

Stanford, bankruptcy and unsecured liabilities - options and opportunities

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The High Court decision of *Stanford v Stanford*¹ has implications for trustees in bankruptcy and non-bankrupt spouses who are parties to property proceedings under s 79 *Family Law Act* ("FLA"). This paper explores some of the possibilities, challenges and opportunities raised by one of the rare occasions when the High Court has deliberated on what s 79 means.

Stanford reminds legal practitioners that there are other avenues for the parties, rather than simply relying on establishing contributions and s 75(2) factors as part of a s 79 claim.² The existing legal and equitable interests of the parties must be identified before they can be altered. If the Family Law Courts give greater emphasis to legal and equitable interests than it generally has done in the past, this could change the legal landscape for both trustees and non-bankrupt spouses. Considering "just and equitable" as a preliminary matter, arguably gives more opportunities for trustees in bankruptcy to try to retain or to recover property of the parties to the marriage to pay debts owed by the bankrupt.

Since the judgment in *Stanford* was handed down, the courts and lawyers have had to re-consider the four steps and notional property. This process is continuing and it may be some time before there is some clarity. An issue which has received less attention is unsecured liabilities. They are relevant, not only where one party is bankrupt, but to most relationships. Credit cards debts, loans from family members and unsecured trade and personal debts are common. Post-*Stanford* it is relevant to whether unsecured liabilities are legal and equitable interests which can be altered under s 79.

2005 Amendments

The *Bankruptcy and Family Law Legislation Amendment Act 2005* ("2005 Amendments") is often seen as disadvantageous to trustees. A trustee cannot institute s 79 proceedings against a non-bankrupt spouse as a means of trying to enlarge the assets in the bankrupt estate available for creditors whereas a non-bankrupt spouse can bring a s 79 application to try to increase their entitlements by claiming against property which has vested in the trustee. Therefore, unless the non-bankrupt spouse issues proceedings or proceedings have already

¹ (2012) FLC 93-518

² A de facto partner makes a claim under s 90SM rather than s 79 FLA. In this paper, the equivalent section for a de facto relationship is not given, unless the law is different

commenced at the time of the bankruptcy, a trustee trying to increase the property available to the creditors is left only with the options of a claw-back under s120, 121 or 122 of the *Bankruptcy Act 1966* ("BA") or under s 106B of the FLA or trying to claim an equitable interest in the non-bankrupt spouse's property. If, however, the non-bankrupt spouse institutes proceedings, the trustee can try to argue that some of the bankrupt's debts should be paid from property of the non-bankrupt spouse. The non-bankrupt spouse can proceed under s 79 against property which has vested in the trustee. The prospect of the non-bankrupt spouse being successful is increased by the ability of the non-bankrupt spouse to argue for an adjustment under s 75(2). The only factor among the 19 factors listed in s 75(2) which is of any relevance to the trustee is s 75(2)(ha), which refers to the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt.

Another problem for the trustee can be whether the bankrupt is willing to co-operate with the trustee. The bankrupt's evidence can be essential to maximise the assessment of contributions in favour of the bankrupt (and therefore the trustee) and minimise the assessment of s 75(2) factors in favour of the non-bankrupt spouse. The bankrupt may be co-operative, either motivated by the vengefulness which motivates some other separated spouses, or a desire to achieve an annulment of their bankruptcy.

The court must make an appropriate order, if it is just and equitable to do so. Many of the reported cases involve debts which are much greater than the property pool, so there is no prospect of them all being paid in full and no opportunity for the bankrupt to achieve an annulment.³ An interesting question is whether the overwhelming size of the liabilities relative to the value of the property of the parties and the trustee does or should influence the court in determining whether it is just and equitable to make an order.

Constructive trust claims have always been important for non-bankrupt spouses involved in proceedings in courts other than the Family Law Courts, as property held by the bankrupt upon trust for another person is not property which is divisible amongst the creditors of the bankrupt under the "BA".⁴ Post *Stanford*, non-bankrupt spouses and trustees in bankruptcy ought to consider all possible legal and equitable interests. Whilst the 2005 Amendments have generally been interpreted to place the s 79 claims of non-bankrupt spouses above the legal and equitable interests of trustees and creditors, the situation post-*Stanford* is not yet clear.

The *Stanford* decision

The case involved an elderly couple involuntarily separated by circumstances. The wife required nursing home care and died during the course of the proceedings. The High Court upheld the husband's appeal against an order for a payment to the wife's estate after the

³ *Johnson & Johnson [1999] FamCA 369; Trustee of the Property of G Lemnos & Lemnos (2009) FLC 93-394; Commissioner of Taxation and Worsnop (2009) FLC 93-392*

⁴ s 116(2) BA

husband's death. The majority allowed the husband's appeal primarily on the ground that the Full Court of the Family Court did not address the requirements for making orders after a party's death. The minority agreed, but did not deal with the broader issues under s 79.

The High Court majority rejected the husband's argument that a s 79 order can only be made if the parties have separated. In a de facto relationship, the property rights and interests of the parties cannot be enlivened under s 90SM unless and until there is a breakdown of the relationship. Consistently with the referral of powers by the State and Territories with respect to de facto relationships, s 90SM(1) expressly only covers "property settlement proceedings after the breakdown of a de facto relationship".

What is the proper approach to s 79?

Stanford reminds us to look at the Act. One of the major 2005 amendments was to 79(1). In matters involving a bankrupt spouse s 79(1) says:

The court may make such order as it considers appropriate...

(b) altering the interests of the bankruptcy trustee in the vested bankruptcy property including:

(c) an order for a settlement of property in substitution for any interest in the property and

(d) an order requiring either or both of the parties to the marriage or the bankruptcy trustee to make for the benefit of either or both of the parties to the marriage [but not the trustee] such settlement or transfer of property as the court determines.

The manner in which the court must exercise the power under s 79(1) is set out in s 79(2):

The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

Section 79(4) requires the court to take into account certain matters such as contributions and the matters listed in s 75(2) (which include incomes, earning capacities, care of children and the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt) so far as they are relevant in "considering what order (if any) should be made".

The High Court warned:

To conclude that making an order is "just and equitable" *only* because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.⁵

Contrary to the usual authority and practice of the past, the High Court majority rejected the notion that s 79(2) was a step to be undertaken at the *end* of the process. The majority said

⁵ At para 40

that whether it is "just and equitable" to make an order under s 79(2) arises *before* the court looks at s 79(4), rather than *after* looking at s 79(4). Section 79(2) and s 79(4) are separate inquiries and the "two inquiries are not to be merged."

In determining applications under s 79, the High Court set out three fundamental propositions that "must not be obscured":

1. Identify the *existing* legal and equitable interests of the parties as if they were not married without reference to their possible entitlements under s 79. The court must then consider whether it is just and equitable to alter the parties' interests;
2. Section 79 is a broad power, but that does not mean unguided judicial discretion or "palm tree justice";
3. There is no starting assumption that a party has the right to a s 79 order.

In relation to the first proposition, the existing interests of a trustee must be ascertained, not simply the interests of the spouses. The High Court's view makes sense as interests cannot be "altered" under s 79(1) unless the court first identifies those interests. An example arising from *Stanford* is the possibility that the wife may have had an interest by way of a constructive trust in the husband's home. This equitable interest could have been identified before the Family Court decided whether or not it was just and equitable to make s 79 orders. If the wife had an equitable interest, the Court could have simply declared under s 78 FLA that the wife had an interest by way of a constructive trust and the extent of that interest. An alteration of the parties' interests under s 79 may not have been just and equitable after their existing rights had first been determined.

The High Court majority in *Stanford* did not directly consider or confirm the validity of the "four step" approach.⁶ Under the "four step" approach, a trustee usually achieved its best possible outcome if it successfully argued that the bankrupt's debts should be paid from the property pool under step 1 (where the asset pool was identified and valued), prior to the balance of the property pool being divided between the non-bankrupt spouse and the trustee. Trustees were often at a disadvantage regarding the assessment of contributions and s 75(2) factors under steps 2 and 3, because:

- The bankrupt may have gambled or otherwise wasted assets in a manner which meant the non-bankrupt spouse had no responsibility for the debts;⁷
- The non-bankrupt spouse often denied knowledge of debts such as tax debts although the non-payment of those debts had benefited the non-bankrupt spouse and children. Lack of

⁶ *Hickey & Hickey* (2003) FLC 93-143, *Phillips & Phillips* (2002) FLC 93-104

⁷ *Kowaliv & Kowaliv* (1981) FLC 91-092

knowledge can be important in determining whether the non-bankrupt spouse should be held liable with respect to penalties and interest, but perhaps not for primary tax;⁸

- The future needs of the non-bankrupt spouse and children often significantly increase the entitlements of the non-bankrupt spouse. The only matter among 19 matters listed in s 75(2) of any relevance to the trustee is s 75(2)(ha), which refers to the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt.

The "just and equitable" requirement and intact relationships

The High Court majority considered that the just and equitable requirement of s 79(2) is "readily satisfied" if the parties are, as the result of a choice made by one or both of the parties, no longer living in a marital relationship.

An involuntary separation, as occurred in *Stanford*, is not enough of itself for it to be just and equitable to make a s 79 order. The court must be satisfied that it is just and equitable to make a s 79 order. Whether the courts may determine that it is just and equitable to make an order where one of the parties is bankrupt but the parties are not separated, is as yet unclear.

One of the immediate questions which arises is whether non-bankrupt spouses will more frequently apply for a property settlement even though their marriages are intact where their spouse faces bankruptcy. Under the FLA, parties to a de facto relationship or marriage can seek orders which have the outcome that the creditors of one of the parties will not be paid or may not be paid. A Family Law Court is able to make the orders, provided creditors are on notice of the proposed orders and do not oppose them. The orders can be made even if the creditors oppose them, if the court finds that it is appropriate to do so. If parties provide full disclosure of creditors to the court, and notice to creditors of the proposed s 79 orders, the orders will be difficult for a trustee to set aside later under s 79A FLA.

The requirement that it is just and equitable to make an order is more difficult to satisfy in intact marriages as they still have the "common use of the property",⁹ however, there have been few cases to date.¹⁰

In a pre-*Stanford* decision, the court refused to make s 79 orders in intact marriages in *McCormack & McCormack* and *Peakes & Peakes* [2009] FMCAfam 1250. Two wives and their husbands' trustees in bankruptcy sought orders for the transfer of half interests of properties to the wives from their husbands' trustees in bankruptcy. The aim was apparently to avoid paying stamp duty on the transfers. The wives were not separated from their husbands and the court refused to make the orders sought.

⁸ *Johnson & Johnson* [1999] FamCA 369; *Trustee of the Property of G Lemnos & Lemnos* (2009) FLC 93-394

⁹ *Stanford v Stanford* (2012) FLC 93-518, paras 42 and 44

¹⁰ They include *McManus & McManus*, Dessau J, unreported, 21 March 1997; *Neale & Neale* (1991) FLC 92-242; *Jennings v Jennings* (1997) FLC 92-773; *Sterling & Sterling* [2000] FamCA 1150; *Conti & Conti* [2008] FMCA 1156; *Stanley & Stanley (No 2)* [2009] FamCA 432 and *Polik & Polik* [2012] FamCA 335

Wilson FM held:

It is difficult to see how those transactions arise out of the marital relationship. They arise from a commercial dealing that has failed. The fact that one party to a marriage is purchasing an interest in property (in which he or she already holds an interest) from the trustee in bankruptcy of the other does not, to my mind, mean that the proceedings arise out of the marital relationship.¹¹

The Federal Magistrate did not consider the purpose for which the s 79 orders were sought, but refused to make the orders on jurisdictional grounds (which following *Stanford* may not be a valid argument). The court could also have refused because the orders were sought for an improper purpose, being to avoid payment of stamp duty on a land transfer. Orders which have the effect of avoiding liability to a revenue authority¹² may be orders which are not just and equitable to make in an intact marriage.

What is a legal or equitable interest?

The pre-*Stanford* practice was to list "property of the parties" and "financial resources". The requirement post-*Stanford* is to list all legal and equitable interests and this seems broader. At first, glance, "equitable interests" includes constructive trusts, resulting trusts and estoppel interests. "Legal interests" may be narrowly defined as legal entitlements to property, but a broader view may encompass, for example, the parties' contractual and tortious rights and liabilities, including unsecured liabilities.

An "interest" is defined in *Osborn's Concise Legal Dictionary*:

A person is said to have an interest in a thing when he has rights, titles, advantages, duties, liabilities connected with it, whether present or future, ascertained or potential, provided they are not too remote.

That dictionary defines equitable interests but gives no definition of legal interests. It defines an equitable interest as a right recognised and enforceable only according to the rules of equity. It talks about rights *in personam* and *in rem*. In the *Lexis-Nexis Encyclopaedic Australian Legal Dictionary* an "equitable interest" is defined more narrowly as:

An interest in property enforced and created by equity in the situation where it would have been unconscionable for the legal owner of the property to retain the benefit of the property.

It goes on to define a "legal interest" as:

The legal, as opposed to beneficial, interest in property. Under the system of common law and equity, the legal title in property can be separated from its beneficial interest. .

Lexis-Nexis says, in contrast to *Osborn*, that a "legal interest" is a right *in rem* (i.e. it is enforceable against anyone), while an equitable interest confers only a right *in personam*.

¹¹ At para 4

¹² *Redman & Redman* [2012] FamCA 364

Applying *Stanford* to recent cases

Non-bankrupt spouses who have benefited from the actions of a bankrupt spouse, whether or not they conspired together to defeat creditors, may find s 79(2) in its new format a greater hurdle to jump when trying to keep assets away from the trustee. It is revealing to look at cases involving bankruptcy which pre-date *Stanford* and speculate how they might be decided now.

In *Commissioner of Taxation and Worsnop*¹³ the Commissioner of Taxation appealed against an order that the former matrimonial home in the wife's name be sold and the net proceeds of sale be divided equally between the wife and the Commissioner. The only substantial asset was the home worth \$4.75 million. There was conflicting evidence as to the wife's knowledge of the husband's tax avoidance but the trial Judge accepted that the wife did not know and it could not be said that she ought to have known. The husband had transferred his interest in the home (then worth \$1.5 million) to the wife for only \$1.00 about 5 or 6 years prior to separation, at around the time the husband changed his business activities.

The trial Judge made no adjustment in favour of the wife for s 75(2) factors although she had the primary care of 4 children aged between 1¾ and 13 years and this affected her earning capacity. The s 75(2) factors in her favour were off-set against the husband's tax indebtedness as a factor in the Commissioner's favour under s 75(2)(ha). The wife had no knowledge of the debt, which was by then about \$13 million.

In balancing the competing claims of the wife against the Commissioner, the Full Court found that the trial Judge appreciated the critical features of the exercise, and said:

In our view, the Commissioner of Taxation is in a position distinguishable from that of a commercial creditor. Commercial creditors have a choice about to whom they extend credit. On the other hand, the position of the Commissioner as a creditor of taxpayers is of a completely different origin. The onus is on taxpayers to make full and proper disclosure to the Commissioner of Taxation. The Commissioner does not extend credit at all, but becomes a creditor by virtue of the conduct of the affairs of the taxpayer.¹⁴

The Full Court of the Family Court upheld the 50/50 split of the net pool. Although the wife had benefited from the husband's avoidance of tax, neither the trial Judge nor the Full Court completely absolved her from responsibility for the debt.

In light of *Stanford*, was the order that the Commissioner only receive 50% of the net proceeds of sale just and equitable? If the court had determined the parties' legal and equitable interests in the property first, would it have found that the wife was not entitled to retain a half-interest in the home? Was the finding that the wife lacked knowledge of the debt sufficient to deny the Commissioner's right to be paid when the wife had benefited from the non-payment of tax?

¹³ (2009) FLC 93-392

¹⁴ At para 86

In *Trustee of the Property of G Lemnos & Lemnos*¹⁵ the husband's trustee successfully appealed against property orders which required that the former matrimonial home, which had vested in the trustee, be sold and the net proceeds divided equally between the trustee and the wife. The trial Judge found that the wife had contributed directly to the matrimonial home through her income (from distributions received by her from the family trust which received income from the husband's legal practice) and by signing a guarantee. Contributions were assessed as equal at the date of the trial. The husband was re-assessed for income tax for the period 1991-2002. A sequestration order was made against him in 2006 and the parties separated in July 2007. At the time of the trial the equity in the home was about \$2-2.5 million and the husband's bankrupt estate had debts of about \$6 million.

The Full Court of the Family Court held that the interests of unsecured creditors did not automatically prevail over the interests of the non-bankrupt spouse and their competing claims must be balanced in the exercise of the wide discretion conferred by s 79. The wife argued that the husband wasted assets by acting recklessly and negligently in completing his tax returns, an act wholly within his knowledge. For twelve years he claimed outgoings on a property which was usually his primary residence. The majority found that the husband's conduct was not within the exceptions to the waste principle in *Kowaliv*,¹⁶ as it was not designed to *diminish* the value of the matrimonial assets, but to *increase* them. The wife received the benefit of the funds which flowed from the husband's conduct, and it was neither just nor equitable for her to escape all responsibility for payment of the *primary* tax.

The majority in *Lemnos* followed the Full Court of the Family Court in *Johnson & Johnson*¹⁷ where it was said "unless there were compelling circumstances to the contrary, a just outcome demanded that the wife take the good with the bad" and that unless "the husband was on a frolic of his own and acting contrary to the wife's express wishes" there was no reason for the trial Judge to leave the husband with the burden of the tax penalties. The majority in *Lemnos* allowed the appeal because of the trial Judge's treatment of the primary tax burden as "waste." The minority allowed the appeal because of the way the trial Judge applied s 75(2)(ha). By ordering that the wife receive 50% of the equity in the home, the trial Judge gave priority to the wife over the unsecured creditors. The unsecured creditors were owed approximately \$6 million. They received the same dollar amount as the wife, or about 20% of their claims. In finding that the husband should satisfy the tax debt from his resources, the trial Judge had already decided the issue which s 75(2)(ha) directed him to consider (the effect of any proposed order or the ability of a creditor to recover the creditor's debt) under step 3 of the four step process.

¹⁵ (2009) FLC 93-394

¹⁶ (1981) FLC 91-092

¹⁷ [1999] FamCA 369. The report in Austlii is incomplete. The quotations are from para 244 of *Lemnos*.

The majority in *Lemnos*, unlike in *Johnson*, accepted that the husband was “on a frolic of his own” but did not accept that the wife’s lack of knowledge or complicity in the husband’s wrongful deductions determined whether she should share responsibility for the payment of *primary* taxation on his income during the marriage. The statement in *Johnson*, that spouses should generally “take the good with the bad,” had even more force when applied to allocating responsibility for *primary* taxation, rather than tax penalties. Both the trial Judge and the Full Court considered that the wife in *Lemnos* should share some responsibility for the primary tax. Following *Stanford*, was it just and equitable for any order to be made that allowed the wife to be able to claim against the home which had solely vested in the trustee? Was it just and equitable that the creditors received only 20% of their claims?

Unsecured liabilities

For the purposes of s 79, a distinction is not often made between creditors with judgment debts and those without. The position of unsecured creditors has not been considered in depth post-*Stanford*. If the debts of creditors without judgments are taken into account in determining the net pool of interests available for alteration by the Court between the parties under s 79, a creditor which may be unable to substantiate its claim, may receive priority over the legitimate interests of a party to the marriage under s 79. However, if those creditors are ignored, the legitimate debts owed to third parties may not be paid at all. Is that just and equitable? The priority given to unsecured liabilities (if any) in family law proceedings becomes more important if one party is bankrupt.

A "debt" is defined simply under the BA to include a "liability". In the distribution of a bankrupt estate, a creditor lodging a proof of debt is not required to have judgment against the bankrupt. Provided the claim is admitted by the trustee, the debt will be paid *pari passu* (in proportion) with other debts if there is property to distribute. Creditors with or without judgment debts rank equally.¹⁸ In fact, a creditor cannot obtain judgment after bankruptcy.¹⁹

Debts provable in bankruptcy are defined widely under the BA as:

all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or his discharge by reason of an obligation incurred before the date of the bankruptcy are provable in his or her bankruptcy.²⁰

A trustee can admit or reject a proof of debt in whole or in part or require further evidence in support of it.²¹ A trustee may require a statutory declaration to be lodged by a creditor to

¹⁸ Subject to certain exceptions in s 108, 109 and 109A BA

¹⁹ s 58(3)BA

²⁰ s 82(1)

²¹ s 102(1) BA

substantiate the proof of debt.²² There is a right of review of the decision of the trustee.²³ Debts are not proved until admitted by the trustee.²⁴

A bankrupt is not released from all provable debts. A bankrupt is still liable, for example, for debts incurred by fraud, such as some Centrelink debts, and debts incurred under a maintenance order.²⁵ Debts which are not provable debts include debts incurred after the date of bankruptcy and HELP debts under the *Higher Education Support Act 2003 (Cth)*.²⁶

With respect to provable debts, the bankrupt has no direct liability to the creditors, but has obligations under the BA, including possibly making contributions from income. As far as the creditors are concerned, upon bankruptcy the creditors no longer have a right of action for the debt. The debts merely give the creditors the right to prove in the bankrupt estate.²⁷

In contrast to the BA, neither "debt" nor "liability" are defined in the FLA. A debt does not fall easily within the definition of "matrimonial cause" in s 4(1) of the FLA which talks about "property". The problem of the absence of any reference to debts and liabilities in the matrimonial causes is exacerbated by the extended definition of "matrimonial cause" in s 90AD. For the purposes of Pt VIII AA (and by implication, for no other purposes) a debt owed by a party to a marriage is treated as property under para (ca) of the definition of matrimonial cause in s 4 and in s 114(1)(e).

The Full Court in *Biltoft & Biltoft*²⁸ set out the general practice prior to *Stanford* of dealing with liabilities which has largely continued post-*Stanford*:

A general practice has developed over the years that, in...applications pursuant to...s 79, the Court ascertains the value of the property of the parties to a marriage by deducting from the value of their assets the value of their total liabilities...Where the assets are not encumbered and moneys are owed by the parties or one of them to unsecured creditors, the court ascertains the value of their property by deducting from the value of their assets the value of their total liabilities, including the unsecured liabilities...²⁹

The Full Court stated with respect to the rights of unsecured creditors as against a spouse:

Notwithstanding the general practice which has developed, the Court has indicated that it may properly determine not to take into account or to discount the value of an unsecured liability in certain circumstances. Such liabilities would include, but are not limited to a liability which is vague or uncertain, if it is unlikely to be enforced or if it was unreasonably incurred ...Thus, although there is a general rule. ..., the rule is not absolute, is not prescribed by the statute and there are a number of well recognised exceptions to some of which we have already referred. There is no requirement that the rights of an unsecured creditor or a claim by a third party must be considered and dealt with prior to the Court making an order under s 79, nor is there a rule of priority as between a creditor

²² s 84(1) BA

²³ s 104(1) BA

²⁴ s 83 BA

²⁵ s 153(2) BA

²⁶ s 82

²⁷ *Clyne v Deputy Commissioner of Taxation* [1984] HCA 44; (1984) 154 CLR 589 at para 4 per Gibbs CJ, Murphy, Brennan and Dawson JJ

²⁸ (1995) FLC 92-614

²⁹ At p 82,124

claimant and a spouse. Those rights, however, cannot be ignored. They must be recognised, taken into account and balanced against the rights of the spouse.³⁰

Referring back to the discussion earlier in this paper of the definition of legal and equitable interests, is an unsecured liability a legal or equitable interest? An "interest" is a "thing" (using *Osborn's* definition) which seems a broad enough concept to suggest that it can be a liability. *Bevan & Bevan*³¹ was the first Full Court case to consider the nature of unsecured liabilities after *Stanford*. The Full Court seemed to take a narrow approach, but the later case of *Layton & Layton* seemed to look at interests more broadly.

Justice Finn put the problem in these terms in *Bevan & Bevan*:

These reminders that the jurisdiction under s 79 is a jurisdiction to alter individual interests in title to property and that there is no community of property in this country, might also call into some question the current practices in relation to the treatment of property which is no longer in existence but which one party has had the use of (the so called "addbacks"), and perhaps also of the unsecured liabilities of one or both parties. It may well be that these matters should more strictly be considered in making findings under s 79(4)(e) (i.e. s 75(2)), or in an extreme case, when considering the question under s 79(2) as to whether it is just and equitable to make any order under s 79. But these questions do not arise in the present case, and are thus for another day.³²

Much has been written and discussed about the impact of *Stanford* on add-backs and notional property and it is beyond the scope of this paper to consider them. However, very little has been written about how unsecured liabilities are considered post-*Stanford* and the cases are only starting to explore the options.

The Full Court, in a bench which included Justice Finn, looked at the issue of unsecured liabilities in *Layton & Layton*.³³ The husband appealed against the trial Judge's refusal to "add-back" to the pool a joint loan of \$50,000 taken out by the parties to meet the legal costs of the wife's son in criminal proceedings. The husband argued that it was agreed that the wife would be solely liable for the debt and the wife conceded that she arranged to have the loan statements sent to her sister's address.

The Full Court considered that there was substance in the husband's complaint that the trial Judge's reasoning was inadequate as to why she ignored the fact that the wife had apparently had the sole use of the funds. The trial Judge's findings as to the purpose of the loan suggested that the wife should be the party responsible for the loan. The Full Court said:

It may well be, of course, that in light of certain of the observations made by members of the Full Court in their judgments in *Bevan & Bevan* ... (which were delivered subsequently to her Honour's decision in this case and to the hearing of this appeal), that it would not have been appropriate for her Honour to treat the loan funds in question as "notional property" to be added back to, or included in, the property available for distribution between the parties. But however that may be, it would seem on the basis of

³⁰ At p 82,127-8

³¹ (2013) FLC 93-545

³² At 160

³³ [2014] FamCAFC 126

the evidence to which we were taken, and have earlier recorded, that justice and equity would require that the wife's use of these loan funds should have been taken into account in some way in favour of the husband either as a contribution by him or as a matter under s 75(2)(o) of the Act. It might even have been open to a court on a proper analysis of the evidence, to have concluded that the sum of \$50,000 representing the loan funds was a debt which the wife owed to the husband and which should have been repaid out of the net proceeds of the sale of the matrimonial home.³⁴

The Full Court seemed to take a broad view of the definition of legal and equitable interests so as to encompass the possibility that there may be a contract between the parties as to the payment of a debt. In practical terms, this may mean that the parties have agreed that both parties will use a credit card or incur an electricity or telephone debt in the sole name of one of the parties and that it will be paid from the incomes and/or property of both parties.

The Full Court left open the option of dealing with the debt as, for example, a contractual issue if an add-back was not appropriate.

In *Stone & Elliott*³⁵ the husband argued that the "pool" should be identified at the so-called "first step" and his debts (personal loan and crystallised tax bill) that related to a period during the relationship and after it ceased but when he was still making mortgage payments, should be given priority in payment from the net proceeds of sale of a real property. Neville J noted that no legal (or any other) reason was given as to why priority should be given to the payment of the unsecured debts.³⁶

The husband opposed funds being repaid to the second respondent (the wife's mother). Neville J found that a contract existed between the second respondent and the parties. He also found for the second respondent on the basis of estoppel. For example, the husband acknowledged the regular repayments made to the second respondent over some time.

After referring to *Bevan and Biltoft*, Neville J said:

None of the qualifications to which the Full Court referred is evident on the facts here. Indeed the contrary is true: the liability is not vague or uncertain; and the second respondent has taken formal steps (in these proceedings) to recover it.³⁷

The second respondent's debt was given priority for payment whereas the other debts of the parties were taken into account in determining the property pool.

In *Devopoulos & Devopoulos*³⁸ Loughnan J rejected the argument that the husband's tax debt was vague and uncertain. The quantum of the debt was set out in a Statement of Claim in the Supreme Court of New South Wales as \$789,506.61 as at February 2012 and as at

³⁴ At para 38

³⁵ [2014] FCCA 181

³⁶ At para 67

³⁷ At para 115

³⁸ [2014] FamCA 224

17 December 2012 the debt stood at \$923,433.46 according to the ATO Portal. Although Loughnan J was satisfied that the debt was owed to the ATO, he did not include it in the balance sheet setting out the net pool of assets for division between the parties.

Loughnan J listed it as a debt solely of the husband because:

- no meaningful explanation was provided for the husband's failure to lodge tax returns, pay his tax or keep the wife advised about the potential liability;
- the principal debt had been paid and the balance seemed to be penalties and interest;
- the wife had agreed to pay almost \$300,000 of joint funds to discharge the main debt;
- the ATO did not object to the approach proposed by the wife.

Jarrett J in *Simon & Simon*³⁹ was dealing with net equity in a home of \$185,000. The wife had a personal loan of \$7,000. The husband had unsecured creditors of \$76,600. The wife had superannuation of about \$11,000 and the husband had about \$32,000.

There was sufficient equity in the real property to pay the husband's unsecured creditors in full. The husband said that the debts were mainly incurred by him for family purposes. In those circumstances, if the husband was not bankrupt, Jarrett J said that they would have been paid from the gross pool and the rest of the net assets divided between the parties.

Jarrett J considered that it was arguable:

...that given the circumstances, the Court would be justified in approaching the case on the basis that the pool of assets for division is the net pool after payment of the first respondent's unsecured creditors. Given the surplus that would exist if the matter was not complicated by the bankruptcy, the debts due to the unsecured creditors would be accounted for in the process undertaken by the Court.⁴⁰

However, the matter was not argued in that way and Jarrett J did not consider it further.

The parties' contributions were assessed as equal. There was evidence from the husband's father that the \$150,000 interest free loan was intended to benefit both parties so it was not caught by the *Kessey & Kessey*⁴¹ and *Gosper & Gosper*⁴² line of authority. A 15% adjustment under s 75(2) was made, primarily because the wife had the care of a 15 year old child and received minimum child support. The adjustment would have been larger but the unsecured creditors were a factor against the wife under s 75(2)(ha).

³⁹ [2013] FCCA 432

⁴⁰ At para 70

⁴¹ (1994) FLC 92-495

⁴² (1987) FLC 91-818

An example of a case where the Court refused to deduct a liability from the property pool to be divided between the parties is *Hagan & Gerald*.⁴³ The parties had been separated for five years. The husband asserted that he had been unable to pay his tax as it fell due for three financial years since separation. He owed about \$40,000 and submitted that the debt had arisen because of the amounts spent by him for the benefit of the wife and the children including money paid by him when the children were in his care.

The Court found that the husband failed to demonstrate that he had been unable to pay his tax. For example, in the 2012 financial year the family trust had received \$596,584 and he paid \$146,682 of this for the benefit of the wife and the children. He was left with \$449,902 from which to pay his income tax and living expenses. As in other years, he had chosen to spend his income and not pay his tax. In these circumstances it was not just and equitable to treat the husband's tax as a joint liability.

Identifying equitable interests

In light of the greater emphasis placed on equitable interests at the outset of the s 79 process, there is more scope for both trustees in bankruptcy and non-bankrupt spouses to utilize equitable principles to achieve a more favourable outcome. An understanding of equitable interests is therefore crucial for family law practitioners, and the following section seeks to provide a refresher on the equitable concepts of estoppel, constructive and resulting trusts, as well as provide a number of case examples. Equitable interests and remedies which are not considered in this paper but may be relevant include equitable accounting, equitable liens and specific enforcement. The question of whether an equitable interest arises at the time it is imposed by a court order or at an earlier time is beyond the scope of this paper.

Estoppel

Estoppel operates to prevent a party from denying or asserting something if it would be unconscionable to do so. The elements, as set out in *Walton's Stores (Interstate) Ltd v Maher*⁴⁴ are as follows:

- The plaintiff assumed that a particular legal relationship existed between the plaintiff and the defendant, or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship;
- The defendant induced the plaintiff to adopt that assumption or expectation;
- The plaintiff acted or abstained from acting in reliance on the assumption or expectation;

⁴³ [2013] FamCA 714

⁴⁴ [1988] HCA 7

- The defendant knew or intended him to take that action or inaction;
- The plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and
- The defendant failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

The High Court recently revisited the nature of estoppel in the context of a relationship breakdown, in *Sidhu v Van Dyke*.⁴⁵ The appellant lived with his wife on a homestead on a rural property they owned as joint tenants. The respondent lived in a cottage also located on the rural property, approximately 100 metres away from the homestead. The respondent and the appellant formed a romantic relationship, and over the course of a number of years the appellant promised the respondent that he would arrange for the land to be subdivided (including procuring his wife's consent), and ensure that the portion of land containing the cottage was placed into the respondent's name. The respondent acted in reliance on this promise, to her detriment. The specific detriment suffered was found to arise from the maintenance and improvement work carried out by her on the rural property as well as the loss of opportunities to obtain a higher income from full time employment. The High Court did not, however, rely on the Supreme Court finding that the respondent lost the opportunity to obtain a property settlement from her former husband. The appellant and his wife ultimately refused to convey the property to the wife, and did not do all things required to subdivide the land.

The High Court found that estoppel was enlivened and upheld the Supreme Court of New South Wales decision that the appellant be held to the representations made to the respondent. In doing so, the High Court undertook a useful look at the concept of reliance, and in particular the sufficiency of proof of detrimental reliance required to ground an estoppel claim:

- The claimant wore the legal burden of proving she was induced to rely upon the representation.
- A presumption of reliance does not arise from the mere fact that a party enters into a contract after a material representation was made to them. To the contrary, the court made it clear that to refer to any "presumption of reliance" in the context of equitable estoppel fails to recognize that it is the conduct of the representee induced by the representor which is the very foundation for equitable intervention, although the conduct of the representor need not be the sole inducement operating on the mind of the representee.⁴⁶
- Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact.

⁴⁵ [2014] HCA 19

⁴⁶ At para 37

As to the relief available to the claimant, the Court reiterated that the measure of relief is not limited to the value of the promise. However, the detriment was of such an extent and involved sufficiently life-changing decisions so as to warrant performance of the promise.

The High Court did not look at the effect of the decision on the appellant's wife although she presumably may have argued that her position was relevant if she and the appellant were separated.

In the recent decision of the Full Court of the Family Court in *Vadisanis & Vadisanis and Anor*,⁴⁷ the husband's mother intervened in property proceedings between the husband and wife, seeking the recognition and repayment of a number of loans and advances of funds made both to the husband solely and the parties jointly. One of the arguments raised by the wife against the intervener was that the intervener's conduct gave rise to a promissory estoppel preventing her from enforcing the terms of a loan agreement. In particular, the wife alleged that the husband's mother:

- On several occasions said that the money was not to be repaid;
- In continuing to advance money to the parties and in not seeking repayment of the loans until after the parties separated, had conducted herself in a way that led the wife to understand that no money was owing or, at least, she was not liable to the intervener for a loan on which was accruing compound interest.

It is unclear from the judgment the detriment which the wife asserted, however for the purpose of the appeal the Full Court found that the wife's assertion of estoppel was not adequately addressed by the trial judge, and his failure to do so was an appealable error. Although the Full Court expressed reservations as to the merits of the wife's argument it emphasized that it could not have been argued that "the equitable estoppel point was so lacking in merit that it was unworthy of his Honour's consideration."⁴⁸

A question which may arise is whether a trustee in bankruptcy is bound by an estoppel against the bankrupt personally. The property of the bankrupt does not include property held by the bankrupt upon trust for another person, but equitable interests generally are not specified.⁴⁹ Despite the wording of the BA, the trustee is bound by the equitable obligations of the bankrupt.⁵⁰ Arguably, an alleged promissory estoppel against a bankrupt should operate to bind the trustee, and by extension a trustee can also seek to raise an estoppel on behalf of the bankrupt.⁵¹ However, it would be difficult for the trustee to assert that the bankrupt "relied to his detriment" on the promise as it would require the cooperation of the bankrupt to give the right

⁴⁷ [2014] FamCAFC 97

⁴⁸ At para 100

⁴⁹ s 116(2)(a)BA

⁵⁰ *Ex parte James re Condon* (1874) 9 ChApp 609; *Re Sabri*; *ex parte Brien* (1997) FLC 92-732

⁵¹ *Lucas v McNaughton* (1990)FamLR 347; *CCH Australian Family Law and Practice* para 40-565

evidence, as well as divulge to the trustee the conversations and other evidence which give rise to the promise.

The trustee is at a disadvantage in that estoppel cannot oust the jurisdiction of the Court pursuant to Pt VIII of the FLA.⁵² Accordingly, the trustee cannot argue an estoppel on behalf of a bankrupt spouse to prevent the non-bankrupt spouse from seeking a Pt VIII order.⁵³ But can the trustee argue that the non-bankrupt spouse is estopped from denying that a debt should be paid? It should be noted that in *Bevan*, the wife was able to rely on the husband's representations made 18 years previously that she be able to keep all the property in Australia to prevent the making of a property division order. The husband signed a power of attorney to facilitate her doing this, however shortly prior to the expiration of the 12 month period after their divorce was final the husband issued property proceedings. In finding in favour of the wife, the Full Court relied on *Stanford* rather than a finding of estoppel, although the distinction was not completely clear.

Resulting trusts

A resulting trust arises:

- By operation of law where the acquisition and legal ownership of an asset do not reflect the contributions to the purchase price made by another.
- In the absence of evidence as to intention to the contrary and the operation of the presumption of advancement.
- It is presumed that the person providing the purchase monies did not intend the legal owner to take beneficial ownership. For example, where two people have contributed to the purchase price of an asset in unequal shares, it is presumed that a resulting trust is created in the proportions in which they contributed the purchase money.⁵⁴

The existence of a resulting trust may be displaced by the presumption of advancement, which arises in relationships where the person providing the purchase money is under an obligation to support the person who holds the legal title. Thus, for example, where a parent makes a contribution of funds to a child (including an adult child), in the absence of any evidence to the contrary, that contribution will be treated as a gift as opposed to a loan or acquisition of equity. In the context of a marriage, if a property is purchased by one spouse entirely but the other spouse is registered as the legal owner, it is presumed that the contributing spouse intended the other spouse to take the property beneficially. Accordingly, that spouse will hold both the legal and equitable interests in the property.

⁵² *Woodcock v Woodcock* (1997) FLC 92-739

⁵³ *Plut & Plut* (1987) FLC 91-834

⁵⁴ *Calverley v Green* (1984) FLC 91-565

Both the presumption of a resulting trust and the presumption of advancement can be rebutted by evidence of the actual intention of the purchaser at the time of purchase. This is to be ascertained by “evidence of the acts and declarations before or at the time of purchase or so immediately after it as to constitute a part of the transaction.”⁵⁵ In *Vadisanis*, this meant that evidence of loan agreements entered into, and conversations following the advance of funds, were of no assistance to the intervener seeking to rebut the presumption of advancement.

In *Crafter and Ors & Crafter and Ors*⁵⁶ the Full Court of the Family Court considered the beneficial ownership of assets legally owned by the husband and wife, but where it was asserted by the husband’s family that they did so as trustees for other family members. Adding to the complexity was that the contentious assets had been purchased some 20 years prior. The Full Court upheld the trial judge’s refusal to give consideration to the existence of a resulting trust, as the purchase prices for the contentious assets were largely met from loans from unrelated parties. The fact that the husband’s mother advanced \$10,000 after the date of settlement of the purchase did not establish the existence of a resulting trust as not only was it advanced following settlement, but it was also caught by the presumption of advancement.

In *The Trustees of the Property of John Daniel Cummins v Cummins*,⁵⁷ the High Court considered the circumstances where a resulting trust arises in respect of a matrimonial relationship where one party is bankrupt, and in doing so gave significant weight to the rights of a trustee. The parties were not separated. The wife received an inheritance prior to the marriage which was at least partially used for the parties’ first property purchase. Later, the parties purchased vacant land as joint tenants. The bankrupt paid one-quarter of the purchase price and his wife paid the balance. They built a house on the land using joint funds and jointly borrowed funds. In 1987 the bankrupt transferred his half interest in the home to the wife. She paid stamp duty on the transfer but did not pay the monetary consideration stated on the transfer.

The bankrupt was a barrister who did not lodge tax returns for about 40 years. He became bankrupt in December 2000 owing tax of about \$1 million. The bankrupt and his wife separated in 2002. The trustee sought to challenge the transfer of the husband’s interest in the property pursuant to s 121 BA. The wife argued that in the event that the transfer was void, she still beneficially owned a portion of the bankrupt’s legal interest by way of a resulting trust arising from her contributions to the purchase and construction costs. The trustee was successful before a single Judge of the Federal Court, unsuccessful before the Full Court of the Federal Court and successful in the High Court.

⁵⁵ *Vadisanis* at para 44, restating *Calverley v Green* at 262

⁵⁶ [2012] FamCAFC199

⁵⁷ [2006] HCA 6

The High Court found that in a traditional marriage it is often “a purely accidental circumstance” whether money is contributed by a party to the purchase of the home or to living expenses. It concluded that in 1987 the wife’s beneficial interest in the home did not exceed her legal interest before the transfer. After the legal transfer, her beneficial interest remained at 50%. The trustee was, therefore, entitled to 50% of the equity in the home.

Cummins was a useful development for trustees. It enables trustees to seek to recover one-half of an asset owned solely by the non-bankrupt spouse, even where the trustee has no claim to the asset pursuant to the BA or on the basis of the existence of a constructive trust in favour of the bankrupt. It is perhaps even more important following *Stanford*, which emphasised that the existing legal and equitable interests of the parties are a starting point in the s 79 exercise.

However, as was demonstrated in *Official Trustee in Bankruptcy & Brown*,⁵⁸ neither a trustee (nor a bankrupt spouse) can rely on an inference of joint beneficial ownership automatically arising. In *Brown*, the property was registered in the sole name of the non-bankrupt spouse. The trustee relied on *Cummins* to claim a 50% interest in the property on the basis of a resulting or constructive trust. Driver FM (as he then was) accepted the principle from *Cummins* that:

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.⁵⁹

However, he went on to distinguish *Cummins*, in that he did not accept that the parties had a “traditional matrimonial relationship”. Instead, he determined the interests of the parties, not under the FLA, but as a joint venture relying on such High Court cases as *Baumgartner v Baumgartner*,⁶⁰ *Muschinski v Dodds*⁶¹ and, particularly the mathematical approach taken to contributions in *Calverley v Green*.⁶² The Court ordered that the wife receive 67% of the net proceeds of sale based on her equitable interest and that the trustee receive the balance.

Constructive trusts

A constructive trust arises by operation of law where, having regard to the circumstances of the case, it would be unconscionable for one party to rely, as against the other party, on legal title to property as representing the actual interests of the parties.⁶³ In this sense, constructive trusts can be differentiated from resulting trusts as their formation is not dependent on the intentions of the legal owner of the property. They are also less restrictive in that the events that give rise to a constructive trust can arise after the acquisition of the asset.

⁵⁸ [2011] FMCA 88

⁵⁹ *Cummins* at para 71

⁶⁰ (1987) 164 CLR 137

⁶¹ (1985) 160 CLR 583

⁶² (1984) FLC 91-565

⁶³ *Foley & Foley and Anor* [2007] FamCA 584, para 72.

In the context of a marriage, a constructive trust may arise, for example, where although a property is registered in joint names, one party has made overwhelming contributions to the property and there is nothing to suggest that party intended the other to benefit from this. As mentioned above, in *Stanford*, the wife may have been able to assert a beneficial interest in the husband's home by way of a constructive trust, by virtue of her non-financial and homemaking contributions to the property.

In *Sui Mei Huen v Official Receiver for Official Trustee in Bankruptcy*,⁶⁴ the husband and wife had acquired the matrimonial home as joint tenants. After separation, and approximately 2 years prior to the husband's bankruptcy, the husband and wife signed an agreement providing for the wife to own 100% of the matrimonial home, although the title was not changed. The Full Court of the Federal Court gave effect to the agreement between the parties. The wife was successful in obtaining a declaration that the trustee's half interest in the matrimonial property was held on constructive trust for her. In reaching this decision, the Full Court addressed the appropriate application of the *Cummins* principle, stating:

There is nothing in the joint reasons for judgment in [*Cummins*] to suggest that the presumed intention in favour of an equitable joint tenancy of the matrimonial home can never be displaced by an express or constructive agreement between the husband and the wife or by the enforceable creation by one of a trust in favour of the other of his or her presumed joint interests.⁶⁵

The Full Court found that the presumption of an equality of equitable interests was rebutted.

In *Official Trustee in Bankruptcy v Lopatinsky*⁶⁶ the Full Court of the Federal Court found that the non-bankrupt wife had made a disproportionate share of the payments due under a mortgage which she and her husband had jointly given over property although the husband and wife "pooled" their incomes so as to enable mortgage instalments to be paid. The Full Court held that a constructive trust should be imposed to reflect the proportions to which each of the parties had contributed in excess of or below his or her 50% liability to discharge the mortgage debt. The wife had received 81% of the net proceeds of sale. The Full Court accepted that her entitlement was greater than 50% and remitted the matter back to the trial Judge to determine the extent of her equitable interest.

In *Re Sabri; ex parte Brien*⁶⁷ the Family Court considered whether the trustee in bankruptcy took the husband's interest in the property subject to the wife's interests pursuant to a constructive trust. The husband and wife entered into consent orders in the Family Court providing for the husband to transfer his interest in the property to the wife in exchange for a payment of money. Two months later, the husband was made bankrupt, having committed an

⁶⁴ [2008] FCAFC 117

⁶⁵ At para 55

⁶⁶ [2003] FCAFC 109; (2003) FLC 93-149

⁶⁷ (1996) 21 FamLR 213

act of bankruptcy the year prior. Rather than seek to set aside the orders pursuant to s 79A, the trustee challenged the transfer of the husband's legal title in the property to the wife. The trustee argued that the orders only permitted the husband to transfer his "right, title and interest" in the property, which at the time of transfer was subject to his pending bankruptcy pursuant to the act of bankruptcy he had already committed. In refusing to void the transfer, the Court found that the wife's financial and non-financial contributions to the marriage gave rise to a constructive trust in favour of the wife prior to the claw-back or relation-back period. As to the date an interest in a constructive trust arose, Chisholm J stated:

it is open to a court, where justice and equity so require, to treat an interest arising under a constructive trust as dating from a time prior to the court proceedings.⁶⁸

In *Draper v Official Trustee in Bankruptcy*,⁶⁹ the husband and wife held the property as joint proprietors, although both asserted that at all times the beneficial interest in the property was held by the wife (the non-bankrupt spouse) pursuant to a constructive trust. The trustee rejected this claim. The Full Court held that the Federal Magistrate, in finding in favour of the trustee, had ignored the fact that the mortgage repayments were paid solely from the wife's salary. The matter was remitted for rehearing and an equitable accounting.

It should however be noted that, consistent with *Cummins*, the mere repayment of a mortgage debt does not, without more, give rise to a constructive trust. This was demonstrated in *Holden v Santosa*,⁷⁰ the non-bankrupt spouse unsuccessfully argued the existence of a constructive trust with respect to the matrimonial home. Federal Magistrate Hartnett (as she then was) found that a constructive trust could not exist simply because the non-bankrupt spouse solely made the mortgage repayments and paid the costs of other outgoings.

Where a bankrupt spouse has contributed income toward the maintenance and/or mortgage of a property following bankruptcy, the trustee may be able to argue that a constructive trust ought to be applied in its favour, as in effect, the bankrupt's contributions (which may have otherwise become part of the assets available for distribution among creditors) has created equity in the property, which equity is property which vests in the trustee.⁷¹

Practical implications

Post-*Stanford*, the trustee and the non-bankrupt spouse have increased options. Practical matters the trustee or the non-bankrupt spouse can consider include:

1. Identify the existing legal and equitable interests as if the spouses were not married.

⁶⁸ At para 229

⁶⁹ [2006] FCAFC 157

⁷⁰ [2011] FMCA 251

⁷¹ *Davies & Davies* [2012] FMCAfam 866; *Re Gillies*; *Ex parte Official Trustee in Bankruptcy* [1993] FCA 289.

2. Can it be argued that it is just and equitable to alter these interests or that it is not just and equitable to do so?
3. Should a s 78 declaration be sought in preference to a s 79 order?
4. Is it better not to invoke the FLA jurisdiction at all?
5. Look at contributions and other matters under s 79(4) and s 75(2);
6. Check the timing when debts were incurred - pre or post-separation?
7. What are the nature of the debts and to what extent did the non-bankrupt spouse benefit from them?
8. What was the non-bankrupt spouse's knowledge of them?
9. Is there a contractual basis for the alleged debts? If so, who is liable? For what? When? What documents establish them?
10. Do any equitable interests or remedies apply?
11. Should an application be made to set transactions aside under either the FLA or the BA. There are different requirements under each Act;⁷²
12. Assess the total debts (including the trustee's fees and expenses) and the likely legal costs relative to the available property.

Conclusion

Stanford presents opportunities for trustees and non-bankrupt spouses to argue for a better outcome. A s 79 order may not be made as it may not be just and equitable to make one. Alternatively, it may be just and equitable to make an order which differs from the order which might have been made pre-*Stanford*. Where one party is bankrupt the importance of setting out the legal and equitable interests of the parties cannot be understated. Then, it must be determined whether it is just and equitable to make an order altering those interests under s 79(2). In the absence of a precise definition of "just and equitable" it is open for trustees to argue that where a non-bankrupt spouse has received benefits from the debts incurred by the bankrupt, it is just and equitable that they be paid. A non-bankrupt spouse may not be absolved of liability even if they did not know of the debts and could not be expected to have known. A non-bankrupt spouse's interest may need to defer to a contractual liability to pay an unsecured creditor or the non-bankrupt spouse may be estopped from denying that the debt should be given priority. Looking at

⁷² Section 106B FLA, sections 120, 121 and 122 BA

the precise nature of the debt and its purpose may be more important than before *Stanford*.

An examination of the legal and equitable interests of the parties, including trust claims by either spouse or the trustee and contractual obligations, may result in a different outcome than assessing contributions and s 75(2) factors under s 79 than occurred prior to *Stanford*. It is too early to say whether these increased opportunities will lead to increased successes by either trustees or non-bankrupt spouses. However, it is an opportunity for the Court to look at what priority should be given to the contractual or other claims of creditors as against the discretionary claims of a non-bankrupt spouse under s 79 and the discretionary nature of claims in equity by a non-bankrupt spouse or a trustee in bankruptcy.

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