summary judgment, Backhouse J. used the power under

[14] *Mgrdichian v. Mgrdichian*, [2005] CarswellOnt 3495

R. 20.05 to impose terms as are just. Noting the high probability of the wife's ultimate success, the lack of credibility of the respondents, the attempts to deceive the court and the failures of disclosure, Backhouse J. determined that it was unsafe to leave the added parties in control of Haig Investments Inc.. Backhouse J. granted an order for the appointment of an interim receiver to manage the assets pending trial, ordered the interim receiver to pay fifty percent of the net income of the company to the wife and an interim payment of $125,000 all to be accounted for at trial. The added parties sought leave to appeal this decision. Mr. Justice Jennings sitting as the Divisional Court dismissed the leave application and confirmed the jurisdiction to order an interim receiver.[15] Subsequently the added parties' pleadings were struck.[16] They failed to seek a stay of the order striking their pleadings and delayed in perfecting their appeal of that order. In the intervening period, the wife proceeded to an uncontested trial and obtained final judgment. The added parties appeal of the order striking their pleadings was dismissed as moot.[17]

An uncontested trial in the matter was heard by Rivard J. who provides a helpful summary of the principles relevant to a finding of fraudulent conveyance. He cited the husband's actions had the following "badges of fraud:" the husband was left in the financial situation where he could claim he had nothing left; the transactions occurred between close relatives; the effect of the transfers was to delay and defeat the wife's claims; the grantee knew that the assets being transferred to him had substantially greater value than he was paying them for; the husband transferred his assets in secrecy; the

[15] *Mgrdichian v. Mgrdichian*, [2005] O.J. No. 2912 (Ont.Div.Ct)
[16] *Mgrdichian v. Mgrdichian* [2005] CarswellOnt 9097
[17] *Mgrdichian v. Mgrdichian*, [2006] CarswellOnt 5477

consideration was grossly inadequate and there was unusual haste in closing the transaction.[18] The wife had made good use of the interim receiver who was able to trace the flow of funds in his bank accounts and other records to which the receiver had access.

Rivard J. set aside the husband's transfers and declared them void as a fraudulent conveyance. He granted orders to the wife for equalization and lump sum spousal support. He ordered the added parties pay her damages for fraud including punitive damages. He ordered that the husband and the added parties be liable for the receiver's fees, as approved by the court. Although it may be difficult for the wife to fully collect on the substantial judgment that she obtained, the appointment of the interim receiver both preserved a significant asset to satisfy her claims and enhanced her ability to collect information in a situation in which her husband and related parties obdurately refused disclosure. While Backhouse J. made her award in the context of a Rule 20 summary judgment order, the same relief is presumably available pursuant to R. 16(9)(c) of the *Family Law Rules* and s. 101 of the *Courts of Justice Act.*[19]

3. Piercing the Corporate Veil

Where the payor spouse in a family law action has a corporate interest that is effectively his or her *alter ego* a court may pierce the corporate veil to ensure enforcement of family orders. In *Wildman v. Wildman*, the Court of Appeal affirmed a decision of Kruzick J. which provided that all the amounts owing by the husband to

[18] *Mgrdichian v. Mgrdichian* (2006) CarswellOnt 2621 (Ont.S.C.J)
[19] S.101(1) of the *Courts of Justice Act* provides: "In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so."

the wife by secured and enforceable not only against him personally but against the various companies through which he operated his business.[20] The trial judge also ordered that the costs and prejudgment interest be payable and enforceable as spousal support. The husband did not appeal the substantive order that he pay more than $800,000 to his wife on account of support, costs and interest. He appealed only the enforcement orders. This partial appeal clearly troubled the Court of Appeal. It presumably indicates a concern by the husband only to avoid payment of the amounts owing and that he had no sustainable objection to the court's award on the merits.

The Court of Appeal in *Wildman* held that in appropriate family law cases the court should disregard the separate legal personality of a corporate entity where "it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."[21] In his decision, Laskin J.A. approved this test for piercing the corporate veil:

In general,

1. The individual must exercise complete control of finances, policy and business practices of the company;
2. That control must have been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights;
3. The misconduct must be the reason for the third party's injury or loss.

In applying these factors to the *Wildman* case, Laskin J.A. concluded that the husband first, called himself "sole proprietor" and did not differentiate between his business

[20] *Wildman v. Wildman* [2006] CarswellOnt 6042 (Ont.C.A.)
[21] *Wildman, supra* at 5

and personal assets in his own cash logs; second, he controlled his business enterprises to divert money from the corporate to his personal use; and third that the children and his wife have suffered because they have not received the monies ordered by the court. Laskin J.A. further commented that the failure to name the companies as parties was immaterial as notice to the husband personally was sufficient.

The Court of Appeal upheld the decision of the trial judge to allocate the costs award to spousal support as reasonable and not reaching the threshold at which appellate courts review costs orders. This provision has the benefit from the wife's perspective that these costs may be collected through the Family Responsibility Office. The Court of Appeal overturned the trial judge's decision to allocate the prejudgment interest in the same manner as the interest award clearly related to the property provisions of the order.

4. Pension Orders and Vesting Property

In *Trick v. Trick*, the Court of Appeal reviewed the boundaries of enforcement against a payor spouse's pension assets.[22] In *Trick* the husband had substantial child and spousal support arrears but had managed to judgment proof his assets. He resided in the United States. The only assets remaining in Canada were his private pension and his Canada Pension Plan ("CPP") and Old Age Security ("OAS") benefits. At trial, Fragomeni J. had granted an order vesting 100% of the payor's Nortel pension in the wife

[22] *Trick v. Trick*(2006) 81 O.R. (3d)241 (Ont.C.A.)

and garnishing 100% of his CPP and OAS benefits. Fragomeni J. also ordered Mr. Trick to name his wife as beneficiary on his pension plans. Mr. Trick moved to set aside the enforcement portions of this order, although similarly to the *Wildman* appeal he did not seek to overturn the substantive order of Fragomeni J. for a variation to terminate child and spousal support payments and rescind his arrears.

The recipient wife submitted that the court had jurisdiction under s. 100 of the *Courts of Justice Act* to vest title to property in her. Section 100 provides: "

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Writing for the Court of Appeal, Lang J.A. noted that the *Divorce Act*[23] does give a court authority to secure a spousal support order which may be construed as authority to encumber sufficient to invoke jurisdiction under s. 100 for a court to vest property in a recipient spouse. Lang J.A. did not review the *Family Law Act*[24] provisions as they were not applicable, but s. 9 of the *Family Law Act* also grants courts the jurisdiction to vest property in a spouse to enforce a property order pursuant to Part I of the Act and s. 34(1)(c) of the *Family Law Act* grants courts the jurisdiction to vest property in a spouse's name to enforce a support order under that Act. Lang J.A. did not finally determine the scope of authority to vest property pursuant to s. 100 of the *Courts of Justice Act* as the specific terms of the *Pensions Benefit Act ("PBA")*[25] prohibit such a vesting order. S.66(4) of the PBA permits the execution against or attachment of payments under a pension to enforce a support order to a maximum of fifty percent of

[23] R.S.C. 1985, c. 3 (2nd.Supp)
[24] R.S.O. 1990, c. F.3, as am.
[25] R.S.O. 1990, c. P.8, as am.

the payment. In her discussion, Lang J.A. referred with approval to the lower court decision of *Nicholas v. Nicholas.* In *Nicholas*, the court granted a "stacking order" which provided that fifty percent of the pension be applied to satisfy an equalization obligation and the other fifty percent to satisfy a support obligation.[26] In *Trick,* the recipient wife had no equalization claim outstanding so was limited to collect fifty percent of the pension on account of her support claim.

Lang J.A. reviewed the relevant federal garnishment legislation and concluded that collection against the CPP and OAS benefits is limited to fifty percent of the benefit. Although CPP and OAS are generally protected from attachment, the Federal *Family Orders and Agreements Enforcement Assistance Act*[27] provides that support orders may be enforced against any Federal payments notwithstanding any other legislation. This is limited to be in accordance with provincial law. Ontario's *Family Responsibility and Support Arrears Enforcement Act*[28] caps garnishment of a payor's income source at 50% which includes a pension source.

Mr. Trick was largely successful on his appeal. Lang J.A.'s decision is of assistance, however, to other spouses enforcing claims as it clearly indicates appellate approval of stacking orders and opens the door to courts vesting property in order to enforce spousal support claims under the *Divorce Act* .

[26] *Nicholas v. Nicholas*, [1998] O.J. NO. 1750, referred to with approval in *Trick, supra* at 258
[27] R.S.C. 1985, c. 4 (2nd Supp.) as am.
[28] S.O. 1996, c. 31, as am.

Closing

The utility of the various enforcement methods in the cases discussed here will depend on the particular fact of each case. Some, such as appointing a receiver, may involve considerable cost which needs to be weighed against the likely recovery. Many of these recent decisions are reflective of real creativity by counsel and courts who should be commended for their efforts to make our court system legitimate and effective for parties.

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