

## VARIATION AND ENFORCEMENT OF MAINTENANCE ORDERS: RUTTAN REVISITED

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*It is a widespread legislative practice in Canada to confine the power of a lower court to the enforcement of maintenance orders and to prohibit that lower court from varying or rescinding those orders. At the same time an enforcement court may not, without specific statutory authorization, decline to enforce a maintenance order. In Ruttan v. Ruttan in 1982 the Supreme Court of Canada confronted the question whether a particular course of judicial action should be characterized, on the one hand, as variation, rescission or declining to enforce, or, on the other hand, enforcement. The decision has created difficulty for lower courts, particularly on the question of their power to determine whether a maintenance order has expired, and the dimensions of this difficulty are explored in this article. It is suggested at the same time that a legislative policy that refuses, for the most part, to permit courts concerned with enforcement to determine whether a maintenance order has expired, is misconceived.*

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*Selon une pratique législative courante au Canada, la compétence des tribunaux de première instance se limite à l'exécution des ordonnances d'entretien et ces tribunaux n'ont pas le droit de modifier ou d'annuler ce genre d'ordonnance. Mais, en même temps, le tribunal qui a la compétence de faire exécuter ces ordonnances ne peut pas, sans que la loi l'y autorise explicitement, refuser de les faire exécuter. La Cour suprême du Canada a décidé en 1982 dans l'affaire Ruttan c. Ruttan la question de savoir si un acte judiciaire particulier représente la modification ou l'annulation de l'ordonnance ou le refus de la faire exécuter, ou s'il représente la décision de la faire exécuter. Cet arrêt a créé certaines difficultés pour les tribunaux de première instance, en particulier quand il s'agit pour eux de décider si l'ordonnance a expiré; c'est ce problème qui fait le sujet de l'article. L'auteur avance que la pratique législative qui refuse, la plupart du temps, de permettre aux tribunaux responsables de l'exécution de l'ordonnance de décider si elle a expiré ou non n'est pas bien fondée.*

In 1982, after the decision of the Supreme Court of Canada in *Ruttan v. Ruttan*,<sup>1</sup> this author predicted<sup>2</sup> that courts charged with the enforcement of maintenance orders would have difficulty interpreting and working with the decision. Some four years have passed and it is now appropriate

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<sup>1</sup> [1982] 1 S.C.R. 690, (1982), 135 D.L.R. (3d) 193, 27 R.F.L. (2d) 165.

<sup>2</sup> K.B. Farquhar, *The Variation, Enforcement and Interpretation of Maintenance Orders in Canada—Some New Aspects of an Old Dilemma* (1982), 60 Can. Bar Rev. 585.

to review the subsequent decisions for the purpose of testing the accuracy of the prediction and of commenting on the principles that have seemed to emerge.

As was pointed out in the earlier article,<sup>3</sup> it is a widespread legislative practice in Canada to confine the power of a lower court to the enforcement of maintenance orders and to prohibit that lower court from varying or rescinding those orders. It has, at the same time, been said that an enforcement court may not, without specific statutory authorization, decline to enforce a maintenance order.<sup>4</sup> Courts in Canada have always had difficulty in deciding whether a particular course of judicial action should be characterized, on the one hand, as variation, rescission or declining to enforce, or, on the other hand, enforcement. Thus, the decision in *Ruttan v. Ruttan*,<sup>5</sup> which met the question head on, was bound to be significant.

The decision was made against the following legislative background. Section 11 of the Divorce Act,<sup>6</sup> having provided for the making of maintenance orders by superior courts within the provinces, also provided in subsection (2) that: "An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order . . .". At the same time, section 15 of the Act provided:

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 other manner as is provided for by any rules of court or regulations made under section 19.

In other words, the function of variation or rescission was entrusted only to the superior court that made the original order, and other courts were confined to enforcing existing orders.

In the *Ruttan* case the Supreme Court of Nova Scotia, upon the granting of a decree nisi of divorce, 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, the point of the father's contention being that the daughter was no longer a "child of the marriage" within the definition of that term contained in section 2 of the Divorce Act.<sup>7</sup> The father was prevented from making this allegation in the Provin-

<sup>3</sup> *Ibid.*, at pp. 587-601.

<sup>4</sup> *Meek v. Enright* (1977), 81 D.L.R. (3d) 108, 5 B.C.L.R. 11, 4 R.F.L. (2d) 50 (B.C.C.A.).

<sup>5</sup> *Supra*, footnote 1.

<sup>6</sup> R.S.C. 1970, c. D-8.

<sup>7</sup> *Ibid.*

cial Court and appealed to the County Court, but it was held there<sup>8</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 British Columbia Court of Appeal<sup>9</sup> it was pointed out that the dichotomy between, on the one hand, variation, rescission and declining to enforce and, on the other, enforcement, was too abridged. A further function—interpretation of the maintenance order—was identified, and it was noted that an enforcement court must, as a matter of logic, be permitted this function. First, Lambert J.A. decided that a maintenance order in favour of a child under the Divorce Act must cease to have effect as soon as the child ceased to be a child of the marriage. Secondly, he ruled that an enforcement court, upon being asked to enforce a maintenance order under the Divorce Act, could and had to decide, if asked, whether the child had ceased to be a child of the marriage. In support of this ruling he pointed 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 refusing to enforce an expired order.

The decision of the British Columbia Court of Appeal was overturned in the Supreme Court of Canada,<sup>10</sup> although, as has been pointed out earlier,<sup>11</sup> it is difficult to pinpoint the reason why or to grasp the implications of the decision. The heart of the judgment of McIntyre J. is contained in the following sentence:<sup>12</sup>

If the provincial court judge had entertained the question of 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.

The court, in other words, appeared to be placing an undefined limitation on the power of an enforcement court to interpret a maintenance order for the purpose of deciding whether or not it has expired. In the earlier article the following statement appears:<sup>13</sup>

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

<sup>8</sup> (1979), 10 F.L.D. 240 (B.C. Co. Ct.).

<sup>9</sup> [1981] 3 W.W.R. 385, (1981), 20 R.F.L. (2d) 122 (B.C.C.A.).

<sup>10</sup> *Supra*, footnote 1.

<sup>11</sup> *Loc. cit.*, footnote 2, at pp. 611-616.

<sup>12</sup> *Supra*, footnote 1, at pp. 695 (S.C.R.), 197 (D.L.R.), 170 (R.F.L.).

<sup>13</sup> *Loc. cit.*, footnote 2, at p. 616.

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.

The issue of the power of an enforcement court to interpret a maintenance order has arisen in a number of reported cases decided since *Ruttan*, and there is no doubt that the decision has caused the difficulties predicted. These difficulties were most comprehensively addressed in the decision of Thomson Prov. Ct. J. in *Goldhar v. Goldhar*.<sup>14</sup> A divorce decree provided that support should be paid by a father on behalf of each of two children "so long as that child is normally resident with the wife, and in full-time attendance at school, college or university and under the age of 23 years". The father ceased payment on the basis that the children, at universities outside Canada, were not normally resident with the wife. Enforcement proceedings were brought in the Ontario Provincial Court Family Division, but the father disputed the jurisdiction of the court and brought a preliminary motion to have the matter transferred to the Supreme Court.

Thomson Prov. Ct. J. began his analysis of the *Ruttan* dilemma by making a series of useful distinctions between the kinds of issues that could arise in enforcement cases.

In the vast majority of cases, it was held, "the order to be enforced is clear in its wording, there is no dispute as to its meaning and the court easily enters into the question of whether it should be enforced".<sup>15</sup> But, the judgment continued, difficulty arises when the order is less than clear and, by attempting to interpret it to give it meaning, the court may in fact be varying the order. Judge Thomson initially divided this category of case into two sub-categories. The first sub-category embraced those cases where the original order is so vague as to be impossible to comprehend. The second sub-category included the situation arising "when . . . there is some question about whether some event had subsequently occurred which would end or alter the amount owing".<sup>16</sup> This sort of case called for yet a further conceptual subdivision:<sup>17</sup>

- (1) Where the question is whether certain facts amount to the terminating event described in the decree, the court would have to be fully satisfied that there is only one possible interpretation which could be arrived at. Here the issue is generally the meaning, in law, of certain wording employed in the decree and, in light of *Ruttan*, I think all doubts should be resolved in favour of a decision not to attempt to provide an answer.
- (2) Where the dispute is as to the facts themselves, it would seem permissible to go further. The court hears evidence in order to clarify such questions as "is the child really attending university", "what was last year's increase in the cost of living" or "how much did the debtor earn last year"? Once the necessary

<sup>14</sup> (1983), 41 O.R. (2d) 378 (Ont. Prov. Ct. Fam. Div.).

<sup>15</sup> *Ibid.*, at p. 380.

<sup>16</sup> *Ibid.*, at p. 381.

<sup>17</sup> *Ibid.*, at pp. 382-383.

findings of fact have been made, these are then applied to the words of the decree (assuming these words are clear and create no interpretive difficulties). In my view, the risk of reaching conclusions which might be contrary to the intent of the court which made the original order is much less when one is unravelling factual disputes rather than engaging in what amounts to legal interpretation of an order.

It is submitted with respect that in setting out this analysis Judge Thomson has gone some considerable distance toward making some practical sense of the *Ruttan* decision and has provided a framework for reconciling other decisions rendered since *Ruttan*.

In the first category of case, "the order to be enforced is clear in its wording, there is no dispute as to its meaning, and the court easily enters into the question of whether it should be enforced".<sup>18</sup> This statement owes something to the dictum of Karswick Prov. Ct. J. in *Lapinskas v. Lapinskas*<sup>19</sup> that "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". In adopting this dictum Judge Thomson appears to be taking the view that the *Ruttan* prohibition extends only to certain decisions concerning whether or not a maintenance order has expired. Other decisions, such as ascertaining the correct identities of the payee and payor, and computing the amount which was ordered to be paid in the original maintenance decision, seem to be open to the enforcement court.

The decision in *Glassman v. Glassman*<sup>20</sup> (the first reported decision after *Ruttan* that took *Ruttan* into account) is consistent with this point of view. A maintenance order had been made under the Divorce Act under the terms of which a father was obliged to pay part of the living expenses of two of his children so long as they were in full-time attendance at a high school, university or other recognized institution of higher learning. The father made payments for a time, but ceased payments when a family dispute arose. The children applied to enforce the order in the Provincial Court under section 28 of the Family Law Reform Act.<sup>21</sup> The ruling upon decree nisi provided that the "husband shall be responsible for all other costs necessary for the support of the children entitled to payments by the wife herein and without limiting the generality of the foregoing, shall include tuition fees, clothing, etc".<sup>22</sup> One of the arguments advanced by the father was that an enforcement court was not entitled to calculate a precise figure under that ruling. He insisted that a quantification by the enforcement court could amount to a variation and that it was therefore prohibited by *Ruttan*. Main Prov. Ct. J. held that this was not a case to

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<sup>18</sup> *Supra*, footnote 15.

<sup>19</sup> (1977), 3 R.F.L. (2d) 126, 131 (Ont. Prov. Ct. Fam. Div.).

<sup>20</sup> (1982), 38 O.R. (2d) 146, 29 R.F.L. (2d) 257 (Ont. Prov. Ct. Fam. Div.), affirmed on appeal, (1983), 42 O.R. (2d) 58, 35 R.F.L. (2d) 10 (Ont. Co. Ct.).

<sup>21</sup> R.S.O. 1980, c. 152.

<sup>22</sup> *Supra*, footnote 20, at pp. 147 (O.R.), 259 (R.F.L.) (Prov. Ct.).

which the principles of *Ruttan* applied, saying that: "[t]he limits of the maintenance order made by Walsh J. are, in principle, precise . . . . The order is not vague, confusing or capable of two or more reasonable interpretations."<sup>23</sup> This reasoning was approved by Matthews Co. Ct. J. on the appeal.

Judge Thomson next referred to cases where the original order is so vague as to be impossible to comprehend. He gave as an example the case of *Roberts v. Roberts*,<sup>24</sup> where the judge was unable to understand a very complicated clause relating to support that was contained in the minutes of settlement that had been incorporated into the decree nisi in a divorce case. Caney Prov. Ct. J. concluded that he could not enforce the order and dismissed the application. Another example offered was the case of *Marion v. Marion*.<sup>25</sup> In that case it was unclear whether a superior court judge had ordered that a support order be stayed, and Dunn Prov. Ct. J. accordingly found himself unable to enforce the order.

Judge Thomson's second category turns out to be, it is submitted, the obverse of the first. When the issue is not whether the order has expired, and the enforcement court believes that it can identify the payor and payee and the amount (if any) to be paid, it can go ahead and decide whether or not to enforce the order free of any concern that it might, in arriving at a decision, be varying or rescinding the order. But when, as in *Roberts* and *Marion*, the enforcement court can make no sense of the order, no sensible enforcement decision can be made, and the court must decline jurisdiction. This would not, conceptually, appear to be anything like the decision not to enforce that was disapproved of by the British Columbia Court of Appeal in *Meek v. Enright*.<sup>26</sup>

Having analysed situations where the issue before the enforcement court is *not* whether the order has expired, Judge Thomson goes on to describe his view of the law where expiry or alteration of the amount payable *is* the issue. In other words he addresses himself to the case where "there is some question about whether some event has subsequently occurred which would end or alter the amount owing".<sup>27</sup> As has already been pointed out, further distinctions were made here. First, the question could be whether certain facts amount to a terminating or altering event described in the decree. Secondly, the dispute could be as to the facts themselves.

It is surely significant that the overwhelming number of reported cases on this issue since *Ruttan* have raised the question whether certain

<sup>23</sup> *Ibid.*, at pp. 152 (O.R.), 266 (R.F.L.) (Co. Ct.).

<sup>24</sup> Unreported, Ont. Prov. Ct. Fam. Div., June 18, 1982.

<sup>25</sup> Unreported, Ont. Prov. Ct. Fam. Div., August 8, 1982.

<sup>26</sup> *Supra*, footnote 4. This case is discussed in more detail *infra*.

<sup>27</sup> *Supra*, footnote 14, at p. 381.

facts amount to a terminating event described in a decree. In all of these cases, save one, the courts have felt constrained by *Ruttan* to proclaim the principle that there must be enforcement.

In *Ridding v. Morrison*<sup>28</sup> a child maintenance order made pursuant to the Divorce Act in Ontario was once again in issue. The father had ceased to pay and the mother took enforcement proceedings in the Provincial Court Family Division pursuant to section 27(2) of the Family Law Reform Act.<sup>29</sup> Prior to the enforcement proceedings the father and mother had entered into desultory negotiations about the liability of the father to pay, and one of the father's defences was that the fact of the negotiations amounted to an implied agreement that the order had terminated. Nasmith Prov. Ct. J. found himself confronted with the classic dilemma of the enforcement judge. On the one hand he saw a reading and an interpretation of the original order as inevitable,<sup>30</sup> yet realized that *Ruttan* placed undefined limits on this function. Ultimately, in a dictum which grasps at a distinction similar to that later proclaimed in *Goldhar*, he said:<sup>31</sup>

Taken at their strongest, these cases<sup>[32]</sup> seem to stand for authority in the enforcing court to interpret High Court decisions or the effect of subsequent events on High Court decisions if those events were contemplated in the decision and only if the decision, the subsequent events, and the intended effect of the subsequent events are so unequivocal and unambiguous as to virtually come about "by operation of law."

Judge Nasmith could not find that the effect of subsequent negotiations on the original order was unambiguous, and he enforced the order.

In *Goldhar* itself Judge Thomson was of the opinion that the dispute was not as to the facts, but rather whether the undisputed facts would support a finding that the children were still "normally resident" with their mother. Thus he felt obliged to regard the resolution of the dispute as closed to him because of the strictures of *Ruttan*.

In *Mitchell v. Mitchell*<sup>33</sup> a husband was, in conjunction with a divorce decree, ordered to pay maintenance both to his wife and to his children. The husband ceased payment, the wife brought enforcement proceedings

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<sup>28</sup> (1982), 31 R.F.L. (2d) 97 (Ont. Prov. Ct. Fam. Div.).

<sup>29</sup> *Supra*, footnote 21.

<sup>30</sup> In this connection he quoted: *Re Bitel and Bitel* (1969), 8 D.L.R. (3d) 497, [1970] 1 O.R. 383 (Ont. Prov. Ct. Fam. Div.), rev'd without reasons (1970), 9 D.L.R. (3d) 636, [1970] 2 O.R. 168 (Ont. H.C.); *Hwong v. Hwong* (1976), 24 R.F.L. (2d) 70 (Ont. Prov. Ct. Fam. Div.); *Lapinskas v. Lapinskas*, *supra*, footnote 19; *Murray v. Murray* (1979), 12 R.F.L. (2d) 365 (Ont. Prov. Ct. Fam. Div.); *Glassman v. Glassman*, *supra*, footnote 20. These cases, with the exception of *Glassman*, have been discussed in the earlier article, *loc. cit.*, footnote 2.

<sup>31</sup> *Supra*, footnote 28, at p. 102.

<sup>32</sup> *Supra*, footnote 30.

<sup>33</sup> (1983), 32 R.F.L. (2d) 461 (Alta. Prov. Ct.).

<sup>34</sup> The issue of adjournment is discussed *infra*.

in the Alberta Provincial Court, and the husband's defence was that he had not received all of the property he had been awarded pursuant to a judgment concerning the division of matrimonial property. Leveque Prov. Ct. J. held that the husband's possible right of set-off against the wife could not offset his obligation to pay maintenance on behalf of his children, and an enforcement order was issued. In relation to the spousal claim, although the issue was adjourned,<sup>34</sup> the principle was acknowledged that the court was not free to decide whether or not to enforce.

The case of *Z.T. v. V.T.*<sup>35</sup> presented the *Ruttan* dilemma in traditional form. Pursuant to a decree of divorce a husband was ordered to support his children "as long as the children remain infants under the Divorce Act". The wife applied to enforce the order in the Alberta Provincial Court, but the husband contended that one child was no longer a "child of the marriage" under the Divorce Act. Realizing that the facts were on all fours with *Ruttan*, Fitch Prov. Ct. J. concluded that he had no alternative but to enforce the order. More significantly, however, he went further and compared the facts in *Z.T. v. V.T.* with the facts of another case<sup>36</sup> on the same docket for enforcement. The order in that case provided that maintenance should be paid for the children

... provided however that payment for any child shall cease upon that child reaching the age of 18 years, or marrying, or becoming self-supporting for a period of 3 months, or shall cease to live with the Petitioner, whichever event shall or may first occur; provided that maintenance shall continue for each child past the age of 18 so long as that child attains passing grades at school. Such maintenance however will cease upon that child attaining the age of 21 years.

Of this case Judge Fitch said:<sup>37</sup>

Here the maintenance order ends upon the happening of any of several events, and it is merely a matter of evidence not involving any conclusions of law as to whether any of the events have occurred and therefore the order has ended according to its own terms.

Although Judge Fitch did not mention the *Goldhar* case, he was clearly attempting to make the same kind of distinction between applying and interpreting the order as Judge Thomson.<sup>38</sup> It is submitted, however, that it is an over-simplification to describe that distinction as one between law and fact, as it is surely more accurately described in *Goldhar* as involving either clarity or ambiguity.

In *Tessis v. Tessis*<sup>39</sup> McLatchy Prov. Ct. J. applied *Goldhar*. The husband, in divorce proceedings, was ordered to pay child maintenance

<sup>35</sup> (1983), 35 R.F.L. (2d) 210 (Alta. Prov. Ct.).

<sup>36</sup> *P. v. P.*, Unreported, Alta. Q.B., Edmonton No. 28829, March 12, 1979.

<sup>37</sup> *Supra*, footnote 35, at p. 212.

<sup>38</sup> Whether or not each event in *P. v. P.* could be so clearly identified will be discussed later in this article.

<sup>39</sup> (1983), 36 R.F.L. (2d) 357 (Ont. Prov. Ct. Fam. Div.).



and was granted access pursuant to a separation agreement that was incorporated into the decree absolute. The agreement provided that provisions dealing with custody and access were fundamental terms, the breach of which entitled the injured party to terminate the agreement. The husband alleged that the wife had interfered with his right to access and ceased making the child maintenance payments. The wife applied to enforce the arrears, but the husband contended that, because the wife had fundamentally breached the agreement, he was not bound by the decree and there were no arrears to enforce. Judge McLatchy appealed to both *Ruttan* and *Goldhar* and had very little difficulty in concluding that he was being asked whether certain facts amounted to a terminating event. Equally he found that whether the decree had been terminated was a very complex question to which there was no clear, unambiguous answer. Thus it was held that enforcement should proceed.

In sharp contrast to the foregoing cases stands *Ross v. Ross*,<sup>40</sup> in which a decree nisi provided that a father should pay maintenance to each child of the marriage so long as each child respectively was in regular attendance at a recognized institute of learning and was a dependent child within the meaning of the Divorce Act. When the oldest child graduated from university and enrolled in a postgraduate programme the father ceased making payments and an enforcement proceeding ensued. The enforcement decision of Robson Prov. Ct. J. was, in the light of *Ruttan*, clearly incorrect, but it exposes the *Ruttan* dilemma in classic form. The judge noted that he was uncertain whether the oldest child was a "dependent child" within the meaning of the Divorce Act, and he was concerned that concluding the issue for himself might very well amount to a variation of the order. He therefore decided that it was safer to decline to enforce. It will be apparent immediately, of course, that the facts of *Ross* do not differ in any substantial way from the facts in *Ruttan*, and it will be equally apparent that Judge Robson, bound as he ought to have been by *Ruttan*, ought to have enforced the maintenance order. Yet *Ross* dramatizes the implications of *Ruttan*. If there is any question that a support order may have expired, enforcing it may just as often amount to a variation as declining to enforce it. What if, in *Ridding v. Morrison*,<sup>41</sup> the parties had in fact reached an agreement that the order cease to have effect? What if, in *Goldhar v. Goldhar*,<sup>42</sup> the children were not "normally resident" with their mother? What if, in *Mitchell v. Mitchell*,<sup>43</sup> the original court had intended that the spousal maintenance obligation be contingent upon the settlement of the matrimonial property transfers?

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<sup>40</sup> [1983] W.D.F.L. No. 424 (Ont. Prov. Ct. Fam. Div.).

<sup>41</sup> *Supra*, footnote 28.

<sup>42</sup> *Supra*, footnote 14.

<sup>43</sup> *Supra*, footnote 33.

What if, in *Z.T. v. V.T.*,<sup>44</sup> the child was no longer a "child of the marriage"? What if, finally, in *Tessis v. Tessis*<sup>45</sup> the wife was in fundamental breach of the agreement? In each of these eventualities, it is submitted, it would be a clear variation of each of the maintenance orders for an enforcement court to enforce, yet this is what *Ruttan* requires.

It is submitted with respect that Judge Thomson, in *Goldhar*, made the best of things by attempting to discern, in *Ruttan*, some occasions upon which it will be permissible for an enforcement court to conclude that an order has expired and that an enforcement process ought not, therefore, to issue. These occasions were described by Judge Thomson as those "where the dispute is to the facts themselves".<sup>46</sup> To put this another way, the dictum would seem to refer to those maintenance orders in which the terminating event has been clearly set out, and in relation to which, if the question were put whether or not that event had occurred, there could only be one answer. Two simple examples may serve to clarify the distinction. On the one hand a maintenance order may state that it is to expire when a child turns sixteen. On the other hand it may state that the order is to expire when the child becomes self-supporting. A variety of reasonable people, upon being given all of the relevant evidence, are highly likely to reach the same conclusion on whether or not a child is sixteen. The same group, upon being asked whether a child is self-supporting, may come to differing conclusions as a result of applying different views on what it means to be self-supporting. Judge Thomson's view of *Ruttan* would seem to be that an enforcement court may decide whether or not a child is sixteen and may enforce or decline to enforce accordingly. But the court may not, it would seem, decide whether a child is self-supporting and, if the issue is raised in enforcement proceedings, the court must enforce, regardless of the evidence.

At this point it is appropriate to mention again the example used by Judge Fitch in *Z.T. v. V.T.*<sup>47</sup> of a case where an enforcement court could conclude an expiry issue for itself. He referred to *P. v. P.*<sup>48</sup> in which payment under a maintenance order was to cease when a child either (i) reached the age of eighteen years, (ii) married, (iii) became self-supporting for a period of three months, or (iv) ceased to live with the petitioner. It is submitted that, using Judge Thomson's test, an enforcement court could decide on some, but not all, of these events. After a consideration of all the relevant evidence there would be very little likelihood of any disagreement among reasonable people on whether or not a child was eighteen or had married. But, it is suggested, there might be legitimate dis-

<sup>44</sup> *Supra*, footnote 35.

<sup>45</sup> *Supra*, footnote 39.

<sup>46</sup> *Supra*, footnote 14, at p. 383.

<sup>47</sup> *Supra*, footnote 35 and following text.

<sup>48</sup> *Supra*, footnote 36.

agreement on whether or not a child was self-supporting or had ceased to live with someone. What if a child, in 1985, had an income of \$5,000 a year and was living rent-free with a relative on a short-term basis? Is such a child self-supporting or not? What if a child lived with his mother for four days in each week, but lived at his place of employment for three days in each week? Does such a child "live with" his mother or not? It is submitted that even one of the situations in which Judge Thomson himself suggested, by way of example, that an enforcement court could make a decision, is suspect. He implied<sup>49</sup> that if a maintenance order were to state that it should expire upon a child's ceasing to attend university, an enforcement court could make up its own mind on whether or not that event had occurred. But what if the child in question has a full-time job but is enrolled at a university and takes night classes there?

It is submitted that Judge Thomson's distinctions are valid, not prohibited by *Ruttan*, and useful as far as they go. Whenever an enforcement court can, in the one proceeding, determine whether or not a maintenance order has expired and make an enforcement decision accordingly, the ends of convenience, cheapness and speed in the enforcement process are surely served.

Yet the usefulness of the distinctions will obviously depend on the frequency with which maintenance orders are expressed, in the original court, to expire upon the occurrence of events about which there can be no dispute. At the same time, much will depend on whether indisputability is given a consistent characterization. It is significant that Judge Fitch thought that there could be no debate about whether a child was self-supporting or could be said to be living with his mother. Judge Thomson thought there could be no dispute about whether a child was attending university.

Two further points must be made. The first is that it would often be a bad thing for original courts to start limiting themselves to indisputable events to signify the expiry of maintenance orders. Neither are they likely to do so. If a court thinks that a child should be maintained until he or she is self-supporting, it is unlikely, merely on account of *Ruttan*, to rule that maintenance should cease upon the child reaching the age of 18. The second point is that the *Goldhar* distinctions, although valiant and the only ones authorised by *Ruttan*, do not, objectively viewed, make much sense. If an enforcement court is entitled, as it was in *Glassman*,<sup>50</sup> to translate the general formula of a maintenance order into a precise figure, and is entitled to decide whether a child is or is not married, why may it not, at the same time, decide whether or not a child is a "child of the marriage" under the Divorce Act?<sup>51</sup>

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<sup>49</sup> *Supra*, footnote 14, at p. 381.

<sup>50</sup> *Supra*, footnote 20.

<sup>51</sup> *Supra*, footnote 6, s. 2.

A subsidiary issue, forced upon the courts by the nature of the *Ruttan* decision, is that of adjournment of the enforcement proceedings. If an enforcement court is not entitled to decide whether or not an order has terminated, but must leave that decision to another court, is it proper for the enforcement court to adjourn the enforcement proceedings whilst the payor obtains a ruling from the appropriate court? In a number of the decisions already referred to, the enforcement courts, while acknowledging the force of *Ruttan*, attempted to effect a compromise by referring to adjournment.

In *Ridding v. Morrison*<sup>52</sup> Nasmith Prov. Ct. J. considered an adjournment, but rejected it on the basis that the father's defence to the enforcement process was too slender to be likely to succeed in the higher court. In *Goldhar v. Goldhar*<sup>53</sup> Judge Thomson thought that an enforcement court had the power to adjourn pending a resolution of the interpretation issue, but disagreed with the view of Judge Nasmith in *Ridding v. Morrison* that the crucial deciding factor ought to be the enforcement judge's view of the merits of the judgment debtor's defence. Rather, he said, the court should take into account the following factors:<sup>54</sup>

1. Is the debtor pursuing his remedy before the Supreme Court as quickly as possible?
2. What sort of delay is involved in getting the matter before the Supreme Court?
3. What hardship will be caused to the creditor by the delay?
4. Conversely, what hardship might the debtor suffer if the enforcement matter goes ahead while proceedings in the other court are pending?

It will be recalled that *Goldhar* involved a preliminary motion on jurisdiction. Judge Thomson ruled that the applicant could continue with the enforcement proceedings, but ruled also that it would be open to the defendant to apply for an adjournment. In *Mitchell v. Mitchell*<sup>55</sup> Judge Leveque simply assumed that he had the power to adjourn the enforcement proceedings *sine die* until the interpretation issue was resolved, while in *Tessis v. Tessis*<sup>56</sup> MacLachy Prov. Ct. J. assumed he had the power, but chose not to adjourn after finding that the tests set out in *Goldhar* were not met.

Given the constraints of *Ruttan*, it would seem that in many cases the use of the power to adjourn enforcement proceedings, pending a resolution elsewhere of the interpretation issue, would be a useful judicial weapon. The question arises, however, whether even this limited flexibility is always available to enforcement courts. It is submitted that the issue is raised by the decision of the British Columbia Court of Appeal in *Meek*

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

<sup>53</sup> *Supra*, footnote 14.

<sup>54</sup> *Ibid.*, at p. 384.

<sup>55</sup> *Supra*, footnote 33.

<sup>56</sup> *Supra*, footnote 45.

v. *Enright*,<sup>57</sup> a decision referred to and specifically approved in *Ruttan*. In *Meek v. Enright* what was at stake was a maintenance order that had been made in California and registered in British Columbia under legislation dealing with the reciprocal enforcement of maintenance orders.<sup>58</sup> Initially it had been argued that the enforcement court in British Columbia had the power both to vary the order and to decline to enforce it, but in the British Columbia Court of Appeal only the latter point was pursued. McFarlane J.A. said:<sup>59</sup>

... 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.

Can it be said, therefore, that an enforcement court, in adjourning an enforcement proceeding, is declining to enforce and thus infringing the rule in *Meek v. Enright*? It is submitted that this conclusion is not warranted.

First, in *Meek v. Enright* reference was made to the possibility that the power to decline to enforce could be conferred on an enforcement court by statute. It must therefore also be possible to confer upon the court the power to adjourn. In *Glassman, Goldhar and Tessis* it was specifically held that the power to adjourn was to be found in the Family Law Reform Act,<sup>60</sup> and it is now becoming common for provinces to confer upon provincial courts the power to employ a variety of enforcement mechanisms.<sup>61</sup> Thus it will usually be possible to find either expressly or by implication, legislative authority for the power to adjourn.

Secondly, it could also be argued quite simply that an adjournment amounts to a decision to delay enforcement rather than to a decision to decline to enforce. In *Meek v. Enright* itself the initial decision of the Provincial Court judge was to decline to enforce altogether and not merely to adjourn. Thus it could be said that an enforcement judge who adjourns is continuing to acknowledge the validity and enforceability of the maintenance order in question, and merely agreeing to enforce at a later date. Ultimately, however, it is submitted again that the need to consider the question of adjournment in this context is a direct consequence of the constraints placed upon enforcement courts by the decision in *Ruttan*.

The contention has already been made<sup>62</sup> that the *Ruttan* decision is a disappointing one insofar as there seems to be no particular danger in

<sup>57</sup> *Supra*, footnote 4. This case has been discussed at some length in the earlier article, *loc. cit.*, footnote 2, at pp. 601-603.

<sup>58</sup> Family Relations Act, S.B.C. 1972, c. 20.

<sup>59</sup> *Supra*, footnote 4, at pp. 115 (D.L.R.), 19 (B.C.L.R.), 59 (R.F.L.).

<sup>60</sup> R.S.O. 1980, c. 152, ss. 27-32.

<sup>61</sup> See, for example: British Columbia, Family Relations Act, R.S.B.C. 1979, c. 121, ss. 63-69; Manitoba, The Family Maintenance Act, C.C.S.M. c./F20, ss. 25-31.6.

<sup>62</sup> *Loc. cit.*, *supra*, footnote 2.

permitting enforcement officials to interpret maintenance orders for the purpose of deciding whether or not they have expired. Indeed, the logic of permitting them to do so seems inescapable. As Lambert J.A. pointed out in *Ruttan* in the British Columbia Court of Appeal,<sup>63</sup> an enforcement judge who enforces an order when it has expired is surely varying it. Yet it would now appear that the only way of circumventing *Ruttan* is by legislative intervention.

In the earlier article<sup>64</sup> it was pointed out that the separation of the variation and rescission function on the one hand, and the enforcement function on the other is pervasive in the Canadian system. An order made under the Divorce Act, 1968 in, for example, Ontario might have come to be enforced, but only enforced, in a lower court either in Ontario<sup>65</sup> or in another province.<sup>66</sup> By the same token, an order made under provincial legislation in, for example, British Columbia may come to be enforced, but only enforced, in a lower court either in British Columbia<sup>67</sup> or in another province.<sup>68</sup> Thus the opportunities for legislative intervention are numerous.

Unfortunately, there does not appear to be any indication in recent legislative activity that the issue is receiving direct attention. In the Divorce Act, 1985<sup>69</sup> the old dichotomy is preserved. While sections 17 and 18 of the Act confer jurisdiction to vary, rescind or suspend maintenance orders on a considerable variety of courts,<sup>70</sup> the fact remains that the judges of those courts must still be appointed by the Governor General.<sup>71</sup> Section 20(3) of the Act, by contrast, provides that:

An order that has legal effect throughout Canada . . . may be

- (a) registered in any court in a province and enforced in like manner as an order of that court; or
- (b) enforced in a province in any other manner provided for by the laws of that province.

Thus the division of judicial responsibility that gave rise to the issue in *Ruttan* continues under the new Act. But the dimensions of the issue are nonetheless changed to a degree. Under the Divorce Act of 1968 the only court that could vary or rescind a maintenance order was the court that

<sup>63</sup> *Supra*, footnote 9.

<sup>64</sup> *Loc. cit.*, *supra*, footnote 2.

<sup>65</sup> *Ibid.*, at pp. 588-590.

<sup>66</sup> *Ibid.*, at pp. 590-599.

<sup>67</sup> *Ibid.*, at pp. 599-600.

<sup>68</sup> *Ibid.*, at pp. 600-601. Under this umbrella falls the enforcement of orders made in reciprocating foreign states.

<sup>69</sup> Bill C-47, First Session, Thirty-third Parliament, 33-34 Eliz. II, 1984-86.

<sup>70</sup> That jurisdiction, under the Divorce Act of 1968, was confined to the court that made the original order: R.S.C. 1970, c. D-8, s. 11(2).

<sup>71</sup> *Supra*, footnote 69, s. 2(1).

made the order.<sup>72</sup> Under the Divorce Act, 1985<sup>73</sup> a court in a province has jurisdiction to vary a maintenance order if (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding, or (b) both former spouses accept the jurisdiction of a court.<sup>74</sup> At the same time, section 18(2) provides that:

Notwithstanding subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and

(a) the respondent in the application is ordinarily resident in another province, and

(b) in the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19,

the court may make a variation order without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and where so confirmed it has legal effect in accordance with the terms of the order confirming it.

Thus, facilities for variation proceedings under the new Act are more widespread, but the court that made the original order will not always have the jurisdiction to vary it. It seems therefore that when the question arises as to whether or not a support order under the new legislation has expired or has altered, the matter almost certainly cannot be dealt with by an enforcement court, may or may not be dealt with by the court that made the original order, and will usually have to be dealt with by the courts of the parties' ordinary residences. Thus, a court other than that which made the order is likely to be interpreting the order. It will remain a fact, however, that where one party wishes to enforce an order and the other wishes to defend on the basis that the order has expired or has altered, two proceedings will be necessary if the enforcement process has been initiated in a lower court. Indeed, the fact that access to variation proceedings is made easier, coupled with the fact that the issues of expiry and alteration must continue to be dealt with in variation proceedings, may well contribute to an increase in such proceedings.

The position under the most recent Uniform Reciprocal Enforcement of Maintenance Orders Act<sup>75</sup> differs from that under the divorce legislation inasmuch as the power to vary or rescind an order from a reciprocating state is quite extensive.<sup>76</sup> There is no jurisdictional limitation of ordinary residence and the variation function is not, in general, confined to superior courts.<sup>77</sup> Thus the Uniform Law Conference has approached the *Ruttan* problem by going around it—at least part of the way. Even if

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<sup>72</sup> *Supra*, footnote 70.

<sup>73</sup> *Supra*, footnote 69.

<sup>74</sup> *Ibid.*, ss. 5(1), 17(1).

<sup>75</sup> Adopted by the Uniform Law Conference of Canada in 1979 and amended in 1982.

<sup>76</sup> Uniform Reciprocal Enforcement of Maintenance Orders Act, s. 7.

<sup>77</sup> But see *ibid.*, s. 7(2).

an interpretation of an order is seen as a variation, a variation proceeding could normally be joined to an enforcement proceeding in the same court.

Yet the factor common to the federal and provincial approach is a refusal to permit courts concerned only with enforcement to determine, in most cases, whether a support order has expired or has altered in its application. It has been submitted that enforcement courts ought to be permitted to exercise this function, but the *Ruttan* decision makes it necessary that there be legislative intervention in order to bring about change. A short provision in the relevant federal and provincial legislation that "the power to enforce a support order includes the power to determine whether or not it has expired or whether or not an altering event has taken place" would surely mend the situation, and the writer can think of no compelling reason why this power should be kept from enforcement courts. At the same time, what do seem compelling are the arguments of logic, convenience, speed and cost that may be advanced in favour of taking this step.