BANKRUPTCY AND FAMILY LAW: FIRST COME, FIRST SERVED?

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This paper draws upon a more extensive review of the law in relation to the overlap between the Bankruptcy and Family Law jurisdiction completed by Peter Waters for the Judges Law Reform Committee of the Family Court in 1983. This article is an attempt to develop some of the larger policy questions surrounding the competing claims of the family and the creditors of a bankrupt for a share of the bankrupt's estate.

The Bankruptcy Act 1966 (Cth) and Part VIII of the Family Law Act 1975 (Cth) give rise to competing jurisdictions. There have been successive legislative attempts to determine some priority between the interests of creditors to realise the bankrupt's assets, and the interests of the family to maintain a suitable standard of living. This has been done by conferring an immunity from the retrospective provisions of the Bankruptcy Act, upon maintenance agreements and orders. However, much of this legislative tinkering has been misconceived, or lacking in an adequate analysis of the complex policy issues at stake.

The policy confusion stems from the ambivalent relationship the non-debtor spouse has with the bankrupt when they continue to cohabit, or have yet to institute matrimonial proceedings. On the one hand the spouse is identified with the debtor as having reaped the benefits of over-extended credit and a standard of living beyond the family's means. It would therefore be considered unjust to give the spouse any priority over unsecured creditors.

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There is also the danger that an extension of immunity to all Family Court orders in Bankruptcy, or a liberalisation of the rules that apply to interspousal transfers, would widen the loopholes by which spouses can collude in sheltering assets from creditors by putting them into the hands of the non-debtor (but often financially implicated) spouse.

On the other hand, the spouse also stands as a creditor in bankruptcy. Husbands and wives may hold property separately, but the non-debtor spouse may also have legal interests in the debtor's property, or equitable claims arising by means of express, implied or resulting trust.[1] The latter claims are notoriously difficult to establish between spouses. A spouse also has inchoate rights that extend beyond these rights in law and equity to include the property that the spouse would have received in a property re-allocation under section 79 of the Family Law Act 1975. At present the non-debtor spouse's share of the bankrupt's estate may vary according to whether or not matrimonial proceedings have preceded bankruptcy. In this article we underscore this 'first come, first served' relationship between creditors and spouses by looking at three different situations. The first situation is where there have been matrimonial proceedings prior to bankruptcy. The second situation concerns the rights of the non-bankrupt spouse when bankruptcy coincides with matrimonial breakdown. And the third situation is where the family remains intact despite bankruptcy, and no matrimonial proceedings are pending or contemplated.

I. MATRIMONIAL PROCEEDINGS PRIOR TO BANKRUPTCY

The Bankruptcy Act contains a number of elements of retrospectivity which permit the trustee in bankruptcy to reclaim property of which the bankrupt has divested himself or herself prior to the bankruptcy. The property is brought back into the pool which is available for division amongst all the creditors.

1. Relation Back

The Bankruptcy Act (section 116(1)) permits the trustee to reach back and reclaim property to which the bankrupt was entitled at the commencement of bankruptcy. This is known as the doctrine of 'relation back'. The "commencement of the bankruptcy" is not necessarily the date when the debtor was made bankrupt. It is the time of the earliest act of bankruptcy within six months before the presentation of the petition on which the debtor became bankrupt (section 115(1)).

Section 123(6) confers a wide immunity against relation back against transfers of property made pursuant to maintenance orders or agreements.

> Nothing in this Act invalidates, in any case where a debtor becomes a bankrupt, a conveyance, transfer, charge, disposition, assignment, payment or obligation executed,

1 Only the property of the bankrupt can be sequestrated, not that held in trust for another: s.116(2)(a) Bankruptcy Act.

made or incurred by the debtor, before the day on which the debtor became a bankrupt, under or in pursuance of a maintenance agreement or maintenance order.

A maintenance agreement is defined in section 5 of the Bankruptcy Act as

a maintenance agreement, within the meaning of the Family Law Act 1975, that has been registered in or approved by a court in Australia or an external Territory or any other agreement with respect to the maintenance of a person that has been so registered or approved;

A maintenance order is defined as an order,

with respect to the maintenance of a person made or registered under a law of the Commonwealth or a State or Territory of the Commonwealth.

In contrast to this approach, property orders of the Family Court do not attract similar protection. Transfers of property made by a bankrupt spouse to his spouse pursuant to an order under Part VIII of the Family Law Act will only be protected if they can be brought within the general saving provisions in section 123(1). This section provides:

(1) Subject to sections 118 to 122 (inclusive), nothing in this Act invalidates, in any case where a debtor becomes a bankrupt –
  (a) a payment by the debtor to any of his creditors;
  (b) a conveyance, transfer or assignment by the debtor for valuable consideration;
  (c) a contract, dealing or other transaction by or with the debtor for valuable consideration; or
  (d) any transaction to the extent of a present advance made by an existing creditor,

  if –
  (e) the transaction took place before the day on which the debtor became a bankrupt;
  (f) the person, other than the debtor, with whom it took place, did not, at the time of the transaction, have notice of the presentation of a petition against the debtor; and
  (g) the transaction was in good faith and in the ordinary course of business.

While the transfer of property pursuant to a Family Court order might well be for 'consideration' where the other spouse has been ordered to transfer property or pay money in return, this transfer would still not be described as being in the ordinary course of the bankrupt's business as is required by section 123 (1)(g).

In *Re Bedford*,[2] a court exercising jurisdiction under the Matrimonial Causes Act 1959 (Cth) ordered the husband to transfer property to his wife. The court was unaware that after the commencement of the proceedings before it but before judgment, the husband had committed an act of bankruptcy. In subsequent bankruptcy proceedings it was held that while the matrimonial court's order was valid, there was no property for it to 'bite on' as the property had by relation back vested in the trustee in bankruptcy prior to the making of that order.

2. Voluntary Settlements

If a debtor has made certain kinds of voluntary settlements or payments of money within specified periods before 'the commencement of the

2 (1968) 12 FLR 309.

bankruptcy' those transactions are voidable against the trustee unless they fall within the protective provisions of section 120(1) and (2). "Settlement" is broadly defined to include any disposition of property or money. There are two kinds of settlement which can be set aside under section 120:

(1) A settlement that comes into operation within two years before the commencement of bankruptcy if it is not one of the following settlements:-
   (a) A settlement made before and in consideration of marriage; or a settlement in favour of a purchaser or encumbrancer taking the property in good faith and for valuable consideration; or
   (b) a settlement made on or for the spouse or children of the settlor, of property that accrued to the settlor after marriage in right of the spouse of the settlor (such as on the spouse's intestacy).

(2) A settlement made within five years of the commencement of the bankruptcy, not being a settlement within paragraph (a) or (b) of section 121 or void under section 120(1), unless the parties claiming under the settlement prove: –
   (a) that the settlor, at the time of making the settlement was able to pay all his debts without the aid of the settled property: and
   (b) that the settlor's interest in the property passed to the trustee of the settlement, or the donee, on its execution.

Settlements made pursuant to section 87 of the Family Law Act may also be said to be for valuable consideration in that the transferee is forgoing his or her rights to apply for orders under Part VIII. The same specific protection may not be afforded to section 86 agreements because they do not preclude a spouse applying at some future date for a property order. However these agreements may nonetheless fall within the wide ambit of section 123(6) of the Bankruptcy Act which will be discussed in more detail below.

On the other hand, settlements made pursuant to property orders under Part VIII of the Family Law Act do not come within the general protection of section 123(6); nor are they afforded the specific protection of section 120(1) unless there is valuable consideration, that is that the order requires property or money to move in both directions.[3] Unlike the general exceptions to relation back there is no further requirement that the settlement be in the ordinary course of the bankrupt's business.

There is authority which would distinguish between a consent order and an order which is the result of a contested hearing, in determining whether there has been consideration. In *Re Abbott (a bankrupt); ex parte the Trustee of the Property of the Bankrupt* v. *Abbott*[4] the wife received the bulk of the proceeds of sale of the former matrimonial home as a result of a consent order under section 24(1) of the Matrimonial Causes Act 1973 (Eng.). At the time, the husband was insolvent although the wife was unaware of that fact.

3 Consideration should be read as part of a commercial purchase relationship: *In re Densham (a bankrupt); ex parte Trustee of Property of Bankrupt* v. *Bankrupt* [1975] 1 WLR 1519; *In re Windle; ex parte Trustee of Property of Bankrupt* v. *Bankrupt* [1975] 1 WLR 1628 and *In re A Debtor; ex parte the Official Receiver Trustee of the Property of the Debtor* v. *Morrison* [1965] 1 WLR 1498. However in *Re Pope; ex parte Dicksee* [1908] 2 KB 169 failure to apply for maintenance in return for settlement constituted consideration.

4 [1982] 3 All ER 181; see also J. Gibson-Watt, "Financial Provision and the Semi-Insolvent Partner" (1985) 15 *Fam Law* 50.

The trustee applied to the High Court to have the transaction set aside under section 42(1) of the Bankruptcy Act 1914 on the grounds that this was a settlement to which the wife was not "a purchaser... for valuable consideration". The Court (Megarry V.C. and Gibson J.) held that, although there was no quid pro quo in monetary terms, nevertheless consideration was provided by the wife's compromise of her full claim under section 24 of the 1973 Act.

Yet, as counsel for the trustee argued in this case, the characterisation of a consent order as providing consideration leads to the odd result that if the wife was steadfast and contested her claim, the settlement would thereby be void. This characterisation of 'consideration' is particularly artificial in the context of matrimonial proceedings. A spouse may be quite anxious to compromise a claim, but be prevented by a litigious spouse. Further, does one assess consideration by an amount a spouse would have received had the matter continued to a contested hearing? Is this assessment possible in Australia? A further problem is that some of the factors to be taken into account upon property division are past financial or non-financial contributions of the spouses. In other words, one spouse may have built up a right to share in the other's property because of the contribution he or she has made to that property and to the marriage generally. It could therefore be argued that the transfer of property pursuant to a Family Court order should therefore be viewed as a pay-out or recompense for that spouse. On this approach, it is the whole history of the financial relationship between the spouses, and not the process of negotiation after the breakdown of their marriage, which should logically provide the test for 'consideration'. This would have the effect of loosely conferring or deeming 'consideration' for the purposes of section 120(1) upon most transfers which are the result of section 79 orders. While it may be thought that this may open up a new loophole by which spouses may divest themselves of assets even where they continue to cohabit, the "good faith" provision in the subsection and the fraudulent transfer provisions of the Act should provide sufficient protection against abuse.

Section 120(2) does not present such great difficulties in relation to settlements made pursuant to Family Court orders or in the purchase of property as referred to above. In determining whether a person is able to pay his debts, it has been held that regard must be had to all his realisable assets and that a mere temporary liquidity problem is not sufficient.[5]

3. Voidable Preferences

Where a debtor who is unable to pay his debts as they fall due, makes payments or transfers property within the six months before the presentation of the petition on which he is made bankrupt, and those transactions have the effect of preferring one creditor over another, they are void against the trustee or receiver (section 122). It is not necessary that the debtor intended

5 *Rees* v. *Bank of N.S.W.* (1964) 111 CLR 210.

to prefer a creditor, only that it have the effect of doing so.[6]

Transfers of property pursuant to maintenance orders and agreements are afforded specific protection by section 122(2)(c) of the Bankruptcy Act. But transfers of property made pursuant to Family Court orders within the six months before bankruptcy would be a preferential payment to the other spouse as a creditor under the Court order. Those transfers are not afforded specific protection and can only be saved if they fall within the general exception of section 122(2). As with the relation back provisions, the transfer must not only be for consideration but be in the ordinary course of business (section 122(2)(a)).

4. Fraudulent Dispositions

A disposition of property made at any time with intent to defraud a creditor or creditors, and not being a disposition for valuable consideration to a person who acted in good faith, is void against the trustee (section 121(1)). A transfer pursuant to a section 79 order may be set aside under the Bankruptcy Act if all the surrounding circumstances show that the division was made with the aim of hindering or delaying creditors.

Surprisingly, maintenance orders and agreements appear to be rendered immune from this voiding provision. This is because of the extraordinarily wide drafting of section 123(6). While contained within a section dealing only with exemptions from relation back, section 123(6) states that "nothing in this Act" shall invalidate transfers made pursuant to maintenance orders or agreements. It may well be that this sub-section was meant to read 'nothing in this section' or 'nothing in section 116(1)' and that its present phrasing is a drafting error. Nevertheless, on a literal interpretation, section 123(6) protects maintenance agreements and orders from the provisions relating to fraudulent dispositions.

If the effect of this section is to give this blanket immunity to these orders and agreements, whether fraudulently made or obtained, the immunity is obviously too far reaching. There are sound reasons for immunising genuine maintenance against relation back, voluntary settlement and voidable preference. A choice has to be made between the policy of encouraging the bankrupt to support dependants in order to prevent their reliance upon State provision, and the policy of maximising resources in the bankrupt's estate for the benefit of creditors. Consistent with the priority given to the first policy, that of the private obligation to maintain, are the mirroring provisions in the Bankruptcy Act, by which a bankrupt can retain the proceeds of an execution or attachment under a maintenance order or agreement (sections 118(2), 119(6)).[7] Similarly, a maintenance creditor's right of action against the non-sequestrated property of a bankrupt is not stayed by bankruptcy along

6 *Re Stevens* (1929) 1 ABC 90.

7 Maintenance which the bankrupt receives by way of income would be exempt (s.116(1) subject to any order of the court under s.131). Anomalously, lump sum maintenance or maintenance applied to acquire property falls into the bankrupt's estate for division among creditors.

with other creditors (section 58(3)) but may be pursued independently (section 58(5A)).[8] Discharge (compare with sections 149, 150) will also not release the bankrupt from maintenance obligations unless the bankruptcy court so orders.

Nevertheless, the immunity conferred by the Act has two serious defects. It is both too narrow, and too wide. It is too wide because of the susceptibility of these arrangements to collusion, particularly where they are registered by consent under section 86 of the Family Law Act. These agreements may be filed without the necessity of Court approval. In addition, the definition of maintenance (and the financial matters this may deal with) in section 4 of the Family Law Act and as adopted by section 5 of the Bankruptcy Act, is particularly broad. A maintenance agreement may bestow rights of occupation in the family home, with the effect of preventing the creditors from realising the asset on bankruptcy. A maintenance agreement may also bestow rights on third parties. In *Gazzo* v. *Comptroller of Stamps (Vic.); ex parte Attorney-General for Victoria*, Gibbs C.J. said in relation to this definition:

> [i]t is very wide in its scope and includes many agreements that could not be described as 'maintenance agreements' in the ordinary sense. Although an agreement will not fall within the definition unless it was made between the parties to a marriage ... such an agreement may have other parties as well. Although a maintenance agreement must make provision with respect to 'financial matters', it may also make provision with respect to other matters. Even if the agreement is made only between the parties to a marriage, and is made only with respect to 'financial matters', it may not arise out of, or be concerned with, the matrimonial relationship. For example, one former spouse may agree to buy from the other, property which was never matrimonial property, and such transaction may have been purely a business transaction which had nothing to do with any obligation on the part of one spouse to maintain the other. If the agreement, in so far as it is made between the spouses does concern matters arising out of the matrimonial relationship, it may nevertheless include an agreement with some other person who has no connection whatever with the marriage. For example, if the spouses

8 The spouse may also prove for a maintenance debt or maintenance arrears to the extent provided in the legislation. At present under s.82(1A) of the Bankruptcy Act a provable debt will include,

(a) a *periodical sum* that became payable by the bankrupt before, but not more than one year before, the date of the bankruptcy under *a maintenance agreement* or *maintenance order* (whether entered into or made, as the case may be, before or after the commencement of this sub-section); and

(b) *a lump sum* (whether payable in one amount or by instalments) that *became payable by the bankrupt before the date of the bankruptcy* under *a maintenance agreement* or *maintenance order* (whether entered into or made, as the case may be, before or after the commencement of this sub-section) [emphasis added].

S.82(1) of the Bankruptcy Act also provides:

> Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of bankruptcy, or to which he may become subject before his discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his bankruptcy.

This section does not catch all other maintenance liabilities. Future periodic payments of maintenance have been considered insufficiently final or uncertain (*Linton* v. *Linton* (1885) 15 QBD 239) to be proved in bankruptcy. A full discussion of the enforceability of maintenance is beyond the scope of this article, but see R.A. Allen, "Bankruptcy Notices and Family Court Judgments" (1983) 57 *ALJ* 626.

agree to sell the matrimonial home and divide the proceeds equally, the agreement to that effect may be embodied in a document which contains also an agreement between the spouses and the purchaser of property.[9]

The parties to a marriage could together, or with a third person such as a family company, put beyond the bankruptcy jurisdiction all property of the bankrupt spouse. Prior to bankruptcy and in the relation back period, a bankrupt husband can enter into an agreement with his wife, by which he undertakes to transfer all of his property to the wife for her use and benefit and for her maintenance and for the maintenance of their children. The agreement could be registered by consent as a maintenance agreement pursuant to section 86 of the Family Law Act. The husband could then continue to live with his family in apparent harmony. This flagrant abuse of Family Law Act procedures would be immune from attack by the trustee in bankruptcy and the property would be beyond the reach of creditors.[10]

On the other hand, the immunity conferred by the Act is too narrow, because it fails to protect property orders. The apparent justification for this policy is that maintenance rights are different in kind from capital rights under section 79 of the Family Law Act. However, this is not the case. Maintenance may be payable in a lump sum and have a capital component, such as to enable a spouse to obtain housing.[11] Property orders may conversely contain a maintenance element. The matters to be taken into account in a property division under section 79 include contributions (financial and non-financial) to property and to the welfare of the family, and the respective future needs of the parties. As regards the needs of the parties, section 79(4)(d) directs the court to refer back to the "maintenance" factors set out in section 75(2) of the Act. While a property order is not to be confused with an order for maintenance, maintenance factors can, in some cases, greatly influence how property is divided. Take the hypothetical case of a couple who are asset rich but income poor – a husband who is retired and in receipt of superannuation instalments upon which both husband and wife are dependent. Transfer of the housing equity to the wife via property settlement may be the device used to redress any imbalance in the future needs of this couple. This property order has a significant maintenance component, despite the fact that it is difficult to quantify. Thus, as the Act is presently structured, the dichotomy between maintenance and property orders is not altogether clear. The question is, should that transfer, pursuant

9 (1981) 38 ALR 25, 28.

10 This proposition has recently been confirmed in the Supreme Court of Western Australia, in *Melsom* v. *Mullen* (1985) FLC 91-611. In this case a deed was registered in the Family Court under s.86 which provided for the transfer of real property from the husband to the wife as trustee to provide lump sum maintenance for the children. After the husband's bankruptcy the trustee in bankruptcy sought a declaration that the conveyance would be void for being a fraud on creditors under s. 89 of the Property Law Act 1969. An injunction was sought to restrain transfer of the property pursuant to the deed. The injunction was refused on the basis that, as a matter of law ss121 and 123(6) of the Bankruptcy Act would prevail over s. 89, and the deed could not be attacked.

11 *Anast and Anastopoulos* (1982) FLC 91-201. *Cf.* s. 87 agreements which may cover both property and maintenance rights.

to a section 79 order, be protected against the husband's bankruptcy?

5. Options for Reform

There are a number of ways in which these anomalies in the Bankruptcy Act could be ironed out, depending upon the priority to be afforded to the debtor's spouse *qua* creditor:

(a) property orders under section 79 could be afforded the same protection as maintenance orders or agreements, including relief from stay (compare with section 58(5A)) and protection against discharge;

(b) alternatively, the Bankruptcy Court could be empowered to look behind maintenance orders and agreements, and section 79 orders, in order to distinguish reasonable financial provision from property re-distribution. An inquiry of this sort, although giving rise to difficulties of construction, is conducted by the Bankruptcy Court in the United States.[12] Still, the forensic difficulties should not be underestimated. It is difficult to identify the 'needs' element in a section 79 judgment,[13] or in the quid pro quo that characterises a negotiated settlement. It may be placing an unreasonable burden on judges exercising bankruptcy jurisdiction to look behind the motives of judges exercising family law jurisdiction, or to determine the real character of the rights being dealt with;[14]

(c) in either event the immunity bestowed upon maintenance under section 123(6) should be 'rolled back', and made subject to the fraudulent disposition provisions of section 121. In addition, the Family Court could be empowered to set aside maintenance agreements for fraud on third parties. At present section 86(3) and section 87(8) of the Family Law Act only permit the setting aside of a maintenance agreement by reason of fraud on a party to the agreement. By contrast section 79A(1)(a) does provide for the setting aside of an order under section 79:

> Where, on application by a person affected by an order made by a court under section 79 in proceedings with respect to the property of the parties to a marriage or either of them, the court is satisfied that –

12 See J.J. Cohen, "Congressional Intent in Excepting Alimony, Maintenance, and Support From Discharge in Bankruptcy" (1982-83) 21 *J Fam L* 525; C.D. Young, "Dissolution of Marriage and the Bankruptcy Act of 1973: 'Fresh Start' Forgotten" (1977) 52 *Ind L J* 469; P.L. Schiffer, "The New Bankruptcy Reform Act: Its Implications for Family Law Practitioners" (1980-81) 19 *J Fam L* 1; J.M. Tucker, "The Treatment of Spousal and Support Obligations Under Chapter 13 of the Bankruptcy Reform Act" (1982) 45 *Tex B J* 1359.

13 Contrast the tentative proposals of the Australian Law Reform Commission as to the replacement of s.79 with a three stage process, with maintenance quantified in the final stage: *Matrimonial Property Law*, Discussion Paper No. 22-1985.

14 In *Re Jensen; ex parte Jensen* (1982) FLC 91-282, Fitzgerald J. characterised a Family Court consent order, described in its own terms as being "by way of property settlement" as being in reality a maintenance order. His Honour held that because the order provided for the payment of a sum of money by instalments without specifying a particular fund from which the payments were to be made it could not be an order for the division of property under s.79.

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;

It is arguable that "a miscarriage of justice" is not limited to a fraud on parties to the order, but could also include a miscarriage of justice in so far as there has been a fraud on third parties – namely, creditors. On this interpretation, the phrase, "a person affected by an order" already gives a trustee standing to apply to the Family Court to have a section 79 order set aside.

II. BANKRUPTCY PRIOR TO MATRIMONIAL PROCEEDINGS

In this section, we deal with the situation where the marriage has broken down and the parties intend to seek a definition of their rights under the Family Law Act but the bankruptcy of one of them intervenes.

If the bankruptcy comes first, it will generally not be possible or practicable for either party to subsequently institute Family Law proceedings against the other in respect of property or maintenance. The general rule is that a bankrupt may not commence legal proceedings without the consent of the trustee and those proceedings are in any event to be pursued by the trustee. Proceedings under the Family Law Act for maintenance and property are probably an exemption to this general rule because they are actions *in personam* rather than *in rem.* Nonetheless, any property which a bankrupt was ultimately to receive as a result of such proceedings would fall within the definition of "after acquired" property and vest immediately in the trustee to be divided amongst the creditors. In other words, the bankrupt spouse would be litigating for the benefit of his or her creditors.

On the other side of the coin, it would be pointless for the bankrupt's spouse to pursue family law proceedings against the bankrupt after the bankruptcy simply because there is no longer any property against which a section 79 order could bite.[15] Of course, in the fortunate situation that a surplus arises (section 148), this may later form the subject-matter of a property order under Part VIII of the Family Law Act.

So, a prior bankruptcy will in most circumstances have the practical effect of barring subsequent proceedings under the Family Law Act and of depriving the spouses of the entitlements which they might otherwise have received under the Act. The only way in which the spouses could gain some of these entitlements would be to somehow 'hold-off' bankruptcy or 'roll it back' to permit the spouses rights under the Family Law Act to be determined. This would permit the spouse to receive property which might either subsequently be protected in the bankruptcy or if it is not, then for him or her to have a debt which will be provable along with those of the other creditors.

15 S. 58 Bankruptcy Act 1966 subject to exemptions set out in ss 116(2), (3) and (4); see: *Re Trigg; ex parte Trigg and the Official Receiver* (1978) 25 ALR 207; *Page and Page (No. 2)* (1982) FLC 91-241; Nor can a s.79 application be proceeded with on the basis of *lis pendens*: *Wallmann and Wallmann* (1982) FLC 91-204.

Section 85(1) of the Family Law Act gives the Family Court statutory powers to set aside dispositions which have the effect of defeating an order or claim under the Family Law Act. It provides that

> In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

Recent case law has thrown light on the ability of the Family Court to set aside bankruptcy under section 85 of the Family Law Act. In *Milland and Milland*[16] the Full Court of the Family Court accepted that a Deed of Assignment is an instrument or disposition which may attract the avoiding provision of section 85. The husband had called a creditors meeting under section 188 of the Bankruptcy Act and executed a Deed of Assignment with his creditors under Part X. At that point the husband was divorced from his wife, but a property or maintenance order had yet to be made. The wife sought an order under section 85 on the basis that the Deed was a "property settlement avoidance scheme" which was entered into to frustrate her claims under the Family Law Act.

The Court at first instance held that the validity of the Deed was within the exclusive jurisdiction of the Federal Court. Under section 222 of the Bankruptcy Act the wife could have struck down the Deed for failure to comply with the provisions of Part X. On appeal, the Full Court held that the Family Court could set aside the Deed. They held that the Bankruptcy Act did not give the Federal Court exclusive jurisdiction over Deeds.

> The fact that two different Courts may have jurisdiction to set aside a deed may give rise to some difficulties, if there are concurrent proceedings, but this is not an insuperable obstacle, as each court acts under different grounds.[17]

The Family Court's power under section 85 may theoretically extend a long way beyond the particular circumstances of *Milland's* case. Section 85 permits the Family Court to set aside dispositions or transfers whether or not there has been mala fides or evasive intention on the part of the debtor. Despite this, it is unlikely that the Court *would* set aside a Part X agreement in such circumstances, particularly where the administration is so far advanced that the effect would be to frustrate creditors and interfere with the rights of other third parties. In *Holley and Holley*,[18] the wife applied for dissolution and property orders after the husband entered into a Deed of Assignment with creditors. The Full Court refused to interfere with the decision of the trial judge not to exercise his discretion to set aside the deed. The Court emphasised that the section itself requires a judge to take into account the interests of bona fide third parties in the exercise of his or her discretion. In this case third parties had relied upon a contract to purchase the debtor's property. Further, they had been encouraged in that transaction

16 (1981) FLC 91-065; *cf. Davies* v. *Davies* (1980) FLC 90-868.
17 *Milland* v. *Milland* (1981) FLC 91-065, 76,504.
18 (1982) FLC 91-257.

by the debtor's wife. The Court also pointed to the fact that the husband had not willingly entered into a Part X agreement to defeat the wife's claims, but rather had taken action to stay ceditors at the instigation of his wife.

If proceedings have been commenced under Part VIII of the Family Law Act, and property has been sequestered as a result of a creditor's petition, the Family Court will probably not be able to set aside the bankruptcy under section 85. In *Wallmann and Wallmann*,[19] Murray J. held that "the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party" could not be equated with the making of a sequestration order by a court of competent jurisdiction following a proper judicial inquiry. A transmission of property did not come about because of the husband's action, in this case, but "simply as a statutory consequence of bankruptcy". Therefore section 85 could not be used to set it aside.

In those cases outside the reach of section 85, the remedy for the spouse (as a person "aggrieved" or "interested" in the matter under section 303 of the Bankruptcy Act) would be to apply for an annulment of sequestration. Under section 154(1)(a) of the Bankruptcy Act the Bankruptcy Court must be satisfied that

> a sequestration order ought not to have been made or, in the case of a debtor's petition, that the petition ought not to have been presented or ought not to have been accepted by the Registrar.

Thus only in the limited circumstances where a petition is an abuse of process because it is a deliberate attempt to forestall Family Court proceedings, and the debtor is actually able to satisfy liabilities, may the Court annul the sequestration.

Still to be resolved is whether section 85 may be used to set aside a bankruptcy on a *debtor's* petition. Here there is no order of the Court sequestrating the debtor's estate, and the petition is presented to the Registrar in Bankruptcy and not the Court. The answer may turn upon the fine distinction as to whether the debtor's property vests by reason of the presentation of the petition or by reason of the order.

Where a spouse has merely set the wheels in motion under Part X of the Bankruptcy Act, or foreshadowed a debtor's petition, and proceedings have already been instituted for orders under Part VIII of the Family Law Act, the Family Court may have some power to 'hold back' the bankruptcy until it defines the rights of the spouses under the Family Law Act. The Family Court has very wide injunctive powers over spouses under both sections 114 and 85 of its Act. The Court could restrain a spouse or his agent or solicitor from presenting a debtor's petition or preparing the requisite documents or giving the required notice for a creditors meeting. This would then given the bankrupt's spouse an opportunity to seek a definition of his or her rights under the Family Law Act.

On the other hand, where the bankruptcy proceedings are set in motion by a creditor, the Family Court probably has no power to stall the

19 Wallmann, note 15 *supra*.

bankruptcy pending the exercise of its own jurisdiction. The High Court has held on a number of occasions that the Family Court has little power under its Act to affect the rights of third parties. In the recent decision of *Re Ross-Jones J; ex parte Green*[20] the High Court reaffirmed this view in relation to proceedings brought by a creditor against a spouse. In this case, the creditor, Mrs Green had obtained a judgment on a loan to her son-in-law. He, in turn sought an indemnity from his wife in relation to this debt in the Family Court property proceedings. A Family Court judge temporarily restrained the mother-in-law from proceeding with her debt recovery action, pending a decision on the wider question of whether the Family Court could postpone these proceedings until after the completion of the section 79 proceedings. The High Court quashed these temporary orders made by the Family Court against Mrs Green, on the basis that as the Family Court had no substantive jurisdiction to determine or alter third party rights, it had no injunctive power to prevent a third party proceeding to exercise those rights.

Even if the Family Court does have some power to hold back bankruptcy, this is of little practical benefit as the liabilities which created the bankruptcy must still be taken into account in the calculation of the property available to be divided between the spouses. That is, while the Family Court might postpone the process of bankruptcy it cannot rearrange liabilities.[21] In *Prince and Prince*[22] the wife separated from her husband after ten years of marriage and commenced section 79 proceedings. At that time the estate was worth in the vicinity of $9.6 million and the wife could reasonably have expected to receive a substantial share. The hearing was set down for over a year and a half later. In the meantime, the former husband executed an indemnity in favour of a finance company in relation to a mortgage. The mortgagor defaulted, and the finance company issued proceedings in the Supreme Court of Queensland against the husband and others in the sum of $9.5 million. The majority of the Full Court held that the section 79 proceedings could not proceed until the size of the husband's obligation to the finance company was determined by the Supreme Court.

In this case the size of the contested liability was overwhelming in comparison to the remainder of the distributable estate. One can nevertheless postulate cases where the amount of unencumbered assets gives the court sufficient ambit to make a section 79 order.[23] However, by parity of reasoning it would seem to be unlikely that the Family Court would exercise its jurisdiction once a bankruptcy petition is issued, and the question of general insolvency is raised. In this event the identification of distributable assets would be impossible.

We would therefore argue that a petition in bankruptcy will invariably preclude a spouse from pursuing or commencing an application for property

20 (1984) FLC 91-155.
21 *Pockran and Crewes; Pockran* (1983) FLC 91-311.
22 Full Court of Family Court (1984) 54 ALR 467.
23 *Cf.* Evatt C.J. in *Prince, id.*, 473, 474.

division. Therefore the race to have a property matter determined before a notice of bankruptcy is issued, can have dramatic consequences.

1. Options for Reform

This section raises two different types of policy issues. The first issue concerns abuse of process, namely the bankruptcy under Part X or by debtor's petition which is embarked upon to evade the jurisdiction of the Family Court. Remedies exist under section 85 of the Family Law Act. Sections 222, 236 and 242 of the Bankruptcy Act also provide a limited basis for setting a deed or petition aside. Here the Bankruptcy Court must be satisfied that terminating the deed would be in the interests of creditors. The interests of the spouse who is a maintenance creditor, or a putative creditor under section 79 are not recognised. Indeed, a spouse is prohibited from voting at the creditors' meeting held to decide upon a Deed of Arrangement, despite the fact that the decision taken will affect his or her standing *qua* creditor.

Theoretically, expanded grounds for review could be inserted into section 154(1)(a) of the Bankruptcy Act to annul sequestration on a debtor's petition, and similar amendments could be made to sections 222, 236 and 242 to permit review of the debtor's evasive intentions. However, if the obligations to creditors are genuine, what does it matter that the debtor has accelerated his decline into bankruptcy, with the intention of keeping property from his or her spouse?

The second and more difficult issue, concerns the fact that the substantive claims of spouses to a division of property are, in practical terms, forestalled once bankruptcy proceedings are commenced. There may be some rough justice in this approach. The reason often given for not sheltering a spouse from the consequences of the other's bankruptcy is that the non-debtor is implicated in the financial misadventure and must take the swings with the roundabouts. Just as a spouse may have *contributed* to the building up of assets, so he or she may have contributed to their dissipation, or have participated in unwise financial ventures.

This approach does not reflect the circumstances of Mrs Prince's case. Here, the liability was incurred after divorce, in the long period before the fixing of a property hearing. Had *Prince* proceeded to a property hearing, responsibility for the way debts were incurred or assets run down may have been attributed to the husband and compensating transfers of property may have been made by the Family Court in the process of dividing the property. One answer to this problem might be simply to remedy procedural delays in contested property matters. After all, spouses are protected to the extent that they have separate property, from the bankruptcy of the other spouse. The loss of the property of the other spouse is merely fortuitous. Or is the resolution of Mrs Prince's dilemma to make her inchoate rights to matrimonial property, capable of being proved in bankruptcy? If so, how could this be achieved?

One way would be to deem inchoate rights to matrimonial property to be

rights *in rem*, for the purposes of proving them in bankruptcy. But this is somewhat fanciful in that section 79 requires an assessment of the property and respective financial resources of the parties before redistribution. The rights of third parties cannot be affected nor liabilities ignored. Therefore, the assessment of the provable debt under section 79 cannot take place until all other debts are proven in bankruptcy and arguably, the period prior to discharge estimated. In other words the Court exercising powers under section 79 must stand behind all the creditors and look forward to property that will be surplus, or in reversion, before it can estimate the provable debt.

Another avenue would be to create a matrimonial property regime in which rights to a spouse's property vest during marriage. This occurs in overseas community property regimes. But a host of new problems would emerge. Is it worth introducing machinery of this complexity to solve the problems under discussion? In many community property regimes spouses are implicated in each other's debts, despite possible opposition to the assumption of liability in the first instance.[24] The non-debtor spouse may himself or herself be drawn into the bankruptcy.

In the absence of vested matrimonial property rights in Australia, a gap will continue to exist whereby the spouse without significant separate property may lose out if he or she has been unable to obtain a property division or lump sum maintenance prior to bankruptcy. This is despite the fact that the spouse may have contributed to the building up of property and played no part in its dissipation.

III. BANKRUPTCY WHERE NO MATRIMONIAL PROCEEDINGS

The spouse whose marriage has soldiered on in the face of declining fortune is in a disadvantageous position on bankruptcy. The needs of the continuing economic unit for home and household goods will often depend upon the largesse of the trustee in bankruptcy. The fact that such goods are jointly owned will not necessarily preclude sale. Where separate property of the bankrupt's spouse has been lent or made available to the bankrupt, these debts will be deferred to the claims of other creditors.

It may be argued that this disadvantage is inevitable. If marriage is to be considered an economic partnership, the partners must stand back and help bail out the firm. However the treatment of spouses bears closer examination.

1. Deferred Claims

Any money or other property "made available or lent" by a spouse to the

24 Even in the model community property regime promulgated by the United States Commissioners in Uniform State laws in 1983 (the Uniform Marital Property Act) this problem has not entirely been resolved, because of the presumption that a debt of the other spouse is incurred for a family purpose: U.M.P.A. para. 8(a). For a useful summary of this problem, see K.D. Ross, "Sharing Debts: Creditors and Debtors Under the Uniform Marital Property Act" (1984) 69 *Minn L Rev* 111.

other spouse who subsequently becomes bankrupt, is to be treated as an asset of the bankrupt's estate. The spouse is only able to prove its value as a deferred creditor, that is he or she will only receive a dividend after the other creditors have been paid in full (section 111).

The meaning of "lent or made available" has been considered in two High Court cases, and while the second purports to be consistent with the first, there are considerable differences in approach.

In *Gosling* v. *McCombie*[25] the wife purchased four pieces of land and registered them in the names of herself and her husband as joint tenants. The husband held his undivided moiety on trust for the wife. Two of the properties were mortgaged and the funds paid into a joint bank account upon which both had power to and did, draw. The third property was mortgaged to the bank, by deposit of a certificate of title, to secure an overdraft. The husband was made bankrupt and the trustee claimed the husband's undivided moiety in each of the four properties under section 111.

The Court held that a spouse who places the legal title to property in her spouse, but retains the equitable estate is not making that property available to her spouse within the meaning of section 111. However, Menzies and Walsh JJ. (Barwick C.J. dissenting) held that in allowing her husband to obtain money for his own use by mortgaging the moieties registered in his name, the wife made them available to him within section 111, and that the undivided moiety of the husband, vested in the trustee. Walsh J. said:

> [t]he expression 'made available' is one which has not any established technical meaning. In my opinion, the question whether or not property is caught by the section may be determined by considering whether or not the real effect of what has taken place is that the husband was enabled to carry out or take part in a dealing with his wife's property, in a way which but for her concurrence would not have been possible, which is similar to that in which he could have dealt with property which he himself owned and which gives to him a benefit or advantage.[26]

In *Thompson* v. *Smith*[27] the husband and wife executed a joint second mortgage over land in which they were both beneficially entitled, to secure a loan by a bank to the husband, to underwrite his business ventures. The wife signed on the condition that the husband would indemnify her for payments due under the second mortgage. The High Court (Gibbs, Mason and Aickin JJ.) held that the wife had not made available her share to the husband and that she had dealt with her own moiety herself, though in a way to benefit the husband. Gibbs J. (with whom Mason and Aickin JJ. agreed) distinguished *Gosling* on the basis that the wife had allowed the husband to deal with moieties that were beneficially hers.

In reaching his conclusion, Gibbs J. placed particular emphasis on the policy that seems to have laid behind the original provision in the Married Women's Property Act 1901 (N.S.W.). That is, though a married woman can hold property separately from her husband, where a third person has been

25 (1972) 126 CLR 487.

26 *Id.*, 506.

27 (1976) 51 ALJR 177; applied in *Farrugia* v. *Official Receiver in Bankruptcy* (1982) 43 ALR 700.

misled into thinking that it was her husband's property, she should not be able to turn around and assert that separate ownership.

If the narrower construction of Gibbs J. as to the meaning of "made available" is to prevail, then it seems illogical that the section should only apply to spouses. If the function of this provision is to deal with the marriage as a partnership, then commercial partners who have made funds available to their partnership, should also have their claims deferred on this basis according to the doctrine of reputed ownership. The British Review Committee on Insolvency Law and Practice (The Cork Committee) justified the analogous section 36(2) of the Bankruptcy Act 1914 (Eng.) on this basis.[28] They further recommended that the provision be extended to de facto relationships, but stopped short of including other "connected" individuals. If the rationale of these sorts of provisions is to be a holding out of ownership then there seems no logical reason why it should be limited between persons living in a personal relationship. We would argue that a preferable approach would be to implement more neutral holding out provisions which did not assume economic unity between husband and wife or between de facto husband and wife, although in practice it may well be that reputed ownership is more readily proven between persons in these relationships.

2. Jointly Held Property

Where spouses purchase a house as joint tenants or tenants in common and one spouse provides a proportion of the purchase price that is greater than his or her share in the ownership, this may, to the extent of the excess, be a settlement voidable within section 120(i). In the typical marriage where the house is jointly owned, but there have been unequal direct financial contributions to the purchase price, more than half of the equity may go into the bankrupt's estate.[29]

Further, the effect of bankruptcy will be to sever the joint tenancy so that the non-bankrupt spouse holds as tenant in common.[30] The trustee may proceed to sale against the wishes of the non-bankrupt spouse. This may be contrasted with the situation in England. Where joint tenants hold under a trust for sale, the court, under section 30 of the Law of Property Act 1925 (Eng) is vested with discretion to postpone sale. Admittedly this discretion is infrequently exercised against the interests of creditors. It may however benefit the few hard cases. In *Re Holliday*,[31] the wife had already petitioned for divorce and applied for property division when the husband filed a bankruptcy petition. She applied unsuccessfully to have the petition set aside as an abuse of process, and as an attempt to thwart her property division.

28 *The Report of the Review Committee on Insolvency Law and Practice* (The 'Cork Report') HMSO Cmnd 8558, paras 1132-1144.

29 *The Economic Consequences of Marriage Breakdown in Australia*, Institute of Family Studies (1985).

30 *Re Butler's Trusts* (1888) 38 Ch D 286.

31 [1980] 3 All ER 385.

The court did, however, postpone sale for five years to give the ex wife and three young children the benefit of occupation until the two oldest children would be over 17 years old. An important factor in the eyes of the court was the fact that the creditors were not clamouring for sale as it was a bankruptcy on the husband's own petition.[32]

It would appear that a very significant proportion of married people in Australia hold title to the home as joint tenants. The Institute of Family Studies Survey and the Court Survey by the Australian Law Reform Commission indicate a figure in the region of 70% of married people who own their home in this way. Among older couples the tendency to sole ownership appears to be more pronounced. It may also be that of those homes held in the name of one spouse only, the reasons for this arrangement include the desire to shelter the asset in the hands of the spouse who does not have precarious business or financial involvements. Hence it is reasonable to assume that restraints upon sale of a home subject to a joint tenancy would benefit the majority of non-debtor spouses. The degree of protection considered necessary can extend from rights of first refusal upon sale through to possible postponement of sale as described above.

3. Bankruptcy Exemptions

The exemptions set out in section 116(2), (3) and (4) of the Bankruptcy Act include, inter alia, property deemed necessary to sustain the bankrupt and preserve his or her livelihood. For example, sub-section 2(b) exempts

> necessary wearing apparel, necessary household property of the bankrupt (including any sewing machine used for domestic purposes) and such other household property of the bankrupt, if any, as the creditors by resolution determine.

The "necessary household property" exemption relies for its interpretation upon individual assessments by bankruptcy administrators; whereas "such other household property of the bankrupt" depends upon the generosity of the majority of creditors. It must also be remembered that questions of title to household goods tend to become submerged over time. Whether or not the administrator decides that they are owned by the bankrupt would tend to be resolved by prudence or negotiation rather than by clear legal presumptions. Goods relevant to the earning capacity of the bankrupt are also exempt subject to limits of $1,000.00 value but again the ceiling may be raised by a resolution of creditors, or by the Court. The operation of these exemptions is susceptible to conservative assessment, because of the duty upon administrators in bankruptcy to realize the full potential of the debtor's property. The exemptions as a whole have repeatedly been criticised as being

32 This discretion is infrequently exercised against the interests of creditors: according to K. Gray and P. Symes, *Real Property and Real People* (1980) 282-284; see C. Palley, "Wives, Creditors and the Matrimonial Home" (1969) 20 *N Ir L Q* 132; C. Hand, "Bankruptcy and the Family Home" [1983] *Convey* 219; *Re Turner (A Bankrupt)* [1974] 1 WLR 1556, 1558; *In re Bailey (A Bankrupt)* [1977] 1 WLR 278; *Re Densham* [1975] 1 WLR 1519, and *Re Lowrie; ex parte Trustee* v. *A Bankrupt* [1981] 3 All ER 353. For a judgment in favour of the non-debtor spouse in which the Court of Appeal postponed sale of the family home, see *Re Holliday* [1980] 3 All ER 385. In this case there was a low debt ratio to equity in the home.

in need of reform.[33]

In overseas jurisdictions, certain basic family assets have been singled out for special treatment in bankruptcy. In North America homestead-style provisions 'save' a portion of the equity of the matrimonial home from creditors. In the United States, the Bankruptcy Amendment Act of 1978 created a system of federal bankruptcy exemptions. An individual debtor may choose between Federal or State (homestead) exemptions, unless the State of domicile has opted out of the Federal scheme altogether. In fact, a majority of States have opted out. The State exemptions can, however, be extremely generous. In California the exemption is $30,000. This sum may be increased to $45,000 where for example the debtor or the debtor's spouse is 65 years old or over.

The Federal exemptions offer the debtor as part of a package of exemptions, an exemption of up to $7,500 in a property used as a residence, free from the claims of certain creditors. In addition, there is what is known as a 'wildcard' exemption of $400, to which the unused part of the $7,500 residence exemption (up to the value of $3,750) may be added. This gives a potential 'wildcard' of $4,150, and it can be used to protect otherwise non-exempt proprerty or to raise the level of available exemptions. For example if a debtor only has a $6,000 equity in a home, the unused $1,500 may be added to the $400 general exemption and used to make a totally exempt motor car worth $3,100.

As the 'wildcard' was originally conceived, all of the unused $7,500 could be added to the general exemption. From a housing point of view, this equalised home-owners and renters. Debtors who lost this exemption could transfer it to raise the exemption on other exempt property. However, in the face of pressure from credit organisations, debtors lost 50% of the $7,500 exemption under the 1984 Bankruptcy Reforms Act and are now only able to apply $3,750 of that amount to exempt other property.

These generous family home exemptions in the United States derive from nineteenth century homestead legislation which aimed to protect land settlers from the destabilising effects of foreclosure. The federal bankruptcy reforms have similar origins – the philosophy of a 'fresh start' which is in the interest of the bankrupt and in the interests of the economy. Small business is encouraged to take risks; if the venture fails, the debtor is to be encouraged to start again. Home occupation is considered part of this fresh start.

In Australia bankruptcy exemptions are viewed as a form of minimal relief to the debtor. They provide for bare essentials and may at one time have prevented the bankrupt from falling back onto the State. Contemporary Australian social values may well determine that housing is as essential as clothing and personal belongings in this regard.

The suitability of enlarging bankruptcy exemptions is presently under

33 *Cf.* D.Sgt L. Kelly, *Debt Recovery in Australia* 73-78, in Law and Poverty Series, AGPS, and by the same author, *Insolvency; the Regular Payment of Debts*, para. 167, Law Reform Commission Report No. 6 (1977).

review in Australia, as part of an inquiry into general insolvency law by the Australian Law Reform Commission.[34] The issues raised by this paper suggest that it may be desirable for exemptions to reflect not only the needs of the debtor but the interests of the spouse or dependants.

IV. THE FUTURE DIRECTION OF REFORM

In this article we have explored the anomalous treatment of family law orders in the bankruptcy jurisdiction, and suggested possible amendments to the Bankruptcy Act and Family Law Act to prevent collusion and to protect property orders from the retrospective provisions of the Bankruptcy Act.

The injustice which might befall the non-debtor spouse when bankruptcy takes place prior to matrimonial proceedings is less easily 'cured', because of the complex issues involved. A suitable avenue for reform may be via bankruptcy exemptions. Certain assets in the bankrupt's estate could be preserved, bearing in mind the bankrupt's responsibility for his or her dependants. And the most obvious asset, in the Australian context, is the family home.

No current evidence is available in Australia about the importance of housing equity as a realisable asset in bankruptcy. This is an area deserving of attention and research in view of the escalation of bankruptcies in the past decade.[35] However, recent research does reveal that the home is the most valuable asset for the majority of divorcing couples in Australia, particularly if superannuation is excluded from the matrimonial property pool.[36] Reforms which more fairly distributed the value or use of this asset between the bankrupt, the bankrupt's spouse and creditors, would go some way to reconciling the competing interests of spouses and creditors, irrespective of whether proceedings had been commenced under the Family Law Act.

In New Zealand, under their Matrimonial Property Act 1976, only the non-owner spouse may claim the benefit of a protected interest. They are considered to be bearing the cost of a deferred community property regime, in which the creditors of the owner spouse may whittle away at the matrimonial property before an order can be made under the Act. The protected interest prevents the non-owner's putative claim from being eroded to meet the unsecured personal debts of the owner-spouse.

The sum is arrived at first, by looking at the specified sum (currently NZ $21,500). Second, by calculating half the equity in the home by deducting all the secured debts. Third, by calculating the share obtainable were a property application to take place between the spouses under the Act. Take the smaller sum, and as a fourth step, deduct all non-personal debts (that is matrimonial debts defined by the Act). This net sum is available to the non-

34 *General Insolvency Inquiry*, Australian Law Reform Commission, Issues Paper No. 6 (1985).
35 *Annual Report by the Attorney-General on the Operation of the Bankruptcy Act 1966*, AGPS (1984) Schedule 2 – Part B.
36 Note 26 *supra*.

owner spouse either upon execution by a creditor, or upon bankruptcy.

Given that a very substantial number of matrimonial homes appear to be jointly owned in Australia, it may be considered that New Zealand type provisions which protect the non-owner spouse are irrelevant. On the other hand such provisions could be tailored to benefit the spouse who already owns a share of the property and is in jeopardy of having that share whittled down in the bankruptcy.

The problem with protected interests in the home as transferable bankruptcy exemptions such as the housing 'wildcard', is that they provide a very rough social measure of a debtor's needs or the needs of a spouse or family. If housing was taken as an indicium of need, at what level should the exemption be set? The more substantial the sum, the greater the infringement upon the rights of unsecured creditors, and the greater the likelihood that the exemption would be used to shelter non-necessary assets. A sum set uniformally throughout Australia would not reflect the enormous differences from one State to another in the cost of private housing or the availability of public or private rented accommodation.[37]

A further problem is the basis of eligibility for the exemption. Not all spouses are financially dependant and for them the protected interest will be a welcome but unrequired 'windfall'. Some may be financially implicated in all but name in the bankruptcy and they are to the extent of the protected interest sheltered from the consequences of their own acts. An added dimension to policy formation in this area is the introduction of the Sex Discrimination Act 1984 (Cth). Section 26 of that Act provides that

> It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's sex, marital status or pregnancy, in the peformance of that function, the exercise of that power or the fulfilment of that responsibility.

"Marital status" is defined as "the status or condition of being single, married, separated, divorced, widowed or the de facto spouse of another person". "De facto spouse" means a person of the opposite sex who lives with a person as husband or wife on a bona fide domestic basis although not legally married (sub-section 4(1)). Section 40(1) exempts acts done by a person in direct compliance with "any other Act, any State Act, or any law of a Territory, in force, at the commencement of this Act." However this exemption is to expire two years after the commencement of the Sex Discrimination Act (in August 1984). Revised Bankruptcy exemptions which unreasonably privilege married people would offend the spirit of the Sex Discrimination Act.

Finally, protected interests do not save the home from sale, they generally just compensate for loss of housing equity by means of cash payment. Hence, if the object is to preserve a roof over the bankrupt's family,

37 Sophie Watson, *Housing after Divorce*, Research Paper No. 2, Matrimonial Property Inquiry, Australian Law Reform Commission (forthcoming).

restraints upon sale may be seen as a better and more effective way of achieving this. In England, the Cork Committee recommended that the new Insolvency Act should extend the powers of the Court to postpone sale of the family home, where the title is in the name of one spouse only. The Report recommends that sale should only be achieved without application to the Insolvency Court in limited and specified circumstances, such as where there are no dependent children or parents and the wife has made an informed consent to the sale in writing. The Report defines a family home and sets out the social and financial circumstances to be taken into account by the court in exercising discretion. It also provides that if the family home is already the subject of matrimonial proceedings, then any claim relating to that property should remain with the Family Division with the trustee having a right to be heard.[38]

It is not entirely clear, how, under the Cork proposals, the court could steer a path through two incompatible interests – the social needs of the family and the commercial rights of creditors. Following the passage of the Insolvency Bill through the Committee Stage of the House of Lords this year, the Governemnt published a White Paper setting out with greater clarity the factors a court must consider when contemplating an order for postponement. It also throws the burden of proof for postponement onto the debtor, instead of the trustee. The court is directed to consider the prospect of the applicant securing alternative accommodation, either from income, or from other sources which are to include local authority housing. This provision deflects criticism that a debtor and his or her family should not be allowed to luxuriate in over-adequate housing at the expense of creditors. Also to be considered is the extent to which an applicant is implicated in the bankruptcy, and the extent to which the home itself has been acquired or improved with funds or benefits provided by unsecured creditors. In other words, rather than affording a 'blanket protection', the Cork proposals have been reworked to provide a 'safety net' for the more needy cases.

In Australia, it may be considered that protections that attach to the home upon bankruptcy are worth striving for. They recognise the interests of the non-debtor spouse to a share of the matrimonial home or to continued occupation in some circumstances but at the same time do not shut out creditors from the due satisfaction of debts owed to them.

The Australian Law Reform Commission is concurrently conducting major reviews of both Matrimonial Property Law and Insolvency Law. A convenient opportunity exists to rethink the relationship of creditors and spouses under both the Bankruptcy Act and Family Law Act within a consistent and coherent framework. It will probably never be possible to strike a complete balance between the competing interests of a bankrupt's family and his or her creditors but at least a fairer, and more rational, trade-off could be found.

38 Note 28 *supra* paras 1124-1131.