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BY DAVID FINDLING

THE FINDLING LAW FIRM

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Foreclosure Of A Lien For Unpaid Support

MCL 552.27(a)ⁱ provides a seemingly simple and effective means of enforcement for past due alimony and child support. The exact language of the section is as follows:

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.ⁱⁱ 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. . .

MCL 552.27(a) appears to provide support payees with an excellent remedy. Despite that, it seems to be little used. Case law concerning that specific provision of MCL 552.27 is sparse, and from my research, almost non-existent since it was amended in 1998.ⁱⁱⁱ So what are the reasons for its infrequent use by support payees? Three potential reasons come to mind. First, people just lack knowledge of MCL 552.27(a). Second, MCL 552.27(a) refers to mortgage foreclosures but otherwise is lacking in guidance. Actually attempting to put it in use may be procedurally difficult and confusing. Third, the (quite valid) excuse for just about everything these days; the economy renders it an ineffective remedy.

Before I delve into the possible reasons for its scarce use, I will just give a short explanation of the remedy provided by MCL 552.27(a).^{iv} Generally, a "mortgage lien" is a creditor's optimal lien. The debtor grants the creditor a lien and it is

actually enforceable should the debtor default on payment of the monetary obligation. Compare to a judgment lien under MCL 600.2801 *et. seq.* which is not enforceable in the sense that one cannot foreclose or execute on it. Similar to a "mortgage lien", the plain language of MCL 552.625a grants a support payee a lien for unpaid support and MCL 552.27(a) provides for a means of enforcement upon default. In other words, this section basically grants a "mortgage lien" to a support payee when the support payor is in default.

A simple explanation for the lack of persons taking advantage of MCL 552.27(a) is that its existence is just not common knowledge. The remedy is provided for in the Support and Parenting Time Enforcement Act.^v Many attorneys practicing domestic relations are more likely focused or specialized in the pre-judgment issues of a divorce such as obtaining custody, support or a marital property award in favor of the client. They may lack knowledge of post-judgment means of enforcement. Likewise, attorneys who specialize in collection may have little knowledge of domestic relations statutes, even those that provide a means of enforcement.

Second, though the statute seems straightforward, issues may arise when attempting to use it. For example, the court in *Wells v. Wells*, 144 Mich. App 722, 375 NW2d 800 (1985) stated that a lien can only be enforced by MCL 552.27 if it is granted in a judgment of divorce. Therefore, if a judgment of divorce grants support but not a lien for unpaid support, MCL 552.27(a) may appear to be useless. But *Wells* was decided in 1985 prior to an amendment to MCL 552.27 enacted in 1998. At the time of *Wells*, MCL 552.27 read that support "shall constitute a lien upon such of the real and personal estate. . . as the court by its judgment shall direct."^{vi} MCL 552.27 was amended in 1998 and the phrase "the court by its judgment shall direct" was removed.^{vii} Further, section 625a of the Support and Parenting Time Enforcement Act^{viii} was enacted in 1998.^{ix} This section actually provides for the support lien by operation of law, without any qualifying judgment language.^x When shepardized, *Wells* appears to



remain good law. But that is likely because there are few published opinions concerning MCL 552.27 since 1998. It appears that a grant of a lien in the judgment of divorce is no longer necessary to take advantage of MCL 552.27(a).

Another question which arises is whether MCL 552.27(a) requires a new proceeding to be instituted to foreclose on real property of the support payor. Alternatively, whether the support payee can simply file a motion in the divorce proceeding requesting foreclosure. Presumably, it would be less expensive and time consuming to file a motion. Further, it seems to make sense since the divorce court is empowered to enforce its own decrees.^{xi} If the support payor falls behind on support, why not ask the divorce court to order the foreclosure by motion?

The language “in the same manner and upon the same notice as in suits for the foreclosure of mortgage liens”^{xii} is very specific. It would lead one to believe that to avoid procedural defect defenses, the MCL 552.27(a) foreclosure process should be done in exactly the same manner as provided in the mortgage foreclosure statutes. MCL 600.3101 *et. seq.* requires foreclosure proceedings to be instituted by a complaint seeking foreclosure. This position is strengthened by *Ulman v. Ulman*, 148 Mich. 353, 11 NW 1072 (1907). In *Ulman*, the wife was granted alimony and a lien on real estate of the husband. The husband defaulted and the wife sought to enforce her lien by proceedings in Oceana County, where the real estate was located. The husband argued that the Oceana County court did not have jurisdiction to enforce the lien, only the Muskegon County court did since it granted the lien via the judgment of divorce. The wife argued that the correct forum for suit was the county in which the real property was located. She based her argument on the language of [what is now] MCL 552.27(a) “in the same manner and upon like notice” taken with the mortgage foreclosure statute which requires all suits for foreclosure to be filed in the circuit court of the county where the property is located.^{xiii} The Michigan Supreme Court agreed with the wife. The court stated:

The Legislature evidently had in view an independent proceeding in chancery to foreclose these liens. The statute was also enacted with knowledge of section 515 quoted above. It will be presumed that the Legislature intended by providing as it did for the foreclosure of these liens to bring them within all of the provisions of the statute providing for the foreclosure of mortgages in courts of chancery, of which section 515 is the first section. Such a construction is reasonable and necessary. No possible confusion can arise under it, nor any conflict of jurisdiction between the courts of different counties.^{xiv} (Emphasis supplied).

So *Ulman* provides that the foreclosure action must be initiated in the county in which the real property is located. Can a motion be filed if the real property and divorce action are located in the same county? Going back to the “the same manner”^{xv} language coupled with the court’s statements in *Ulman* that the legislature “had in view an independent proceeding”^{xvi} and intended to bring foreclosure of these liens “within all the provisions of mortgage foreclosure statutes”^{xvii}, the answer seems to be no.

Lastly, MCL 600.3101 *et. seq.* is a very detailed statute. To properly comply with it, a specific process has to be followed, pre- and post-sale of the real property. But what about unintended, unforeseen conflicts in the statutes? For example, the award of support in a judgment of divorce is a judgment.^{xviii} However, the judicial foreclosure statutes provide that if a judgment on the underlying obligation is awarded prior to the filing of a complaint for foreclosure sale, the creditor must have first sought payment from personal property of the debtor.^{xix} Since the support payee always has a prior money judgment against the support payor is s/he barred from taking advantage of MCL 552.27(a) without first trying to execute on personal property of the Debtor? MCL 552.27 permits the court to grant one or more of the remedies provided, which includes not only real estate foreclosure but execution of personal property.^{xx} Further, there is no particular order in which the remedies must be used. If the legislature intended the support payee to attempt collection from personal property before real property would MCL 552.27 have been written as permitting one or more remedies simultaneously? It does not seem likely.

The third reason for the lack of use of MCL 552.27(a) is the simplest but may be the largest. In these economic times, there is a good possibility the support payor’s real property lacks equity. The support payee may have a similar lien to a “mortgage lien” but the lien is not accorded any special priority over prior recorded encumbrances.^{xxi}

Whatever the reasons, MCL 552.27(a) is a handy remedy and should be used whenever possible. However, to the extent possible, care should be taken so that it is properly implemented.

Endnotes

- i. This article does not address the remaining provisions of MCL 552.27. It further does not address perfecting a lien under MCL 552.625a or MCL 552.27. But keep in mind that perfection is one of the most important aspects of enforcing a lien in general. Therefore, an attorney or creditor should always ensure a support lien is perfected against property of the debtor.
- ii. Sec. 25a. (1) provides:

