

LEGALWISE LECTURE

18 MARCH 2010

BANKRUPTCY AND

FAMILY LAW

WHAT YOU NEED

TO KNOW IN 2010

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CURRICULUM VITÆ OF

SALLY SUSAN NASH

Sally is acknowledged as a leading insolvency lawyer. She was admitted to practice in 1977 and has practiced in insolvency, general commercial litigation and debt recovery litigation since that time. Her practice is in all State and Federal Courts involving commercial and insolvency litigation acting for creditors, Trustees, Liquidators, bankrupts and directors. Sally has been involved in many leading edge cases and is very well considered by her clients and fellow practitioners. She also has extensive experience acting for secured creditors in the enforcement of their securities.

Often asked to speak to the profession and clients, Sally is happy to assist with PLT and in house training.

Sally is a member of the Law Society of NSW, Law Council of Australia, Commercial Insolvency and Reconstruction Committee; Insolvency Practitioners Association of Australia; Turnaround Management Association Australia and Member of the Smaller Practice Issues Committee of INSOL International, International Association of Restructuring, Insolvency and Bankruptcy Professionals.

In 2008 Sally reviewed and updated the Lawyers Practice Manual for New South Wales debt recovery chapter.

See also website www.sallynashandco.com.au

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1. LAW REFORM – 19 September 2005

- 1.1 The Family Law Act was substantially amended on 19 September 2005. These amendments enable the Family Court and Federal Magistrates Court to deal with bankruptcy matters where there is a property family law dispute.
- 1.2 The circumstances in which the Family Law Act and the Bankruptcy Act collide are:-
- (a) determining the property to be distributed both to the wife and to the unsecured creditors;
 - (b) whether the Trustee in Bankruptcy will stand in the shoes of the bankrupt for the benefit of property orders;
 - (c) whether a bankruptcy is bona fide, particularly in the circumstances of the filing and acceptance of a Debtors Petition;
 - (d) when an action is taken to set aside Family Court orders which have arisen within 5 years or earlier periods between the bankrupt and the spouse such that assets are transferred to the non bankrupt spouse to the disadvantage of the ordinary unsecured creditors of the bankrupt.
- 1.3 The substantial changes were to give the Family Court of Australia jurisdiction in a bankruptcy where one of the parties to the marriage goes bankrupt. Consider also if a wife could intervene on a Creditors Petition hearing as a person affected by such an order and if such intervention would succeed in view of the commencement of the bankruptcy at the act of bankruptcy.
- 1.4 A statement of the policy objectives and comments and changes extracted from the revised Explanatory Memorandum with respect to the Bankruptcy and Family Law Acts is set out as Schedule "A" hereto.

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2. JURISDICTION

- 2.1 The jurisdiction of the Family Court will only apply in circumstances where both the bankruptcy and the property application occur after 19 September 2005. **Re: Eykamp & Eykamp & Ors** [2009] FamCA. The application for property orders under the Family Law Act commenced before 19 September 2005. The bankruptcy occurred after that date. The Court found there was no jurisdiction despite the intention of the Act that there should be.
- 2.2 In **Zachary & Zachary & Ors** [2008] FMCAFAM 1209 the husband presented a Debtors Petition in 2003 and his bankruptcy was extended until 2011. It was found that s79(11)(12)(13) and (17) of the Family Law Act did not apply to bankruptcies existing before 18 September 2005. This was followed in **Joyce Mary Townend v Miles Hamilton Townend & Official Trustee in Bankruptcy** [2008] FMCA 1610:-

“It is clear that in respect of a bankruptcy entered before the commencement date of the amending Act being 18 September 2005, there was no jurisdiction in the Court to deal with the vested bankruptcy property of a bankrupt party to the marriage.....The amending Act did not in any event, give the Court jurisdiction to deal with the property other than vested bankruptcy property.....I agree with His Honour’s views as to jurisdiction. In my view, this case is indistinguishable from Zachary & Zachary. Mr Townend was made bankrupt by an order of this Court on 18 August 2005. That was before the commencement of the Bankruptcy & Family Law Legislation (Amendment) Act 2005. The consequence, as was pointed out by Kemp FM in Zachary & Zachary, is that this Court has no jurisdiction to deal with the property of a bankrupt which vests in the Official Trustee pursuant to the Bankruptcy Act in family law proceedings and no jurisdiction to make orders in those family law proceedings against the Trustee where the Trustee is an unwilling participant, having been joined as a second respondent to the applicant wife.”

- 2.3 It is fair to say that the prospect of the bankruptcy remaining current and having any substantial effect in family law proceedings is unlikely but the timing and dates should be checked in all matters.

3. FAMILY LAW ACT 1975

- 3.1 For a copy of the relevant sections, see Schedule “B” at the end of the paper.

4. EXONERATION

- 4.1 The law of exoneration is accepted in a bankruptcy context most recently by the Full Court or the Federal Court in ***Parsons v McBain*** (2002)192ALR772 stated to be

“20” The equity of exoneration is an incident of the relationship between surety and principle debtor. It usually arises where a person has mortgaged his property to secure the debt of another whether or not that other has covenanted to pay the debt. However it will also arise in a case where, although not an actual suretyship, the relationship is treated as one of suretyship...

“21” An equity of exoneration operates in the nature of “a charge upon the estate of the principal debtor by way of indemnity for the purpose of enforcing against the estate the right which (the beneficiary) has, as between (the beneficiary) and the principal debtor to have that estate resorted to first for the payment of the debt”

The effect of the equity of exoneration is that were co-owners (usually husband and wife) mortgage their property so that money can be borrowed for the benefit of one of them eg. the husband’s business, the other has an interest in the property which is primarily liable to pay the debt and has an entitlement to charge against the others property upon payment of that debt.

- 4.2 This case dealt not only with a constructive trust created in favour of each of the de-facto wives of each bankrupt, but charged the de-facto husbands interest in the property with the mortgage debts which they had borrowed for the purpose of their business. This was notwithstanding the fact that the real property was purchased by each husband prior to entering into the de-facto relationship but taking into account the fact that each of the de-facto husbands and wives contributed to repayments.
- 4.3 On 14 December 2004 Nicholas J in the Supreme Court of New South Wales in ***Phillip Ashley Dickson v Geoffrey Philip Reidy*** (2004) NSW SC 1200 considered the position of a wife forging her husbands signature in relation to a mortgage and the vesting of the real property in her Trustee in bankruptcy. The husband succeeded in an action against the Trustee and was exonerated against the Trustee’s interest in the property. The Court found in favour of the husband against the Trustee in Bankruptcy that each of the loans made by the wife were for her own benefit and her interest in the property which had vested in Mr Reidy as her Trustee in Bankruptcy was charged to secure the exoneration in favour of the husband.
- 4.4 It was also argued in ***Phillip Ashley Dickson v Geoffrey Philip Reidy*** (2004) NSW SC 1200 that the quantum of the debt to which the interest of the wife Trustees in the real property was to be charged became an unsecured liability in the bankruptcy and should be the subject of a Proof

of Debt. The peculiar circumstances of that matter involved correspondence between solicitors and an argument that the husband had by agreeing to the sale of the real property and its distribution had abandoned his charge. Directions to pay were given at settlement which provided for a division of the net proceeds of sale 50% to the husband and 50% to the wife's Trustee in bankruptcy. The Court held

“the Defendant’s final submission was that, assuming the Plaintiff has established his claim, the amount recoverable should be limited to the remaining funds in the bankrupt estate after payment of money in the ordinary course of its administration which is said to total about \$78,000.00” in my opinion the submission must be rejected. The wife’s interest in the property passed to the Defendant subject to the charge. Proceeds of sale received by the Defendant were likewise charged to the benefit of the Plaintiff. The Defendant had been on notice of the Claim since the letter to his solicitors of 29 May 2003 for these reasons the Plaintiff is entitled to a declaration that the Defendant pay to him the sum of \$115,313.30 together with interest. The question of costs was left to the parties to agree upon.”

- 4.5 The fact that monies are raised and applied for the use of one party of the marriage without benefit to the other is sufficient to attract the doctrine of exoneration. See also ***Lin v Official Trustee in Bankruptcy (2002)*** 187 ALR 220.
- 4.6 The doctrine of exoneration is based on the facts of a particular matter and the intention of the parties. If for example, the parties agreed between them that the borrowing would be for the benefit of the husband and corroborated that evidence, it would be difficult for a Trustee in bankruptcy to discharge his onus of proof.
- 4.7 Where it can be demonstrated that each borrowing and mortgage was for the sole benefit of one party to the marriage then the other party is entitled to a charge.
- 4.8 This principle and the concept of **charge** is fundamental to the Bankruptcy Act and the position of the Trustee in Bankruptcy. The Trustee receives no better title to property than the bankrupt. Therefore if the bankrupt's real property is charged with a constructive trust or the doctrine of exoneration the Trustee may not know and may deal with the asset, incur costs and be seriously disadvantaged. On the other hand, a husband or wife who does not fully understand the doctrine or rights may forgo those rights innocently believing that they do not exist or, that they have merged in the bankruptcy into a right to lodge a Proof of Debt.

5. PROPERTY HELD ON TRUST, OTHER PROPERTY DOES NOT VEST IN A TRUSTEE IN BANKRUPTCY

- 5.1 Trust property, superannuation and other property set out in s116(2) do not vest. A copy of Section 116(2) is attached to this paper at Schedule "C".
- 5.2 To turn "trust" does not mean pursuant to the terms of a Deed of Trust or a declaration of trust. It can mean a constructive trust, bare trust or resulting trust. The terms of a constructive trust are dealt with in ***Muschinski v Dodds*** and ***Giumelli v Giumelli*** (supra).
- 5.3 The terms of a resulting trust are dealt with in terms of ***Calverley v Green*** (1984) 155CLR242 (at 258) in which the High Court set out the following:-
- "When two or more purchasers contribute to the purchase of property and the property is conveyed to them as joint tenants, the equitable presumption is that they hold the legal estate on trust for themselves as tenants in common in shares for a proportionate to their contributions unless their contributions are equal".*
- 5.4 By application of the principle of the resulting trust in ***Calverley v Green***, the Full Court of the Federal Court in ***Official Trustee v Lopatinsky*** (2003) FCAFC 109 (30 May 2003) determined that the interest of Mrs Lopatinsky in the matrimonial property was more than 50% by reason of the fact that when the parties first purchased their first matrimonial home, it was purchased in the names of both parties jointly but that Mrs Lopatinsky contributed much more to the original purchase price. That purchase price was found to have been greater than 87% and accordingly on a sale of the property, she was entitled to 87% of the proceeds of sale and the Official Trustee who represented the husband, only 13%.
- 5.5 In ***Cummins v The Trustees of the Property of John Daniel Cummins, A Bankrupt*** [2004] FCAFC 191 (30 July 2004), the Full Court considered again the ***Calverley v Green*** principle and found in favour of Mrs Cummins on a resulting trust argument for the original purchase price of the Hunters Hill property. In that matter the Trustee argued a claim under s121 of the Bankruptcy Act that the transfer of the property by the bankrupt was designed to defeat creditors. Section 121(2) was found not to have been properly pleaded but the High Court overturned the Full Court decision.
- 5.6 The High Court of Australia in ***The Trustees of the Property of John Daniel Cummins, a bankrupt v Cummins*** [2006] HCA 6 simply chose to adopt the orders and reasons of Sackville J at first instance to set

aside the transfer of property by the husband to the wife under s121 Bankruptcy Act.

- 5.7 However the High Court does make reference to ***Calverley v Green*** which was the case primarily relied on by Mrs Cummins to support her trust argument. Their Honours decided to duck the issue by deciding that it was unnecessary in Cummins to look at the conflicts between ***Calverley v Green*** and ***Pettitt v Pettitt***, an English authority (see paragraphs 67 and 68 ***The Trustees of the Property of John Daniel Cummins, a bankrupt v Cummins*** [2006] HCA 6).

6. JOINT MATRIMONIAL ENTERPRISE – HIGH COURT IN CUMMINS

- 6.1 The High Court has introduced a new concept of the joint matrimonial enterprise. In ***The Trustees of the Property of John Daniel Cummins, a bankrupt v Cummins*** [2006] HCA 6, the Court stated:-

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

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

To that may be added the statement in the same work:

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

72. *That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses. There is no occasion for equity to fasten upon the registered interest held by the joint tenants a trust obligation representing differently proportionate interests as tenants in common. The subsistence of the matrimonial relationship, as Mason and Brennan JJ emphasised in *Calverley v Green*[86], supports the choice of joint tenancy with the prospect of survivorship. That answers one of the two concerns of equity, indicated by Deane J in *Corin v Patton*, which founds a presumed*

intention in favour of tenancy in common. The range of financial considerations and accidental circumstances in the matrimonial relationship referred to by Professor Scott answers the second concern of equity, namely the disproportion between quantum of beneficial ownership and contribution to the acquisition of the matrimonial home.”

- 6.2 Clearly the High Court have left it open to the Family Court in considering property settlement, how to determine the joint matrimonial enterprise, notwithstanding the fact that the property may be wholly purchased in the name of one party, but the family unit live in that property. It is not so different, one assumes to the *Baumgartner* principle.
- 6.3 Mason CJ, Wilson and Deane JJ in *Baumgartner v Baumgartner* ((1964) CLR 137 at 149) in the context referred to the "contributions, financial and otherwise" of the parties to the proceedings. The Court went on to say at page 150 that there was a need to examine the individual parties' respective contributions "either financially or in kind". This was further emphasised by Gaudron J in the case at page 156-157 where her Honour made reference to the taking into account of the income forgone by the mother during a period of maternity leave to care for the child of the relationship.
- 6.4 **Re: Sabri** [1997] 137 FLR 165, supports the view that "spousal contributions" can entitle the contributor to those contributions to an equitable interest in priority to that of the Trustee.
- 6.5 The High Court decision of *Giumelli v Giumelli* [1999] 196 CLR 101 will now have to be considered which involved a partnership with parents who promised that he would be the owner of their property and Justices Gleeson CJ, McHugh, Gummow and Callinan JJ in the joint judgment said (at 112) that:-

“A constructive trust of this nature is a remedial response to the claim to equitable intervention made out by the plaintiff. It obliges the holder of the legal title to surrender the property in question, thereby bringing about a determination of the rights and titles of the parties.

The term ‘constructive trust’ is used in various senses when identifying a remedy provided by a court of equity. The trust institution usually involves both the holding of property by the Trustee.”

7. LEAVE TO PROCEED

- 7.1 It is arguable whether or not leave to proceed is required under s58(3) of the Bankruptcy Act where a party is seeking to deal with the property of

the bankrupt. Generally, in Family Court proceedings, because of the amendments, such leave is not sought. However there is a view in relation to any other type of claim that such leave to proceed ought to be obtained. There is usually no difficulty with it being granted.

- 7.2 Often, as part of the leave application, an application is made to transfer the proceedings to the Federal Court of Australia to have the matter determined on bankruptcy principles rather than general equity principles.

8. SECTION 120/121 OF THE BANKRUPTCY ACT

- 8.1 A copy of Sections 120 and 121 are attached to this paper at Schedule "D". Commencement of bankruptcy is set out in s115 which is attached to this paper at Schedule "E"

- 8.2 It is often the case that a spouse, whilst undergoing financial hardship, transfers an asset to the other spouse and no market value is paid for the transfer.

- 8.3 In ***Official Receiver v Huen*** [2007] FMCA 304 the Court declared that an agreement signed between the husband and wife dated 1 September 2003 and purporting to give the wife the sole beneficial ownership of real estate was invalid at law and if valid at law, was void under s120 of the Bankruptcy Act. The Court declared the Trustee in Bankruptcy and the wife to be the joint owners of the land as tenants in common in proportions:-

- "(a) to be agreed between the applicant and the bankrupt having regard to the Court's reasons for judgment and subject to further order of the court;*
- (b) failing agreement between the applicant and the respondent, as further determined and ordered by the court."*

- 8.4 The Court considered *Cummins, Parsons, McBain* as to the principle to be applied in determining whether or not the transaction should be set aside and if so, the value to be given to the Bankruptcy Trustee's interest. The Federal Magistrate quoted *Cummins* as follows:-

"The transaction to which attention must be directed, in the sense given in Charles Marshall respecting the principles of resulting trusts, is a composite of the purchase of the Hunters Hill property followed by construction of a dwelling house occupied as the matrimonial home for many years preceding the August transaction. The relevant facts bearing upon, and helping to explain, the nature of the joint title taken on registration on 10 August 1970 includes the other elements in that composite. To fix merely upon the unequal proportions in which the purchase of monies were provided for the calculation of the beneficial interests

in the improved property which was dealt with subsequently in August 1987 would produce a distorted and artificial result, at odds with the practical and economic realities.”

- 8.5 The land in the *Huen* case had been purchased by the wife with a \$5,000.00 deposit but they purchased the property as joint tenants and obtained finance jointly over the property and other property. The Court did not consider the fact that the bankrupt left the land and left the matrimonial property and his wife and 3 children relevant or connected to the transaction which was being set aside. The parties had previously owned joint property which was sold and the proceeds used to acquire the current land. The Court found there was no intention to create neither a resulting trust nor a constructive trust. It was a joint matrimonial venture of the type referred to in *Cummins*.
- 8.6 The High Court recently had cause to consider a transfer in the matter of ***Vale v Sutherland*** [2009] HCA 26. Mr and Mrs Vale had not separated and were not the subject of any family law application. However the case is a useful guide as to the insight into the way in which the High Court will review a s120 void transfer. The wife had transferred her interest in real properties to Mr Vale. The wife was subsequently declared bankrupt. At the time they were joint tenants of the property. The transfer was said to be for \$2.00. The transfer occurred on 23 April 1999 and the bankruptcy commenced with the commission of the act of bankruptcy on 26 February 2001.
- 8.7. The Trustee issued a statutory notice under s139ZQ which was set aside at first instance and overturned by the Full Court. To procure a win for the Trustee, the High Court allowed the Trustee to file a Cross Claim seeking relevant declarations that the transfer between the husband and wife was void under s120 of the Bankruptcy Act. The Trustee sought payment of the monetary value of the property which had been transferred although it would have been open to him to actually seek the property to be re-transferred to him. The majority of the decision deals with s139ZQ but the High Court in relation to valuation says:-

“21. *Valuation for the purposes of s120 (and s121 and s122) involves market value at the time of the transfer. Valuation is a notoriously inexact science. It is apparent from the reference in the opening words of s139ZQ(1) to those provisions as rendering transactions void under Div 3 of Pt VI of the Act, that questions of the accuracy of particular valuations may be presented by sub division J. Section 139ZQ(8) makes allowance for this by using the phrase “recoverable.....as a debt” stating:-*

“An amount payable by a person to the trustee under this section is recoverable by the trustee as a debt by action against the person in a court of competent jurisdiction”

The provision requires treatment as a liquidated sum of an amount claimed by the trustee as being equal to the value received. In that sense, it represents an adaption and extension of the rule in Sheppard v Hills respecting statutory obligations to pay money and recovery of a liquidated claim. The scheme of subdivision J encourages the saving of costs by, on the one hand, compliance with the notice by the transfer to the trustee of property in respect of the value of which the notice requires payment (s139ZQ(7)) and on the other hand, by the revocation or amendment of notices to accommodate a settlement (s139ZQ(4)) but s139ZS does not provide the means for the determination of a dispute,.....such disputes are to be resolved in proceedings.....”

- 8.8 In my opinion a Trustee in Bankruptcy is able to lodge a **caveat** in circumstances where he is satisfied that there is sufficient evidence to void a transfer between parties in circumstances where the criteria under s120 and/or s121 of the Bankruptcy Act are met. This is because the opening paragraph of each section states:-

“(1) A transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferor's bankruptcy”

- 8.9 The sections do not state is void if declared by a Court to be void but declares that the transfer is void.

9. PRIORITY OF CREDITORS

- 9.1 A creditor has a right to intervene in Family Court proceedings, even if a party is not bankrupt. However the right to intervene does not give the creditor priority. In **Commissioner of Taxation & Worsnop & Anor** [2009] FamCAFC 4, the decision of Rose J was upheld. The ATO was given no special priority as a creditor, notwithstanding the fact that matrimonial property (real estate) was acquired whilst tax was unpaid. There was no matter of principle that the ATO ought to receive priority, not only over other unsecured creditors, but above claims at family law of the spouse of the debtor spouse. The husband argued that the ATO should be paid first and then the matrimonial property divided. The wife indicated that she had no knowledge of the husband's tax fraud and therefore had no disentitling conduct. The ATO intervened in a property settlement between the husband and the wife.
- 9.2 Similar arguments have been made such as in **Vasilias & Vasilias** [2008] FamCA 34 wherein the wife was also unaware of the husband's tax fraud. The husband denied that the husband was a party to the

scheme and the wife successfully obtained the major assets with a requirement to pay some money to the husband. The Court found that *“all of his current taxation liability seems to me to be associated with his activities subsequent to separation in June 2005. The benefit the husband does receive however, is that his obligation of increasing the mortgage is reduced by \$23,110 that came from the ING account...”*.

10. SECTION 79 FAMILY LAW ACT ORDERS

- 10.1 In ***Lasic v Lasic*** [2007] FamCA 837 the husband was bankrupt. The wife had been transferred all of the assets. The Trustee in Bankruptcy represented one creditor. The creditor's debt was minor compared with the overall costs of the administration, which included the cost of the Family Court litigation.
- 10.2 Under bankruptcy law, the creditor is no longer a creditor. The creditor has only a right to lodge a Proof of Debt in the bankruptcy (s82 Bankruptcy Act). Therefore there was no creditor to pay. The amendments to the Family Law Act are that the Trustee in Bankruptcy represents all of the creditors, even if there is only one creditor. The decision was bad at law as it directed the wife pay directly the money the creditor was owed, thereby depriving the Trustee of the money which, in reality, would have gone to pay the Trustee's remuneration, costs and expenses of managing the estate.
- 10.3 The Full Court of the Federal Court in ***Pantzer v Wenkart*** [2006] FCAFC 140 the Full Court stated at paragraph 1:-

“A fundamental feature of Australian bankruptcy law is that the estate of the bankrupt vests in a trustee. The trustee must administer the estate and deal with the bankrupt's real and personal property in accordance with the provisions of the Bankruptcy Act 1966 (Cth) (‘the Act’) and do so for the benefit of the creditors of the bankrupt and the bankrupt. The trustee must be a suitably qualified accountant. Some estates are simple to administer, others are not. Often, property is marshalled and sold by the trustee and the proceeds used to pay creditors, though creditors can be paid from funds realised by other means. The trustee must be involved in the process. The costs of administering the estate are paid out of the estate. Those costs will include the professional fees of the trustee as well as expenses and legal costs. Sometimes there are sufficient funds in the estate to meet the trustee's remuneration, disbursements and expenses. On other occasions there are not and the trustee bears the loss.”

- 10.4 On appeal, the Full Court of the Family Court in ***Trustee for the bankrupt estate of Lasic v Lasic*** [2009] FamCAFC 64 ordered the

payment made to the creditor was not within power. It confirmed that on bankruptcy the creditors rights were converted into a right to prove in the bankruptcy and then participate in any dividend. There was no separate right of a creditor to enforce the judgment nor receive payment. However there are some exceptions to this in relation to HECS debts and some criminal fines and penalties.

- 10.5 In ***Lemnos v Lemnos*** [2007] 38 FamLR 594, the husband, a solicitor, had not paid tax and owed in excess of \$6 million. The wife moved the Family Court for an order for a 50% interest in a house property registered solely in the name of the husband. The husband was declared bankrupt by the ATO for unpaid tax and all of the husband's property, which included the house, vested in John Melliush, a Registered Trustee in Bankruptcy. The argument was that the vesting remained and the ATO debt would be paid and anything left over would become part of the matrimonial pool. At first instance the wife received a 50% interest in the house.
- 10.6 The Family Court noted that the status of creditors of other considerations required under s75(2) did not elevate the entitlement to creditors to be paid in priority.
- 10.7 The Full Court of the Family Court in ***Trustee of the property of Lemnos v Lemnos*** [2009] 223 FLR 53 allowed the appeal but remitted the matter for rehearing. The Full Court did not regard the husband's conduct as disentitling conduct under ***Kowaliw v Kowaliw*** [1981] FLC 91. His conduct was not designed to, nor did it diminish the value of the matrimonial assets. Indeed his conduct increased the matrimonial pool. The first instance Judge gave no consideration to the significance of the fact that the wife had enjoyed the benefits flowing from the husband's conduct and this was a necessary matter for consideration to determine if the wife was complicit in the husband's conduct.
- 10.8 Further, the approach at first instance that the ATO should be satisfied from the husband's interest was an error in interpreting s75(2)(ha). The Full Court directed that the primary Judge consider the size of the debts to the creditors and the offsetting approach made by the primary Judge was incorrect. Further, the Judge could have made an adjustment in favour of the Trustee and did not do so. This was an incorrect approach.
- 10.9 In ***Reua v Reua*** [2008] FamCA 1038 there were property proceedings in the Family Court. The wife was making an application for all of the matrimonial pool. Both the husband and the Trustee were respondents. The wife sought an order that all of the matrimonial pool, including the property vested in the husband's Trustee in Bankruptcy, should be settled upon her. If this occurred, neither the Trustee nor the creditors would receive a dividend from the bankrupt estate. The Court

found the husband had not engaged in disentitling conduct. The wife had played an active role in administering the husband's business.

- 10.10 In **West v West** [2007] FMCAfam 681, the Trustee resisted the application of the wife for 100% of the matrimonial home which had previously been held jointly. On bankruptcy the joint tenancy was severed and the Trustee and the wife owned the property jointly. The Court ordered that the Trustee in Bankruptcy transfer the bankrupt's interest in the home to the wife and that the wife be paid 95% of the bankrupt's superannuation. In these circumstances the Trustee argued that his costs, expenses and remuneration would not be paid. The Court was unconcerned because it also meant that the creditors would not be paid because of the Trustee's remuneration, costs and expenses.

11. BINDING FINANCIAL AGREEMENTS

- 11.1 In **Black & Black** [2008] FamCAFC 7, the Full Court considered whether a binding financial agreement had complied with the necessary requirements of s90G(1)(b). It failed to do so as it did not include a statement that the parties had received independent legal advice in relation to all of the matters. The Full Court found that a strict compliance was required and in the circumstances, the Court was entitled to review the matter under s79 principles.
- 11.2 The Family Law Act has now been amended so that strict compliance is not necessary.
- 11.3 However a Trustee in Bankruptcy is entitled to apply under s90KA of the Family Law Act to set aside a binding financial agreement in circumstances where it has the effect of transferring property in circumstances where there has been a bankruptcy.

12. BANKRUPTCY LEGISLATION AMENDMENT BILL

SENATE ECONOMICS REFERENCES COMMITTEE ENQUIRY INTO LIQUIDATORS AND ADMINISTRATORS

- 12.1 There is currently a proposal to amend the Bankruptcy Act and a Senate enquiry has just been completed. A number of changes are proposed which will affect Trustees, but for practitioners, the main change is that the jurisdiction to make a person bankrupt will be increased from \$2,000.00 to \$10,000.00.

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“SCHEDULE A”

Bankruptcy Act

- “12. *From a family law perspective, the legal ownership of property does not always reflect the non-financial contribution of the parties to the marriage. The special interest of the non-bankrupt spouse in the marital property created through both financial and non-financial contributions, which may be recognised by the Family Court in exercising its discretion to alter property interests, is not expressly recognised under the Bankruptcy Act.*
18. *The Bill also proposes amendments to ensure that financial agreements under Part VIIIA of the Family Law Act cannot be used to defeat the claims of creditors. One amendment will exclude financial agreements from the definition of ‘maintenance agreement’ in the Bankruptcy Act to ensure that trustees can use the ‘clawback’ provisions of that Act to recover property transferred prior to bankruptcy under such an agreement. A further amendment will introduce a new act of bankruptcy which will occur when a person is rendered insolvent as a result of assets being transferred under a financial agreement. This will mean that the person’s bankruptcy will be taken to have commenced at the time of that transfer which will extend the ‘relation back’ period. This will allow the trustee to claim property transferred under the agreement as divisible property in the bankrupt’s estate.*

Section 34A

24. *.....This is to ensure that where bankruptcy and family law matters are running concurrently, they can be dealt with*

together. By virtue of proposed new section 35, the Family Court has jurisdiction in bankruptcy in relation to any matter connected with, or arising out of, the bankruptcy of the bankrupt where a party to a marriage is a bankrupt, and the trustee of the bankrupt's estate is:

- (a) a party to property settlement proceedings in relation to either or both of the parties to the marriage; or
- (b) an application under section 79A of the Family Law Act for the variation or setting aside of an order made under section 79 of that Act in property settlement proceedings in relation to either or both of the parties to the marriage; or
- (c) a party to spousal maintenance proceedings in relation to the maintenance of a party to the marriage.

At the end of subsection 116(2)

29. Inserts a new paragraph 116(2)(q). The effect of this proposed amendment is that property will not be divisible amongst creditors of the bankrupt where the trustee is required to transfer such property to the spouse of the bankrupt under an order under Part VIII of the Family Law Act.

At the end of subsection 121

30. A new Section 121A. These amendments would establish a rebuttable presumption of insolvency in two circumstances – firstly, where a bankrupt has made a transfer of property while they have an outstanding tax return, and secondly, where the bankrupt has made a transfer of property and has failed to keep

adequate books, accounts and records for the purposes of section 270 of the Bankruptcy Act.

At the end of subsection 161

32. *A proposed new subsection 161(4) provides that where a trustee (the first trustee) who is a party to proceedings under the Family Law Act ceases to be the trustee of the bankrupt's estate and another person becomes the first trustee's successor in office (the second trustee), the second trustee will be substituted for the first trustee in the relevant proceedings. This is to ensure that proceedings are not interrupted where there is a change of trustee.*

Family Law Act 1975

Subsection 4(1)

33. *New definition in subsection 4(1) of what is a bankruptcy trustee.*

Subsection 4(1) (after paragraph (c) of the definition of matrimonial cause)

35. *A new paragraph (caa) in the definition of matrimonial cause. The new paragraph expands the definition, the effect of which is that a court can deal with a matrimonial cause which is proceedings between a party to a marriage and the bankruptcy trustee with respect to the maintenance of that party.*

Subsection 4(1) (after paragraph (ca) of the definition of matrimonial cause)

36. *A new paragraph (cb) in the definition of matrimonial cause is to include proceedings between a party to a marriage and the*

bankruptcy trustee with respect to the vested bankruptcy property (defined in item 17) of the bankrupt spouse.

Subsection 4(1)

37. *It is proposed to insert a new definition of personal insolvency agreement.*

Subsection 4(1)

38. *Under the proposed amendment it is defined in proceedings with respect to the property of the parties to the marriage or with respect to vested bankruptcy property (this is defined as 'property of the bankrupt that has vested in the bankruptcy trustee under the Bankruptcy Act') in relation to a bankrupt party to a marriage.*

Subsection 4(1)

41. *A new definition of vested bankruptcy property. This concept means property of the bankrupt that has vested in the bankruptcy trustee under the Bankruptcy Act. The definition also provides that, when determining whether the bankrupt spouse's property has vested in the bankruptcy trustee, property has the same meaning as in the Bankruptcy Act.*

At the end of subsection 71A

45. *This means that it is not possible for parties to use a binding financial agreement relating to property or financial resources that is the subject of those proceedings to prevent a court dealing with that property or financial resource in accordance with these amendments.*

Section 74

47. *Section 74 is to be amended to provide a court with the power to make spousal maintenance orders. The proposed new subsection (2) provides that the bankruptcy trustee must be joined as a party to the proceedings where the court is satisfied that the interests of the bankrupt's creditors may be affected by an order and the application for spousal maintenance was made whilst the party was a bankrupt or the party became a bankrupt after the application was made but before the proceedings were finally determined. The bankruptcy trustee must apply to become a party before the court can join the trustee as a party.*

Paragraph 75(2)(h)

51. *Inserts a new paragraph (ha) after paragraph 75(2)(h). This provides that a court making an order under section 74 (relating to spousal maintenance) must consider the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debts.*

Subsection 79(1)

55. *Paragraph (b) provides that a court can alter the interests of the bankruptcy trustee in the vested bankruptcy property. It provides that a court can make an order against the relevant bankruptcy trustee (if any) to make such settlement or transfer of property as the court determines for the benefit of either party to the marriage, or child of the marriage.*

Subsection 79(1B)

58. *Refers to the expanded definition of property settlement proceedings which includes proceedings with respect to vested bankruptcy property.*

Subsection 79

59. *Amend subsection 79 to omit 'parties to the proceedings' and replace (wherever occurring) with 'parties to the marriage' because under these amendments, a bankruptcy trustee could be a party and the proceedings referred to in paragraphs (a), (b) and (c) of the subsection are intended to apply only to parties to a marriage.*

Subsection 79(5)

68. *Inserts a reference to the relevant bankruptcy trustee (if any) in subsection 79(5) to make clear that he or she may be a party to an application under section 79 and thus have standing, alongside either party to the marriage, to seek an adjournment.*

Section 79

75. *After section 79, these amendments provide the circumstances for the bankruptcy trustee or the trustee of a personal insolvency agreement to be made a party to proceedings to alter property interests under the Family Law Act where a party to the marriage is bankrupt. The effect of this is that the bankruptcy trustee or trustee of a personal insolvency agreement steps into the shoes of the bankrupt spouse in making submissions to the court about vested bankruptcy property. Where the bankrupt trustee has become a party the bankrupt spouse can only make submissions in relation to this property in exceptional circumstances. This reflects the reality that the bankrupt spouse no longer has ownership of property that has vested in the*

bankruptcy trustee or trustee of a personal insolvency agreement.

76. *The proposed new subsection 79(11) provides that the bankruptcy trustee must be joined as a party to the proceeding upon application by the bankruptcy trustee where the court is satisfied that the interests of the bankrupt's creditors may be affected by an order and the application was made whilst the party was a bankrupt or the party became a bankrupt after the application was made but before the proceedings were finally determined.*

77. *Proposed subsection 79(12) provides that if the bankruptcy trustee is joined as a party under subsection (11) then the bankrupt is not entitled to make submissions to the court in the course of the property proceedings in connection with any of the vested bankruptcy property, except with leave of the Court."*

SCHEDULE “B”

Section 4A states:-

“Third party proceedings to set aside financial agreement

- (1) For the purposes of paragraph (eab) of the definition of “matrimonial cause” in subsection 4(1), third party proceedings means proceedings between:
 - (a) either or both of the parties to a financial agreement; and
 - (b) a creditor or a government body acting in the interests of a creditor.....
- (2) In this section:

“creditor” means:

 - (a) a creditor of either of the parties to the financial agreement; or
 - (b) a person who, at the commencement of the proceedings, could reasonably have been foreseen by the Court as being reasonably likely to become a creditor of either of the parties to the financial agreement”

Section 4 states:

“Interpretation

“bankruptcy trustee”, in relation to a bankrupt, means the trustee of the bankrupt’s estate.

“debtor subject to personal insolvency agreement” has the meaning give by section 5.

“matrimonial cause” means:

- (c) proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage or:
 - (ii) the bankruptcy trustee of a bankrupt party to the marriage; with respect to the maintenance of the first mentioned party;
- (cb) proceedings between
 - (i) a party to a marriage; and
 - (ii) the bankruptcy trustee of a bankrupt party to the marriage;

with respect to any vested bankruptcy property in relation to the bankrupt party, being proceedings.....”

“personal insolvency agreement” has the same meaning as in the Bankruptcy Act 1966.

“property”, in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

“property settlement or spousal maintenance proceedings” means proceedings with respect to:

- (a) the property of the parties to a marriage or either of them; or
- (aa) the vested bankruptcy property in relation to a bankrupt party to a marriage; or
- (b) the maintenance of a party to a marriage.

“property settlement proceedings” means proceedings with respect to:

- (a) the property of the parties to a marriage or either of them; or
- (b) the vested bankruptcy property in relation to a bankrupt party to a marriage.

“trustee”, in relation to a personal insolvency agreement, has the same meaning as in the Bankruptcy Act 1966.

“vested bankruptcy property”, in relation to a bankrupt, means property of the bankrupt that has vested in the bankruptcy trustee under the Bankruptcy Act 1966. For this purpose, property has the same meaning as in the Bankruptcy Act 1966.

Note: There is no definition of controlled debtors property under Part X.

Section 74 states:

“Power of court in spousal maintenance proceedings

- (1) In proceedings with respect to the maintenance of a **party** to a **marriage**, the **court** may make such order as it considers proper for the provision of maintenance in accordance with this Part.
- (2) If:
 - (a) an application is made for an order under this section in proceedings between the parties to a **marriage** with respect to the maintenance of a **party** to the **marriage**; and
 - (b) either of the following subparagraphs apply to a **party** to the **marriage**:
 - (i) when the application was made, the **party** was a bankrupt;
 - (ii) after the application was made but before the proceedings are finally determined, the **party** became a bankrupt; and
- (a) the bankruptcy **trustee** applies to the **court** to be joined as a **party** to the proceedings; and
- (b) the **court** is satisfied that the **interests** of the bankrupt's **creditors** may be affected by the making of an order under this section in the proceedings;

the **court** must join the bankruptcy **trustee** as a **party** to the proceedings.

- (3) If a bankruptcy **trustee** is a **party** to proceedings with respect to the maintenance of a **party** to a **marriage**, then, except with the leave of the **court**, the bankrupt **party** to the **marriage** is not entitled to make a submission to the **court** in connection with any vested bankruptcy property in relation to the bankrupt **party**.
- (4) The **court** must not grant leave under subsection (3) unless the **court** is satisfied that there are exceptional circumstances.
- (5) If:
 - (a) an application is made for an order under this section in proceedings between the parties to a **marriage** with respect to the maintenance of a **party** to the **marriage**; and
 - (b) either of the following subparagraphs apply to a **party** to the **marriage** (the *debtor party*):
 - (i) when the application was made, the **party** was a debtor subject to a personal insolvency agreement; or
 - (ii) after the application was made but before it is finally determined, the **party** becomes a debtor subject to a personal insolvency agreement; and
 - (c) the **trustee** of the agreement applies to the **court** to be joined as a **party** to the proceedings; and
 - (d) the **court** is satisfied that the **interests** of the debtor **party's** **creditors** may be affected by the making of an order under this section in the proceedings;

the **court** must join the **trustee** of the agreement as a **party** to the proceedings.

- (6) If the **trustee** of a personal insolvency agreement is a **party** to proceedings with respect to the maintenance of a **party** to a **marriage**, then, except with the leave of the **court**, the **party** to the **marriage** who is the debtor subject to the agreement is not entitled to make a submission to the **court** in connection with any property subject to the agreement.
- (7) The **court** must not grant leave under subsection (6) unless the **court** is satisfied that there are exceptional circumstances.
- (8) For the purposes of subsections (2) and (5), an application for an order under this section is taken to be finally determined when:
 - (a) the application is withdrawn or dismissed; or
 - (b) an order (other than an interim order) is made as a result of the application.”

Section 75 states:

“Matters to be taken into consideration in relation to spousal maintenance

- (1) In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in subsection (2).

- (2) The matters to be so taken into account are:

- (ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and
 - (n) the terms of any order made or proposed to be made under section 79 in relation to:
 - (i) the property of the parties; or
 - (ii) vested bankruptcy property in relation to a bankrupt party."

Section 79 states:-

Alteration of property interests

- (1) In property settlement proceedings, the court may make such order as it considers appropriate:
- (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them—altering the interests of the parties to the marriage in the property; or
 - (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage—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:
 - (i) either or both of the parties to the marriage; or
 - (ii) the relevant bankruptcy trustee (if any); to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.:
 - (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
 - (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in

- relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the [marriage](#) or either of them; and
- (a) that there is likely to be a significant change in the financial circumstances of the parties to the [marriage](#) or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and
- the [court](#) may, if so requested by either [party](#) to the [marriage](#) or the relevant bankruptcy [trustee](#) (if any), adjourn the proceedings until such time, before the expiration of a period specified by the [court](#), as that [party](#) to the [marriage](#) or the relevant bankruptcy [trustee](#), as the case may be, applies for the proceedings to be determined, but nothing in this subsection requires the [court](#) to adjourn any proceedings in any particular circumstances.
- (6) Where a [court](#) proposes to adjourn proceedings as provided by subsection (5), the [court](#) may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:
- (b) any of the vested bankruptcy property in relation to a bankrupt [party](#) to the [marriage](#).
- (10) The following are entitled to become a [party](#) to proceedings in which an application is made for an order under this section:
- (a) a [creditor](#) of a [party](#) to the proceedings if the [creditor](#) may not be able to recover his or her debt if the order were made;
- (b) any other person whose [interests](#) would be affected by the making of the order.”

SCHEDULE “C”

Section 116(2) states:-

- “(2) subsection (1) does not extend to the following property:-
- (a) *property held by the bankrupt in trust for another person*”
 - (b) *the bankrupt's household property that is:*
 - (i) *of a kind prescribed by the regulations; or*
 - (ii) *identified by a resolution passed by the creditors before the trustee realises the property;*
 - (ba) *personal property of the bankrupt that:*
 - (i) *has sentimental value for the bankrupt; and*
 - (ii) *is of a kind prescribed by the regulations; and*
 - (iii) *is identified by a special resolution passed by the creditors before the trustee realises the property;*
 - (c) *the bankrupt's property that is for use by the bankrupt in earning income by personal exertion and:*
 - (i) *does not have a total value greater than the limit prescribed by the regulations; or*
 - (ii) *is identified by a resolution passed by the creditors; or*
 - (iii) *is identified by an order made by the Court on an application by the bankrupt;*
 - (ca) *property used by the bankrupt primarily as a means of transport, being property whose aggregate value does not exceed the amount prescribed by the regulations or, if before the trustee realises the last-mentioned property the creditors determine by resolution a greater amount in relation to that property, that greater amount;*
 - (d) *subject to sections 128B, 128C and 139ZU:*
 - (i) *policies of life assurance or endowment assurance in respect of the life of the bankrupt or the spouse or de facto partner of the bankrupt;*
 - (ii) *the proceeds of such policies received on or after the date of the bankruptcy;*
 - (iii) *the interest of the bankrupt in:*
 - (A) *a regulated superannuation fund (within the meaning of the Superannuation Industry (Supervision) Act 1993); or*
 - (B) *an approved deposit fund (within the meaning of that Act); or*
 - (C) *an exempt public sector superannuation scheme (within the meaning of that Act);*
 - (iv) *a payment to the bankrupt from such a fund received on or after the date of the bankruptcy, if the payment is not a pension within the meaning of the Superannuation Industry (Supervision) Act 1993 ;*

- (iva) *a payment to the bankrupt under a payment split under Part VIII B of the Family Law Act 1975 where:*
 - (A) *the eligible superannuation plan involved is a fund or scheme covered by subparagraph (iii); and*
 - (B) *the splittable payment involved is not a pension within the meaning of the Superannuation Industry (Supervision) Act 1993 ;*
- (v) *the amount of money a bankrupt holds in an RSA;*
- (vi) *a payment to a bankrupt from an RSA received on or after the date of the bankruptcy, if the payment is not a pension or annuity within the meaning of the Retirement Savings Accounts Act 1997 ;*
- (vii) *a payment to the bankrupt under a payment split under Part VIII B of the Family Law Act 1975 where:*
 - (A) *the eligible superannuation plan involved is an RSA; and*
 - (B) *the splittable payment involved is not a pension or annuity within the meaning of the Retirement Savings Accounts Act 1997 ;*
- (g) *any right of the bankrupt to recover damages or compensation:*
 - (i) *for personal injury or wrong done to the bankrupt, the spouse or de facto partner of the bankrupt or a member of the family of the bankrupt; or*
 - (ii) *in respect of the death of the spouse or de facto partner of the bankrupt or a member of the family of the bankrupt;*

and any damages or compensation recovered by the bankrupt (whether before or after he or she became a bankrupt) in respect of such an injury or wrong or the death of such a person;

Note: See also subsection 5(6).

- (k) *amounts paid to the bankrupt under a rural support scheme prescribed for the purposes of this paragraph;*
- (l) *amounts paid to the bankrupt under a rural support scheme prescribed for the purposes of this paragraph, where the amounts are paid in circumstances prescribed for the purposes of this paragraph;*
- (m) *prescribed amounts paid to the bankrupt under a rural support scheme prescribed for the purposes of this paragraph;*
- (ma) *prescribed amounts paid to the bankrupt under a rural support scheme prescribed for the purposes of this paragraph, where the amounts are paid in circumstances prescribed for the purposes of this paragraph;*
- (mb) *amounts paid to the bankrupt by the Commonwealth as compensation in relation to the loss of:*

- (i) an amount covered by paragraph (k), (l), (m) or (ma); or*
- (ii) property purchased or acquired wholly or partly with such an amount;*
- (n) property to which, by virtue of subsection (3), this paragraph applies;*
- (p) amounts paid to the bankrupt under subsection (2C) or (4);*
- (q) any property that, under an order under Part VIII of the Family Law Act 1975 , the trustee is required to transfer to the spouse, or a former spouse, of the bankrupt;*
- (r) any property that, under an order under Part VIIIAB of the Family Law Act 1975 , the trustee is required to transfer to a former de facto partner of the bankrupt.”*

SCHEDULE “D”

BANKRUPTCY ACT 1966 - SECT 120

Undervalued transactions

Transfers that are void against trustee

(1) A transfer of property by a person who later becomes a bankrupt (the *transferor*) to another person (the *transferee*) is void against the trustee in the transferor's bankruptcy if:

(a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and

(b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.

Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

Exemptions

(2) Subsection (1) does not apply to:

(a) a payment of tax payable under a law of the Commonwealth or of a State or Territory; or

(b) a transfer to meet all or part of a liability under a maintenance agreement or a maintenance order; or

(c) a transfer of property under a debt agreement; or

(d) a transfer of property if the transfer is of a kind described in the regulations.

(3) Despite subsection (1), a transfer is not void against the trustee if:

(a) in the case of a transfer to a related entity of the transferor:

(i) the transfer took place more than 4 years before the commencement of the bankruptcy; and

(ii) the transferee proves that, at the time of the transfer, the transferor was solvent; or

(b) in any other case:

(i) the transfer took place more than 2 years before the commencement of the bankruptcy; and

(ii) the transferee proves that, at the time of the transfer, the transferor was solvent.

Rebuttable presumption of insolvency

(3A) For the purposes of subsection (3), a rebuttable presumption arises that the transferor was insolvent at the time of the transfer if it is established that the transferor:

(a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

Refund of consideration

(4) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

What is not consideration

(5) For the purposes of subsections (1) and (4), the following have no value as consideration:

- (a) the fact that the transferee is related to the transferor;
- (b) if the transferee is the spouse or de facto partner of the transferor--the transferee making a deed in favour of the transferor;
- (c) the transferee's promise to marry, or to become the de facto partner of, the transferor;
- (d) the transferee's love or affection for the transferor;
- (e) if the transferee is the spouse, or a former spouse, of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* ;
- (f) if the transferee is a former de facto partner of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* .

Protection of successors in title

(6) This section does not affect the rights of a person who acquired property from the transferee in good faith and by giving consideration that was at least as valuable as the market value of the property.

Meaning of **transfer of property** and **market value**

- (7) For the purposes of this section:
- (a) **transfer of property** includes a payment of money; and
 - (b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and
 - (c) the **market value** of property transferred is its market value at the time of the transfer.

BANKRUPTCY ACT 1966 - SECT 121

Transfers to defeat creditors

Transfers that are void

(1) A transfer of property by a person who later becomes a bankrupt (the **transferor**) to another person (the **transferee**) is void against the trustee in the transferor's bankruptcy if:

- (a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and
- (b) the transferor's main purpose in making the transfer was:
 - (i) to prevent the transferred property from becoming divisible among the transferor's creditors; or
 - (ii) to hinder or delay the process of making property available for division among the transferor's creditors.

Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

Showing the transferor's main purpose in making a transfer

(2) The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (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.

Other ways of showing the transferor's main purpose in making a transfer

(3) Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.

Transfer not void if transferee acted in good faith

(4) Despite subsection (1), a transfer of property is not void against the trustee if:

(a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and

(b) the transferee did not know, and could not reasonably have inferred, that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and

(c) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

Rebuttable presumption of insolvency

(4A) For the purposes of this section, a rebuttable presumption arises that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:

(a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

Refund of consideration

(5) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

What is not consideration

(6) For the purposes of subsections (4) and (5), the following have no value as consideration:

(a) the fact that the transferee is related to the transferor;

(b) if the transferee is the spouse or de facto partner of the transferor--the transferee making a deed in favour of the transferor;

(c) the transferee's promise to marry, or to become the de facto partner of, the transferor;

(d) the transferee's love or affection for the transferor;

(e) if the transferee is the spouse, or a former spouse, of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* ;

(f) if the transferee is a former de facto partner of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* .

Exemption of transfers of property under debt agreements

(7) This section does not apply to a transfer of property under a debt agreement.

Protection of successors in title

(8) This section does not affect the rights of a person who acquired property from the transferee in good faith and for at least the market value of the property.

Meaning of **transfer of property** and **market value**

(9) For the purposes of this section:

(a) **transfer of property** includes a payment of money; and

(b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

(c) the **market value** of property transferred is its market value at the time of the transfer.

SCHEDULE “E”

BANKRUPTCY ACT 1966 - SECT 115

Commencement of bankruptcy

(1) If a person becomes a [bankrupt](#) on a [creditor's petition](#) and subsection (1A) does not apply, then the [bankruptcy](#) is taken to have relation back to, and to have commenced at, the time of the commission of the earliest act of [bankruptcy](#) committed by the person within the period of 6 months immediately before the date on which the [creditor's petition](#) was presented.

(1A) If:

(a) a person becomes a [bankrupt](#) on a [creditor's petition](#) that was based on breach of a [bankruptcy](#) notice; and

(b) the time for compliance with the notice was extended under subsection 41(7); and

(c) [the Court](#) making the sequestration order considers that the application under subsection 41(7) was frivolous, vexatious or otherwise without substantial merit;

then the [bankruptcy](#) is taken to have relation back to, and to have commenced at, the time that would have applied under subsection (1) of this section if the time for compliance had not been extended.

(1B) If a person becomes a [bankrupt](#) because of a sequestration order made under Division 6 of Part IV or under Part X, then the [bankruptcy](#) is taken to have relation back to, and to have commenced at, the time of the commission of the earliest act of [bankruptcy](#) committed by the person within the period of 6 months immediately before the date on which the application for the sequestration order was made.

(2) The [bankruptcy](#) of a person who becomes a [bankrupt](#) as a result of the acceptance of a [debtor's petition](#) is taken to have relation back to, and to have commenced at, the time indicated in the following table.

Debtor's petition bankruptcy--time to which bankruptcy has relation back and time bankruptcy commences	
Circumstances in which debtor's petition was presented or accepted	Time to which bankruptcy has relation back and time of commencement of bankruptcy

Debtor's petition bankruptcy--time to which bankruptcy has relation back and time bankruptcy commences

Circumstances in which <u>debtor's petition</u> was presented or accepted	Time to which <u>bankruptcy</u> has relation back and time of commencement of <u>bankruptcy</u>
1 <u>Petition</u> accepted by <u>the Official Receiver</u> under a direction of <u>the Court</u>	Time specified by <u>the Court</u> as <u>the commencement of the bankruptcy</u>
2 <u>Petition</u> presented when at least one <u>creditor's petition</u> was pending against the <u>petitioning debtor</u> (whether alone, as a member of a partnership or as a joint <u>debtor</u>), and accepted by <u>the Official Receiver</u> without a direction from <u>the Court</u>	Time of the commission of the earliest act of <u>bankruptcy</u> on which any of the <u>creditor's petitions</u> was based
3 <u>Petition</u> presented when no <u>creditor's petitions</u> were pending but the <u>debtor</u> had committed at least one act of <u>bankruptcy</u> in the past 6 months, and accepted by <u>the Official Receiver</u> without a direction from <u>the Court</u>	Time of commission of the earliest act of <u>bankruptcy</u> within the 6 months before the <u>petition</u> was presented
4 <u>Petition</u> presented when no <u>creditor's petitions</u> were pending and the <u>debtor</u> had not committed any act of <u>bankruptcy</u> in the past 6 months, and accepted by <u>the Official Receiver</u> without a direction from <u>the Court</u>	Time of presentation of the <u>petition</u>

(3) A creditor's petition or a sequestration order made on a creditor's petition is not invalid by reason of the commission of an act of bankruptcy before the time when the debt on which the petition was based was incurred.

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