FAMILY LAWYERS

BANKRUPTCY AND INSOLVENCY

When family law meets bankruptcy

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Background

Before 2005 trustees and non-bankrupt spouses were often engaged in races to commence or complete litigation in different courts. The *Bankruptcy and Family Law Legislation Amendment Act 2005* ("the 2005 Act") applies to bankruptcies for which the date of bankruptcy was on or after 18 September 2005. The solution was ostensibly simple, that all disputes be decided by the Family Court, but the 2005 Act did not give clear direction to the Courts as to how to resolve disputes. There are now sufficient cases to give clearer, but not definitive, advice as to possible outcomes.

The position has been complicated more recently by the High Court decision of *Stanford v Stanford* (2012) FLC 93-518. When applied to cases where trustees in bankruptcy and non-bankrupt spouses are parties to property proceedings under s 79 *Family Law Act* (“FLA"), *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. The existing legal and equitable interests of the parties must be identified before they can be altered. If the Family Law Courts start to give greater emphasis to legal and equitable interests than it generally has done in the past, this could change the landscape for both trustees and non-bankrupt spouses. Also, 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 whether the "four steps" commonly used in the past to implement s 79 still apply, and whether "notional" property or add-backs can be considered. This process is continuing and it may be some time before there is clarity. An issue which has received less attention is unsecured liabilities. They are relevant to the parties' financial circumstances, not only where one party is bankrupt, but to most relationships. Credit card debts, loans from family members and unsecured trade and personal debts are common. Post *Stanford*, it is relevant whether unsecured liabilities are legal or equitable interests which can be altered under s 79.

Most de facto couples who separated after 1 March 2009 are now covered by the *FLA*, subject to jurisdictional hurdles such as the length of cohabitation and the place of cohabitation. In this paper, the sections of the *FLA* which apply to de facto couples are not stated. There are usually, but not always, equivalent sections in the *FLA*.

Brief overview of bankruptcy

Upon bankruptcy, the bankrupt's property vests in the trustee in bankruptcy under s 58 *Bankruptcy Act 1966* ("*BA*"). The exceptions are property which is exempt under s 116 *BA*. The most important of these are:

- superannuation although payments into superannuation made to defeat creditors can be clawed back under s 128B or 128C *BA*;
- most household goods (s 116(2)(d));
- motor vehicle with equity of up to $7,500;
- tools of trade worth up to $3,650;
- property held by the bankrupt on trust;
- property transferred under a maintenance order (s 123(6) *FLA*);
- property dealt with in orders under Pt VIII or Pt VIIIAB *FLA*.

The bankruptcy may be considered to have commenced before the date of bankruptcy - perhaps 6 months or more. The property in the bankrupt estate may be expanded by:

- transfers of property (made prior to the bankruptcy by a spouse who is later bankrupted) to a non-bankrupt spouse, may be property of the bankrupt (and therefore part of the bankrupt estate) under s 58(1) if made after the date of bankruptcy;
- transfers of property (including pursuant to court orders or financial agreements) may be set aside under the claw-back provisions, particularly:
  - s 120(1) - transfers by the bankrupt are void against the trustee if within 5 years of the start of the bankruptcy and there was no consideration or it was less than the market value of the transfer;
  - s 120(3) - transfers are not void against the trustee if they occurred more than 2 years before the start of the bankruptcy and the transferee proves that at the time of the transfer, the transferor was solvent;
  - s 120(5) - transfers relying on a family relationship, marriage or de facto relationship, promise to marry or partner and love or affection as consideration are excluded as market value consideration;
  - s 121 - transfers are void if the main purpose was to defeat creditors (s 121(1)(b)). The main purpose is taken to be the purpose in s 121(1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become insolvent (s 121(2));
  - s 122(1) - a transfer of property by a person who is insolvent (the *debtor*), in favour of a creditor, is void against the trustee in the debtor's bankruptcy if the transfer:
    - had the effect of giving the creditor a preference, priority or advantage over other creditors; and
    - was made within a certain period, usually 6 months before the bankruptcy commenced
  - s 128B and 128C - superannuation contributions made on or after 28 July 2006 may be clawed back if the contributions were intended to defeat creditors.

Exemption of trust property

In cases involving a bankrupt party there are often arguments about whether property is held on trust and is therefore exempt property. An example of such a case is *Oliver v Malanos* [2011] FCA 1354, where the Federal Court upheld an appeal by the former husband of the bankrupt from a decision of the Federal Circuit Court. The respondent was the trustee of the wife's bankrupt estate. The parties were in dispute over a bank account in the joint names of the parties of approximately $400,000. The trustee contended that about $200,000 was property of the bankrupt which vested in the trustee at the commencement of the bankruptcy. The husband argued that all of the funds were held in trust for the benefit of the children of the marriage.

The Family Court had made consent orders in 2008 for the sale of the former matrimonial home and the division of the proceeds of that sale between Mr Oliver and Ms Fung. Importantly, orders 5 and 6 were:

> *5. Following completion of the sale of the property, each of the parties shall deposit into a fund to be created the sum of $200,000 for the payment of all education expenses including tertiary school fees for the children of the marriage...*
>
> *6. The fund for the education of the children referred to in order 5 shall be in the name of the Husband and shall be managed and administered by him, subject to the Wife's right to receive accounts for the fund upon request from time to time.*

Ms Fung became bankrupt in 2009. Mr Oliver sought a declaration in the Federal Circuit Court that certain funds were held on trust for the education expenses of the children pursuant to the Family Court orders. This was opposed by the trustee who, consistently with a demand issued under s 129(4A) *BA*, asserted that approximately half the funds in the bank account were beneficially owned by Ms Fung at the time she became bankrupt and hence vested in the trustee. Mr Oliver said that he and Ms Fung exhibited an intention that the $400,000 left in the joint bank account be held on trust in favour of their children. Further, or in the alternative, Mr Oliver argued that the effect of the orders was to alter the parties' property interests so as to vest legal title to $200,000 for the purposes of the trust. He disputed the trustee's argument that he and Ms Fung had failed to comply with order 6 by not establishing a separate account to hold the moneys to be applied for the benefit of the children.

The trustee argued that the consent orders did not express an intention that the fund to be created for the children was a trust fund and that the joint account did not meet the description envisaged for the fund to be established under the Family Court orders. The joint account was used for a number of purposes unrelated to the education of the children.

The Federal Circuit Court held that order 5 created an enforceable liability at an uncertain time following completion of the sale of the former matrimonial home, for Mr Oliver and Ms Fung to pay $200,000 from the proceeds of that sale into a fund for the benefit of their children. The order was imperfect in that the obligation to pay did not arise until after the completion of the sale of the property and the obligation to pay did not arise within any particular time after that completion. The orders did not expressly create a trust and, until the fund was created, it was hard to see how there could be one.

The Federal Court upheld the appeal primarily on the grounds that the vesting provisions in the BA were subject to orders under s 79 *FLA* and that a trust had been validly created.

Overview of the 2005 Amendments

The 2005 Act gave the Family Court power to make s 79 *FLA* orders about property which has vested in a trustee in bankruptcy. The court can order that property, otherwise available for distribution to creditors, be transferred to the non-bankrupt spouse.

The general rule under the *BA* that property vests in the trustee at the date of bankruptcy (s 58 *BA*) is subject to property settlement and spousal maintenance orders (s 59A *BA*). Section 116(2)(q) *BA* provides that property of the bankrupt is exempt if, under a Pt VIII *FLA* order, the trustee is required to transfer that property to the spouse of the bankrupt. Section 116(2)(r) refers to orders under Pt VIIIAB *FLA.*

The 2005 Act 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 *FLA* proceedings or *FLA* proceedings have already commenced at the time of the bankruptcy, a trustee trying to increase the property available to the creditors is left only with the option of a claw-back under s120, 121 or 122 of the *BA* or trying to claim an equitable interest in the non-bankrupt spouse's property. If, however, the non-bankrupt spouse institutes *FLA* proceedings, the trustee can try to argue that some of the bankrupt's debts should be paid from property of the non-bankrupt spouse or seek that a transaction be set aside under s 106B *FLA*, which may be easier to achieve than under the *BA*.

The prospects of the non-bankrupt spouse being successful in claiming property which has vested in the trustee 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 or the ability of a creditor of a party to recover the creditor's debt. The other factors favour the non-bankrupt spouse. Prior to *Stanford*, the trustee only rarely improved its position under the *FLA* and often went backwards (eg. *West & West* [2007] FMCAfam 681; *Malta & Malta (No 3)* [2008] FamCA 748. But cf *Reua & Reua* [2008] FamCA 1038).

Another problem for the trustee is 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 totally unco-operative. Alternatively, the bankrupt may be very co-operative, perhaps motivated by vengefulness or by a desire to achieve an annulment of their bankruptcy.

Many of the reported cases involve debts the total of which are much greater than the gross property pool, so there is no prospect of them all being paid in full and no opportunity for the bankrupt to achieve an annulment (e.g. *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). An interesting but unresolved question is whether the overwhelming size of the liabilities relative to the value of the gross property pool does, or should, influence the court in determining whether it is just and equitable to make an order and if so, what order.

The "just and equitable" requirement and intact relationships

The High Court majority in *Stanford* 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.

By contrast, 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 High Court said it is possible for a court to be satisfied that it is just and equitable to make a s 79 order if the parties are involuntarily separated. 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. This issue does not arise in de facto relationships as a breakdown of the relationship is expressly required before jurisdiction can be exercised under the *FLA*.

Creditors and trustees in bankruptcy may be concerned about parties in intact marriages obtaining court orders to the detriment of creditors and trustees. The requirement that it is just and equitable to make an order is probably more difficult to satisfy in intact marriages as they still have the "common use of the property" (at paras 42 and 44 of *Stanford*). Pre *Stanford* cases dealing with this question 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.

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. The Court refused to make the orders on jurisdictional grounds which may no longer be valid following *Stanford*. However, 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 authority may be orders which are not just and equitable to make in an intact marriage (eg. *Redman & Redman* [2012] FamCA 364).

Unsecured debts

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 or appropriate? The priority given to unsecured liabilities (if any) in family law proceedings becomes more important if one party is bankrupt.

A "debt" is defined 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 (Subject to certain exceptions in s 108, 109 and 109A *BA*). In fact, a creditor cannot obtain judgment after bankruptcy s 58(3) *BA*.

Debts provable in bankruptcy are defined widely under s 82(1) of 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.

The bankrupt may have obligations under the *BA* to creditors, including possibly making contributions from income. However, the debts merely give the creditors the right to prove in the bankrupt estate (*Clyne v Deputy Commissioner of Taxation* [1984] HCA 44; (1984) 154 CLR 589 at para 4 per Gibbs CJ, Murphy, Brennan and Dawson JJ) and the creditors can no longer pursue payment from the bankrupt directly.

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 or child support assessment (s 153(2)). 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)* (s 82). An order under s 79 *FLA*, unlike a maintenance order, which is a provable debt (e.g. *Langer & Griffin* [2013] FamCAFC 170) and cannot be enforced by the non-bankrupt spouse without leave under s 58(3) *BA*.

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 VIIIAA (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* (1995) FLC 92-614 set out the general practice prior to *Stanford* of dealing with liabilities, which has largely continued post-*Stanford* (at p82,124):

> 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...

The Full Court stated with respect to the rights of unsecured creditors as against a spouse (at p 82,127-8):

> 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 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.

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. But is an unsecured liability a legal or equitable interest? 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* as:

> 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 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*.

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* (2013) FLC 93-545 was the first Full Court case to consider the nature of unsecured liabilities after *Stanford*. The Full Court in *Bevan* took a narrow approach, but in the later case of *Layton & Layton* [2014] FamCAFC 126 the Full Court seemed to look at interests broadly.

Justice Finn put the problem in these terms in *Bevan & Bevan* (at 160):

> 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**.**

In *Layton*, the Full Court, in a bench which included Finn J, looked at the issue of unsecured liabilities. 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 responsible for the loan. The Full Court said (at para 38):

> 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 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.

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 if parties have agreed that both parties will use a credit card of which one party is the primary card holder or incur an electricity or telephone debt in the sole name of one of the parties, that their agreement that the debt will be paid from the incomes and/or property of both parties is enforceable.

In *Stone & Elliott* [2014] FCCA 181 the husband argued before Neville J 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.

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 (at para 115):

> 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.

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* [2014] FamCA 224 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. As at 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* [2013] FCCA 432 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 (at para 70):

> ...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.

However, the matter was not argued in that way and Jarrett J did not consider it further. He assessed the parties' contributions 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* (1994) FLC 92-495 and *Gosper & Gosper* (1987) FLC 91-818 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).

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* [2013] FamCA 714. 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 in that year 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.

The Full Court of the Family Court in *Puddy & Grossvard* (2010) FLC 93-432 was clear that both s 79(10)(a) and s 75(2)(ha) refer to debts which are uncontroversial. Coleman J said (at para 61):

> However, I am not convinced that the combination of these sections provides a jurisdictional basis for entertaining the liquidator's claim. These provisions enable a creditor to intervene in proceedings in the circumstances referred to in s 79(10)(a), and oblige the court in such circumstances to have regard to the matter identified in s 75(2)(ha). There is a material distinction between being a "creditor" and asserting an indebtedness which is disputed. A jurisdictional basis other than s 79 thus needs to be enlivened in order for the court to entertain disputed debt claims.

Warnick and Boland JJ said at (paras 102-3):

> We agree with Coleman J that there is power within the terms of the *Family Law Act 1975* (Cth) ("the Act") to make an order that a party to a marriage pay an amount to a creditor, whether that creditor is a party or not. However, we doubt that, leaving aside the accrued jurisdiction, there is power to bind a creditor, even if party to the property settlement proceedings, to accept, in satisfaction of a debt, less than the full amount, or to determine the merits and/or quantum of a creditor's claim.
>
> In short, in our view, the principles enunciated in *Biltoft & Biltoft* (1995) FLC 92-614 and the terms of s 79(10) and s 75(2)(ha) of the Act are directed to the questions of the right to, and the prospect of, recovery by creditors of their debts, not to the proof

> of those debts, against one or other or both of the parties to the marriage, where liability is in issue.

The liquidator relied on accrued jurisdiction. It raised, but did not pursue using Pt VIIIAA as a possible source of jurisdiction.

In the past, the Family Court was particularly concerned to ensure that revenue authorities, such as the Australian Taxation Office and State Revenue Offices, were paid (eg. *Chemaisse and Chemaisse* (1988) FLC 91-915). Priority was often given to tax debts over the non-bankrupt spouse and other unsecured creditors (*Hannah & Hannah; Tozer & Tozer* (1989) FLC 92-052). However, Coleman J in *Lemnos & Lemnos* (2009) FLC 93-394 considered that the Australian Taxation Office no longer had priority over other creditors due to the *Insolvency (Tax Priorities) Legislation Amendment Act 1993*. Among other amendments, s 123(5) *BA* was deleted. This section protected payments of tax. The trial Judge, Le Poer Trench J, for different reasons, agreed. He said (cited at para 127 of the Full Court's judgment):

> I have some concern with the outcome of this case insofar as the creditor principally to lose out in this case is the Australian Tax Office and therefore the tax payers of this land. The question should realistically be asked why the wife should ultimately prosper at the expense of the public purse. The answer so far as I am concerned is that the *Family Law Act* as now standing provides for that to be the outcome in appropriate cases. The legislation does not elevate the status of creditors to a ranking above the other considerations.

Section 75(2)(ha) *FLA*

The 2005 Act added s 75(2)(ha) to the *FLA*, requiring the Court to consider "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." However, the interests of creditors are only one factor amongst many to be considered under s 75(2). The interests of creditors are not given more or less weight than other factors under this section.

In *Lasic & Lasic* [2007] FamCA 1188 the husband's trustee in bankruptcy sought to set aside consent orders made between the husband and the wife. Under the orders the husband's interests in 6 jointly owned pieces of real estate were transferred to the wife. The wife conceded that the inference was open that the consent orders had been entered into to avoid the payment of a possible damages award against the husband, such that the making of the orders was a miscarriage of justice. The trial Judge relied on s 75(2)(ha) and required the wife to pay $319,081 to Mr M, a creditor, who had sustained serious injuries as a result of being shot due to the negligence of the husband and the parties' son.

On appeal, in *Trustee for the bankrupt estate of Lasic & Lasic* (2009) FLC 93-402, the Full Court understood the trial Judge's concern that if the husband's entitlement was paid to the trustee, Mr M would receive nothing. Reluctantly, the Full Court concluded that ordering a direct payment by the wife to Mr M was not within the trial Judge's power.

In *Orchard & Orchard* [2008] FamCA 979, Dessau J acceded to the submissions by the husband's trustee about s 75(2)(ha) that she should consider it relevant that the husband's superannuation was exempt under s 116(2)(d)(iii) *BA.* The trustee wanted the wife to receive a superannuation split and Dessau J ordered one. She said (at paras 93-4):

> The effect of the order is that the wife shall not receive further assets immediately. She has received some, but I am conscious that the balance of her share of the settlement will be in superannuation that she cannot yet access (she is 48 years old). However, she is housed and financially secure with Mr W. She moves into the future secure, and this gives her own financial resource.
>
> The effect of the order is the opportunity for the husband's creditors to be satisfied, as he shall retain the non-exempt asset.

The Full Court in [2009] FamCAFC 90 dismissed the wife's appeal.

In *Malta and Malta (No 3)* [2008] FamCA 748 Cronin J refused to take superannuation only into account as a s 75(2) factor as the parties submitted. The wife's petitioning creditor was a party to the proceedings as the bankruptcy petition had been transferred to the Family Court. Cronin J discussed s 75(2)(ha) and refused to make an adjustment under s 75(2), saying (at paras 112 and 117):

> I have contemplated the problem set out in s 75(2)(ha) relating to the orders I make in relation to creditors. In relation to the wife, it would clearly seem that there is nowhere near enough in the entitlement of the wife to enable her to satisfy all of her creditors. On the other hand, I have been told that the husband has a debt to the Australian Taxation Office of something in the vicinity of $2 million and there is no prospect that he will be able to pay that. Whether anybody bothers to enforce that debt is a matter beyond my control…
>
> One of the difficult issues in this case having regard to the bankruptcy jurisdiction that I am being asked to exercise is the fact that any order I make in favour of the wife may very well end up in the hands of a very few people particularly having regard to the costs of the petitioning creditor. As such, to make an adjustment of a modest sum in favour of the wife in this case would have little, if any, value for the wife. Her sum

> on all of the evidence I have seen, will end up in the hands of the creditors. Even so, there is little between the parties of difference when I balance up all of those factors. In my view, there is no basis for an adjustment under s 75(2) of the Act in this case.

In *Pippos & Pippos* [2008] FamCA 542, debts incurred by the husband post-separation led to the husband's bankruptcy. Burr J gave the wife 5% on account of s 75(2) factors. He said he would have given her 10%, but the factors in her favour were partially balanced by those which favoured the trustee in bankruptcy under s 75(2)(ha) and (n) and the regard he must have to the husband's creditors' ability to recover their debts. He did not seem to consider it relevant that the debts were incurred post-separation.

In *West & West* [2007] FMCAfam 681 there was no evidence by the husband of any contributions by him to the purchase of the former matrimonial home. The court was satisfied that the wife had made the majority of the contributions to the party's property and that the property (including superannuation) ought be divided 85%/15% in favour of the wife. In relation to contributions and s 75(2) factors the trustee was severely hampered by the absence of evidence on behalf of the husband.

The Federal Magistrate considered it relevant under s 75(2)(ha) that the creditors were unlikely to receive a dividend from any monies which the court ordered the trustees be entitled to receive out of the matrimonial property. He agreed with the submissions on behalf of the wife and said (at para 111):

> It would be *perverse* if the wife and children were *"forced from their home"* and the operation of those relevant provisions of that legislation in relation to *"the Trustees' costs"* meant RACV Finance would remain out of pocket.

In *Commissioner of Taxation & Worsnop* (2009) FLC 93-392 the Commissioner of Taxation appealed against an order that the former matrimonial home be sold and the net proceeds be divided equally between the wife and the Commissioner. The only substantial asset was the home worth $4.75 million. 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. 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 tax debt was by then about $13 million. 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. Her s 75(2) factors were off-set against the husband's indebtedness to the ATO as a factor in the Commissioner's favour under s 75(2)(ha).

In balancing the competing claims of the wife against the Commissioner, the Full Court found that the trial Judge clearly appreciated the critical features of the exercise, and said (at para 86):

> 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. As seen, Rose J gave "...much weight to the fact that the outstanding tax indebtedness of the husband is a debt to the Crown and implicitly there is a public interest issue", though he also recognised that the Commissioner had no priority over the wife's claims.

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 the 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?

In *Trustee of the Property of G Lemnos & Lemnos* (2009) FLC 93-394 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 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. 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 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 *Kowaliw* (1981) FLC 91-092 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* [1999] FamCA 369. The report of *Johnson* in *Austlii* is incomplete. Quoting from *Johnson* the Full Court said in *Lemnos* (at para 244) "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 majority said that 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.

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*, *w*as 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 upon the husband's bankruptcy?

A case in which the trustee improved its position was *Reua & Reua* [2008] FamCA 1038. Before the trial commenced, the trustee and the wife each held property of about $320,000. The husband's unsecured creditors were owed $233,860 and contingent unsecured creditors claimed about $850,000. The wife sought to retain all the assets vested in the trustee. The husband sought an equal division of non-vested property between himself and the wife, and that the trustee pay unsecured creditors from the trustee's share. The trustee sought that the wife and the trustee each retain the property they currently owned. Stevenson J said (at paras 69, 96-7):

> Principally, these liabilities are thus pre-separation debts or amounts spent on the construction of various properties. I see no reason to exclude any of these unsecured debts in the calculation of the value of the net pool of property...
>
> The orders sought by the wife would mean that no unsecured creditor could recover its debt. She sought to retain the property which she holds and to take all of the property vested in the Trustee. There would thus be no funds available to the Trustee from which he could pay any of the creditors.
>
> The orders sought by the husband would mean that the unsecured creditors would be paid. The orders sought by the Trustee would permit him to discharge the debts to the unsecured creditors, from the property presented vested in him.

Stevenson J ordered a 65%/35% split of the vested and non-vested property so that the wife paid the trustee the sum of $118,892.

Setting aside orders and transactions

The ability of creditors and the trustee to use s 79A was considered in such cases as *Semmens v Commonwealth of Australia & Collector of Customs* (1990) FLC 92-116 and the *Official Trustee in Bankruptcy v Donovan* (1996) FLC 92-703. A creditor's standing to apply to set orders aside under s 79A was further clarified by the 2005 Act. Section 79A(4) provides that a creditor of a party is taken to be a person whose interests are affected by the order if the creditor may not be able to recover their debts because the orders was made. Under s 79A(5), a trustee is taken to be a person whose interests are affected by a s 79 order if, when the order was made, one of the parties to the marriage was a bankrupt or a party became bankrupt after the order was made.

If the trustee is a party to proceedings under the *FLA*, the Court may set aside or restrain the making of an instrument or disposition:

- which is made or proposed to be made by or on behalf of, or by direction or in the interests of, the bankrupt; and
- which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order (s 106B(1A) *FLA*).

In practice, s 106B orders are made more readily than orders under the clawback provisions under s 120-122 of the *BA*.

Financial agreements

Financial agreements are not as secure for the parties as consent orders if bankruptcy is a possibility. Transfers pursuant to court orders are protected by s 59A *BA.* Consent orders have the approval of the Court and, provided there has been full disclosure of the debts and notice to third party creditors, they will be more difficult for a trustee to set aside than a financial agreement entered into by the parties in private.

Following *ASIC v Rich* (2003) FLC 93-171, amendments were made to the *FLA* and the *BA* to protect the position of the trustee in bankruptcy and creditors with respect to a financial agreement. These amendments included:

- creditors have standing to apply to set a financial agreement aside (s 90K (1A))
- it is an act of bankruptcy if a person becomes insolvent as a result of a transfer or transfers made under a financial agreement (s 40(1)(o) and s 40(7) *BA*)
- the claw back provisions in the *BA* can be used to recover property transferred under a financial agreement (s 40(1)(o) and s 120 *BA*)
- a separation declaration must be made before a financial agreement comes into force or takes effect if it relates to property or financial resources (s 90DA(1) *FLA*)

In *Official Trustee in Bankruptcy & Galanis* [2014] FamCA 832, Rees J found that the trustee in bankruptcy of a discharged bankrupt did not have standing to apply to set aside a financial agreement made subsequent to the bankrupt's discharge.

Cummins and equitable principles

In *The Trustees of the Property of John Daniel Cummins v Cummins* [2006] HCA 6, the bankrupt and his wife purchased vacant land as joint tenants in 1970. 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. His tax liability in 2000 was almost $1,000,000. He became bankrupt in December 2000. The bankrupt and his wife separated in 2002. The trustee in bankruptcy 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.

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 in bankruptcy. Its impact was not watered down by the 2005 Act. Its importance is perhaps even greater following *Stanford* which emphasised that the existing legal and equitable interests of parties are a starting point in the s 79 exercise.

In Official Trustee in Bankruptcy and Brown [2011] FMCA 88 the property was registered in the sole name of the non-bankrupt spouse. The trustee relied on *Cummins*. Driver FM accepted that the case had to be decided with due regard to the dicta in *Cummins*, in particular (at para 71) where the High Court quoted from Professor Scott's *The Law of Trusts*, 4th ed (1989), vol 5, §454 at 239:

> 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

However, Driver FM distinguished the case before him, saying (at para 30):

> I have no difficulty in accepting that Ms Brown did not hold the property solely for herself but also held it on trust for Mr Daevys in recognition of the contribution he made to its acquisition, maintenance and improvement. It is certainly open to me to find, as the Official Trustee contends I should that the property was held jointly by Ms Brown and Mr Daevys. However, I do not accept that this case must be determined in conformity with the High Court decision of *Cummins v Cummins*. First, this case can be distinguished from *Cummins* on the basis that the purchase of the Property by Ms Brown occurred prior to the marriage and without any apparent intention to assist Mr Daeveys to defeat his creditors. It was no doubt convenient for Mr Daevys to conceal his interest in the Property from the Official Trustee until after his discharge from bankruptcy, in the mistaken belief that he could thereby withhold that asset from his creditors That, however, was Mr Daevys' scheme, not Ms Brown's.

The Court treated the contributions by the parties to the property, not under the *FLA*, but as a joint venture relying on such cases as *Baumgartner v Baumgartner* (1987) 164 CLR 137, *Muschinski v Dodds* (1985) 160 CLR 583 and, particularly the mathematical approach taken in *Calverley v Green* (1984) 155 CLR 242. The Court ordered that the wife receive 67% of the net proceeds of sale and that the Official Trustee receive the balance. The trustee had sought a 50%/50% division.

A *Cummins* type argument relying on *Calverly v Green* was unsuccessfully argued by the wife in *Pascoe v Nguyen* in [2007] FMCA 194, which was upheld on appeal by the Full Court of the Federal Court in *Nguyen v Pascoe* [2007] FCAFC 181.

Other cases which have considered equitable principles include *Holden v Santosa* [2011] FMCA 251 where the non-bankrupt spouse unsuccessfully argued, *inter alia*, that there was a constructive trust and *Official Trustee in Bankruptcy v Draper* [2006] FCAFC 157 where the matter was remitted to the Federal Magistrates Court for rehearing and an equitable accounting. In *Sui Mei Huen v Official Receiver for Official Trustee in Bankruptcy* [2008] FCAFC 117 a declaration was made that the trustee's half interest was held on constructive trust for the non-bankrupt spouse. The Full Court of the Federal Court said (at para 78):

> Whether a constructive trust exists is assessed by circumstances existing at the time when the property is acquired though events after its acquisition are not irrelevant … and its existence does not depends upon the intention of the parties.

Bankrupt's standing in *FLA* proceedings

The right to issue s 79 proceedings is a right *in personam*, which therefore does not vest in the trustee. However, if there are s 79 proceedings already on foot at the date of the bankruptcy, or the non-bankrupt spouse issues s 79 proceedings, the bankrupt is not a necessary party to the proceedings. A bankrupt loses the right to make submissions regarding vested bankruptcy property if a trustee in bankruptcy is a party to property settlement proceedings. The bankrupt must seek the leave of the court to make submissions (s 79(12)). Leave can only be granted in exceptional circumstances (s 79(13)). The bankrupt can, however, as of right, make submissions about property which has not vested, such as superannuation. These submissions may, of course, indirectly deal with vested property.

In *Reua & Reua* [2008] FamCA 1038 Stevenson J found that there were "exceptional circumstances" because:

1. There was no opposition to the granting of leave by the wife and the trustee in bankruptcy.

2. The husband sought relief in respect of non-vested property so he was a participant in the proceedings anyway.

3. The husband had knowledge of the circumstances in which many of the unsecured debts were incurred. Although the husband's evidence was useful to the court and the trustee, the bankrupt could have been a witness without being a party.

None of these seem to be "exceptional" circumstances in the sense otherwise used in the *FLA.*

In *Pacelli and Hopkinson* [2010] FMCAfam 1248, the wife and the husband's trustee in bankruptcy entered into final consent orders as to property. The orders omitted to deal with the husband's superannuation interest of about $13,000. The bankrupt's main argument that he had standing was that he was a "a person affected" by a s 79 order and that the order could be set aside under s 79A(1)(a) as there had been a failure to disclose relevant information.

Burnett FM found that the pre 2005 law that s 79 rights of a bankrupt were a personal right was unaffected by the bankruptcy and still applied with respect to property which had not vested in the trustee (see also *Blake & Blake* [2011] FMCAfam 796). The argument that, as a matter of construction, s 79A(5) specifically excluded a bankrupt from pursuing rights in respect of non-vested property was rejected.

Arguably, the trustee may have done better if the superannuation was included in the pool and the bankrupt's interest was split 100% to the wife. Burnett FM suggested, however, that if the wife formally abandoned any claim to the bankrupt's superannuation and the bankrupt persisted in his s 79A claim, an application for security for costs by the trustee and the wife would be viewed favourably by the court.

In *Freer & Freer* [2008] FamCA 131 the bankrupt sought that the Family Court proceedings be stayed pending the final determination of Supreme Court proceedings which appeared close to resolution. There was, however, no evidence of the likely settlement and whether the settlement sum would be sufficient for the husband to pay out his judgment debts and obtain an annulment of his bankruptcy. Although any damages received in the Supreme Court proceedings might enlarge the asset pool, the wife did not seek to claim against them.

Strickland J said (at para 17):

> Thus the effect of making the orders sought by the husband would provide no advantage to the husband in terms of the asset and liability pool. The only advantage is that he would be babe to run his own case. However, there would be significant prejudice to the wife. I am told that, in effect, the assets for division are the former matrimonial home and shares in accompany. I am told ... that the husband resides in the home ... and thus the wife would be prevented from accessing one of the major assets of the marriage which would be the subject of the property settlement proceedings for many years to come. In the meantime, though, on that scenario the husband would presumably continue to reside in the matrimonial home and he would be the one who would enjoy the benefit of that asset.

If s 79 proceedings are issued by a person who subsequently becomes bankrupt, the trustee has 28 days after being served with notice of the action, to elect to prosecute or discontinue the action (s 60(2) *BA*). If an election is not made within 28 days, the trustee is deemed to have abandoned the action (s 60(3)).

If the trustee does not prosecute the action, the bankrupt can apply under s 178 *BA* to be able to continue with the action (e.g. *Trent & Rowley* [2014] FamCA 447).

If orders are made under s 79 during the period of a party's bankruptcy, and the bankrupt is entitled to an interest in property pursuant to those orders, that interest is "after-acquired property" under s 58(1)(b) *BA* and it immediately vests in the trustee.

Conclusion

The insertion of s 75(2)(ha) means that in the s 79 process, the interests of creditors is one of the factors to be considered. In practice though, it appears to be given no more weight than the other factors and creditors may lose out against a non-bankrupt spouse with significant s 75(2) factors, such as being on a low income with young children.

Parties to the marriage and trustees in bankruptcy need to remember that the *BA* still applies and that the trustee can use *BA* principles to protect and enlarge its interests. The claw back provisions, such as s 120 and 121 *BA* and a *Cummins* type argument are available in addition to s 79 arguments and s 106B *FLA* applications.

Under the *FLA* the court has the power to make such orders as:

- that property which vested in the trustee at the date of bankruptcy be transferred to the non-bankrupt spouse
- that a debt which is part of the bankruptcy be paid from property which has not vested in the trustee in bankruptcy
- that the non-bankrupt spouse receive some or all of their entitlements in superannuation so that there is more non-exempt property available for the trustee

Although not discussed in this paper, at some stage it would be helpful if the Full Court reconsidered *Kowaliw & Kowaliw* (1981) FLC 91-092 and gave clearer guidance as to which debts are "debts of the marriage" to be paid from the "property of the parties" when calculating the net pool.

It is likely that the development of the law relating to the rights of bankruptcy trustees and non-bankrupt spouses will depend upon whether unsecured liabilities are found to be a legal or equitable interest which can be altered under s 79.