



# THE ENFORCER

BY DAVID FINDLING

## I Didn't know I could File a Lien for Unpaid Support

Most practitioners feel confident engaging in discovery, litigating custody issues or conducting a trial. However, once they obtain a judgment on behalf of their client, it seems that many feel lost in determining how to enforcement their client's judgment. In this column, you can look forward to learning how to help your client collect the sums they are owed (and hopefully seeing that their attorney also gets paid).

This month we will discuss enforcement of unpaid child and/or spousal support. The best place to start is how to obtain a lien to secure your client's claim. Securing a claim has innumerable benefits:

- Priority over junior lienholders;
- Insurance that if the property owner (support payer) transfers the property the lien will follow; and
- Avoidance of possible bankruptcy issues as the lien passes through a bankruptcy estate unaffected by the debtor's discharge.

### How does the Lien Arise?

A lien for unpaid support accrues by operation of law pursuant to MCL §552.27. It provides:

If alimony or an allowance for the support and education of the children is awarded to either party, the amount of the alimony or allowance constitutes a lien upon the real and personal estate of the adverse party as provided in section 25a of the support and parenting time enforcement act, 1982 PA 295, MCL 552.65a. The court may do 1 or more of the following if the party defaults on the payment of the amount awarded:

(a) Order the sale of the property against which the lien is adjudged in the same manner and upon the same notice as in suits for the foreclosure of mortgage liens.

(b) Award execution for the collection of the judgment.

(c) Order the sequestration of the real and personal estate of either party and may appoint a receiver of the real estate or personal estate, or both, and cause the personal estate and the rents and profits of the real estate to be applied to the payment of the judgment.

(d) Award a division between the husband and wife of the real and personal estate of either party or of the husband and wife by joint ownership or right as the court considers equitable and just.

Remember, there are two important considerations for a lien, its creation and *its perfection*. MCL §552.27 grants your client a lien simply because they are owed unpaid support. Unfortunately, it does not provide a mechanism for perfection (more about this later).

### Race-Notice

A holder of an interest in real property who first records his interest has priority over subsequent purchasers (or lienholders). MCL §565.29 provides:

Every conveyance of real estate with the state hereafter made, which shall not be recorded as provided in this chapter, shall be void against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

See also MCL 565.24(4), which provides that "subsequent owners or encumbrances shall take subject to the perfected liens, rights or interests."

### Perfection of Your Client's Lien for Unpaid Support

This is the Achilles heel for most lawyers. They obtain a lien under the Judgment of Divorce and they never record a copy with the Register of Deeds. Keep in mind that your



client does not have a valid lien unless it is perfected. The essence of perfection is to furnish public notice of the secured party's interest in the collateral. *Biggins v Southwest Bank*, 490F.2d 1304, 1311 (9th Cir. 1973).

The State Court Administrative Office has prepared Form FOC 90 for use in perfecting your client's lien for child support. It is a simple fill in the blank form which can be executed by counsel or the support payee. It must be recorded in the county wherein the support payee has an interest in real property to give notice of the lien.

### Now What?

Perfection offers your client numerous remedies under §552.27. Your client can foreclose on his/her lien or request the appointment of a receiver to liquidate the property.

Remember, there are three words that are essential for insuring that your client receives the support they are due:

notice, notice and notice. Make sure that your client's claim for support is secured and you will save many headaches in the future.

### Endnotes

1. A Chapter 7 bankruptcy discharge only extinguishes an action against the debtor *in personam* while leaving intact an action in *rem*. *Johnson v. Home State Bank*, 501 U.S. 78, 115 L. Ed. 2d 66, 111 S. Ct. 2150 (1991). As such, a pre-existing lien on property remains enforceable against that property even after an individual's personal liability has been discharged. *Dewsnup v. Timm*, 502 U.S. 410, 116 L. Ed. 2d 903, 112 S. Ct. 773 (1992).

In interpreting this precedent, Michigan court have also found that liens pass through bankruptcy intact. See *Kleinheksel v. Delta Props., Inc.*, 2005 Mich. App. LEXIS 1721 (2005) and *Hermiz v. Kamma*, 2005 Mich. App. LEXIS 2670 (2005).

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