SCRUTINISING THE BANKRUPTCY JURISDICTION IN FAMILY COURTS

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November 2007

Ordinarily the parties to proceedings in the Family Law jurisdiction are the parties to the marriage. Third parties who may or may not be affected by those proceedings were often unaware of action between spouses. Action between spouses relating to property would usually affect the property rights of one spouse vis-à-vis the other. In addition, however, orders might also affect a creditor – if only because orders made may distribute property rights to one spouse or the other and, in the absence of a legal or equitable interest in a particular piece of property, the creditor's capacity to recover by sequestration or seizure and sale of a particular piece of property might be eliminated because that piece of property was placed in the hands of one of the non-debtor spouse.

If proceedings were conducted honestly and above board, then the legitimate interests of creditors should normally be taken into account. We are all familiar with step one in any property settlement proceeding – that is, to identify the pool of assets and liabilities – which, of necessity, requires the parties to identify the assets AND the liabilities.

The Court does not ignore legitimate liabilities – even contingent ones - although some debts were disregarded, for example where the Court concluded that the alleged liability was unlikely to be called up (*Af Petersens and Af Petersens* (1981) F.L.C. 91-095), or it is vague and uncertain, or, in some circumstances if it was unreasonably incurred (*Biltoft v. Biltoft* (1995) F.L.C. 92-614; *Kimber v. Kimber* (1981) F.L.C. 91-085; *Kowaliw v.*

Kowaliw (1981) F.L.C. 91-092). However, it would be rare that the Court was concerned to ensure the creditor was given notice unless there was clear evidence that a creditor had an interest in a particular property item in relation to which an order was sought or likely to be made.

In proceedings between spouses relating to the division of property on the break down of the marriage, the Court takes the property of them (or of either of them) as it finds it. The 'bankruptcy jurisdiction' collides with the family law jurisdiction in a number of respects. The most important relate to:

- third party rights as against a party or the parties to a marriage; and
- the capacity of either party to obtain relief under the *Family Law Act 1975* in the event the other party to the marriage is or becomes bankrupt prior to the final determination of proceedings brought under the Act for property settlement or spousal maintenance.

The second situation has traditionally posed particular practical problems, because, on the making of a sequestration order, the property of the party vested in the trustee for bankruptcy (*see section 58 of the Bankruptcy Act 1966).* Notwithstanding the property would have been available for distribution between spouses under the *Family Law Act 1975*, on bankruptcy, jurisdiction to make order affecting property (then vested in the trustee) ceased except through the use of equity. The non-bankrupt spouse could take the proceedings no further and, effectively, his or her 'entitlement', if any, was extinguished or at the least postponed to the interests of the creditors.

Sometimes, in a rare spirit of cooperation that often did not exist during the course of the relationship, spouses in divorce determined that it would be far better if 'their property' remained in the hands of the family rather than going to a third party creditor. Sometimes, then, the spouses would enter into consent orders or a binding financial agreement providing that one spouse received all the property while the other received all the debt.

When carried into effect through a consent order, then the arrangement ought to have failed IF the parties complied with their obligations to make proper disclosure to the Court when seeking approval of the terms of settlement. If the existence of third party debt was disclosed then it should be unlikely that the Court would approve an arrangement that left the creditor 'high and dry' without proper notice (*Lanceley v.Lanceley* (1994) F.L.C. 92-491).

If the third party rights were not disclosed, then the Court most probably would set aside the orders on application by the third party on the basis that there had not been full and frank disclosure of the third party interests giving rise to a miscarriage of justice (*Official Trustee in Bankruptcy v. Donovan and Stevens* (1995) F.L.C. 92-596*).* Section 79A enabled a 'person affected' by an Order made by the Court under section 79 in property settlement proceedings to apply to vary, set aside an order.

When carried into effect via a binding financial agreement then it was much more difficult for a third party to enter the fray and to seek relief against the provisions of a binding financial agreement. Section 90K enables a Court to set aside a financial agreement or a termination agreement if, and only if, the Court is satisfied of a limited

number of matters, including, that either party to the agreement entered into the agreement for the purpose or purposes (one of which included the purpose) of defrauding or defeating a creditor or with reckless disregard for the interests of a creditor or creditors of the party: (*s.90K(1)(aa) - inserted in 2003).* A 'creditor' is defined to include a person who could reasonably have been foreseen by the party as being reasonably *likely to become* a creditor of the party: *(s.90K(1A))*. The amendment requiring a 'separation declaration' came later – in the 2005 amendments (*s.90DA*) but also appears to have been in response to *Rich*. Presumably the amendments were made to overcome the situation highlighted by *A.S.I.C. v. Rich* (2003) F.L.C. 93-171.

In 2003, amendments were made to the *Family Law Act 1975* by the insertion of Part VIIIA which authorized the making of orders and injunctions directed to or altering the rights, liabilities or property interests of third parties. Orders made under that Part are binding on third parties. The amendments effected in 2003 went some way to assist in the resolution of disputes involving third party property rights but did not overcome the problem of the property rights of the bankrupt spouse vesting in the trustee

The Family Court has had bankruptcy jurisdiction since 1988. Jurisdiction was conferred on the Family Court by the provisions of the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988*. Section 27 of the *Bankruptcy Act 1966* provides exclusive jurisdiction to the Federal Court and the Federal Magistrates Court except for the jurisdiction of the High Court and the jurisdiction of the Family Court provided under sections 35 or 35A of the *Bankruptcy Act 1966*

The Bankruptcy and Family Law Legislation Amendment Act 2005

The most significant amendment in relation to the bankruptcy jurisdiction in the context of family law came through the *Bankruptcy and Family Law Legislation Amendment Act 2005*. This Act was assented to on 18 March 2005 and came into effect on 19 September 2005.

In the second reading speech for the Bill, the Attorney General explained the intention of the amendments was to:

> *... enable concurrent bankruptcy and family law proceedings to be brought together in a court exercising family law jurisdiction, to ensure that all issues are dealt with at the same time. This is achieved by giving courts exercising family law jurisdiction additional jurisdiction to deal with bankruptcy matters that are run concurrently with a family law financial matter, and by facilitating the bankruptcy trustees' and third party creditors' involvement in family law proceedings. By merging the courts' jurisdiction on bankruptcy and family law matters in cases where these areas interact, the amendments will allow the courts exercising family law jurisdiction to consider the non-financial contributions of a non-bankrupt spouse to the acquisition of family property.*
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> *Under the schedule 1 amendments, the trustee in bankruptcy can be a party to property or spousal maintenance proceedings under the Family Law Act 1975 and the court will have jurisdiction over property that has become vested bankruptcy property. The court will be able to make an order against the relevant bankruptcy trustee as part of the property adjustment order, allowing the trustee effectively to stand in the shoes of the bankrupt spouse.*
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> *The effect of these amendments will be to offer procedures and protections to the non-bankrupt spouse that were not previously available. At the same time, the court can be on notice about the interests of creditors of a bankrupt spouse and can take those interests into account in determining family property or spousal maintenance orders.*

From then the Family Court and the Federal Magistrates Court are able to deal with any matter connected with or arising out of the bankruptcy of either spouse in cases involving:

- spousal maintenance applications under section 72 of the *Family Law Act 1975*
- declarations of property interests under section 78 of the Act
- property settlement applications under section 79 of the Act; and
- setting aside orders under section 79A of the Act; as well as
- enforcement of the above orders.

Where one spouse has become bankrupt prior to the conclusion of property proceedings (and, or, spousal maintenance proceedings), then the proceedings can be instituted or continued as the case may be and the trustee stands in for the bankrupt or debtor and is able to make submissions on behalf of creditors in relation to the matrimonial property. Once the trustee has become a party to the property or spousal maintenance proceedings, the bankrupt or debtor can only make submissions in relation to the vested property in exceptional circumstances

Although the provisions of the 2003 amendments enabled the Court to make orders under section 79 binding third parties and third parties were required to be afforded procedural fairness, section 79(10), inserted by the 2005 Amendment provided beyond doubt that a creditor of a party to family law property proceedings who may not be able to recover his

or her debt if a property order were made, or any other person whose interests would be affected by an order in such proceedings, is entitled to become a party to those proceedings.

Under section 79A a creditor who may not be able to recover his/her debt and the bankruptcy trustee of a party who is or who becomes bankrupt are deemed to be persons whose interests are affected by an order where an order has been made by the court in respect of property of the parties to the marriage or either of them. The trustee is also given standing under this provision where the court has made an order in relation to vested property and, at the time the order was made, a party was a bankrupt.

Section 106B was also amended to enable the Court to make orders where a party is a bankrupt and the trustee is a party to the proceedings and also where a party is a party under a personal insolvency agreement.

The definition of a 'matrimonial cause' was amended to include proceedings between a spouse and the bankruptcy trustee with respect to spousal maintenance and proceedings between a party to the marriage and the bankruptcy trustee with respect to vested bankruptcy property in relation to the bankrupted party and arising out of the marital relationship or in relation to concurrent, pending or completed divorce or validity of marriage proceedings between the parties to the marriage or certain other categories of proceedings arising out of a marriage or purported marriage relationship Other definitions in section 4 were similarly amended to make it clear that proceedings could be

heard in relation to the property that vested in the trustee on the bankruptcy of one of the spouses.

In particular, section 79 was amended to permit the Family Court to make orders in proceedings with respect to vested bankruptcy property 'of' a party to the marriage and to make such orders as the Court considers appropriate altering the interests of the bankruptcy trustee in the vested bankruptcy property including the power to require the bankruptcy trustee to make a settlement or transfer or property in favour of the non-bankrupt spouse or a child of the marriage.

Section 79(10) enables a creditor of the parties or either of them to become a party to proceedings under section 79, but subsection 79(10A) precludes a creditor holding a provable debt in the bankruptcy of one of the parties or if a party is a debtor subject to a personal insolvency agreement from becoming a party.

Subsection 11 allows the bankruptcy trustee to apply to join as a party to the proceedings and, if the Court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under section 79, then the Court **must** join the trustee. Thereupon the bankrupt party cannot make a submission to the Court in connection with any vested bankruptcy property without leave of the Court. The Court can only give such leave in **exceptional circumstances.** Similar provisions apply in relation to the trustee of the estate of a party who is a debtor under a personal insolvency agreement.

Provision was made in the 2005 amendments for the rules of Court to be amended to provide for the bankruptcy trustee (or trustee under a personal insolvency agreement) to

be notified if a bankrupt became a party to an application under section 74, 78, 79 or 79A.

Chapter 6 of the *Family Law Rules* now covers the progress of a case after the bankruptcy of a party or upon a party entering into a personal insolvency agreement. The Rules require notice to be given to the other party, the trustee and to the Court if a party is a bankrupt or a debtor subject to a personal insolvency agreement in proceedings under sections 66G (relating to child maintenance), 66S (relating to the modification of child maintenance orders) as well as 74, 78, 79, 79A and s.83 (relating to the modification of spousal maintenance orders) and a pending case under Divisions 4 or 5 of Part 7 of the *Child Support (Assessment) Act* 1989 (relating to applications for changes of child support assessments and orders for payment other than as a periodic sum). Notice must be in writing and must be given within 7 days after the party becomes both a party and a bankrupt or debtor as the case may be.

Provision has also been made in the Rules (as required by the Amendments) for the trustee to give notice to the non-bankrupt/non-debtor spouse of any application under section 139A of the *Bankruptcy Act 1966* – that is, to have certain property vested in the trustee if, for example, during the 'examinable period' the bankrupt provided services and did not then receive any or any proper remuneration, or an entity acquired property during the examinable period and the reality is proved to be that the entity holds it for or on behalf of the bankrupt/debtor or in like circumstances. The *examinable period* is defined by section 139CA of the *Bankruptcy Act 1966* and can go as far back as 5 years prior to the bankruptcy or act of insolvency. In effect, it prevents 'sweetheart deals'

between non bankrupts and the bankrupt where under property is held or accumulated for the bankrupt to be handed over to the bankrupt later.

Notwithstanding the trustee may be a party to the proceedings, the Court has power under section 80 to order the bankrupt or debtor, as the case may be, to execute any necessary deed and to produce any necessary documents to ensure that an order made under Part 7 is able to be carried out effectively including the provision of security for the due performance of an order.

Where the trustee makes an application to the Federal Court or Federal Magistrates Court under s139A of the *Bankruptcy Act*, and there are related family law financial proceedings on foot, the Family Court is able to stay or transfer the family law proceedings

Other Legislative Provisions

Section 29 of the *Bankruptcy Act 1966* provides that all Courts having jurisdiction under that Act to act in aid of and be auxiliary to each other. A specific jurisdictional base is given to the Family Court under sections 35 and 35A of the *Bankruptcy Act 1966*.

Under section 35, if a party is bankrupt and the trustee is a party to proceedings for spousal maintenance or property settlement of under section 79A of the *Family Law Act 1975* then the Family Court has jurisdiction in bankruptcy in relation to any matter connected with , or arising out of, the bankruptcy of the bankrupt spouse.

Section 35A of the *Bankruptcy Act* 1966 enables the transfer of matters from the Federal Court to the Family Court on application of a party in the Federal Court or by the Court of its own motion. Similarly matters may be transferred from the Federal Magistrates Court to the Family Court under section 35A. In the event of the transfer then the Family Court has jurisdiction to hear and determine the proceeding, including all matters not otherwise within its jurisdiction that are associated with its jurisdiction or that the Federal Court would otherwise have had jurisdiction to determine and can make all orders that the Federal Court had jurisdiction to make.

Section 120 of the *Bankruptcy Act 1966* provides that certain transfers of property by a bankrupt (prior to the bankruptcy) are void as against the bankruptcy trustee. One exclusion is a transfer pursuant to an agreement approved under the *Family Law Act 1975* (formerly section 86 agreements).

The Case Law

There have been few cases in either the Federal Court and in the Family Court/Federal Magistrates Court applying and examining the effect of the 2005 amendments.

In the Federal Court decision of *Macks v. Edge* [2006] FCA 1077, Besanko J., examined the provisions of the *Bankruptcy and Family Law Legislation Amendment Act 2005,* in the context of an opposed application for transfer of proceedings to the Family Court

from the Federal Court which arose in a case where the trustee in bankruptcy alleged in Federal Court that transfers to bankrupt's former spouse were void – and there were separate proceedings on foot in Family Court in which bankrupt's former spouse sought orders against the trustee altering the interests of the trustee in vested bankruptcy property in an application pending to set aside a transfer of property. The wife sought an order for transfer to the Family Court in order that if the trustee was successful in its application for the declaration in relation to the transfer of the property, she would be able to pursue a claim for property settlement in relation to that property.

The case contains an examination of the provisions of the *Bankruptcy and Family Law Legislation Amendment Act 2000.* However, of interest to this paper is that the trial Judge held that while the Federal Court had the power to determine whether or not the transfer was void against the trustee, it did not have jurisdiction to determine the property settlement claim, whereas, if the proceedings were transferred to the Family Court then the Family Court had jurisdiction to determine both whether or not the transfer was void against the trustee and also, in the event the property vested in the trustee, the Family Court could then exercise its jurisdiction to make a property settlement order. In the end result, the trial Judge refused the application as the proceedings to determine the validity of the transfer were nearly ready for hearing. If the trustee was unsuccessful then the wife would not need a property settlement.

Section 59A of the *Bankruptcy Act 1966* provides that sections 58 and 59 of the *Bankruptcy Act 1966* take effect subject to Part VIII of the *Family Law Act 1975.*

Sections 58 and 59 relate to the vesting of property in the trustee upon both an initial and subsequent bankruptcy.

Lemnos and Lemnos [2007] Fam CA 1058 is a Family Court decision of Justice Le Poer Trench delivered on 30 August 2007. His Honour indicated that the amendments effected by the *Bankruptcy and Family Law Legislation Amendment Act 2005* were of critical importance. The parties were the husband and wife and the trustee in bankruptcy of the husband's estate. Insofar as they related to the amendments, his Honour identified the issues to be determined in the case as follows:

> 1. The power of the Court to make an order under section 79 against the property of the bankrupt husband now vested in the Trustee of the bankrupt estate
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> 2. Whether it is appropriate in the circumstances of this case to make any order which would vest property of the estate held by the Trustee in the wife
>
> 3. Whether the court should make a money order in favour of the wife rather than an order which changes the entitlement of the Trustee in specific property
>
> 4. Assuming a determination based upon an assessment of contribution of the parties to the marriage gives rise to an interest in favour of the wife in a particular property, what adjustment should be made under section 75(2) increasing or decreasing the wife's entitlements/interest in that property
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> ..

6. How should the court approach the consideration of section 75(2)(ha) in this case.

His Honour said:

" 42. Of central importance to this case is the effect of the *Bankruptcy and Family Law Legislation Amendment Act 2005* on property proceedings in the Family Court where one party is bankrupt and the trustee has been joined in proceedings. The aim of these amendments was to clarify the law when the competing interests of bankruptcy trustees and non-bankrupt spouse come before the courts. This was done in main through granting an expanded jurisdiction to the Family Court over bankruptcy matters. The legislation attempts to achieve this through amendments to the *Family Law Act 1975* ("the FLA") and the *Bankruptcy Act 1966* (Cth) ("the BA") which came into effect on 19 September 2005.

..

44. By virtue of these amendments the Family Court has jurisdiction to deal with the bankruptcy of a spouse involved in matrimonial property proceedings. The court is empowered to make such orders as it considers appropriate, and this may include alteration of the interests of the bankruptcy trustee in the vested bankruptcy property.

..

49. Dr Tom Altobelli in his commentary at "[40-730] Family Court's Bankruptcy jurisdiction" in Marriage and Bankruptcy, *CCH Family Law and Practice* (accessed online 27/07/2007) says of these provisions:

> *This is a complete conferral of bankruptcy jurisdiction on the Family Court extending not just to the Bankruptcy Act, but also to adjudicating on all of the equitable issues that may arise in connection with bankruptcy. This is a new and very broad jurisdiction for the Family Court, and it enables it to deal with all the diverse issues that will be encountered when bankruptcy and family law interact.*

50. Thus as a result of the jurisdiction conferred on the Family Court under the *Bankruptcy Act* the court has available to it the full range of statutory remedies provided under this Act as well as at general law. If equitable remedies are necessary, these may be available under the accrued jurisdiction of the Family Court.

..

52. In property proceedings the Family Court has power to make such order that it considers appropriate with respect to altering the interests of the bankruptcy trustee in vested bankruptcy property where the bankrupt is a party to the marriage: s79(1)(b). This includes power to order that the bankruptcy trustee make settlement or transfer property: s.79(1)(d)

..

54. There are other provisions in s.79 that deal with circumstances where a spouse is bankrupt. Section 79(11) requires the bankruptcy trustee be joined as a party in certain circumstances. Section 79(12) prevents a bankrupt from making submissions with respect to any vested bankruptcy property if a trustee is a party to proceedings, except with leave of the court. By virtue of s.79 (13) leave will only be granted in exceptional circumstances. There are other provisions in s.79 that were enacted through the bankruptcy amendments but these are not directly relevant to the present proceedings.

55. The Amendments have also expanded the definition of property under the *Family Law Act* to include property that has vested in the trustee of a bankrupt party to a marriage. Pursuant to section 4 of the *Family Law Act* the definition of "property settlement proceedings" and "property settlement or spousal maintenance proceedings" now includes reference to "vested bankruptcy property". Vested bankruptcy property is defined under s.4 as "property of the bankrupt that has vested in the bankruptcy trustee under the *Bankruptcy Act 1966*. For this purpose, property has the same meaning as the *Bankruptcy Act 1966*."

56. Upon a person becoming bankrupt, the property divisible amongst creditors vests in the trustee of the bankrupts estate by virtue of s.58 (1)(a) of the *Bankruptcy Act.* Divisible property is defined in s.116 (1) and s.116 (2) sets out certain categories of exempt property. Pursuant to s.59Aof the *Bankruptcy Act*, vesting of property in the trustee in bankruptcy is "subject to an order under Part VIII of the *Family Law Act 1975*". Further, section 116(2)(q)of the *Bankruptcy Act* provides that property divisible amongst creditors does not extend to:
... any property that, under an order under Part VIII of the Family Law Act 1975, the trustee is required to transfer to the spouse of the bankrupt.

57. Section 80(4) of the *Family Law Act* enables the Court to make an order under s 80(1)(d) of the Act, directing the bankrupt to do such things as necessary "to enable an order to be carried out effectively or to provide security for the due performance of an order".

58. The Amendments have given legislative recognition to the obligation of the Court to consider the impact or any orders on the ability of a creditor to recover debt "as far as that effect is relevant" through the insertion of s 75(2) (ha). In property proceedings, the court is required to take into account section 75(2) factors as far as they are relevant by virtue of s 79(4)(e). Section 75(2) (ha) reads:

> *75(2) The matters to be so taken into account are... (ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant*

59. Section 75(2)(ha) is only one of many factors the court is required to consider under s 75(2) and is not given any special priority over the other factors. Note that s 75(2)(n) requires consideration of the terms of the order made or intended to be made in relation to property or vested bankruptcy property. Also, s 75(4) clarifies that reference to 'party' under s 75 means a party to the marriage not the bankruptcy trustee.

60. Dr Tom Altobelli in his commentary at "[40-750] Determining priorities: creditors or family of the bankrupt?" in Marriage and Bankruptcy, *CCH Family Law and Practice* (accessed online 27/07/2007) considers the impact of the amendments on priorities between creditors and the spouse, in particular the effect of s75(2)(ha). In summary, Altobelli argues:

1) Section 75(2) gives no priority to creditors' interests. Altobelli said*:*

> *...it is hard to see how the interests of creditors will not be subsumed to the needs of children and spouses in those cases where it is not possible to reasonably meet those needs in some other way. This is not because of some ideological favouritism towards the interests of families as opposed to the interest of creditors — it is simply the result of an exercise in statutory interpretation. If the legislature had intended that creditors' interests have any priority, the legislature would have said so. There is not even a hint of priority as there is no logical rationale for the inclusion of s 75(2)(ha) where it is, i.e. between s 75(2)(h) and s 75(2)(j) (both of which deal with maintenance). It is not as if, for example, s 75(2)(ha) marks the point at which the factors under consideration change in character from personal to financial. There is simply no hint at any special priority, and it is probably quite fortuitous and unexpressive that s 75(2)(ha) is now the middle factor in a list of 17 (i.e. it is ninth on the list).*

2) Creditors interests have higher protection in wording of s 90AE than s 75(2)(ha)

3) No assistance can be gained from the Bankruptcy Act as to priorities. Section 109 of this Act has an order of priority in relation to bankruptcy proceedings. Altobelli argues that s 109 is not relevant to Family Law Act proceedings as:

> *... to equate the claims and needs of the bankrupt's family to the position of unsecured creditors is simply illogical. Unsecured creditors chose to become creditors, and they could have protected themselves against the consequences of being unsecured (e.g. through retention of title clauses, effective credit control and administration etc). It might be somewhat*

> *harder to convincingly assert that a bankrupt's child chose to be in a situation where they might lose the home they live in, and that they could somehow have protected themselves. The Bankruptcy Act provides no assistance as to how priorities should be determined in the present contest.*

4) There is potential flexibility to accommodate claims of an equitable nature

5) Providing confirmation that Family Law Act rather than Bankruptcy Act principles apply is section 116(2) (g) of the Bankruptcy Act (which excludes property covered by a Part VIII Family Law Act order from divisible property).

6) In relation to statutory interpretation of s.75(2)(ha), Altobelli referred to the Attorney-General's Second Reading Speech (House of Representatives, 17 February 2005, Bankruptcy and Family Law Legislation Amendment Bill 2005, p 20) as support for the proposition that creditors interests don't have priority, although they are not to be ignored and they may be taken into account. In the second reading speech referred to above Mr. Ruddock stated:

> *The effect of these amendments will be to offer procedures and protections to the non-bankrupt spouse that were not previously available. At the same time the Court can be on notice about the interests of creditors of a bankrupt spouse and can take those interests into account in determining family property or spousal maintenance orders.*

..

62. I conclude that the amendments require me to consider this case in the usual manner adopted for consideration of Part VIII property applications with exception that I am to treat all of the former property of the husband, now vested in the Trustee, as available for distribution to the wife if that be an appropriate result. The Trustee is also bound by any order I make (within power and jurisdiction) which has the effect of removing property from the vested pool of property reposing in the Trustee prior to the hearing.

63. In submissions the Trustee argued that the appropriate pathway for me to take was to make a finding which is formulated as a money order against the husband and then have that order rank with the other creditors in the bankruptcy. The wife would then receive the same proportion of her debt as the other creditors. In such a circumstance the Trustee says the provisions of section 75(2) (ha) would be satisfied and the result would be just and equitable.

64. With respect to that argument of the Trustee I would say that may be a possible result in a particular case although I would think that in most cases which are likely to be considered by the Court involving a similar situation (i.e. all of the parties' matrimonial assets vesting in a Trustee of one of the parties bankrupt

estate) the applicant will be seeking a transfer of property or the declaration of an interest of the non-bankrupt party in the property vested in the Trustee.

65. In the High Court decision of *Trustees of the Property of Cummins (a bankrupt) v Cummins (2006) 224 ALR 280; (2006) 80 ALJR 589; (2006) 35 Fam LR 343; (2006) 61 ATR 642; [2006] HCA 6* the following extract appears in [2006] HCA 6; 224 ALR 280 at 295- 297:

> *"[67] The "transaction" to which attention must be directed, in the sense given in Charles Marshall respecting the principles of resulting trusts, is a composite of the purchase of the Hunters Hill property followed by construction of a dwelling house occupied as the matrimonial home for many years preceding the August transactions. The relevant facts bearing upon, and helping to explain, the nature of the joint title taken on registration on 10 August 1970, include the other elements in that composite. To fix merely upon the unequal proportions in which the purchase moneys were provided for the calculation of the beneficial interests in the improved property which was dealt with subsequently in August 1987 would produce a distorted and artificial result, at odds with practical and economic realities. Looked at in this way, this is not a case which requires consideration of the authorities where an equitable lien or charge secures expenditure on improvements made but no beneficial interest in the land is conferred.*
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> *[68] Calverley v Green concerned the beneficial ownership of an improved property acquired as joint tenants by a man and a woman who had lived together for about 10 years as husband and wife. The decision of this court was that the presumption that they held the registered title in trust for themselves in shares proportionate to their contributions was not rebutted by the circumstances of the case. Mason and Brennan JJ referred to the statement by Lord Upjohn in Pettitt v Pettitt that, where spouses contribute to the acquisition of a property then, in the absence of contrary evidence, it is to be taken that they intended to be joint beneficial owners. Their Honours said that Lord Upjohn's remarks reflected the notion that both spouses may contribute to the purchase of assets through their marriage "as they often do nowadays" and that they would wish those assets to be enjoyed together for their joint lives and by the survivor when they were separated by death. However, Mason and Brennan JJ considered such an inference to be appropriate only between parties to a lifetime relationship, being the exclusive union for life undertaken by both spouses to a valid marriage, though defeasible and oftentimes defeated.*
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> *[69] It is unnecessary for the purposes of the present case to express any concluded view as to the perception by Mason and Brennan JJ of the particular and exclusive significance to be attached to the status of marriage in this field of legal, particularly equitable, discourse. It is*

enough to note that, as Dixon CJ observed 50 years ago in Wirth v Wirth, in this field, as elsewhere, rigidity is not a characteristic of doctrines of equity. The reasoning of the Privy Council in Malayan Credit is an example of that lack of rigidity.

[70] In the present case, Sackville J referred in the second judgment to the operation of statute law to produce divergent outcomes in particular classes of case. In particular, his Honour referred to the regimes established by s.79 of the Family Law Act 1975 (Cth) and, in New South Wales, by the Property (Relationships) Act 1984 (NSW). The New South Wales statute provides for the declaration of title or rights in respect of property held by either party to a "domestic relationship". That term is broadly defined in s.5 as extending beyond the already broad definition of "de facto relationship" in s.4. The extent to which these statutory innovations may bear upon further development of the principles of equity is a matter for another day.

[71] The present case concerns the traditional matrimonial relationship. Here, the following view expressed in the present edition of Professor Scott's work respecting beneficial ownership of the matrimonial home should be accepted:

> *It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase.*

To that may be added the statement in the same work

> *Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them. [Footnote omitted]*

[72] That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses. There is no occasion for equity to fasten upon the registered interest held by the joint tenants a trust obligation representing differently proportionate interests as tenants in common. The subsistence of the matrimonial relationship, as Mason and Brennan JJ emphasised in Calverley v Green, supports the choice of joint tenancy with the prospect of survivorship. That answers one of the two concerns of equity, indicated by Deane J in Corin v Patton, which founds a presumed intention in favour of tenancy in common. The range of financial considerations and accidental circumstances in the matrimonial relationship referred to by Professor Scott answers the second concern of

equity, namely the disproportion between quantum of beneficial ownership and contribution to the acquisition of the matrimonial home." (Footnotes omitted)

66. Although all of the paragraphs 55 to 75 ought be read under the heading "The ownership of the Hunters Hill property" for my purpose I particularly draw attention to paragraphs 67 to 72 inclusive. These paragraphs highlight the special nature of beneficial ownership of property as between spouses irrespective of the fact that the legal title to the property may stand in one party's sole name.

In *Foley & Foley* [2007] Fam CA 584, the husband and wife sought declaratory relief under Section 78 to the effect that family home of which they were registered as joint proprietors was beneficially held as to 75% by the wife and 25% by the husband. An issue for consideration by the Court was the impact that making the declarations sought would have on the ability of a third party judgment creditor to recover its judgment debt against the husband.

Bennett J. considered a number of authorities including *Draper v. Official Trustee in Bankruptcy* [2006] FCAFC 157, a contest between the parties to the marriage on the one hand and the bankruptcy trustee on the other. Her Honour said:

57. In *Draper v Official Trustee in Bankruptcy*, Mr. and Mrs. Draper had become jointly registered owners of the subject property on 11 July 1989, one day before Mr. Draper became bankrupt. The husband's bankruptcy had the effect of severing the parties' joint tenancy. The Official Trustee, and later an individual Trustee became registered as the holder of Mr Draper's half interest in the property. In July 1992, Mr Draper was discharged from bankruptcy, but the Trustee remained a co-owner with Mrs Draper until the property was sold (presumably by agreement) in late 2005. Whilst Mrs Draper was clearly entitled to one half interest of the proceeds of sale, an issue arose as to her entitlement to the balance of the sale proceeds to which the trustee also asserted an entitlement. The Drapers' claimed that Mrs Draper had always held a beneficial interest in the property and Mr Draper only became a joint registered owner at the insistence of the financial institution that took the first mortgage over the property. They claimed that the intention was that the property would always belong to Mrs

Draper, and her husband had previously held the half interest on an express or constructive trust for Mrs Draper.
Mrs Draper claimed to have paid:

- the stamp duty and conveyancing costs associated with the purchase of the property;

- all capital repayments and paid all interest on the first mortgage; and

- all outgoings and funded all improvements to the property in the period from July 1989 to late 2005;

58. The Trustee alleged that the Draper's had mutually met expenses in relation to the property, and denied the existence of a trust, express or otherwise. The trustee had not acted at an earlier point as there had been minimal equity in the property for recovery.

59. At first instance, the Federal Magistrate dismissed the Drapers' claim and rejected the existence of a trust. His Honour found, inter alia, that there was no agreement at or prior to settlement that Mr Draper's registered interest as a joint tenant would be held for the benefit of Mrs Draper.

60. On appeal, it was noted by Mansfield J with whom Rares J agreed that, at the earliest opportunity, Mr Draper had impressed upon the Trustee that he was only put on the title of the property at the insistence of the financial institution from whom Mrs Draper had sought a loan to purchase the property. The Trustee's inquiries of the financial institution confirmed Mrs Draper's account.

61. The majority held that the learned Federal Magistrate erred in rejecting the submission of the Drapers, being, that it had only been pressure from the lending institution that resulted in Mr Draper being registered as a joint tenant on the property. On this basis, the appeal was allowed and the matter remitted, the Court noting that it would be for the Federal Magistrate on the re-hearing to determine as to whether the "presumption" in *Cummins* (supra) would apply.

62. Rares J in *Draper* (supra) concurred with Mansfield J as to the outcome of the appeal and agreed with His Honour's reasons, subject to some further observations as to the `presumption of equal beneficial ownership' in circumstances where a property is acquired by a married couple as joint tenants. Rares J said (commencing at para 78):

> I am of opinion that the mere fact that Mr Draper was a joint borrower does not necessarily preclude a conclusion that there could have been a resulting trust at the time of the purchase. Nothing said in *Calverley v Green* (1984) 155 CLR 242 requires a conclusion to that effect. Rather, in the passages to which Besanko J makes reference (Gibbs CJ at 155 CLR at

> 251-252 and Mason and Brennan JJ at 257-258) their Honours made clear that the question whether entry into a mortgage for the borrowing of the purchase price rebuts a resulting trust is a factual one, although such conduct is, without some explanation, strongly probative of a rebuttal of a resulting trust because each mortgagor contributed to the purchase price by his and her entry into the obligations in the mortgage.
>
> In the realm of presumptions regarding interests in property, it is important to recognize that the presumptions can be rebutted. The presumptions evolved from a recognition by the Courts that, in the particular situations in which they operate, human beings, over the centuries, have behaved in relation to property transactions in a way which the ordinary application of the presumption is intended to reflect. The flexibility of equity is not to be gainsaid by placing the presumptions into the straight jacket of irrebutability. Indeed, as Gibbs CJ noted in *Calverley v Green* (1984) 155 CLR at 252, if a bystander had asked Ms Green whether she intended that Mr Calverley should own the land beneficially even if he paid nothing under the mortgage and she were obliged to pay the whole mortgage debt with interest '... it is most unlikely that she would have replied in the affirmative'. As this passage indicates, his Honour was deciding the matter on the evidence, not on the basis of the operation of an irrebutable presumption.

63. Rares J then went on to discuss *Calverley v Green* (1984) 155 CLR at 262, noting the admissibility of evidence as to "acts and declarations of the parties before and at the time of the purchase, or so immediately after it as to constitute a part of the transaction", for the purpose of "drawing an inference as to the intention of the parties relating to the beneficial interest which each of them has in the asset purchased" (at para 80). His Honour then referred to a number of factors in *Draper* that may have had the effect of negating any presumption of equal beneficial ownership. These included:
- Mr Draper's involvement in the purchase of the property being prompted only by the requirements of the lending institution;

- The deduction of mortgage repayments from Mrs Draper's accounts;

- The fact that Mr Draper was on the eve of having his estate sequestrated, "it is unlikely that he would have intended either to take a beneficial interest in the property or to put the possibility of his wife obtaining the loan in question" (at para 82); and

- That there was no apparent intent to defraud creditors, as Mr Draper paid nothing for the purchase of the property.

64. Rares J cited the High Court's decision in *Cummins* (supra) and noted that a presumption of equal beneficial ownership "ordinarily applies in the a case where

the parties to a marriage acquire the matrimonial home in joint names... and it may equally be capable of being applied in the present case" (at para 82). His Honour went on to say (at para 83):

> There is no contemporaneous or other evidence that Mr Draper, did provide, or was to provide, any purchase money. Again, the fact that Mrs Draper paid for all the mortgage installments to the lending institution from her salary, and that this was intended from the time the transaction was first proposed (that is, before the sequestration order) is an indication that it was the intention of Mr and Mrs Draper at the time the purchase transaction was entered into and completed, that he would have no beneficial interest in the property. Moreover, the fact that Mrs Draper in effect, was, required by the lending institution to permit Mr Draper's name to be added to the title, so that he would be jointly and severally liable to the lending institution for the repayment of the borrowings, can invoke the presumption of resulting trust from dealings between wife and husband: (cf *Wirth v Wirth;* (1956) 98 CLR 228 at 238 per Dixon CJ; *Calverley v Green* (1984) 155 CLR at 251 per Gibbs CJ, 258, 262 per Mason and Brennan JJ, 266-267 per Deane J; *The Trustees of the Property of Cummins v Cummins* (2006) 224 ALR at 295 [65]-[67] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

65. The third member of the Full Court in *Draper*, Besanko J, agreed for that the appeal should be allowed, but for different reasons to those set out by Mansfield J.

66. Whilst the circumstances surrounding the acquisition of the property in the present case was the subject of evidence and provides the focus for the Wife's claim as to a resulting trust, there is a dearth of evidence about the contributions and treatment by the husband and wife of their interests in the family home post acquisition, save that it was their family home and principal security. Whilst focused upon events surrounding the acquisition of the property, in *Cummins* the High Court did note that (at para 65):

> [W]hilst evidence of subsequent statements of intention, not being admissions against interest, are inadmissible, evidence of facts as to subsequent dealings and of surrounding circumstances of the transaction may be received.

67. This view was endorsed by Rares J in *Draper v Official Trustee in Bankruptcy* (at para 81).

68. In the present case there is no evidence of the husband and the wife having ever regarded the property as anything other than their family home in which each held an interest equivalent to the other in the context of their borrowings to finance renovations and business activities of the husband or, in 1992, when the husband sought advice for them both in relation to asset protection and the establishment of the Trust. Whilst there was evidence that each applied their income for the benefit of the family and the wife's expenditure was in relation to groceries, school fees and the like and the husband was responsible for payment

> of mortgages. However, there is no evidence about the amount of their respective incomes or the amount of the mortgage payments.
>
> 71. Counsel for the wife, in conceding that there was an absence of evidence in relation to specific dealings with the parties interest in the family home over the last 23 years, submitted that I would be in error to take an overly mathematical approach and referred to the views expressed by the High Court in *Baumgartner v Baumgartner* (1987) 76 ALR 75[10] in relation to assessment of pooled contributions, such as the following extract:-
>
> The court should, where possible, strive to give effect to the notion of practical equality, rather than pursue complicated factual inquiries which will result in relatively insignificant differences in contributions and consequential beneficial interest.
> I accept the correctness of the High Court's observations. However, neither those sentiments nor the decision of the High Court in *Baumgartner's* case, permits the imposition of a constructive trust where there is a vacuum of evidence.

Hosking and Hosking [2007] Fam CA 203 involved an application for a splitting order of a superannuation fund where the husband had been made bankrupt. Moore J., considered the application for property settlement in the 'normal way' including a proposition that the husband's bankruptcy itself had an impact on the wife's entitlements and the fact that as a result of the husband's financial circumstances the wife was provided with little or no financial support by the husband post-separation.

Finally, in a child support case, *Tranten & Croft* [2007] Fam CA 703, Kay J., inter alia, considered the relationship between the *Child Support* legislation and the *Bankruptcy Act 1966.* A child support obligation can be proven in the bankruptcy but it will survive the bankruptcy and can be recovered if there is then property available for distribution or ever becomes property available for distribution

Conclusion

While there will, no doubt, prove to be conflicts between traditional views of property proceedings in family law and the views of those who practice in the bankruptcy jurisdiction, it seems clear that the effect of the 2005 amendments was to enable the courts exercising the family law jurisdiction to act in the 'usual' way in relation to property and maintenance proceedings and to treat all property, including property which may have vested in the trustee in bankruptcy, as property over which the Court can exercise jurisdiction. Where family law proceedings are pending on a bankruptcy or are commenced after a bankruptcy, then the property of the bankrupt vests subject to the rider that the Court can order all or part of it to be transferred to the non-bankrupt spouse to satisfy a claim under section 72 or 79.

Creditors are given enhanced rights to be heard and the trustee and creditors are given enhanced rights to seek to set aside orders under section 79A.

There is no reason to suggest that the amendments are not working as intended.