

# THE VARIATION, ENFORCEMENT AND INTERPRETATION OF MAINTENANCE ORDERS IN CANADA—SOME NEW ASPECTS OF AN OLD DILEMMA

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## I. *Introduction.*

The recent decisions of the British Columbia Court of Appeal<sup>1</sup> and the Supreme Court of Canada<sup>2</sup> in *Ruttan v. Ruttan* bring into focus an issue of considerable significance in a system in which the jurisdiction to make, vary or rescind an order for maintenance is usually allocated to one court, and the jurisdiction to enforce to others. The question with which the courts were faced in *Ruttan* was the extent to which an enforcing court may go in the interpretation of a maintenance order without infringing the widely enunciated principle that its function is confined to enforcement and may not extend to variation or rescission. This issue, although by no means peculiarly Canadian, is accentuated here by the nature of a federal system that tends to divide both legislative and judicial responsibility for the making, variation and rescission of maintenance orders on the one side, and their enforcement on the other.

This article has two loosely connected aims. The first is to describe, briefly, the numerous situations in which, in Canada, a court will be asked to enforce a maintenance order that it did not pronounce, and that it has no power to vary or rescind. This will place *Ruttan* in context, but the opportunity will also be taken, in passing, to identify some recent judicial pronouncements in this area which continue to indicate that the dichotomy, whether or not desirable in the abstract, is fraught with constitutional and legislative hazard.

The second aim is to examine *Ruttan* itself both in the Court of Appeal and in the Supreme Court of Canada, the decisions that went before, and the implications of the current position. It will be submitted that the decision of the Court of Appeal did much to clarify a body of jurisprudence that has suffered from a desire to allocate the judicial

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<sup>1</sup> [1981] 3 W.W.R. 385, 20 R.F.L. (2d) 122 (B.C.C.A.).

<sup>2</sup> (1982), 27 R.F.L. (2d) 165. McIntyre J. delivered the unanimous judgment of the full court.

function strictly between variation and rescission on the one hand, and enforcement on the other. The reality is, as the majority in *Ruttan* in the Court of Appeal pointed out, that there is inevitably a third function—the interpretation of the order, and the legislation from which it flows—which in many cases is inseparable from the enforcement power and which does not, appearances to the contrary notwithstanding, lead to an illegitimate assumption of the power to vary or rescind. It will be further submitted, with respect, that the decision of the Supreme Court of Canada served to obscure the application of that analysis.

## II. *The Present System.*<sup>3</sup>

### A. *Introduction.*

The Constitution Act<sup>4</sup> of 1867 provides in part that the federal Parliament is empowered to make laws concerning “Marriage and Divorce”.<sup>5</sup> It also provides that:<sup>6</sup>

The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province. . . .<sup>7</sup>

To the provincial legislatures is allocated, *inter alia*, responsibility for:

Property and Civil Rights in the Province,

and:

The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in these Courts.<sup>8</sup>

This division of powers means, *inter alia*, that responsibility for legislation concerning maintenance is divided between the federal Parliament and the provincial legislatures. It also means that there are substantial limitations on the powers of judges appointed by provincial governments to make, vary or rescind maintenance orders, whether made under federal or provincial legislation.<sup>9</sup>

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<sup>3</sup> See, generally, Mendes da Costa, *Enforcement of Judgments and Orders Across Canada*, in C.B.A. Continuing Education Seminars, No. 2, *Family Law* (1974), p. 93, and also Swan, *Reciprocal Enforcement of Maintenance Orders in Canada* in Mendes da Costa, ed., *2 Studies in Canadian Family Law* (1972), p. 875 and Supplement (1977), p. 295.

<sup>4</sup> See Canada Act 1982, c. 11, Schedule I, Item 1 (U.K.).

<sup>5</sup> *Ibid.*, s. 91(26).

<sup>6</sup> *Ibid.*, s. 96.

<sup>7</sup> *Ibid.*, s. 92(13).

<sup>8</sup> *Ibid.*, s. 92(14).

<sup>9</sup> The scope of this commentary is too limited for a detailed general account of constitutional principles involving the law of maintenance. See, generally, the following: Bushnell, *Family Law and the Constitution* (1978), 1 *Can. J. Fam. L.* 202; Colvin, *Federal Jurisdiction Over Support After Divorce* (1979), 11 *Ottawa L. Rev.* 541; Colvin, *Family Maintenance: The Interaction of Federal and Provincial Law* (1979),

The position under the federal law concerning maintenance—embodied in the Divorce Act<sup>10</sup>—will be examined first, and a distinction will be made between the intra-provincial and inter-provincial position. This will be followed by an exposition of provincial exercises of power in the maintenance field and, again, a distinction will be drawn between intra-provincial and inter-provincial situations.

### B. *The Federal Position.*

The federal Parliament has confined its legislative activity in the field of maintenance to the Divorce Act.<sup>11</sup> It provides, *inter alia*, as follows:

- 11.(1) Upon granting a decree nisi of divorce, the court may, if it thinks fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
  - (a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
    - (i) the wife,
    - (ii) the children of the marriage, or
    - (iii) the wife and children of the marriage;
  - (b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
    - (i) the husband,
    - (ii) the children of the marriage, or
    - (iii) the husband and children of the marriage; . . .
- (2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.
14. A decree of divorce granted under this Act or an order made under section 10 or 11 has legal effect throughout Canada.
15. An order made under section 10 or 11 by any court may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court or in such manner as is provided for by any rules of court or regulations made under section 19.
- 19.(1) A court or court of appeal may make rules of court applicable to any proceedings under this Act within the jurisdiction of that court, including, without restricting the generality of the foregoing, rules of court. . . .
  - (d) providing for the registration and enforcement of orders made under this Act including their enforcement after death: . . .
- (3) The provisions of any law or any rule of court, regulation or other instrument made thereunder respecting any matter in relation to which rules of court may be made under subsection (1), that were in force in

2 Can. J. Fam. L. 221; Payne, Maintenance Rights and Obligations: A Search for Uniformity (1978), 1 Fam. L. Rev. 2-25, 91-107, 185-203.

<sup>10</sup> R.S.C., 1970, c. D-8.

<sup>11</sup> *Ibid.*

Canada or any province immediately before the 2nd day of July, 1968 and that are not inconsistent with this Act, continue in force as though enacted or made by or under this Act until such time as they are altered by rules of court or regulations made under this section or are, by virtue of the making of any rules of court or regulations under this section, rendered inconsistent with those rules or regulations.

It is also important to note that section 2 of the Divorce Act contains an extensive definition of the term "court", so that only superior courts and, in effect, judges appointed by the Governor General under section 96 of the Constitution Act of 1867 may grant divorces and corollary relief.

(a) *Intra-provincial Variation and Enforcement.*

Despite the fact that the courts<sup>12</sup> demonstrated some initial dissatisfaction with the proposition, it now appears clear that no court other than the one that made a maintenance order under the Divorce Act has the power to vary or rescind it.<sup>13</sup> It may be noted in passing that the jurisdictional position on the variation of a custody order made under section 11(2) remains much less settled, but that issue is beyond the scope of this commentary.<sup>14</sup>

Although it seems clear that a British Columbia applicant who wishes to vary or rescind a maintenance order made in, say, British Columbia under the Divorce Act by the British Columbia Supreme Court must apply to that court, the jurisdictional position in relation to enforcement of the order has been questioned. Most provinces in Canada have legislation similar to section 12 of the British Columbia Family Relations Act.<sup>15</sup> This section provides that:

Where a copy of an order for alimony, maintenance, custody or access made by or registered for enforcement with the Supreme Court is certified by a proper officer of that court and filed with the Provincial Court the order including alimony or maintenance arrears accrued before filing, may be enforced by the Provincial Court in the manner in which it enforces its own orders under this Act.

<sup>12</sup> See *Hegg v. Hegg and Plautz*, [1973] 3 W.W.R. 307, 36 D.L.R. (3d) 291, 12 R.F.L. 385 (B.C.S.C.); *Blashill v. Blashill*, [1974] 2 W.W.R. 397, 43 D.L.R. (3d) 637, 14 R.F.L. 196 (B.C.S.C.). These cases held that the power to vary a maintenance order made under the Divorce Act was distributed, depending on the circumstances, among all superior courts in the country.

<sup>13</sup> *Rodness v. Rodness*, [1976] 3 W.W.R. 414, 66 D.L.R. (3d) 746, 23 R.F.L. 266 (B.C.C.A.). See also: *Ramsay v. Ramsay* (1976), 13 O.R. (2d) 85, 70 D.L.R. (3d) 415, 23 R.F.L. 147 (Ont. C.A.); *Re Hall*, [1976] 4 W.W.R. 634, 70 D.L.R. (3d) 493, 24 R.F.L. 6 (B.C.C.A.); *Re Blane and Blane* (1977), 13 O.R. (2d) 466, 71 D.L.R. (3d) 351, 23 R.F.L. 195 (Ont. C.A.); *Soo v. Martineau* (1974), 17 R.F.L. 349 (Ont. Prov. Ct); *Asseltine v. Asseltine* (1973), 16 R.F.L. 129 (Ont. Prov. Ct). And see *Birkbeck v. Birkbeck*, [1982] 2 W.W.R. 382, 26 R.F.L. (2d) 109 (Sask. C.A.).

<sup>14</sup> Cf. *Re Hall*, *ibid.* with *Cochrane v. Cochrane* (1975), 8 O.R. (2d) 310, 57 D.L.R. (3d) 694, 20 R.F.L. 264 (Ont. C.A.); *Ramsay v. Ramsay*, *ibid.*

<sup>15</sup> R.S.B.C., 1979, c. 121.

It will be noted that this legislation<sup>16</sup> provides for the enforcement of a superior court maintenance order in a court over which a provincially-appointed judge presides and, on the face of it, it would seem that the legislation is wide enough to encompass a maintenance order made under the Divorce Act. The issue has, however, recently been raised<sup>17</sup> whether the legislation is constitutionally valid in the light of section 15 of the Divorce Act. The argument runs that section 15 provides for the enforcement of a maintenance order "in like manner" as a superior court order, and that it thereby imports into the Divorce Act the entire range of mechanisms for enforcing superior court orders, such as execution, garnishment and contempt proceedings. It is then pointed out that, in Alberta at least, the Provincial Court does not have this arsenal of weapons at its disposal, and that therefore the federal legislation and the provincial legislation<sup>18</sup> cannot co-exist. It is suggested with respect, however, that this argument may be misconceived, as it depends for its validity on a particular view of section 15 of the Divorce Act. Section 15 does not appear to address itself to the intra-provincial enforcement of Divorce Act maintenance orders, but rather to the interprovincial enforcement of such orders, about which more will be said later. It is submitted, in other words, that section 15 lays down no particular prescription for the enforcement of a Divorce Act maintenance order in the province in which it was made. Equally, the argument seems to ignore section 19(3) of the Divorce Act, which provides, *inter alia*, that "any law . . . respecting any matter in relation to which rules of court may be made under subsection (1) . . . that [is] not inconsistent with this Act, continue[s] in force as though enacted . . . under this Act . . .". Since section 19(1)(d) permits the making of rules of court in relation to the "enforcement of orders", and since the legislation in question in each province antedates the Divorce Act, it would seem that it would be invalid only if it were "inconsistent" with the Divorce Act. As it is submitted that the Act has nothing to say on this matter, it is also submitted that the legislation is constitutionally valid, regardless of what enforcement mechanisms each lower court may have at its disposal.<sup>19</sup> In any event, the

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<sup>16</sup> Alberta: The Provincial Court Act, 1978, S.A., 1978, c. 70, s. 29; Manitoba: The Provincial Judges Act, S.M., 1972, c. 61/P 148, s. 23(4); New Brunswick: Provincial Court Act, R.S.N.B., 1973, c. P-21, s. 9; Nova Scotia: Family Maintenance Act, S.N.S., 1980, c. 6, s. 40(2); Ontario: The Family Law Reform Act, 1978, R.S.O., 1980, c. 152, s. 27(1); Saskatchewan: The Unified Family Court Act, R.S.S., 1978, c. U-11, s. 18(1).

<sup>17</sup> Gledhill, *The Enforcement of Maintenance Payments: A Constitutional Question* (1978), 16 *Alta L. Rev.* 521.

<sup>18</sup> *Supra*, footnote 16.

<sup>19</sup> Gledhill, *op. cit.*, footnote 17, refers to a number of cases which, with greater or lesser degrees of authority on this point, uphold the validity of the legislation, *i.e.*, *R. v. MacDonald*, [1976] 5 *W.W.R.* 391 (B.C.S.C.); *Peroff v. Peroff*, [1972] 1 *O.R.* 171

disparity between the remedies available in the Alberta superior courts and in the Provincial Court did not attract discussion in *Pointmeier v. Pointmeier*,<sup>20</sup> a case, referred to in detail later in this commentary, in which the possible inconsistency of federal and provincial enforcement legislation was addressed and resolved in favour of the province.

(b) *Inter-Provincial Variation and Enforcement.*

It seems settled that the superior courts of one province do not have the power to vary or rescind a maintenance order made under the Divorce Act by the superior courts of another.<sup>21</sup> Equally, however, it would seem certain, by reason of section 15 of the Divorce Act, that the latter courts may enforce an order of the former upon registration pursuant to section 15.<sup>22</sup> Beyond this, the jurisdictional position, particularly in relation to provincially-appointed courts and officials, is now considerably confused.

In the abstract there appear to be three jurisdictional avenues leading to section 92 courts and officials. The first is the enforcement of the order under the Reciprocal Enforcement of Maintenance Orders legislation in each province.<sup>23</sup> The second is enforcement, after reg-

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(Co. Ct): *Re Ritchie v. Ritchie* (1968), 3 D.L.R. (3d) 676 (B.C. Fam Ct); *Bowick v. Bowick*, Unreported, Aug. 29th, 1977 (Alta Fam. & Juv. Ct). See also *Murray v. Murray* (1979), 12 R.F.L. (2d) 365 (Ont. Prov. Ct) where the propriety of enforcing, in the Ontario Provincial Court under s. 27(1) of The Family Law Reform Act, 1978 was raised (*supra*, footnote 16). A maintenance order made under the Divorce Act in the Ontario High Court, was unquestioned. See also Colvin, Family Maintenance: The Interaction of Federal and Provincial Law, *op. cit.*, footnote 8, at pp. 237-239. And see the dictum, proclaimed in another context, of Stevenson J.A. in *Pointmeier v. Pointmeier*, [1982] 3 W.W.R. 505, at p. 509, 26 R.F.L. (2d) 384, at p. 388 (Alta C.A.).

<sup>20</sup> *Ibid.*

<sup>21</sup> See the cases cited *supra*, footnote 13.

<sup>22</sup> Alberta: The Supreme Court Rules, r. 575(1); British Columbia: The Divorce Rules, r. 36(1). On the status of these Rules see *Hilborn v. Killam* (1981), 121 D.L.R. (3d) 696 (B.C.S.C.); Manitoba: The Queen's Bench Rules, r. 745(1); New Brunswick: The Divorce Rules, r. 32(1); Newfoundland: The Divorce Rules, r. 30(1); Nova Scotia: Civil Procedure Rules, r. 57.31(1); Ontario: Rules of Practice, R.R.O., 1980, Reg. 540, r. 813(1); Prince Edward Island: Civil Procedure Rules, r. 57.30; Saskatchewan: The Queen's Bench Rules, r. 621(1).

<sup>23</sup> Alberta: The Reciprocal Enforcement of Maintenance Orders Act, R.S.A., 1980, c. R-7.1, 1980, c. 44; British Columbia: Family Relations Act, *supra*, footnote 15. Pt. 4.1; Manitoba: The Reciprocal Enforcement of Maintenance Orders Act, R.S.M., 1970, c. M20; New Brunswick: Reciprocal Enforcement of Maintenance Orders Act, R.S.N.B., 1973, c. R-8; Newfoundland: Maintenance Orders (Enforcement) Act, R.S.N., 1970, c. 224; Nova Scotia: Maintenance Orders Enforcement Act, R.S.N.S., 1967, c. 173; Ontario: Reciprocal Enforcement of Maintenance Orders Act, S.O., 1982, c. 9; Prince Edward Island: Reciprocal Enforcement of Maintenance Orders Act, R.S.P.E.I., 1978, c. R-4; Saskatchewan: Reciprocal Enforcement of Maintenance Orders Act, R.S.S., 1978, c. R-4. This legislation will be hereafter referred to as "the REMO legislation".

istration under section 15, through general provincial statutes dealing with the enforcement of superior court maintenance orders in section 92 courts.<sup>24</sup> The third is enforcement through procedures specifically referred to in rules of court proclaimed under the authority of sections 15 and 19 of the Divorce Act.<sup>25</sup>

The issue of whether the registration and enforcement of an extra-provincial Divorce Act order is available under the REMO legislation has, remarkably, been to the provincial Courts of Appeal on five occasions since 1980, and the authorities are now in regrettable conflict.

At the appellate level the question arose first in *Gould v. Gould*<sup>26</sup> in Saskatchewan. A decree of divorce and a maintenance order in favour of children of the marriage had been given in Ontario. The wife registered the order in the Court of Queen's Bench in Saskatchewan pursuant to the Saskatchewan REMO legislation,<sup>27</sup> and sought to enforce the order through that legislation. The Court of Appeal held that, because of the doctrine of paramountcy and sections 14, 15 and 19 of the Divorce Act, the enforcement of the order was permitted only through Rule 621(1) of The Queen's Bench Rules, and that any use of the REMO legislation was excluded.<sup>28</sup> Brownridge J.A. emphasized the mandatory language in Rule 621(1). Bayda J. A. preferred to rely principally on the fact that the REMO legislation provided for the registration of maintenance orders made by a court in a "reciprocating state". He stated that in view of the national or federal character of the Divorce Act it was inappropriate to regard the Supreme Court of Ontario, in exercising jurisdiction under the Act, as a court in a "reciprocating state".

The question next arose at the appellate level in New Brunswick in *Re Brewer and Brewer*,<sup>29</sup> where enforcement of a Divorce Act order given in Ontario was sought under the New Brunswick REMO legislation.<sup>30</sup> The court was at pains to attempt to refute each of the points made in *Gould*. Richard J. A. was able to characterize Ontario as a "reciprocating state", despite the national character of the Di-

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<sup>24</sup> *Supra*, footnote 16.

<sup>25</sup> British Columbia appears to be the only jurisdiction in which rules of court made under ss 15 and 19 refer directly to enforcement through a s. 92 court. See *supra*, footnote 22, r. 36(4).

<sup>26</sup> [1980] 6 W.W.R. 506, 114 D.L.R. (3d) 646, 19 R.F.L. (2d) 267 (Sask. C.A.).

<sup>27</sup> *Supra*, footnote 23.

<sup>28</sup> In arriving at this conclusion the court expressly followed two earlier British Columbia decisions: *Moir v. Moir* (1977), 4 B.C.L.R. 370, 4 R.F.L. (2d) 70 (B.C.S.C.) and *Bignell v. Fickett*, [1979] 2 W.W.R. 379, 8 R.F.L. (2d) 384 (Co. Ct).

<sup>29</sup> (1981), 125 D.L.R. (3d) 183, 22 C.P.C. 143 (N.B.C.A.).

<sup>30</sup> *Supra*, footnote 23.

orce Act, because he thought that to suggest otherwise would lead to the proposition, clearly wrong in his opinion, that a court in Ontario had jurisdiction in all of Canada. Next came the argument that section 14 of the Divorce Act, with its declaration of the legal effect of Divorce Act orders throughout Canada, was inimical to the premise of reciprocity in the enforcement of "foreign" judgments upon which the REMO legislation is based. Richard J. A. disposed of this by stating that while section 14 was concerned with legal effect, the REMO legislation was concerned with something else, namely, enforcement. The question of paramountcy was addressed last, but the court took a view much different from that advanced in *Gould*. In essence the court embraced the principle that federal and provincial legislation in the same field may stand together as long as the provincial enactment does not expressly contradict the federal. No general contradiction was found between section 15 of the Divorce Act and the REMO legislation,<sup>31</sup> and in emphasizing the use of the word "may" in section 15 the court concluded that the federal Parliament had not attempted exclusive control of the field of enforcement.

In *Re Murphy and Murphy*<sup>32</sup> the Newfoundland Court of Appeal preferred the view that the REMO legislation<sup>33</sup> was not available for the enforcement of a Divorce Act order made in Alberta, but it is not clear whether the court was made aware of the decisions in *Gould* and *Brewer*, since they were not referred to. The appellate decision is particularly interesting in the light of the opinion of Fagan J. in the court below.<sup>34</sup> In Newfoundland the court charged with the enforcement of maintenance orders is not a section 92 court, but a section 96 court.<sup>35</sup> Equally, according to Fagan J. in *Murphy*, that court has exclusive jurisdiction to enforce all maintenance orders, whether from inside or outside the province.<sup>36</sup> Lastly, also according to Fagan J., there is only one procedure in Newfoundland for the enforcement of all maintenance orders.<sup>37</sup> The combination of these factors, coupled with the fact that the Alberta order had been registered in the Supreme Court of Newfoundland, persuaded Fagan J. that he was entitled to rule that the Newfoundland scheme complied with the requirements of sections 15 and 19(3) of the Divorce Act unless and until new rules of court were made pursuant to section 19. Indeed, he

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<sup>31</sup> A minor contradiction was, however, found on the issue of arrears outstanding for more than a year, and on this single point the REMO legislation was found inoperative. See (1981), 125 D.L.R. (3d) 183, at p. 197.

<sup>32</sup> (1981), 127 D.L.R. (3d) 473, 22 C.P.C. 170 (Nfld C.A.).

<sup>33</sup> *Supra*, footnote 23.

<sup>34</sup> *Re Murphy* (1980), 19 R.F.L. (2d) 105 (Nfld S.C. (U.F.C.)).

<sup>35</sup> The Unified Family Court Act, S.N., 1977, c. 8, s. 5.

<sup>36</sup> *Ibid.*, s. 7(j).

<sup>37</sup> Contained in The Maintenance Act, R.S. N., 1970, c. 233, s. 13.



specifically pointed out that he was not confronted with "a question of registration of the order in a provincial court under a provincial statute"<sup>38</sup> and that "the cases quoted . . . during the argument of counsel all deal with situations different from the case before me".<sup>39</sup> In summary, his view was that the Newfoundland REMO legislation was referentially incorporated into the Divorce Act by virtue of section 19(3) of that Act. That line of argument, although it is submitted that it has merit and attraction as a way of avoiding the constitutional issue, was not dealt with in either *Gould* or *Brewer*, and was rejected on appeal in *Murphy*. It was, however, rejected for a reason peculiar to Newfoundland among the common law provinces. Newfoundland did not, prior to 1968, have divorce legislation, and the court therefore found it impossible to characterize the REMO legislation as being capable of being referentially incorporated by virtue of sections 19(1) and 19(3) of the Divorce Act. Prior to 1968 the REMO legislation, by definition, did not refer to the matter of divorce. Having said that, the court went on to announce its view that the "authority for a court to enforce or pass on orders made pursuant to the Divorce Act must come from the federal legislation and be enforced in accordance with that legislation and Rules of Court made thereunder".<sup>40</sup>

After *Murphy* came the decision of the Manitoba Court of Appeal in *Rubinstein v. Rubinstein*.<sup>41</sup> Little time need be spent in explaining this decision since the court, in effect, adopted the reasoning in *Brewer*.<sup>42</sup> Two aspects are, however, worth emphasizing. First, the court adverted to practical reasons for preferring enforcement under the REMO legislation. Huband J. A. said:<sup>43</sup>

There is an advantage in the enforcement proceedings under the R.E.M.O. Act. A more efficient administration in terms of locating and serving an adverse party is provided. Legal services are available to the person seeking to enforce a maintenance order through the department of the Attorney General. Otherwise, the available remedies for enforcement are the same in both the Court of Queen's Bench and under the R.E.M.O. Act.

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<sup>38</sup> *Supra*, footnote 34, at p. 111.

<sup>39</sup> These cases were not cited in the judgment, but since the decision of Fagan J. preceded the Court of Appeal decisions in *Gould* (*supra*, footnote 26) and *Brewer* (*supra*, footnote 29), the cases to which he was referring presumably included *Moir* (*supra*, footnote 28), *Bignell v. Fickett* (*supra*, footnote 28) and *Gould v. Gould*, [1980] 1 W.W.R. 1, 12 R.F. L. (2d) 67 (Sask. Q.B.).

<sup>40</sup> *Supra*, footnote 32, at p. 476 (D.L.R.). Reference was then made to enforcement under 30(1) of the Divorce Rules, but no mention was made of the assertion by Fagan J. that there was, in any event, only one method of enforcing maintenance orders in Newfoundland, regardless of their provenance.

<sup>41</sup> [1982] 1 W.W.R. 352, (1981), 129 D.L.R. (3d) 744, 25 R.F.L. (2d) 306 (Man. C.A.).

<sup>42</sup> *Supra*, footnote 29.

<sup>43</sup> *Supra*, footnote 41, at p. 355 (W.W.R.).

Secondly, the court dealt specifically with the difference in wording between the Divorce Rules in contention in *Gould*<sup>44</sup> on the one hand, and in *Brewer*<sup>45</sup> on the other. It will be recalled that Rule 621(1) of the Saskatchewan Queen's Bench Rules provides that "registration . . . shall be effected", while Rule 32(1) of the New Brunswick Divorce Rules provides that "registration . . . may be effected". It was held in *Rubinstein* that even though Rule 745(1) of the Manitoba Queen's Bench Rules provides that "registration . . . shall be effected", this did not alter the court's view of the constitutional position.<sup>46</sup>

The latest Court of Appeal pronouncement on the issue is contained in *Pointmeier v. Pointmeier*,<sup>47</sup> where the Alberta court had to consider how an order for maintenance made under the Divorce Act in Ontario might be enforced in Alberta. On the issue of paramountcy Stevenson J. A., delivering the judgment of the court, summarized his view by saying:<sup>48</sup>

I agree with *Rubinstein v. Rubinstein* and *Brewer v. Brewer*. . . that the provisions of the Divorce Act relating to enforcement and registration of judgments are permissive. . . [T]here is no collision. There is, at most, supplementary or complementary legislation and I am unaware of any authority for finding provincial invalidity in such circumstances and none other than *Gould v. Gould* and *Murphy v. Murphy* was put to us.

In this connection it is worth referring to the decision of the Family Court which led ultimately to the Court of Appeal.<sup>49</sup> In that decision Fitch Fam. Ct J. adverted to the possibility that enforcement proceedings might be taken concurrently in both the Court of Queen's Bench and the Family Court, and that inconsistent orders might result. His view was that this possibility existed in a number of situations outside the Divorce Act and was not, therefore, conclusive of the constitutional issue. In any event, he did not regard the situation as serious, as he said that the inferior court order would simply "give way".<sup>50</sup>

Stevenson J. A. also addressed the point that had troubled Bayda J.A. in *Gould*, namely that for the purposes of the Divorce Act, Ontario could not be regarded as a "reciprocating state". Stevenson J.A. held that in choosing the provincial superior courts to administer the Act the federal Parliament had recognized that those courts had

<sup>44</sup> *Supra*, footnote 26.

<sup>45</sup> *Supra*, footnote 29.

<sup>46</sup> Huband J.A. said: ". . . the rule is simply indicating that, for those who choose enforcement by the mechanism available under the Queen's Bench Rules, that is how one must proceed." See *supra*, footnote 41, at p. 358 (W.W.R.).

<sup>47</sup> *Supra*, footnote 19.

<sup>48</sup> *Ibid.*, at pp. 510 (W.W.R.), 389 (R.F.L.).

<sup>49</sup> *U.P. v. W.P.*, [1980] 3 W.W.R. 263, 15 R.F.L. (2d) 301 (Alta Fam. Ct).

<sup>50</sup> [1980] 3 W.W.R. 263, 471. See *Chalifoux v. Chalifoux* (1980), 19 R.F.L. (2d) 381 (Alta Fam. Div.).

territorial limitations, and had displayed that recognition by providing in section 15 for registration and enforcement. This, it was held, was inconsistent with any concept of giving the courts "a totally federal quality".<sup>51</sup>

In view of the disparity of opinion displayed at the appellate level, it is scarcely surprising that the lower courts show an equal lack of unanimity. The British Columbia decisions of *Moir v. Moir*<sup>52</sup> and *Bignell v. Fickett*<sup>53</sup> have already been referred to, and they were followed in part in Ontario in *Dorrington v. Dorrington*.<sup>54</sup> In *Re Villeneuve and Villeneuve*,<sup>55</sup> *Re Haight and Haight*<sup>56</sup> and *James v. Lockhart*,<sup>57</sup> however, Ontario courts preferred the views expressed in *Brewer, Rubinstein* and *Pointmeier*. The only thing that is now clear is that the relationship between the Divorce Act and the REMO legislation must await authoritative resolution in the Supreme Court of Canada.<sup>58</sup>

The second jurisdictional avenue leading to the enforcement, inter-provincially, of Divorce Act maintenance orders by section 92 courts and officials, arises by combining sections 15 and 19(3) of the Divorce Act and general provincial statutes<sup>59</sup> dealing with the enforcement of superior court maintenance orders in section 92 courts. Here again, the recent decisions make it unclear whether this co-existence is constitutionally proper.

If *Re Brewer and Brewer*,<sup>60</sup> *Rubinstein v. Rubinstein*,<sup>61</sup> and *Pointmeier v. Pointmeier*<sup>62</sup> are correctly decided it would appear that there is no difficulty. If the REMO legislation may be used for Divorce Act purposes, it must follow that general provincial enforcement legislation is also valid in this context.

<sup>51</sup> *Supra*, footnote 19, at pp. 511 (W.W.R.), 390 (R.F.L.).

<sup>52</sup> *Supra*, footnote 28.

<sup>53</sup> *Ibid.*

<sup>54</sup> (1980), 31 O.R. (2d) 29 (Prov. Ct (Fam. Div.)).

<sup>55</sup> (1977), 15 O.R. (2d) 341 (Prov. Ct (Fam. Div.)).

<sup>56</sup> (1981), 33 O.R. (2d) 870 (Prov. Ct (Fam. Div.)). In this case Karswick Prov. Ct J. conducts a review of most of the authorities.

<sup>57</sup> (1981), 34 O.R. (2d) 662 (Co. Ct).

<sup>58</sup> Mendes da Costa, *op. cit.*, footnote 3, pp. 156-157, argues that if simplicity and cost were the only consideration, the debate would be resolved in favour of the REMO legislation. In this connection see, too, the dicta of Fitch Fam. Ct J. in *U.P. v. W.P.*, *supra*, footnote 49, at pp. 267 (W.W.R.), 305 (R.F.L.) and of Huband J.A. in *Rubinstein v. Rubinstein*, *supra*, footnote 41, at p. 355 (W.W.R.).

<sup>59</sup> *Supra*, footnote 16.

<sup>60</sup> *Supra*, footnote 29.

<sup>61</sup> *Supra*, footnote 41.

<sup>62</sup> *Supra*, footnote 47.

The decision in *Gould v. Gould*,<sup>63</sup> however, is ambiguous on this point. Woods J.A. said:<sup>64</sup>

. . . I am in accord with the principle set out in *Moir v. Moir*<sup>65</sup> and followed in *Bignell v. Fickett*<sup>66</sup> that the only procedure to register and reciprocally enforce a maintenance order under the Divorce Act is through the provisions of that Act. The Divorce Act contemplates an exclusive jurisdiction on behalf of the court making the original decree nisi or decree absolute insofar as the proceedings under the Act are concerned. . . . Sections 14, 15 and 19 of the Divorce Act make a divorce order or a decree in one province of legal force and effect throughout the Dominion of Canada, and provide a facility to enforce such order throughout the entire country. The provision for registration in the province is necessary in order to proceed to enforcement, but the proceedings and authority for them is the federal authority and not that of the province.

As has already been noted, Brownridge J.A. referred to Rule 621(1) of the Saskatchewan Queen's Bench rules and said that "the effect of this rule is to make it the only means of registration pursuant to section 15 of the Divorce Act".<sup>67</sup>

On one reading of these dicta, it might be said that the decision is authority for the view that the only means of enforcing an extra-provincial Divorce Act order is to register it in a superior court and then enforce it in a superior court.<sup>68</sup>

A number of other factors, however, would lead to the view that the court did not intend to be so sweeping. First, the dicta must be read in the light of the fact that they were directed only at the effectiveness of the REMO legislation. Secondly, the appeal to the authority of *Moir v. Moir*<sup>69</sup> and *Bignell v. Fickett*<sup>70</sup> is significant. Those cases support the view that use of the REMO legislation in the enforcement of Divorce Act orders is ineffective, but, equally, contain no disapproval of a Rule of Court<sup>71</sup> that authorizes enforcement through the Provincial Court in British Columbia.<sup>72</sup> Lastly, the court in *Gould* did not deal directly with the effect of section 19(3) of the Divorce Act.

It is difficult to conclude that the Newfoundland Court of Appeal decision in *Re Murphy and Murphy*<sup>73</sup> addressed the question at all,

<sup>63</sup> *Supra*, footnote 26.

<sup>64</sup> *Ibid.*, at p. 509 (W.W.R.).

<sup>65</sup> *Supra*, footnote 28.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Supra*, footnote 26, at p. 512 (W.W.R.).

<sup>68</sup> This reading is supported by the thesis of Gledhill, *op. cit.*, footnote 17.

<sup>69</sup> *Supra*, footnote 28.

<sup>70</sup> *Ibid.*

<sup>71</sup> The Divorce Rules of British Columbia, *supra*, footnote 22, r. 36(4).

<sup>72</sup> See also *Hilborn v. Killam*, *supra*, footnote 22. Gould J. also spoke of the federal authority occupying the field, but approved of r. 36(4).

<sup>73</sup> *Supra*, footnote 32.

because Newfoundland does not have legislation of the kind at issue.<sup>74</sup>

It is suggested here that the most uncontroversial view is that the general provincial enforcement legislation<sup>75</sup> is incorporated, for Divorce Act purposes, into the Divorce Act itself by section 19(3). It has already been pointed out that the legislation in question antedates the Act, and may be regarded as "laws . . . respecting [a] matter in relation to which rules of court may be made under subsection (1),<sup>76</sup> that were in force in . . . any province immediately before the 2nd day of July 1968 and that are not inconsistent with this Act". If *Moir v. Moir*,<sup>77</sup> *Bignell v. Fickett*<sup>78</sup> and *Hilborn v. Killam*<sup>79</sup> are right, to take any other view would make the propriety of enforcement in a section 92 court depend entirely on whether provision for it is made in a Rule of Court or in a provincial statute.<sup>80</sup> What is surprising is that the concept of combining the general provincial legislation and the Divorce Act by way of referential incorporation was not canvassed directly in *Gould, Brewer, Rubinstein* or *Pointmeier*.

It is, at this point, worth mentioning parenthetically that there have been occasional suggestions that section 96 of the Constitution Act of 1867 prevents the enforcement of Divorce Act maintenance orders by section 92 courts. The argument is that decisions on corollary relief following the granting of a divorce are reserved for section 96 courts unless the federal Parliament proclaims otherwise, because the enforcement of an order cannot be viewed separately from the adjudication that led up to the making of the order.<sup>81</sup> This argument, if well founded, would affect both the intra- and inter-provincial enforcement of Divorce Act orders. The point was most recently taken in the decision of McIntyre D.C.J. in *Gould v. Gould*.<sup>82</sup> He was of the opinion that since he was acting as a local master of the Court of Queen's bench, his authority "to enforce or otherwise pass on orders made pursuant to the Divorce Act . . . must come from the federal

<sup>74</sup> See the earlier discussion of *Re Murphy and Murphy*, *ibid.*, and *Re Murphy*, *supra*, footnote 34.

<sup>75</sup> *Supra*, footnote 16.

<sup>76</sup> S. 19(1) (d) permits the making of rules of court "providing for the registration and enforcement of orders made under this Act".

<sup>77</sup> *Supra*, footnote 28.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Supra*, footnote 22.

<sup>80</sup> Both Mendes da Costa, *op. cit.*, footnote 3, pp. 139-140, and Colvin, Family Maintenance: The Interaction of Federal and Provincial Law, *op. cit.*, footnote 9, at p. 239, suggest that ss. 15 and 19 of the Divorce Act authorize the use of provincial legislation.

<sup>81</sup> See Colvin, *op. cit.*, *ibid.*, at pp. 235-242, and Gledhill, *op. cit.*, footnote 17.

<sup>82</sup> *Supra*, footnote 39, aff'd, [1980] 1 W.W.R. 479 (Sask. Q.B.).

legislation . . .'.<sup>83</sup> Against this view, however, a number of points should be made. First, the Saskatchewan Court of Appeal in *Gould* was careful to express no opinion on the matter.<sup>84</sup> Secondly, there are a number of other authorities, either directly or indirectly on the point, that suggest that it is proper to permit a section 92 court to enforce an order for corollary relief granted by a superior court upon a divorce.<sup>85</sup> Thirdly, and regardless of the value of the decisions just referred to, it is widely agreed<sup>86</sup> that the federal Parliament may, within its own sphere of legislative competence, delegate to section 92 courts some of the authority traditionally exercised by section 96 courts. Although McIntyre D.C.J. in *Gould* stated<sup>87</sup> that he could find no such delegation in the Divorce Act, it is submitted that it exists. Reference is once again made to sections 15 and 19(3) of the Divorce Act and the fact the legislation in question<sup>88</sup> antedates the Divorce Act.

The third jurisdictional avenue leading to the enforcement of Divorce Act maintenance orders in section 92 courts arises by the making of Rules of Court under sections 15 and 19(1) of the Divorce Act. British Columbia appears to be the only jurisdiction in Canada that has such a Rule,<sup>89</sup> but its validity has not so far been challenged. It appears to have been assumed in *Moir v. Moir*,<sup>90</sup> *Bignell v. Fickett*<sup>91</sup> and *Hilborn v. Killam*<sup>92</sup> that the Rule is proper, and even *Gould v. Gould*<sup>93</sup> is consistent with this view. Saskatchewan does not have the equivalent of British Columbia's rule 36(4), but the British Columbia cases were approved in *Gould*.

Leaving constitutional principle aside, there does not appear to have been any recent serious suggestion that the availability to litigants of section 92 courts for the enforcement of Divorce Act maintenance orders is anything but totally justified on the grounds of simplicity, speed and cost.

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<sup>83</sup> *Ibid.*, at p. 6 (W.W.R.).

<sup>84</sup> See, in particular, the judgment of Bayda J.A., *supra*, footnote 26, at p. 518 (W.W.R.).

<sup>85</sup> *Strauch v. Strauch* (1967), 58 W.W.R. 683, 60 D.L.R. (2d) 538 (Alta C.A.); *R. v. MacDonald*, *supra*, footnote 19; *Re Ritchie v. Ritchie*, *supra*, footnote 19. See also *A.G. Ont. v. Scott*, [1956] S.C.R. 137; *Broatch v. Broatch* (1968), 63 W.W.R. 467, 67 D.L.R. (2d) 33 (B.C.S.C.).

<sup>86</sup> See the authorities quoted in Colvin, Family Maintenance: The Interaction of Federal and Provincial Law, *op. cit.*, footnote 9.

<sup>87</sup> *Supra*, footnote 39, at p. 6 (W.W.R.).

<sup>88</sup> *Supra*, footnote 16.

<sup>89</sup> *Supra*, footnote 22, r. 36(4).

<sup>90</sup> *Supra*, footnote 28.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Supra*, footnote 22.

<sup>93</sup> *Supra*, footnote 26.

### C. The Provincial Position.

There is, of course, a substantial provincial legislative presence in the field of alimony and maintenance. It is not, however, proposed here to do more than summarize the position on variation and enforcement of provincial maintenance orders, by reference to the excellent and comprehensive description of the provincial alimony and maintenance laws by Professor Davies in *Power on Divorce*.<sup>94</sup>

#### (a) Intra-Provincial Variation and Enforcement.

Most provinces have retained statutory provisions that confer upon superior courts the power to award alimony.<sup>95</sup> These provisions are quite separate from those which empower provincial courts to award maintenance.<sup>96</sup> For the most part, the statutes that confer the power to award alimony also specify or imply that the power to vary the award remains in the same court.<sup>97</sup> The enforcement of the orders, however, is a different matter, and reference has already been made to provincial legislation that permits the enforcement of superior court alimony and maintenance awards by section 92 courts and officials.<sup>98</sup> Where the power to make and vary an award of alimony and maintenance is allocated to a superior court, and the power to enforce the award to a section 92 court, it cannot be contended, in the absence of express statutory authority, that the section 92 court also has the power to vary. First, in *Lupton v. Lupton*<sup>99</sup> Urquhart J. held that the power to register and enforce a judgment did not encompass the power to vary it. Secondly, section 92 courts are creatures of statute, and may not do more than what is authorized by their enabling statutes.

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<sup>94</sup> 2 Davies, *Power on Divorce and Other Matrimonial Causes* (3rd ed., 1980), pp. 206-275. See also: MacDougall, *Alimony and Maintenance in Mendes da Costa*, ed., 1 *Studies in Canadian Family Law* (1972), p. 283 and Supplement (1977), p. 86; Payne and Downs, *Permanent Alimony* (1970), 18 *Chitty's L.J.* 289-300, 325-335, and (1971), 19 *Chitty's L.J.* 1; Ontario Law Reform Commission, *Report on Support Obligations* (Ministry of the Attorney General, 1975).

<sup>95</sup> Alberta: *The Domestic Relations Act*, R.S.A., 1980, c. D-37, s. 15; British Columbia: *Family Relations Act*, *supra*, footnote 15, s. 5; Manitoba: *The Queen's Bench Act*, R.S.M., 1970, c. C-280, s. 52; Nova Scotia: *Alimony Act*, R.S.N.S., 1967, c. 7, s. 1; Saskatchewan: *The Queen's Bench Act*, R.S.S., 1978, c. Q-1, s. 29. In Newfoundland (*The Unified Family Court Act*, S.N., 1977, c. 88, ss 4, 7(h)) and Prince Edward Island (*Family Law Reform Act*, S.P.E.I., 1978, c. 6, ss 2(c), 19, 20) all applications for alimony and maintenance are brought in superior courts.

<sup>96</sup> See Davies, *op. cit.*, footnote 94, pp. 246-250, 254-256.

<sup>97</sup> Alberta: *supra*, footnote 95, s. 25; British Columbia: *supra*, footnote 95, s. 20; Manitoba: *The Family Maintenance Act*, S.M., 1978, c. 25/F20, s. 21; Nova Scotia: *supra*, footnote 95; Saskatchewan: *supra*, footnote 95, s. 37.

<sup>98</sup> *Supra*, footnote 16.

<sup>99</sup> [1946] O.W.N. 326, [1946] 2 D.L.R. 287 (Ont. H.C.). See also *Meek v. Enright* (1978), 5 B.C.L.R. 11, 81 D.L.R. (3d) 108, 4 R.F.L. (2d) 50 (B.C.C.A.). The principles of these cases are discussed later in more detail.

Thirdly, even in the presence of express statutory authority, the conferring upon a section 92 court of the power to vary an order for alimony granted by a superior court would almost undoubtedly be contrary to section 96 of the Constitution Act of 1867.<sup>100</sup>

(b) *Inter-Provincial Variation and Enforcement of Final Orders.*

Whether a final maintenance order made under provincial legislation is granted by a superior court or a section 92 court, it will be enforced, extra-provincially, through the REMO legislation.<sup>101</sup> It has, over the years, been a matter of contention in Canada whether a court that receives a final order is confined merely to enforcing the order, or may go further and vary it. Since several good accounts of this judicial division of opinion already exist,<sup>102</sup> only the more recent cases on the issue will be identified here. While the preponderance of authority continues to be in favour of the view that the enforcing court may not vary, it is not unanimous.

In *Zikman v. Zikman*<sup>103</sup> the Alberta Family Court was asked to enforce a final maintenance order from Ontario. The court entertained an application by the paying spouse for a variation, even though the application was rejected on the merits. Following earlier Alberta<sup>104</sup> and Manitoba<sup>105</sup> authorities, the court held that registration converted the Ontario order into a local order.

In *Bourassa v. Bourassa*,<sup>106</sup> by contrast, the Saskatchewan District Court ruled that it did not have jurisdiction to vary a final order that had been made by the Provincial Court in Ontario. The court followed the decision of Rae J. in *Pasowysty v. Foreman*<sup>107</sup> and held that the British Columbia order did not become, under the REMO legislation, an order made in Saskatchewan.

<sup>100</sup> See Davies, *op. cit.*, footnote 94, pp. 246-250.

<sup>101</sup> *Supra*, footnote 23. No attempt will be made here to deal with the "provisional order" under the REMO legislation, since the purpose of this part of the commentary is to identify situations in which courts are confined to the "enforcement" function, and in which jurisdiction to vary resides elsewhere. Courts dealing with "provisional" orders may vary, rescind or enforce. See, in this connection and by way of example, s. 70.3(4) and s. 70.4(5) of the British Columbia REMO legislation, footnote 23, *supra*. See, generally, Mendes da Costa, *op. cit.*, footnote 3, and Swan, *op. cit.*, footnote 3.

<sup>102</sup> Dzwiekowski, Comment, (1976), 54 Can. Bar Rev. 795; Mendes da Costa, *op. cit.*, *ibid.*, pp. 111-114; Schuh, Variation of Final Orders Under Maintenance Reciprocity Legislation (1977), 25 Chitty's L.J. 159.

<sup>103</sup> (1977), 1 Can. J. Fam. L. 163 (Alta Fam. Ct).

<sup>104</sup> *Short v. Short* (1962), 40 W.W.R. 592 (Alta T.D.).

<sup>105</sup> *Re Fleming v. Fleming* (1959), 66 Man. R. 480, 28 W.W.R. 241, 19 D.L.R. (2d) 417 (Man. Q.B.).

<sup>106</sup> [1977] 1 W.W.R. 442 (Sask. Dist. Ct).

<sup>107</sup> (1969), 69 W.W.R. 99, 5 D.L.R. (3d) 428 (B.C.S.C.). See also *Harris v. Harris* (1980), 21 B.C.L.R. 145 (B.C.S.C.).



*Pasowysty v. Foreman* was extended by the British Columbia Court of Appeal in *Meek v. Enright*.<sup>108</sup> The court in that case dealt with a maintenance order that had been made in California and registered in British Columbia pursuant to the REMO legislation.<sup>109</sup> On the appeal, counsel for the appellant abandoned the attempt to argue that a British Columbia court had the power to vary the order, but insisted that a local court might decline to enforce it. The court rejected this contention, and extended the principle of *Pasowysty v. Foreman* to encompass the proposition that "whether . . . enforcement [should be] refused or delayed should be for the court of original jurisdiction".<sup>110</sup>

### III. Declining to Enforce.

It has been demonstrated that the division of judicial responsibility for making, varying or rescinding an order for maintenance on the one hand, and enforcing it on the other, is pervasive in the Canadian system. It is, then, scarcely surprising that it has quite frequently fallen to be decided whether a particular course of judicial action is to be characterized as being one thing or the other.

Leaving aside the issue with which the decisions in *Ruttan v. Ruttan*<sup>111</sup> deal, of whether an enforcing court may determine if an order is still effective, a question of recent concern has been whether an enforcing court has any freedom to decline to enforce an order whose currency is not in dispute. If the decision in *Meek v. Enright*<sup>112</sup> is taken at its face value, it would appear that the role of an enforcing court is reduced to that of a mere administrator. Bull J.A., in *Meek v. Enright*, said:<sup>113</sup>

I think it plain both in logic and judicial history, that where a foreign court having jurisdiction over the parties makes an order or judgment affecting their respective rights, and a party against whom a duty or liability is found moves to another jurisdiction, the reciprocal provisions for following that person to that jurisdiction with that judgment for enforcement should not endow the new jurisdiction with the right to do anything more than carry out the enforcement.

McFarlane J.A., agreeing with Bull J.A., said:<sup>114</sup>

<sup>108</sup> *Supra*, footnote 99.

<sup>109</sup> At that time contained in the Family Relations Act, S.B.C., 1972, c. 20. Now see *supra*, footnote 23.

<sup>110</sup> Per Bull J.A., *supra*, footnote 99, at p. 17 (B.C.L.R.).

<sup>111</sup> *Supra*, footnotes 1 and 2.

<sup>112</sup> *Supra*, footnote 99 and see text following footnote 108, *supra*.

<sup>113</sup> *Supra*, footnote 99, at p. 17 (B.C.L.R.).

<sup>114</sup> *Ibid.*, at p. 19, emphasis added. See also the dicta of McKenzie J. in the court below: *Re Enright v. Meek* (1977), 2 B.C.L.R. 29, at pp. 34-35 (B.C.S.C.).

. . . I think I should not impute to the legislature an intention to empower a court of this province, *especially a Provincial Court*, to refuse to enforce the order of a court of competent jurisdiction in a reciprocating state unless that intention be expressed clearly in the statute.

On the other hand, the dicta in *Meek v. Enright* should be interpreted in the light of the original position of the Provincial Court.<sup>115</sup> The Provincial Court Judge had, at the show cause hearing, tentatively asserted jurisdiction both to decline to enforce arrears and to vary, prospectively, the monthly payments under the order. It would seem, therefore, that *Meek v. Enright* does not totally overrule a decision like that in *Stabile v. Stabile*.<sup>116</sup> In that case the British Columbia Supreme Court had made a maintenance order against a husband under the Divorce Act, which the wife sought to enforce in the Provincial Court under the Family Relations Act.<sup>117</sup> The husband sought to vary the order in the same proceedings. The husband, as he was allowed to do under the statute, appealed the Provincial Court's order to the County Court, where he was entitled to a hearing *de novo*. Spencer Co. Ct J. held that he was not permitted to vary the order, but said<sup>118</sup> that he could "decline to enforce payment . . . or . . . enforce it in a restricted manner". In the result, the court, having investigated the husband's financial circumstances, approved a scheme whereby the husband was entitled to discharge his obligations, at least in the short term, at a restricted rate. It is submitted that while *Meek v. Enright* clearly overrules *Stabile* on the matter of declining to enforce (by characterizing this as a variation), it does not speak to the matter of enforcing, at least for the time being, in a restricted manner, or of choosing among a variety of possible modes of enforcement.<sup>119</sup> In this connection it is interesting to speculate what the court in *Meek v. Enright* would have done had it been confronted with the situation that used to arise commonly in Ontario under The Deserted Wives' and Children's Maintenance Act.<sup>120</sup> Under that Act the only means that the Ontario Provincial Court could employ to enforce a maintenance order was to imprison, or threaten to imprison, the person in default. Yet the statute also prohibited imprisonment upon proof that the default was due to inability to pay. In *Hwong v. Hwong*<sup>121</sup> Karswick

<sup>115</sup> Described in *Re Enright v. Meek*, *ibid.*

<sup>116</sup> (1975), 25 R.F.L. 306 (Co. Ct, B.C.).

<sup>117</sup> S.B.C., 1972, c. 20, now repealed by S.B.C., 1978, c. 121.

<sup>118</sup> *Supra*, footnote 116, at p. 311.

<sup>119</sup> It is now becoming common for provinces to confer upon Provincial Courts the power to employ a variety of enforcement mechanisms. See, for example: British Columbia: Family Relations Act, *supra*, footnote 15, ss 63-70; Manitoba: The Family Maintenance Act, S.M., 1978, c. 25/F20, ss 25-31.6; Ontario: The Family Law Reform Act, 1978, *supra*, footnote 15, ss 27-32.

<sup>120</sup> R.S.O., 1970, c. 128, s. 12, now repealed by S.O., 1978, c. 2.

<sup>121</sup> (1976), 24 R.F.L. 70 (Ont. Prov. Ct.).

Prov. Ct J., while acknowledging the distinction between the power to vary and the power to enforce, and his inability to rescind arrears, held that he had the discretion not to commit to prison. In effect then, a decision not to imprison because of lack of ability to pay, amounted to a decision to decline to enforce, if not to vary.<sup>122</sup> Indeed, although the Ontario Provincial Court now has at its disposal a wider range of enforcement processes,<sup>123</sup> its ultimate weapon remains that of imprisonment. Yet imprisonment is still prohibited in the face of inability to pay.<sup>124</sup>

The situation may be slightly different in British Columbia, since the defence of inability to pay is not expressly written into the section of the legislation that provides for imprisonment in the face of default. The relevant subsection<sup>125</sup> provides in part that:

At a hearing . . . the court shall inquire into the circumstances of the person in default, and may, . . . enforce payment of the arrears by ordering [a term of imprisonment].

Does *Meek v. Enright* mean that if a provincial court finds that the defaulter has no assets and no prospects, imprisonment must follow automatically, because a decision not to commit (there being, *ex hypothesi*, no other effective avenue of enforcement) would amount to a declining to enforce? It is submitted that this would be a highly undesirable result, and that *Meek v. Enright* was probably not intended to go so far, since it was decided on facts quite different from those just described.

#### IV. Interpretation of the Order.

##### A. Introduction.

It is trite to observe that an award of maintenance is different from most other judgments in law, and is continuing in nature. Yet despite the fact that its currency is apt to be (although is not always) indefinite, it is never infinite. An award of maintenance, sooner or later, always loses its effect, if for no other reason than the death of the person in whose favour it is made. It is because of the continuing, often indefinite, but never infinite nature of the award, that what some courts have seen as a dilemma has arisen. One horn of it is the frequent division of judicial responsibility for variation and rescission of an order on the one hand, and for its enforcement on the other. This issue is often complicated by the fact that the former function may reside in a superior court, and the latter in an inferior, or at least lower, court. The other horn is that it is contrary to fundamental principle for any

<sup>122</sup> See Payne, *op. cit.*, footnote 9, at p. 188.

<sup>123</sup> *Supra*, footnote 119.

<sup>124</sup> *Ibid.*, s. 29(1).

<sup>125</sup> Family Relations Act, *supra*, footnote 15, s. 67(2).

court to enforce an obligation that no longer exists. If, however, an enforcing court concludes that an order is spent and refuses to act, this may be seen as either a declining to enforce, the ultimate in variation or rescission, or the rebellion of judicial inferiors against their superiors.

### B. *Some Cases Before Ruttan v. Ruttan.*

The issue just described has arisen a number of times both in Canada and abroad, and has often been resolved against the enforcing court. In *Carnegie v. Carnegie*<sup>126</sup> a husband had been ordered to pay alimony to his wife "until further order". The parties subsequently divorced, and after the divorce the husband applied to the court to discharge the order for alimony. It was held that the order should be discharged, but the wife applied in the same proceedings for payment of arrears up to the date of the proceedings. The husband was able to prove that the wife had committed adultery, and submitted that arrears that had accumulated since the date of the adultery should not be payable. The court agreed with the principle that the adultery exonerated the husband from paying alimony and said that, in theory, the arrears ought not to be enforced. Ultimately, however, the court was persuaded that the original court order must stand until discharged, and that all the arrears were payable.

In *Davis v. Davis*<sup>127</sup> an order for the maintenance of a child of the marriage had been made under the Divorce Act. The wife subsequently sought to enforce the order in the Provincial Court in British Columbia, but the husband's defence was that the child had, after the making of the order, turned sixteen. The Divorce Act<sup>128</sup> permits the making of an award in favour of any child of the marriage under sixteen, but a child of the marriage who is sixteen or over may receive maintenance only if he is under the charge of the husband or wife and "unable by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with the necessaries of life". The superior court order placed no temporal limitation on the award, but the husband contended that the order could not be enforced in favour of the child, since she, being over sixteen, was no longer a "child of the marriage". Poole Prov. Ct J. said that an enforcement court had no jurisdiction to conduct a hearing for the purpose of determining whether a child over sixteen was or was not a "child of the marriage", since such an inquiry would be equivalent to a variation proceeding. He did not enforce the order.

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<sup>126</sup> [1953] O.W.N 681, [1953] 3 D.L.R. 782 (Ont. H.C.).

<sup>127</sup> (1977), 5 F.L.D. 269. See also *Bekke v. Bekke* (1977), 5 F.L.D. 271.

<sup>128</sup> *Supra*, footnote 10, ss 2, 11(1).

Ironically, by dint of an equal anxiety not to be seen to be varying exactly the same kind of order as that in issue in *Davis*, the County Court Judge in *Ruttan v. Ruttan*,<sup>129</sup> in response to the identical claim by the husband, said:<sup>130</sup>

In the case at bar the Provincial Court was provided with a valid, subsisting and effective order of the Nova Scotia courts for enforcement. There is no authority in the Provincial Courts to go behind such an order or to question it; its duty is to enforce it.

The same conclusion was reached in *Fisher v. Epton*.<sup>131</sup> H.S. Prowse J. said:<sup>132</sup>

I am of the opinion that under the terms of the decree nisi herein, requiring the respondent to pay maintenance for the two children of the marriage, the Family Court Judge . . . had no alternative to enforce payment of the arrears when the order had not been varied or rescinded [by a higher court] even though there was evidence before him the children had attained 16 years of age.

In *Sawers v. Sawers*<sup>133</sup> what was in contention was a maintenance order made in British Columbia under provincial legislation. The husband, in Manitoba, had complied with the order up to the time that a decree absolute of divorce had been entered in British Columbia. Since, however, the divorce decree did not speak to the issue of maintenance, the husband took the view that the earlier order had expired and declined to pay further. The wife registered the order in Manitoba under the REMO legislation,<sup>134</sup> but when enforcement proceedings began the husband objected to the court's jurisdiction, alleging, in effect, that since the order had expired the enforcement court had no basis upon which to proceed. The enforcement court ruled that it had jurisdiction, and the husband appealed that decision to the Manitoba Court of Appeal. Hall J.A., delivering the judgment of the court, dismissed the appeal. Although he acknowledged that the husband's argument that the order was spent or rendered inoperative by the divorce was not an idle one, he held that it was not appropriate for adjudication by the enforcement court in Manitoba. Significantly, however, he then made the following statement:<sup>135</sup>

That is not to say that in another case it would not be appropriate to apply to the Court of Queen's Bench for an order quashing an order of a reciprocating State or Province on the grounds that it is a nullity rather than attacking the judgment in the Provincial Court of that reciprocating State or Province.

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<sup>129</sup> (1979), 10 F.L.D. 240 (Co. Ct).

<sup>130</sup> *Ibid.*, per Anderson Co. Ct J., at p. 241.

<sup>131</sup> (1980), 19 R.F.L. (2d) 211 (Alta Q.B.).

<sup>132</sup> *Ibid.*, at p. 213.

<sup>133</sup> (1981), 120 D.L.R. (3d) 182, 22 R.F.L. (2d) 66 (Man. C.A.).

<sup>134</sup> *Supra*, footnote 23.

<sup>135</sup> 120 D.L.R. (3d) 182, at p. 188.

The passage does not, it is true, go so far as to say that an enforcement court may rule on the nullity, but it does acknowledge in the abstract the occasional necessity for a court in an enforcing jurisdiction to decide that what looks like a valid maintenance order is not a valid maintenance order.

In *Santa Clara, California v. Hudson*<sup>136</sup> proceedings were taken to confirm a California maintenance order in Saskatchewan. One of the grounds upon which the respondent tried to resist the confirmation was that one of the children named in the order was, at the time of the confirmation hearing, over sixteen. From the tenor of the judgment it seems legitimate to conclude that under California law there was a good case to be made for the proposition that a maintenance order for a child expires upon the child's attaining the age of sixteen. The Saskatchewan court, however, held that it did not have jurisdiction to inquire into the issue and confirmed the California order. One of the reasons advanced by the court for this course of action was that section 7(2) of the Saskatchewan REMO legislation<sup>137</sup> provides in part that:

At a [confirmation] hearing . . . the [respondent] may raise any defence that he might have raised in the original proceedings . . . but no other defence. . . .

The court said that since the child was under sixteen at the time of the original proceedings, the respondent could not then have raised the issue he was now attempting to raise, and was therefore prevented from raising it at confirmation. It is suggested with respect that an extension of the logic of this position would lead to the confirmation of an order in favour of a person who had died between the time of the original proceedings and the confirmation hearing. The court was, it is submitted, misled by a confusion of two separate questions. The first involves an inquiry as to the nature of valid defences to the making of the original order. The second question involves an inquiry as to when that order, by law, expires.

There have been other cases to the same effect in jurisdictions other than Canada. In *Foley v. Cope*,<sup>138</sup> for example, an order had been made by Justices of the Peace for the maintenance of an unborn illegitimate child. After the order had been made, another court ruled, in proceedings involving different parties, that such orders were unauthorized in law. The father ceased payment at that point, and the mother took enforcement proceedings before the Justices. It was held in prohibition proceedings that although the original order was "bad at law", the Justices must act on it until it was revoked by a higher court. In *State v. Dolman*<sup>139</sup> a husband had, in England, been ordered

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<sup>136</sup> (1981), 22 R.F.L. (2d) 55 (Sask. U.F.C.).

<sup>137</sup> *Supra*, footnote 23.

<sup>138</sup> (1904), Tas. L.R. (N.&S.) 214 (S.C. Tas.).

<sup>139</sup> [1970] 4 S. Afr. L.R. 468 (S.C.S. Afr.).

to pay maintenance to his wife. The order was subsequently registered in South Africa. After the husband and the wife had divorced in English proceedings, the husband ceased payment, and was duly prosecuted in South Africa. There was, in the proceedings, some debate about the applicability of either South African or English law to the order. While the law of South Africa provided that the maintenance obligation ceased automatically upon divorce, the law of England did not. The court, however, concluded that the debate was irrelevant and said:<sup>140</sup>

While the order remains registered it is *prima facie* valid and operative. No court in this country can decide that such order has lapsed. If the person liable under such an order alleges that the order is no longer operative, his remedy is to have the order set aside in the country where it has been issued and/or to take administrative steps to have the registration . . . set aside.

The common thread running through the foregoing cases is an acknowledgment of the limited scope of the function of the enforcement court, and the exhibition of a keen concern not to engage upon what might be seen to be a variation or rescission. Ironically, however, that concern has sometimes resulted in a holding that the order continues in force, and sometimes that it does not. What is missing from these cases, it is suggested, is a recognition of the fact that in any enforcement system that is not automatic to the point of absurdity, logic dictates that in any given case there be some interpretation of the order in relation to the legislation from which it flows, and in relation to the facts. The only real issue is the permissible extent of that interpretation.

The decision of the British Columbia Court of Appeal in *Ruttan v. Ruttan*<sup>141</sup> is the first in Canada in which the scope of the interpretation function has been explored in a measured way, but there have been other cases that have recognized the principle in more limited contexts.

In *Chamberlain v. Chamberlain*<sup>142</sup> a wife, after a divorce, sought an order of execution in respect of arrears of maintenance for the children of the marriage. The husband contended, in reply, that his liability ceased when the children attained the age of sixteen. West J. regarded this as a question of interpretation of the New Brunswick Divorce Court Act and ruled that as the Act spoke of maintenance for "children" rather than "children under sixteen", the word "children" meant persons under twenty-one, and that the award had not lost its effectiveness.<sup>143</sup>

<sup>140</sup> *Ibid.*, at p. 471.

<sup>141</sup> *Supra*, footnote 1.

<sup>142</sup> (1960), 44 M.P.R. 304, 23 D.L.R. (2d) 684 (N.B.S.C.).

<sup>143</sup> It should be noted here, however, that the divorce and enforcement proceedings both took place in the same court. This was the New Brunswick Court of Divorce and

In *Re Bitel and Bitel*<sup>144</sup> a divorce had been granted in Ontario and an order for the maintenance of the children of the marriage made under The Matrimonial Causes Act. The order for maintenance did not specify when it was to expire. The wife applied in the Ontario Provincial Court to enforce the order under section 25 of The Provincial Courts Act<sup>145</sup> but, one of the children having turned sixteen, the husband claimed that that part of the order had expired. Steinberg Prov. Ct J. held that The Matrimonial Causes Act dealt with the maintenance of children up to the age of twenty-one, and that the husband's defence must fail. He then said:<sup>146</sup>

It was argued by the husband that if a decision in this matter were granted in favour of the wife, that would in effect amount to my having construed an order of a superior court, which it was argued I had no power to do. . . .

I am of the opinion that once the judgment or order of the Supreme Court for maintenance has been filed for enforcement in the Provincial Court (Family Division), that [sic] the Provincial Judge in the enforcement procedure must give to the judgment or order its reasonable and natural meaning. To argue that I cannot so construe the order of Mr. Justice Grant is to argue that I cannot read it at all.

The same point arose again in *Lapinskas v. Lapinskas*<sup>147</sup> where, once again, enforcement was sought in the Ontario Provincial Court of a maintenance order in favour of a child, made under the Divorce Act in Ontario by the Ontario High Court. The father contended that because the child had turned eighteen, his obligations had ceased. Pointing out the distinction between the power to vary and the power to enforce, noting that the High Court had placed no time limitation on the order, and noting also that the Divorce Act permitted awards of maintenance in favour of some eighteen-year-olds, Karswick Prov. Ct J. held that he had no option but to enforce the order. He said, however:<sup>148</sup>

It is also evident that the Family Court Judge must interpret the Supreme Court order before enforcing it; in other words, the Family Court Judge must decide what it is that he is enforcing, for whom, against whom, for what period of time and for what amount.

More significantly, perhaps, he also went on to say:<sup>149</sup>

Perhaps on some occasions the orders of the Supreme Court direct that the maintenance payments be made to "the child of the marriage" or "so long as the

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Matrimonial Causes, a superior court. Thus, the issue of divided judicial responsibility for variation and enforcement did not arise. See also *Faustman v. Faustman and Everett* (1952), 7 W.W.R. (N.S.) 373 (Sask. Q.B.).

<sup>144</sup> [1970] 1 O.R. 383, (1969), 8 D.L.R. (3d) 497 (Ont. Prov. Ct), rev'd without reasons [1970] 2 O.R. 168, 9 D.L.R. (3d) 636 (Ont. H.C.).

<sup>145</sup> See now, The Family Law Reform Act, 1978, *supra*, footnote 15, s. 27(1).

<sup>146</sup> *Supra*, footnote 144, at pp. 387-388 (O.R.).

<sup>147</sup> (1977), 3 R.F.L. (2d) 126 (Ont. Prov. Ct).

<sup>148</sup> *Ibid.*, at p. 131.

<sup>149</sup> *Ibid.*, at p. 132.



child remains a child of the marriage", and perhaps on those occasions this court would have to interpret the meaning of those phrases in order to determine the extent of its power of enforcement. However, that is not an issue in this case.

In *Murray v. Murray*<sup>150</sup> the enforcement court had to face a more difficult situation. Incorporated into a decree nisi of divorce granted by the Ontario High Court were certain provisions of a separation agreement, one of which stated that the husband should pay the wife a certain periodic sum, which would be increased "when the [husband] has no further obligations under [the agreement] to contribute to the education of the daughter. . .". The wife, subsequently forming the view that the husband had no further obligations to the daughter, applied in the Ontario Provincial Court to enforce payment of the higher sum. The court heard evidence on the matter and, applying *Re Bitel* and *Lapinskas*, stated that it had the jurisdiction to decide that the husband retained obligations to the daughter, and would decline to enforce for the higher sum.<sup>151</sup>

Before exploring *Ruttan v. Ruttan* itself, it is worth mentioning two other British Columbia cases in which an enforcement court had to come to grips with exactly the same issue as that raised in *Davis v. Davis*<sup>152</sup> and *Fisher v. Epton*.<sup>153</sup> In *Fickett v. Bignell* Govan Prov. Ct J. said:<sup>154</sup>

I find as a fact that [the] child is still a "child of the marriage" as being one who is unable for cause to withdraw herself from the charge of the applicant. . . . In so doing I do not concede that I am varying the Quebec order. On the contrary, I have found no reason not to enforce it in full. . . .

In *Bletcher v. Bletcher*<sup>155</sup> Collins Prov. Ct J. said:

. . . if the Provincial Court refuses to tackle the question, it is still faced with the problem, whether the order terminated on the child's 16th birthday, and would have to be amended thereafter . . . or whether the order goes on ad infinitum, and would have to be amended to terminate the maintenance. . . .

An order cannot be blindly enforced. The process of enforcement involves the investigation and substantiation of the relationship between the words of the order and the facts of the situation to which it is to be applied.

It is submitted that the view of the majority of the Court of Appeal in *Ruttan v. Ruttan* justifies the approaches taken in both *Fickett* and *Bletcher*.

<sup>150</sup> *Supra*, footnote 19.

<sup>151</sup> See also the recent decision in *Re Haight and Haight*, *supra*, footnote 56, and *Masse v. Masse* (1981), 16 Alta L.R. (2d) 384, 25 R.F.L. (2d) 197 (Prov. Ct F.D.).

<sup>152</sup> *Supra*, footnote 127.

<sup>153</sup> *Supra*, footnote 131.

<sup>154</sup> (1977), 1 R.F.L. (2d) 269, 275 (B.C. Prov. Ct), reversed on other grounds [1979] 2 W.W.R. 379, 8 R.F.L. (2d) 384 (B.C. Co. Ct).

<sup>155</sup> Unreported, B.C. Prov. Ct, Surrey, 3/1/80.

C. *The Decision in Ruttan v. Ruttan.*

The issue in *Ruttan* has already been identified. In granting a decree nisi of divorce, the Supreme Court of Nova Scotia awarded maintenance without term to "an infant child". At the time of the decree the child was fifteen, but less than a month later she turned sixteen. The mother registered the order in the Supreme Court of British Columbia and then attempted to enforce it in the Provincial Court, the father having made no payments. At the "show cause" hearing that ensued the father attempted to allege that the daughter was both sixteen and self-supporting—in other words no longer a "child of the marriage"—but he was prevented by the court from doing so. The father appealed to the County Court, but, as has already been pointed out, it was held there<sup>156</sup> that for the court to agree with and act upon the father's allegations would amount to a variation or rescission of the Nova Scotia order.

In the Court of Appeal Lambert J.A.<sup>157</sup> asked three questions. The first was whether the order ceased to have effect when the child ceased to be a "child of the marriage" as defined in the Divorce Act.<sup>158</sup> The answer was that it did, on the basis that there was nothing on the face of the statute to suggest that Parliament intended to afford the protection of the statute to someone who was sixteen and self-supporting. A court, therefore, would not have the jurisdiction to make an order that was designed to be enforceable beyond the time when a child became both sixteen and self-supporting and, by parity of reasoning, no court could ever be taken to be attempting to make such an order.

The second question was whether an enforcement court, upon being asked to enforce a maintenance order in favour of a child under the Divorce Act, could or had to decide whether the child had ceased to be a "child of the marriage". The answer here was that it could and must do so if asked. This answer followed logically from the answer to the first question, because the latter meant in effect that every maintenance order made by a superior court in favour of a child must be read as if it contained the following term:

This order will cease to have effect (and may not thereafter be enforced) as soon as the child is either (a) sixteen, or (b) able to withdraw himself or herself from the charge of the husband and wife and to provide himself or herself with necessaries of life, whichever event occurs later.<sup>159</sup>

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<sup>156</sup> *Supra*, footnote 129, and text following.

<sup>157</sup> [1981] 3 W.W.R. 385, at p. 389, 20 R.F.L. (2d) 122, at p. 126. The judgment of Anderson J.A. was, in all important respects, to the same effect as that of Lambert J.A. Hinkson J.A. dissented.

<sup>158</sup> *Supra*, footnote 10.

<sup>159</sup> Recent cases in which the meaning of, and jurisprudence associated with, the second part of the definition of "child of the marriage" include: *Harrington v. Harrington*.

Lambert J.A. was at pains to point out that if an enforcement court were shown convincing evidence that a child had turned sixteen and had become self-supporting, then the court, far from varying or rescinding the order, would be actually fulfilling the direction of the superior court in taking no further step.

The third question was formulated in response to an additional argument made by counsel for the father. This argument was that Parliament had intended that whenever a court made a maintenance order in favour of a child under sixteen, that order should automatically expire upon the child's attaining sixteen, and could not be revived unless the superior court, upon a fresh application, ordered its revival on the basis of the child's state of dependency. The third question, thus, was whether a child ceased to be a "child of the marriage" at sixteen, in the absence of a new judicial determination that the child was under the charge of the husband and wife. The answer was that it did not, for the reason that if Parliament had contemplated a new judicial determination in every case, it would have provided for it explicitly, and not by inference.

Lastly, Lambert J.A. pointed out that his view was not in conflict with the earlier decision of the Court of Appeal in *Meek v. Enright*.<sup>160</sup> In that case it was held that an enforcement court could not decline to enforce a maintenance order, but Lambert J.A. stated that the case neither required nor permitted the enforcement of an order that had expired.

The appeal in *Ruttan* was allowed and the case remitted to the enforcement court for a rehearing.

In a dissenting judgment Hinkson J.A. agreed with Lambert and Anderson J.J.A. that a maintenance order without term in favour of a child under sixteen did not terminate by operation of law upon the child's turning sixteen. He parted company with the majority, however, on the major question. In a short judgment he referred to *Meek v. Enright* and made it plain that he regarded any attempt by an enforcement court to interpret the order that resulted in its non-enforcement as a "declining to enforce" and thus a variation or rescission.

Leave to appeal to the Supreme Court of Canada was granted, and the unanimous judgment<sup>161</sup> of the full court was delivered by McIntyre J. on May 31st, 1982. The judgment is, with respect, a disappointing one, as the majority of the Court of Appeal was overruled by the assertion that the authorities were against their position. The

*ton* (1981), 33 O.R. (2d) 150, 22 R.F.L. (2d) 40 (Ont. C.A.); *Janzen v. Janzen* (1981), 123 D.L.R. (3d) 246, 21 R.F.L. (2d) 316 (B.C.C.A.); *Smith v. Smith* (1981), 20 R.F.L. (2d) 393 (Ont. H.C.).

<sup>160</sup> *Supra*, footnote 99.

<sup>161</sup> *Supra*, footnote 2.

authorities cited were, however, confined to *Jackson v. Jackson*<sup>162</sup> and *Meek v. Enright*.<sup>163</sup> McIntyre J. said that he agreed with Hinkson J.A. that *Jackson* stood for the proposition that a maintenance order made on behalf of a child under sixteen was not extinguished by operation of law when the child reached that age. Equally *Jackson* was said to hold that such a child does not cease to be a child of the marriage only by reason of his having attained his majority. Those views of *Jackson* were not dissenting views in the Court of Appeal, since Lambert and Anderson J.J.A. agreed with them. The relevance of *Jackson* to the major issue, however, is marginal. *Jackson* lays down some rules about when a maintenance order does not expire, but it does not speak to the issue of who is entitled to make, or prohibited from making, a decision on expiry.

The only other case referred to by McIntyre J. was *Meek v. Enright*,<sup>164</sup> in which the following passage was said to be applicable to *Ruttan* and decisive in the allowing of the appeal. Bull J.A. said:<sup>165</sup>

Whether the [foreign maintenance] judgment should be varied, changed, revoked or enforcement refused or delayed should be for the court of original jurisdiction.

Here again it must be said that neither Lambert nor Anderson J.J.A. dissented from this proposition in the Court of Appeal.

McIntyre J. concluded the judgment with the following statement:<sup>166</sup>

If the Provincial Court judge had entertained the question whether or not the child remained a child of the marriage, she would have gone beyond enforcement proceedings and trespassed upon the jurisdiction of the Court which made the order.

It is suggested that no matter what may be said about or deduced from this statement, it does not follow from either *Jackson v. Jackson* or *Meek v. Enright*.

It is submitted with respect that the Supreme Court of Canada, in company with Hinkson J.A. in the Court of Appeal, failed to avoid the snare, into which others have fallen in the past, of giving limited characterization to the range of options that an enforcement court must, both in logic and as a matter of practicality, have. An enforcement court cannot, as *Meek v. Enright* holds, in the absence of express statutory authority vary, rescind or decline to enforce, but it can and must, in accomplishing its task of enforcement, interpret. Were it to do otherwise it would run the risk of even greater excesses of jurisdiction than those of variation, rescission or declining to act.

<sup>162</sup> [1973] S.C.R. 205, [1972] 6 W.W.R. 419, (1972), 29 D.L.R. (3d) 641, 8 R.F.L. 172 (S.C.C.).

<sup>163</sup> *Supra*, footnote 99.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*, at p. 17 (B.C.L.R.).

<sup>166</sup> *Supra*, footnote 2, at p. 170.

It is submitted with equal respect that the logic of the position of Lambert and Anderson J.J.A. is virtually unassailable, and that the only way of avoiding the conclusion to which they came is to credit Parliament with an unreasonable intention. That intention would be to cloak any child who happened, as it were fortuitously, to be either under sixteen, or over sixteen and dependent, when his or her parents divorced, with the potential for lifetime support from his or her parents. Equally, however, that intention would be accompanied by another, namely, to *exclude* from this position of privilege any child who happened to be, equally fortuitously, sixteen and self-supporting when his or her parents divorced. It is paradoxical enough that the children of divorced parents should, as a class under a federal statute, be treated differently in the area of maintenance from the children of married parents under provincial statutes.<sup>167</sup> It is whimsical to suggest that Parliament intended further to discriminate between the children of those who divorce early, and the children of those who divorce late.

#### D. *The Implications of Ruttan v. Ruttan.*

The decision of the Supreme Court of Canada in *Ruttan* will cause substantial difficulty for litigants and the courts, because the principle it lays down is obscure. A series of short examples may serve to elucidate the point further. First, maintenance legislation may give a court jurisdiction to award maintenance to a child until he or she turns eighteen,<sup>168</sup> or to a former wife until she remarries. In such a case an awarding court may either express the above limitations on the face of the order, or simply leave them to be inferred. In either instance, however, the contention ought not to be available that an ordinary enforcement court is prevented from inquiring into whether or not the child has turned eighteen or whether the wife has remarried. To say that it could not, would be to say also that an enforcement court must ignore evidence that the recipient is dead and must enforce the order in spite of it. Turning eighteen, remarriage or death are all events that, in the above example, terminate the order, and it would seem illogical to say that an enforcement court is required to reject evidence that these events either have or have not occurred, and required to order payment regardless of the reality.

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<sup>167</sup> Under most provincial statutes the obligation to maintain a child ceases upon the child's attaining a particular age. Alberta: 16. The Maintenance Order Act, R.S.A., 1980, c. M-1, s. 2(2); British Columbia: 19. Family Relations Act, *supra*, footnote 15, ss 1, 56; Manitoba: 18. The Family Maintenance Act, *supra*, footnote 97, s. 12; New Brunswick: 19. Child and Family Services and Family Relations Act, S.N.B., 1980, c. C-2.1, ss 1, 113; Newfoundland: 17. The Maintenance Act, *supra*, footnote 37, ss 2, 6; Ontario: 16 or 18. The Family Law Reform Act, *supra*, footnote 16, s. 16; Prince Edward Island: 16 or 18. Family Law Reform Act, *supra*, footnote 95, s. 19; Saskatchewan: 16 or 18. The Deserted Wives' and Children's Maintenance Act, R.S.S., 1978, c. D-26, ss 2(b), 3.

<sup>168</sup> E.g., The Family Maintenance Act in Manitoba, *ibid*.

Secondly, maintenance legislation may give a court jurisdiction to award maintenance to a child until he or she is twenty-five, or to a former spouse for life. The awarding court, however, having examined the facts, may prefer to award maintenance to the child or spouse "until he or she is self-supporting".<sup>169</sup> Once again, there can be no doubt that as soon as the recipient becomes "self-supporting", the order terminates, and an enforcement court ought, logically, to have the power to determine whether or not the state of "self-support" has come about. To enforce the order after that state has come about would be to vary the order.

Thirdly, maintenance legislation itself may give a court jurisdiction to award maintenance for the period, but *only* for the period, during which the recipient is needy.<sup>170</sup> In such a case the awarding court may say, expressly, that the award is to terminate as soon as the recipient is no longer needy (or becomes self-supporting),<sup>171</sup> or may leave it to inference. In either instance, however, the enforcement court ought to be able to inquire into the state of the recipient's finances. This inquiry would *not* be for the purpose of varying or rescinding the order, or for the purpose of deciding whether to enforce it or not, but rather for the purpose of determining whether or not it has expired.

It is in the last two situations that complication and confusion have tended to arise, however, and the reason is clear. Here, both the decision to vary or rescind an order, and the decision that the order has expired, involve an inquiry into the *recipient's* finances and general condition. Since the variation and rescission court routinely undertakes such an inquiry, and since the enforcement court ordinarily does not, it has been easy for some courts to perceive the enforcement court in this circumstance to be engaged in an exercise of variation or rescission—particularly since a decision that the order has expired has the same practical effect as a rescission, even though rescission and expiry are conceptually quite different.

It is submitted that the courts in cases like *Carnegie v. Carnegie*,<sup>172</sup> *Davis v. Davis*,<sup>173</sup> *Fisher v. Epton*,<sup>174</sup> and, ultimately,

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<sup>169</sup> Cf. *Murray v. Murray*, *supra*, footnote 150.

<sup>170</sup> As in the Divorce Act itself. See also the Ontario, Prince Edward Island and Saskatchewan statutes cited at *supra*, footnote 166. These provincial statutes, although providing for an upper age limit, do define jurisdiction in part by reference to a state of dependency.

<sup>171</sup> It is quite commonplace for an award made upon a decree nisi to be expressed in favour of a named child "so long as [he or she] remains a child of the marriage".

<sup>172</sup> *Supra*, footnote 126.

<sup>173</sup> *Supra*, footnote 127.

<sup>174</sup> *Supra*, footnote 131.

the Supreme Court of Canada in *Ruttan* failed to avoid this trap.<sup>175</sup> Equally, it is submitted that the courts in cases like *Re Bitel*,<sup>176</sup> *Lapinskas v. Lapinskas*,<sup>177</sup> *Murray v. Murray*,<sup>178</sup> *Bletcher v. Bletcher*<sup>179</sup> and *Re Haight and Haight*<sup>180</sup> did grasp the essential difference between the objectives of the variation court and those of the enforcement court. The decision in *Fickett v. Bignell*,<sup>181</sup> too, was right in principle, although the decision has been widely misunderstood—at least in British Columbia. The reason for this, however, may be that it does not appear on the face of the report that the enforcement judge heard evidence on whether or not the child remained a “child of the marriage”. He found as a fact that she did, but whether this was because the father failed to convince him that the facts were otherwise, or whether the finding was made without evidence out of a fear of being seen to be varying, is not clear.

The difficult and important question that arises after the Supreme Court of Canada decision in *Ruttan* is just what an enforcement court may do now by way of interpreting the order before it. The Supreme Court has laid it down that an enforcement court may not determine whether a child is or is not a “child of the marriage”. But how far does this ruling extend? If the awarding court makes an award of maintenance in favour of a wife “until she becomes self-supporting”, is an enforcement court required to enforce the order even though it is quite clear at the time of the enforcement proceedings that the wife has become self-supporting? If the awarding court makes an award of maintenance in favour of a wife “until she re-marries”, is the enforcement court required to enforce in spite of assured knowledge that she has remarried. If the person in whose favour the order has been made dies, must the enforcement court enforce because *Ruttan* appears to hold that an enforcement court can do nothing else?

This *reductio ad absurdum* is designed to show how difficult it is to extract a principle from *Ruttan*. There is no doubt that the question whether a child is still “a child of the marriage” after turning sixteen is likely to be a more difficult one to answer than whether a child has turned eighteen or whether a wife has remarried. Equally, answering

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<sup>175</sup> In *Sawers v. Sawers*, *supra*, footnote 133, the Manitoba Court of Appeal was, by implication, inviting the Provincial Court to enforce an order that might very well have expired by operation of law. In *Santa Clara v. Hudson*, *supra*, footnote 136, the California order may well have expired when the child in question turned sixteen.

<sup>176</sup> *Supra*, footnote 144.

<sup>177</sup> *Supra*, footnote 147.

<sup>178</sup> *Supra*, footnote 150.

<sup>179</sup> *Supra*, footnote 155.

<sup>180</sup> *Supra*, footnote 151.

<sup>181</sup> *Supra*, footnote 154.

the one question usually calls for judgment of a more subjective nature than is required in answering the others. Yet the degree of difficulty of the question, or the amount of subjectivity involved, can scarcely be the test emerging from *Ruttan*. Neither can it be said that the test depends on whether the question is one of law or one of fact. Whether a child is "a child of the marriage" or whether a wife has remarried are both questions of both law and fact, however that distinction is made.

Enforcement courts are now confronted with an unenviable set of options. The first is to invite ridicule and enforce automatically all orders brought before them, regardless of the circumstances. The second is to take *Ruttan* quite literally and to continue to interpret orders in the ordinary way except where the interpretation function calls for a decision on whether a child is still "a child of the marriage" under the Divorce Act. The third option is to attempt to set about constructing a principled body of rules about when it is appropriate or inappropriate to determine that a maintenance order has run its course. The latter option would certainly seem to be the most sensible of the three, but the lack of guidance in *Ruttan* as to what those principles ought to be will make it in many ways the hardest.

In fairness it ought to be pointed out that the decision in *Ruttan*, whatever its ultimate dimension, is likely in the future to prevent at least two undesirable sets of consequences that would have ensued had the matter been allowed to rest at the level of the British Columbia Court of Appeal. First, as is well known, it is difficult enough as a practical matter to enforce maintenance awards even under ordinary circumstances. The difficulty is compounded when a spouse or parent is given the freedom to stop paying upon the occurrence of a state of affairs about which quite different views may be held. When a former husband is told that he must maintain his former wife until a court orders otherwise, or his child until she turns eighteen, he may not in any event pay, but he is usually in little doubt about when the obligation exists and when it terminates. When, however, the husband or father is told that he may stop paying when the wife or child "becomes self-supporting", he is offered an opportunity to give himself the benefit of a substantial doubt, removable only by the taking of formal proceedings.<sup>182</sup> Secondly, the more indefinable the terminating event, the more likely it is that the judicial system will give conflicting answers to the same question. The facts of the *Ruttan* case may be

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<sup>182</sup> In the Court of Appeal, *supra*, footnote 157, Lambert J.A. advised conscientious spouses and parents that their doubts about whether or not they remained obliged to pay could be removed by applying to the court that made the order. It is not unduly cynical to suggest that the majority of such persons would have preferred the cheaper and less troublesome option of waiting for the recipient to take enforcement proceedings. But see *Smith v. Smith*, *supra*, footnote 159.



taken by way of example. To begin with, it is possible that upon the re-hearing ordered by the Court of Appeal the British Columbia Provincial Court would have concluded that the child was, indeed, no longer a "child of the marriage". This, however, would not have prevented the wife from taking proceedings in a series of enforcement courts across the country,<sup>183</sup> provided that she had the financial resources to do so. Neither would it have prevented the wife from applying to the Nova Scotia Supreme Court for an order that the child remained a child of the marriage.<sup>184</sup> The question whether or not a child is self-supporting is not, after all, necessarily one to which all reasonable people will give the same answer. No exception can be taken to the possibility that the wife might have finally enforced the order, but there can be little doubt that a system that may produce different responses to the same issue is likely to be viewed with a jaundiced eye by the parties.

Yet it is submitted that if these difficulties were thought serious enough to require a remedy (and the writer does not think so), more fitting legislative or judicial alternatives were available than the apparent reduction of the role of the enforcement court to that of an automaton. On the very questionable assumption that it is objectionable to have enforcement courts deciding issues such as whether a child is or is not self-supporting, and on the assumption that this was what the Supreme Court of Canada in *Ruttan* wished to prevent, the more obvious solution is to design legislation that does not confer jurisdiction by reference to the existence of states of affairs that are difficult to define. By the same token, courts could avoid making orders that terminate upon the coming into being of such states. Pursuance of these goals would have other costs in terms of lack of flexibility for courts making maintenance orders, but enforcing courts would have less room for manoeuvre.

It is submitted finally, however, that there is no particular danger in permitting enforcement courts or officials to determine questions such as whether a child has become self-supporting or not, or even whether the pronouncement of a decree *nisi* of divorce brings to an end a maintenance order made under provincial legislation.<sup>185</sup> Courts of appeal, after all, exist in part for the purpose of correcting mistakes of the kind that enforcing agencies with normal interpretative powers might occasionally make.

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<sup>183</sup> The Divorce Act, *supra*, footnote 10, s. 14 provides *inter alia*, that an order made under s. 11 has legal effect throughout Canada.

<sup>184</sup> Such an order was applied for, and ultimately granted, in *Jackson v. Jackson*, *supra*, footnote 162.

<sup>185</sup> See *Sawers v. Sawers*, *supra*, footnote 133.

V. *End Note.*

The division of judicial responsibility for the making, varying and rescinding of maintenance orders on the one hand, and for their enforcement on the other, is well-established in Canada and, even under the most radical constitutional re-arrangements, it is unlikely to disappear.

It is common knowledge that the federal government is anxious to hand over responsibility for "family law" to the provinces, and that the latter are more or less content, if not anxious, to receive it. It is widely thought that if and when the provinces do accept this responsibility, some or all of them will proceed with plans to have family law issues decided at one judicial level. If these designs come to fruition, most of the constitutional and legislative difficulties described in Part II of this article will, it is to be hoped, evaporate.

What will not evaporate, however, are the issues referred to in Parts III and IV. The problem of the inter-provincial enforcement of maintenance awards will take on an even greater significance than it now has, and considerable skill will have to be exercised in designing a system that will work. It is to be hoped that that system will take into account the difficulties that the courts have had with the concepts of variation, rescission, declining to enforce and, particularly, interpretation. It will continue to be difficult, at the practical level, to enforce maintenance awards across the country, and every care should be taken to ensure that the system is not needlessly complicated by misconceptions concerning the powers of the enforcing agency. The decision of the Supreme Court of Canada in *Ruttan v. Ruttan* demonstrates, it is submitted, the need for legislatures to be more precise about what it is that they expect enforcing agencies to do.