BANKRUPTCY AND MATRIMONIAL CLAIMS — THE SPOUSE AS COMPETING CREDITOR PART I

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[*A number of inconsistencies exists in relation to the position of a spouse whose matrimonial claim is in competition with the claims of unsecured creditors on the bankruptcy of the liable spouse. This article examines some significant aspects of the relationship between the Bankruptcy Act 1966 (Cth) and the Family Law Act 1975 (Cth). In particular, the authors look at the extent to which maintenance and property orders and maintenance agreements are provable debts, the consequence of holding such debts provable and the ability of a spouse to issue a bankruptcy notice pursuant to a Family Court order or maintenance agreement. The authors criticize the anomalous result that the resolution of such issues often depends upon the type of order under which the spouse claims, and suggest possible solutions.*]

I. Introduction

The Bankruptcy Act 1966 (Cth) and the Family Law Act 1975 (Cth) each incorporates provisions which potentially abrogate the established rules of property and contract and, in designated circumstances, allow for the expropriation of individuals in order to facilitate the pursuit of particular policy goals.

In relation to the Bankruptcy Act 1966 the traditional dual goals of financial rehabilitation of the honest debtor and the equitable treatment of his unsecured creditors remain paramount. The need to maintain a minimum standard of living for the bankrupt and his dependants is also recognized in certain specified exclusions from the property which vests in the trustee in bankruptcy for distribution to proving creditors.[1] Most significantly, the bankrupt is generally entitled to retain income, including personal earnings, pursuant to s.131 of the Act.[2] Nevertheless, the Bankruptcy Act 1966 largely reflects the nineteenth century socio-economic assumptions on which its legislative antecedents were based. Certainly, its essential framework predates many important social and legal developments in relation to the status of women, family structure and marriage dissolution, which the Family Law Act 1975 recognized and perhaps accelerated.

The present article will attempt to analyze some significant aspects of the current interaction of the Bankruptcy Act 1966 and the Family Law Act 1975

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1 Bankruptcy Act 1966 (Cth) s. 116(2).
2 Bankruptcy Act 1966 (Cth) s. 131.

with particular reference to those provisions which determine the outcome of a competition between the spouse and the unsecured creditors of a bankrupt for the property which vests in, or is recovered by, the trustee in bankruptcy for ratable distribution. Part I analyzes the position when one spouse has been adjudicated bankrupt and the other spouse has an unsatisfied claim against him under a Family Court maintenance order, property order or maintenance agreement. In Part II, the position of a spouse who has already received a settlement pursuant to such an order or agreement prior to the date of bankruptcy is considered.

The article will analyze the extent to which the position of a Family Court litigant in the bankruptcy of the liable spouse is dictated by the particular type of order or agreement on which her claim or settlement is based. It will compare the different application of bankruptcy law to the various types of Family Court orders and agreements, and will also examine the position of the spouse of a bankrupt in an ongoing marriage. In this context, the article will assess the degree to which the different treatment of various familial claimants on insolvency accords with the underlying policy goals of both the Bankruptcy Act 1966 and the Family Law Act 1975.

The article will not offer detailed consideration of the potential jurisdictional conflict between the Family Court and the Bankruptcy Court. Nor will it deal with the related issues of the power, if any, of the Family Court to make orders when one spouse has already been declared bankrupt,[3] or the power of the Family Court to set aside deeds of assignment or arrangement executed under the Bankruptcy Act 1966 pursuant to s.85 of the Family Law Act 1975.[4]

Historically, a spouse rarely competed in any significant sense with the unsecured creditors of her husband on bankruptcy. Prior to the twentieth century, marriage dissolution was relatively unusual, but even when a maintenance or alimony claim did arise in the context of bankruptcy, it was not considered to be a provable debt.[5] Thus, while the claimant wife was free to pursue remedies outside bankruptcy, she was not a creditor entitled to compete for that property of the bankrupt which vested in the trustee in bankruptcy for ratable distribution to his unsecured creditors.

Furthermore, where the bankrupt husband had transferred assets from his estate to his wife within certain time spans prior to sequestration, she would be liable to restore the property to the trustee in bankruptcy, as a result of the doctrine of relation back and other provisions directed at fraudulent disposit-

[3] See *Page and Page* (No. 2) (1982) F.L.C. 91-241 and *Wallmann and Wallmann* (1982) F.L.C. 91-204.

[4] *Milland and Milland* (1981) F.L.C. 91-065. It should be noted that the interaction of the Family Law Act 1975 and the Bankruptcy Act 1966 has offered potential for a spouse who may be the subject of a matrimonial claim by the other spouse, to use bankruptcy to attempt to avoid liability. Where a spouse enters into a deed of arrangement with his creditors in order to avoid a Family Court claim, the Family Court may be able to set aside the deed under s. 85: see *Wallmann's* case. However, when such a spouse presents a debtor's petition and is subsequently bankrupted, the Family Court has no power to set aside the sequestration order.

[5] See infra p. 217-18.

ions and voluntary settlements, unless the transaction fell within the protective exclusions of these provisions. It was necessary to establish that she had provided valuable consideration, in addition to other factors, in order to protect a given disposition, but while forbearance to sue in the Divorce Court, or the compromise of a matrimonial claim might constitute valuable consideration for that purpose, matrimonial proceedings were relatively rare. Accordingly, the unsecured creditors would usually benefit from the operation of the 'claw back' provisions where a familial disponee was involved.

Furthermore, even after the passage of the Married Women's Property Act[6] 1882 the estate available to creditors was augmented by any property lent or entrusted by a wife to her bankrupt husband for trade purposes. Prior to the passage of the Married Women's Property Act 1882, to the extent to which a married woman's property vested in her husband, his creditors would have benefited in any event.

In sum, not only was a wife, even when estranged, unlikely to abstract property from the estate available to unsecured creditors on bankruptcy, but, in designated circumstances she would supplement it with her independently owned property. Given the prevailing conceptions of familial identity, it was considered appropriate that a wife and other dependants shared the financial misfortunes of the bankrupt. Indeed, that attitude has been accepted uncritically until quite recently.[7]

Twentieth century social and legal developments have resulted in the introduction of the estranged or former spouse as a significant competitor for the assets of the bankrupt estate from which familial claimants formerly would have been excluded.

Marriage dissolution is now frequently encountered. The trend was accelerated by the Family Law Act 1975, a radical piece of legislation which substituted a single ground of irretrievable breakdown evidenced by twelve months separation for the previous fault-based grounds.[8] Its unqualified recognition of the equality of the parties to a marriage and restriction of the new mutual obligation of maintenance to situations of need and ability to pay, effected an unprecedented departure from many long-standing assumptions about the relative status and duties of husbands and wives, the hierarchical structure of the family and the permanence of marriage.

In this context, s. 72 of the Family Law Act 1975 provides that:

> a party to a marriage is liable to maintain the other party to the extent that the first-mentioned party is reasonably able to do so, if and only if, that other party is unable to support herself or himself adequately . . . .

The Act also provides for the fair adjustment of the proprietary rights of the parties even where this would involve redistributive justice in the sense that not even an equitable interest previously existed in the benefited spouse.

6 Married Women's Property Act 1882 (Eng.) s. 3.
7 See, for example, the views of Carmichael J. in *Sharkie v. Sharkie* (1981) 18 F.L.R. 89.
8 Family Law Act 1975 (Cth) s. 48.

While the Family Court may merely declare the existing property rights of the parties pursuant to s. 78, it may alternatively make an order altering their existing property rights in accordance with s. 79, provided that in all the circumstances it is just and equitable to do so. Although maintenance orders are capable of variation under s. 83, property orders are final and can only be altered within the strict limits set out in s. 79A. As indicated below, the potential to vary particular Family Court orders and agreements assumes relevance in relation to founding a bankruptcy notice upon, and proving for, the underlying liability.

It is submitted that although recent amendments to the Bankruptcy Act 1966 aimed at accommodating claims based on Family Court orders and agreements have accorded unprecedented creditor status to particular types of matrimonial claimant whose claims are outstanding, and even confer express advantages, the position of claimants under various types of Family Court orders and agreements remains either anomalous or unresolved, both in relation to the ability to initiate proceedings by the issuing of a bankruptcy notice and the possible extent and consequences of proving pursuant to s. 82 of the Bankruptcy Act 1966.

Similarly, where a spouse[9] has already received a settlement of money or other property in accordance with a Family Court order or agreement, prior to the sequestration of the liable spouse, in certain circumstances she will be subject to the right of the trustee in bankruptcy to recover property transferred from the bankrupt estate for distribution to unsecured creditors generally. It is submitted that the current application of bankruptcy law to various Family Court settlements is likewise anomalous and inequitable, in that property received pursuant to a maintenance order or a maintenance agreement has absolute immunity from 'claw back' provisions,[10] whereas transfers or settlements pursuant to a property order remain vulnerable. A distinction based on the technical forms of the Family Court settlements cannot be justified, given their similarity of function and purpose. Not only does the position of familial claimants in bankruptcy hinge entirely on the fortuitous technical form in which their settlement was embodied, regardless of relative need, amounts involved or other relevant factors, but the competition between such familial creditors and ordinary unsecured creditors is distorted, as the results are dictated by the technical characterization of the particular Family Court settlement. Consequently, the policy goals of neither Act are consistently or predictably attained.

As well as the position of Family Court litigants with outstanding or settled claims, the unique postponement of the claim of a current spouse who has either lent or made available her property to a bankrupt spouse in accordance

9 Although spouses of either sex are equally entitled to relief under Part VIII of the Family Law Act 1975, cases discussed in the present article involve Family Court claims by, or settlements in favour of, the female spouse.

10 Bankruptcy Act 1966 (Cth) s. 123(6): see Part II.

with s. 111 of the Bankruptcy Act 1966 is also questionable. The effects of this section are analysed and assessed in relation to other relevant provisions and legislative policies.

II. *Background to the Functioning of the Bankruptcy Act 1966 (Cth)*

Bankruptcy legislation is designed to ensure that the bankrupt's property may be realised and shared equitably amongst his unsecured creditors. Not all claims against an insolvent fall into the category of a provable debt or liability, and persons with a non-provable claim are excluded from participation in the property which vests in the trustee in bankruptcy, although remedies outside bankruptcy remain available to them.

Upon bankruptcy, the existing and after acquired property of the bankrupt (with certain exemptions) vests in the trustee[11] for ratable distribution to creditors with a provable debt as defined in s. 82 of the Bankruptcy Act 1966 (Cth). The creditors' *choses in action* are transmuted into an equitable right to a fair distribution[12] and all alternative actions in relation to provable claims are stayed.[13]

The goal of facilitating an even-handed recovery by unsecured creditors is reflected in their entitlement to prove for their claims in the bankrupt estate.[14] However, in order to promote the ultimate financial rehabilitation of the debtor, the Bankruptcy Act 1966 provides that the bankrupt will secure a release from liability for all provable debts upon discharge from bankruptcy,[15] which ordinarily occurs automatically three years after the sequestration order.[16] As the estate may have been insufficient to provide payment in full, unsecured creditors are expropriated by bankruptcy to the extent to which the estate is inadequate. The right to prove, counter-balanced by the inability to pursue any shortfall on discharge, represents a legislative resolution of the interests of the debtor and his creditors.

Because unsecured creditors are limited to recovery from the assets vested in the trustee while the bankruptcy is on foot, it is necessary, in order to achieve justice for the creditors both as a body and *inter se*, to establish that in certain circumstances property transferred from the bankrupt estate in transactions during particular time spans antecedent to the sequestration order may be reclaimed by the trustee. This ensures that the bankrupt cannot divest himself of assets by voluntary transfer to an interested individual,[17] by a collusive disposition intended to facilitate retention by the debtor himself[18] or even by making a

11 Bankruptcy Act 1966 (Cth) ss 58, 116.
12 Bankruptcy Act 1966 (Cth) s. 82.
13 Bankruptcy Act 1966 (Cth) s. 58(3).
14 Bankruptcy Act 1966 (Cth) s. 82.
15 Bankruptcy Act 1966 (Cth) s. 153.
16 Bankruptcy Act 1966 (Cth) s. 149.
17 Bankruptcy Act 1966 (Cth) s. 120.
18 Bankruptcy Act 1966 (Cth) s. 121.

payment or transfer to a particular creditor[19] which would undercut the goal of equitable treatment by allowing that creditor to engross property which ought to be available for distribution to all. The proceeds of an execution by a creditor within six months prior to the presentation of the petition can also be recovered from the creditor or the sheriff, pursuant to ss. 118-9 of the Bankruptcy Act 1966. In addition to express provisions aimed at catching particular transfers from the insolvent estate prior to sequestration, the long-standing bankruptcy doctrine of relation back also works to augment the property available to unsecured creditors, by establishing the retrospective vesting of the bankrupt's property in the trustee at the date of commencement of bankruptcy.[20] The commencement of bankruptcy is defined by s. 115(1), in relation to a bankruptcy based on a creditor's petition, to relate back to the commission of the earliest act of bankruptcy by the bankrupt within a period of six months immediately preceding the presentation of the creditor's petition. Thus, as a creditor's petition ordinarily will lapse at the expiration of 12 months after the date of its presentation, pursuant to s. 52(4), the bankruptcy might commence up to 18 months prior to sequestration. Section 116(1) provides that all property which belonged to the bankrupt at the commencement of bankruptcy is property divisible amongst the creditors of the bankrupt. Section 58 further provides that the property of the bankrupt vests in the trustee, as does after-acquired property during the period of the bankruptcy. However, s. 116 also establishes exemptions from the property which is divisible amongst creditors and s. 124 establishes that the doctrine of relation back will not apply to certain protected transactions. Protective exemptions are likewise applicable to the 'claw back' provisions of s. 120 and s. 122, although the elements differ, as do the relevant time spans. There is a considerable overlap between relation back and the specific 'claw back' sections of the Act.

Section 111, discussed in detail in Part II, also operates in conjunction with s. 116 to supplement the estate divisible amongst creditors with property either lent or made available by the spouse of the bankrupt.

Thus, although ordinary unsecured creditors cannot pursue any shortfall following discharge, the interaction of the above provisions of the Bankruptcy Act 1966 may result in a retroactive enlargement of the property available for ratable distribution to those with a provable claim.

Although the general consequence of characterizing a debt as provable is to permit the relevant creditor to participate ratably in the distribution of the debtor's available property, there is a corresponding loss of the remedies which would otherwise be available during the course of the bankruptcy, a freezing of executions and ultimate loss of a remedy in relation to any shortfall upon discharge. If the estate is sufficient to satisfy all proving creditors in full, a creditor is obviously advantaged if he has a provable debt. However, some variable factors could operate to place the holder of a non-provable claim in a better position.

19 Bankruptcy Act 1966 (Cth) s. 122.
20 Bankruptcy Act 1966 (Cth) ss 58, 115 and 116.

The property vesting in the trustee for division amongst creditors does not include the bankrupt's income, which includes salary and wages, and possibly more.[21] Although it is possible in theory for the trustee to obtain an order to apply such income for the creditors' benefit, it is apparently difficult to do so in practice.[22] Furthermore, s.116(2) establishes some potentially significant exemptions from the property available for distribution to creditors, including damages for personal injury or wrong to the bankrupt or his family members, and the proceeds of certain life assurance or endowment policies, provided that they have been in force for a specified time.

As only proceedings in respect of provable debts are frozen automatically by reason of the bankruptcy, such income and exempt property would remain vulnerable to non-provable claims against the bankrupt debtor. Proving creditors would be relatively disadvantaged when the property available for distribution is insignificant, but the debtor has a relatively high income which is in practice inaccessible. Particularly when the debtor's income is likely to continue after the termination of the bankruptcy, it might be preferable to have a non-provable claim, which, unlike a provable debt, would survive discharge. In contrast, when the estate is quite large, or alternatively, the debtor has no significant personal earnings, the proving creditor would be in a preferable situation. The consequences of characterizing a given debt as provable are mandatory and follow regardless of whether the particular creditor actually proves.

III. The Spouse as an Unpaid Creditor

1. The Traditional Exclusion of Alimony and Maintenance from the Definition of Provable Debt and as a Basis for the Issuing of Bankruptcy Notices.

Despite a consistent, if *ad hoc*, legislative judicial expansion of the definition of provable debt during the course of the nineteenth century,[23] claims for alimony and maintenance, both future and arrears, were not provable in bankruptcy. Though not explicit exceptions, such claims were excluded as a result of judicial interpretation.

[21] Bankruptcy Act 1966 (Cth) s. 131.

[22] The income does not vest in the trustee, who must apply to the Court, which may take into account obligations to dependants, and should avoid 'pauperizing' the bankrupt.

[23] There was considerable creditor resistance to the expansion of the notion of provable debt, as bankruptcy, with its attendant advantage of ultimate discharge, was long considered a privilege which ought to be available only to traders. Non-trade debtors were exposed to the prospect of perpetual indebtedness and consequent imprisonment. Nevertheless, a series of Bankruptcy Acts in the course of the nineteenth century did expand the application of bankruptcy, as did some notable expansive judgments, *e.g.: Ex parte Llynvi Coal and Iron Co.; Re Hyde* (1871) L.R. 7 Ch. 28.

The grounds for the exclusion of alimony were clearly expressed in *Linton v. Linton*,[24] the earliest notable case on this issue. The husband in that case had been adjudicated bankrupt on his own petition and discontinued payments of alimony due under a Divorce Court order. As he had no property which might be divisible amongst creditors, but merely received a substantial annual income from personal exertion, it was in the husband's interests to argue that the wife's claim for future payments of alimony constituted a provable debt. Had that argument succeeded, the wife would have been effectively deprived of a remedy, and there was some indication that the debtor's realization of that consequence had inspired his self-imposed bankruptcy.

The Court of Appeal held unanimously that future payments of alimony could not constitute a provable debt. Brett M.R. stressed that as an order for alimony was always subject to variation, modification or suspension, it was incapable of valuation,[25] and accordingly incapable of proof. Baggallay L.J. and Bowers L.J. also found that the potentially fluctuating nature of the liability rendered it incapable of estimation, and hence, not provable.[26]

Although future payments of alimony might be varied, or even terminated, it would appear that arrears at least were calculable with certainty and, as such, should be provable in bankruptcy. Indeed, the wife in *Linton v. Linton* had successfully proved for arrears — her right to do so was not challenged.

Nevertheless, a subsequent series of cases established that arrears of alimony were not provable either, on the grounds that even arrears could be varied retrospectively or set aside, and the relevant liability was thus inherently uncertain. As a consequence, the wife in such cases was entitled to pursue all remedies and methods of enforcement outside bankruptcy, but was excluded from the property divisible amongst creditors.

In *Re Carter; Ex parte the Official Receiver; Carter (Respondent)*[27] a case arising under the Australian Bankruptcy Act 1924-1933, Lukin J. departed from the established view that maintenance claims were not provable. While holding that arrears of *alimony* were not provable, his Honour concluded that arrears of *maintenance* were, as a result of the power conferred on the Bankruptcy Court by s. 121(1)(c) of the Bankruptcy Act 1924-1933. That subsection granted an unprecedented discretion to release the bankrupt from, *inter alia*, any liability under, a maintenance order. Subject to the court's discretion, an order of discharge did not release the bankrupt from such a liability.

Lukin J. inferred that the inclusion of such a power must represent legislative intention to confer a new jurisdiction over maintenance orders upon the Bankruptcy Court, and, as a necessary corollary, debts in relation to maintenance orders must be provable in bankruptcy. Certainly, if such liabilities were

24 (1885) 15 Q.B.D. 239.
25 *Ibid.* 245.
26 *Ibid.* 245-7. Note also s. 82(6) of the Bankruptcy Act 1966 (Cth) provides that a debt or liability incapable of fair estimation will not be provable in bankruptcy.
27 (1941) 12 A.B.C. 193.

not provable, they would be unaffected by a discharge order, and specific exception from automatic discharge would accordingly appear illogical and gratuitous.[28]

Nevertheless, two years later, in *Re Canobbio; Ex parte the Official Receiver*,[29] Clyne J. rejected Lukin J.'s. interpretation and reaffirmed that arrears due under a maintenance order could not constitute a provable debt. Clyne J.'s holding was based primarily on his view of the analogous nature of alimony and maintenance. Just as the preponderance of authority indicated that alimony was not provable, due to its inalienability and non-contractual, inconclusive character, maintenance was also an inalienable non-contractual right. As such, Clyne J. accepted that rights and obligations in relation to both alimony and maintenance were more properly incidents of status rather than conventional debts. The husband's duty to maintain his wife and family was 'personal and continuous . . . not contractual in its nature'.[30] In this sense, Clyne J. adopted the view expressed by Higgins J. in *Davies v. Davies*,[31] that the maintenance of a wife was a duty owed to the state rather than to the wife personally. It logically followed that the liability could not be affected by agreement between the spouses and could not be assimilated to a commercial debt provable in bankruptcy.

However, in *Re Partridge*,[32] Clyne J. distinguished his own judgment in *Re Canobbio*, allowing a wife to prove for arrears of maintenance on the basis of the different means of enforcement for arrears established by the relevant state legislation. The relevant New South Wales Act provided that a certificate could be filed for the amount and final judgment subsequently entered. Accordingly, Clyne J. concluded that this mechanism transformed the liability into a provable debt.[33] At least, objections based on the inconclusive nature of the obligation would be overcome.

Although the result in *Re Partridge* indicated that, in certain circumstances, a spouse could prove for arrears of maintenance, the subsequent High Court case of *Opie v. Opie*[34] established that a judgment for arrears of maintenance entered under the prevailing state maintenance legislation was not a final judgment such as to support the issuing of a bankruptcy notice. In *Opie's* case the High Court construed the section of the Bankruptcy Act 1924 corresponding to the current s.40(1)(g) to indicate that the final judgment which could found the issue of a bankruptcy notice must be obtained 'in an action' (or, if a final order, 'obtained in a proceeding'). There had been no relevant action in *Opie's* case. The judgment had simply been entered by court officers in an administrative capacity. As such, there had been no opportunity for the debtor to set up a

28 *Ibid.* 200.
29 (1943) 13 A.B.C. 238.
30 *Ibid.* 239.
31 (1919) 26 C.L.R. 348, 362.
32 (1945) 13 A.B.C. 185.
33 *Ibid.* 187.
34 (1951) 84 C.L.R. 362.

counter-claim and accordingly, the minimum requirement for a cause of action as traditionally defined was lacking.[35] Nevertheless, McTiernan J. at least specifically conceded that the wife had been converted, by the administrative act, into a judgment creditor within the meaning of the Bankruptcy Act 1924[36] although the relevant judgment was incompetent to found a bankruptcy notice.

The decision in *Opie v. Opie* accordingly indicated that although a spouse could prove for arrears of maintenance in certain situations, her ability to exercise the right would depend upon fortuitous circumstances. Presumably, if a creditor with an unimpeachable judgment debt (obtained 'in an action') issued a notice which was not complied with, the claimant spouse could then proceed to present a petition and subsequently prove. Similarly, an act of bankruptcy other than non-compliance with a bankruptcy notice may have been committed, and that too would enable the spouse to prove. Nevertheless, in many cases, a spouse creditor with a potentially provable debt would be unable to initiate proceedings and bankruptcy would accordingly be precluded as an avenue for obtaining payment of the outstanding claim.

The Clyne Committee, in its 1962 report on the operation of the Bankruptcy Act, recommended an amendment which had the effect of overriding the decision in *Opie v. Opie*, in that it provided that a judgment or order which is enforceable as or in the same manner as a final judgment obtained in an action shall be deemed to be obtained in an action. However, the Clyne Report did not specifically advance the need to enlarge the rights of spouses in bankruptcy as the reason for its proposed amendment. Rather, legislative consistency was stressed.[37]

As a result of the Clyne amendment, which was incorporated into the Bankruptcy Act 1966 as s. 40(3)(b), spouses' claims might or might not be sufficient to found a bankruptcy notice, depending on the provisions of the state legislation applicable and whether the individual claimant had proceeded to enter judgment.

Although the Clyne amendment was inspired by a perceived need to secure legislative consistency, consistency was ensured only on a state-wide basis. The uniform application of the Bankruptcy Act 1966 in a wider sense was not guaranteed, due to the dependence of s. 40(1)(g) on state legislation. Indeed, it was possible that claims of an identical nature would have different repercussions depending on the state in which they occurred. If there was no state legislation providing for the entry of a judgment, the deeming effect of s. 40(3)(b) would be frustrated.

35 *Ibid.* 375.
36 *Ibid.* 373-4.
37 Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth* (1962) ('The Clyne Report') 21, para. 58.

Nevertheless, by 1965 similar state enactments indicated that, in practice, the Clyne amendment would have a uniform effect.[38]

However, because the amendment had been proposed in isolation, it introduced a new kind of proving creditor in a very indirect way, without any recognition of the possible anomalies involved in assimilating a spouse to an ordinary creditor. Even when similar state legislation was in force, the amendment had a very capricious operation, as only a wife who had actually filed for final judgment would gain its advantages or disadvantages.

In 1969 D. C. Pearce[39] drew attention to further anomalies, pointing out that a wife who had filed would necessarily be subject to the normal imperatives of having a provable debt. She would lose potential remedies outside bankruptcy and could be subject to voidable preference provisions or incur the obligation to repay execution proceeds under the doctrine of relation back. These consequences might or might not represent a reasonable trade-off for the right to participate in the spouse's bankruptcy, and of course, the wife would not choose to initiate proceedings herself unless it were to her advantage. All the same, she would be vulnerable to the same consequences, however undesirable, if an independent creditor initiated proceedings against her husband. On the other hand, a wife who had not filed prior to the husband's bankruptcy could not prove, even if it were to her advantage.

The potential inequities and irrational consequences of the Clyne amendment highlighted the dangers of expanding the category of provable debts indirectly by means of the section dealing with acts of bankruptcy. Moreover, it was clearly undesirable that a claim for arrears of maintenance should be equated with a provable debt without a corresponding provision for the harmonious functioning of such an assimilation in the overall context of the Bankruptcy Act 1966 given the unique nature of familial relationships.

Furthermore, s. 153(2) of the Act permitted the Bankruptcy Court to exercise its discretion in determining to what extent, if any, discharge from bankruptcy would release the bankrupt from liability under a maintenance order. Otherwise, discharge would not free a bankrupt from any liability under a maintenance order. It will be recalled that this section led Lukin J. to infer that arrears of maintenance must be provable, as otherwise discharge would not release the bankrupt anyway, and s. 153 would be otiose.

After the Clyne amendment, s. 153(2) apparently gained some real effect, because arrears of maintenance would, on occasion, be provable and the bankrupt would accordingly be freed from liability on discharge in the absence of a specific provision. Section 152(2)(c) provided that, as a general rule, all maintenance liabilities would remain on foot, but permitted the court to vary this general rule.

38 Maintenance Act 1965 (Vic.) s. 41; Maintenance Act 1964 (N.S.W.) s. 45; Maintenance Act 1965 (Qld.) s. 45; Social Welfare Act 1926-1965 (S.A.) s. 92a. (no corresponding provision was included in Tasmanian legislation).

39 Pearce, D.C., 'Bankruptcy and Arrears of Maintenance' (1969)43 *Australian Law Journal* 560.

The propriety of investing an insolvency court with a discretion in relation to maintenance liability was questioned by D. C. Pearce, who argued that the relevant experience and guidelines were lacking.

While no cases involving the undesirable possibilities indicated by Pearce actually arose, subsequent cases indicated that uncertainty continued to surround the status of arrears of maintenance.[40] The recognition of these problems was ultimately reflected in an express amendment to s. 82 of the Bankruptcy Act 1966 designed to obviate the problems previously encountered in proving for unpaid matrimonial liabilities on the bankruptcy of a spouse.

2. *Debts Provable in Bankruptcy after the Bankruptcy Amendment Act 1980 (Cth)*

Section 82(1) of the Bankruptcy Act 1966 sets out debts and liabilities which are provable in bankruptcy. It provides:

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

Section 82(1A), incorporated into the Act by the Bankruptcy Amendment Act 1980 (Cth) increased the range of familial obligations capable of proof in bankruptcy.[41] It provides:

> Without limiting the generality of sub-section (1), debts and liabilities referred to in that sub-section shall be taken to include a debt or liability by way of the whole or a part of —
> (a) a periodical sum that became payable by the bankrupt before, but not more than one year before, the date of the bankruptcy under a maintenance agreement or maintenance order (whether entered into or made, as the case may be, before or after the commencement of this sub-section); and
> (b) a lump sum (whether payable in one amount or by instalments) that became payable by the bankrupt before the date of the bankruptcy under a maintenance agreement or maintenance order (whether entered into or made, as the case may be, before or after the commencement of this sub-section).

Despite the 1980 Amendment Act, the Bankruptcy Act 1966 still adopts an unbalanced approach to the issue of proof in bankruptcy of family obligations. This approach is further evidenced in the provisions relating to the continuance of other enforcement procedures during bankruptcy and to rights upon discharge. With respect to these matters spouses who are entitled to payments pursuant to particular family obligations are placed in an advantageous position *vis-à-vis* other creditors, whilst spouses who are entitled pursuant to other types of family obligations are given no advantages over other creditors.

It is important to analyse which types of family obligations are capable of proof in bankruptcy and to determine those obligations which give rise to ad-

[40] In *Re Stanley v. Stanley* (1969) 14 F.L.R. 85 Jenkyn J. upheld the traditional principle that maintenance claims were not provable in bankruptcy, despite the Clyne amendment. Compare the result in *Re Morris* (1974) 22 F.L.R. 460 discussed *infra* p. 242-3.

[41] This amendment came into effect on 1 February 1981.

vantages over other creditors with respect to concurrent enforcement and discharge. Some suggestions for rationalization of the system will be suggested.

(a) *Maintenance Orders*

As stated above,[42] before the Bankruptcy Amendment Act 1980 took effect on 1 February 1981, it was established that neither future payments of maintenance nor arrears of maintenance, whether periodic or lump sum in nature, were capable of being proved *per se* in the bankruptcy of the spouse who was under an obligation to pay.[43] Matrimonial courts had traditionally been invested with wide discretion to vary their maintenance orders, and that was perpetuated by the Family Law Act 1975.

Under s. 83 of the Family Law Act 1975, the court has wide powers to discharge, suspend or vary existing maintenance orders and thus future payments payable under a maintenance order were not considered to have a sufficient degree of finality to be capable of proof in bankruptcy. Further, although the discharge of an order does not affect the recovery of arrears,[44] the enforcement of arrears is always discretionary[45] and the court has a separate power under s. 83(6A) when decreasing periodic maintenance payments, to make the variation retrospective.

The inability to prove such amounts had little adverse effect on a creditor spouse where the bankrupt had little property but a high income as she could pursue other avenues of enforcement outside bankruptcy with a chance of payment in full.[46] However, where a large estate was to be distributed among the creditors, the position of the other spouse may have been improved had she been able to prove in the bankruptcy and share in the proceeds as distributed by the trustee in bankruptcy. Further, the ability to prove would have obviated all the normal problems associated with the collection of maintenance.[47]

The 1980 amendments to the Bankruptcy Act 1966 demonstrate that, at least as far as certain arrears of maintenance are concerned, the legislature considers that a spouse so entitled to arrears should not be disadvantaged *vis-à-vis* other creditors. Section 82(1A) provides, *inter alia*, that debts and liabilities referred to in s. 82(1) must be taken to include periodical sums that became payable by the bankrupt under a maintenance order before, but not more than

42 *Supra* p. 217-19.

43 See, however, *Re Morris* (1974) 22 F.L.R. 460 discussed *supra* and *infra* which provided a means, in certain circumstances, whereby a spouse could prove for arrears of maintenance.

44 Family Law Act 1975 (Cth) s. 83(8).

45 Family Law Act 1975 (Cth) s. 105(1).

46 *Supra* p. 217.

47 See Canberra, *The Report of the National Maintenance Inquiry*, 'A Maintenance Agency for Australia' A.G.P.S. (1984) ch. 3.

one year before the date of bankruptcy,[48] and lump sums that became payable by the bankrupt under a maintenance order before the date of the bankruptcy.

The provision demonstrates that certain maintenance payments payable pursuant to a court order remain incapable of proof in bankruptcy. First, future payments of maintenance under a maintenance order cannot be proved.[49] In view of the fact that future payments may be varied or even terminated[50] if circumstances change sufficiently or if the parties begin to cohabit again, the omission of future payments from provable debts may be logical. The nature of future payments and the court's wide powers of variation make them virtually incapable of valuation. Accordingly, they fall foul of the express requirement established in s. 82(6) that a provable claim must be capable of fair estimation.

It should be noted that under s. 83 of the Family Law Act 1975, the Family Court has the power in decreasing the amount of a periodical sum or in discharging an order, to make the order retrospective to such date as it thinks fit.[51] The court's ability to alter retrospectively amounts payable suggests that if future payments are incapable of proof due to the inability to estimate them, arrears of periodic maintenance may be similarly incapable of accurate valuation and thus should not be capable of proof. Although the court has the power to vary retrospectively, it is suggested that it will be used less than a variation or discharge operating with respect to future payments. The common reasons for a variation, such as changed circumstances of the person liable to pay, will usually apply to a variation to operate with respect to future payments. It is submitted that the distinction between future payments and arrears is clear enough to support their differing treatment in s. 82(1A).

Secondly, arrears of periodical maintenance that were payable more than 12 months before the date of the bankruptcy are incapable of proof in bankruptcy.[52] The omission of this category from s. 82(1A) presumably takes account of the fact that generally the Family Court refuses to exercise its discre-

48 Clause 23 of the Bankruptcy Amendment Bill 1985 (Cth) will, if enacted, provide that in one instance arrears of maintenance owing under a maintenance order that accrue more than one year before the date of the bankruptcy are provable. Section 82 of the Bankruptcy Act 1966 (Cth) would be amended by the insertion of a sub-section (1B) in these terms:

> Notwithstanding sub-section (1A), where a creditor who presents a petition under Division 2 of Part IV has obtained a final order within the meaning of paragraph 40(1)(g) that is a maintenance order of the kind referred to in paragraph 40(3)(f), being an order for the payment of arrears of maintenance that was payable periodically and the whole or a part of which was payable by the bankrupt more than one year before the date of the bankruptcy, the whole of those arrears are provable in the bankruptcy.

Thus once the Family Court has made an order for the payment of arrears of maintenance payable periodically, all the arrears contained within that order will be provable even if they accrued more than one year before the date of bankruptcy. See also *infra* p. 244. This bill has now been enacted as The Bankruptcy Amendment Act 1985 (Cth). Its operation will commence on a day to be fixed by proclamation.

49 As to future payments under a maintenance agreement, see *infra* p. 230-1.

50 Family Law Act 1975 (Cth) s. 83.

51 See Family Law Act 1975 (Cth) s. 83(6A) and (6B) which provide that moneys paid under an order which is subsequently decreased retrospectively may be recovered.

Although the language of s. 83 of the Family Law Act 1975 (Cth), indicates that lump sum maintenance orders are subject to modification, it seems clear, in practice, that such orders (particularly where money has been paid), are unlikely to be altered. See *Rouse and Rouse* (1981) F.L.C. 91-073 and Wade, J., *Property Division Upon Divorce* (1981) 222.

52 See, however, *supra* n. 48.

tion to enforce arrears of maintenance that are more than 12 months old.[53] This is based on the notion that periodic maintenance is intended to provide for the present needs of the recipient spouse: in many instances, it cannot be argued that maintenance which was payable over twelve months previously, is now necessary for present needs.

The fact that up to one year's arrears of maintenance can now be proved in bankruptcy raises the question as to whether s. 82(1A) impinges upon the power of the Family Court to vary or discharge its own maintenance orders. Clearly with respect to future payments, the Family Court's powers are unaffected. Presumably, the Family Court retains its powers to vary maintenance orders retrospectively and to exercise discretion as to enforcement even where the liabilities have been proved in bankruptcy. However, there will be inherent practical difficulties in exercising those powers once the arrears have been proved and payments have been made to the creditor spouse.

The introduction of s. 82(1A) was a clear attempt to ensure that certain maintenance creditors should not be disadvantaged in bankruptcy proceedings by an inability to prove. However, the legislature purported to do more in its 1980 amendments than simply to redress the balance: it ensured the continuation of privileges maintenance creditors enjoyed over other creditors before the amendment.

Unlike other creditors, the spouse who proves may utilize other means of enforcement during the bankruptcy proceedings and his or her debt may remain on foot after the discharge of the bankrupt. Section 58 of the Bankruptcy Act 1966 provides that:

> on bankruptcy all provable debts owing by the debtor are converted from rights of action against the debtor to a right to share in the distribution of the debtor's estate vested in the trustee.

However, by s. 58(5A), a maintenance creditor with a right to prove, can seek to enforce the payments under the general law *and* prove the debt in the bankruptcy. Section 58(5A) provides:

> Nothing in this section shall be taken to prevent a creditor from enforcing any remedy against a bankrupt, or against any property of a bankrupt that is not vested in the trustee of the bankrupt, in respect of any liability of the bankrupt under a maintenance agreement or a maintenance order (whether entered into or made, as the case may be, before or after the commencement of this sub-section).

Although s. 107 of the Bankruptcy Act 1966 ensures that the spouse entitled to maintenance cannot receive more than 100 cents in the dollar, such a person is clearly in a stronger position than other creditors.

Maintenance payments are a means of providing for the present needs of the spouse in need and perhaps children of the marriage. In making the amendments to the Bankruptcy Act in 1980, the legislature took the view that the social significance of maintenance obligations was such that a maintenance creditor should be able to pursue all other remedies for the enforcement of

[53] *Ostrofski and Ostrofski* (1979) F.L.C. 90-730; *Molier and Van Wyk* (1980) F.L.C. 90-911. See also Family Law regulations, reg. 133(12)(a).

arrears in addition to proving in bankruptcy. Apart from the problems of finality and estimation of liability, historically one of the reasons for excluding maintenance payments from proof in bankruptcy, was that, like fines and penalties and tortious damages, obligations to maintain a spouse and children were personal in nature and were viewed as obligations which should continue through bankruptcy proceedings and after discharge.

Apart from being able to prove in bankruptcy and pursue other remedies against the bankrupt during the bankruptcy, the maintenance creditor is placed in an advantageous position upon discharge of the bankrupt. Under s. 153(1), discharge from a bankruptcy operates to release the bankrupt from all debts provable in the bankruptcy. This provision reflects one of the aims of bankruptcy legislation — the rehabilitation of the bankrupt. However, it has always been considered that certain debts such as fines and penalties, debts arising from breach of trust and maintenance should not be released upon discharge. Public interest considerations in ensuring continued liability with respect to such debts outweigh the policy argument of rehabilitation of the bankrupt. Section 153(2)(c) specifically provides, subject to an order of the court under s. 153(2A), that a discharge from bankruptcy does not release the bankrupt from liability under a maintenance agreement or order.[54] By s. 153(2A) the court may order that a discharge from bankruptcy operates to release the bankrupt, to such extent and subject to such conditions as the court thinks fit, from liability for arrears due under a maintenance agreement or maintenance order.

The reason for the inclusion of the court's power in s. 153(2A) appears logical. For example, a wife who is entitled to a particular amount of arrears may prove the debt in the bankruptcy of her husband and receive a *pro rata* payment of 50 per cent of the total amount due. It seems reasonable that the court exercising jurisdiction under the Bankruptcy Act 1966 should have, at the time of discharge, the power to release the husband from at least half of his liability for those arrears.

However, s. 153(2A) is not confined to arrears which are provable in bankruptcy and thus, theoretically a court exercising jurisdiction under the Bankruptcy Act 1966 could release the bankrupt from liability to pay arrears of maintenance which accrued more than one year before the date of bankruptcy.

The power of a bankruptcy court to make orders with respect to the release of maintenance debts intrudes upon the power of the Family Court to vary or enforce maintenance orders. The Full Court of the Family Court has recognized that the Federal Court exercising bankruptcy jurisdiction does have a concurrent jurisdiction with the Family Court within the parameters of s. 153(2)(c) and s. 153(2A).[55] The fact that two different courts have jurisdic-

54 It is unclear why s. 153(2)(c) was necessary before the introduction of the 1980 amendment to the Bankruptcy Act 1966 (Cth).

55 *Milland and Milland* (1981) F.L.C. 91-065.

tion with respect to the same matter may give rise to difficulties, particularly if there are concurrent proceedings. A bankruptcy court which has to consider whether to discharge maintenance obligations under s. 153(2)(c) must be cognizant of the fact that it is intruding into the field of family law[56] and should make such orders so as to intrude as little as possible on the general power of the Family Court to deal with maintenance. It is suggested that a bankruptcy court should only discharge arrears equivalent to the sum paid to a proving creditor spouse by the trustee in bankruptcy.

(b) *Property Orders*

It has been assumed that an amount owing or liabilities existing pursuant to an order under s. 79 of the Family Law Act 1975 are capable of proof in bankruptcy.[57] Section 82(1) of the Bankruptcy Act 1966 includes in the definition of provable debts, all debts and liabilities present or future, certain or contingent, to which the bankrupt was subject at the date of bankruptcy. The reasons for the exclusion of maintenance debts from this general definition[58] appear inapplicable to debts or liabilities arising from property orders. A property order made under s. 79 is not subject to variation, suspension or discharge in the same way as is a maintenance order. It is designed to be a final order. Although s. 79A of the Family Law Act 1975 sets out grounds for the discharge or variation of a property order, such variation can only occur in limited circumstances.[59]

A spouse who, in the bankruptcy of the other spouse, proves a debt or liability pursuant to a s. 79 property order, is not placed in a privileged position as are some maintenance creditors. The spouse is entitled to participate in the distribution of the bankrupt's available property. However, she does not have the advantage, accorded under s. 58(5A) of the Bankruptcy Act 1966 to maintenance creditors, to pursue and enforce other remedies against the bankrupt during the bankruptcy. Neither does such a creditor fall within the category of specific debts which are not automatically released upon discharge from bankruptcy.[60] Once the bankrupt is discharged, the debt or liability arising from a s. 79 property order is released. (This in itself may provide a conceptual objection to treating property orders as provable, at least in so far as they incorporate a maintenance function). In short, the debt or liability under a s. 79 property order is treated in the same way as any ordinary debt. The fact that it arose in consequence of the breakdown of a marriage is apparently considered irrelevant.

56 *Milland and Milland* (1981) F.L.C. 91-065; *Holley and Holley* (1982) F.L.C. 91-257.
57 *Bateman and Patterson* (1981) F.L.C. 91-057; *Re Jensen; ex parte Jensen* (1982) F.L.C. 91-282.
58 See *supra* p. 223.
59 For further discussion of s. 79A see *infra* p. 245-6.
60 Bankruptcy Act 1966 (Cth) s. 153(2).

It is important to consider whether this odd distinction which has been drawn between maintenance creditors and creditors under a s. 79 property order is valid in principle. The reasons for granting certain maintenance creditors a privileged status in the bankruptcy procedure have been set out above. As stated by Clyne J. in *Re Canobbio,*[61] a husband's obligation to maintain his family was 'personal and continuous' and more properly an incident of status than contractual in nature. However, under the Family Law Act 1975 it can no longer be said that a husband has an unqualified and hence continuous moral obligation to maintain his wife and family. An order for maintenance is based on a concept of need:[62] if one spouse has a need for maintenance and the other spouse has the capacity to pay, an order for maintenance may be made in favour of the spouse in need. Despite this basic change, it may still be said that rights and obligations arising from maintenance orders can be seen as predicated on the traditional perception, reaffirmed in *Re Canobbio*, that the husband's obligations are incidents of status rather than conventional debts.

At first glance, it may be argued that an order pursuant to s. 79 of the Family Law Act 1975 can be more closely aligned to an ordinary debt as existing between strangers than to an obligation arising from a maintenance order. However, an examination of s. 79 reveals that an order under that section is based upon more than a simple readjustment of property rights according to direct contributions to the property owned by husband and wife.

Section 79(4) provides that the court must take into account the matters set out in paragraphs (a)-(f) of s. 79(4) in considering what order should be made. Section 79(4)(a), (b) and (c) direct the court to take into account direct and indirect, and financial and non-financial contributions to the property of the husband and/or wife and to the welfare of the family. By s. 79(4) the court is also obliged to take into account the matters referred to in s. 75(2) so far as they are relevant. Section 75(2) sets out the matters which are to be taken into account in the making of a maintenance order under s. 74. Thus, the making of a property order under s. 79 is commonly viewed as comprising two parts. The first part, the 'retrospective' element, is an analysis of past contributions of the husband and the wife to the property of both or either of them. The second part, the 'prospective' or 'maintenance' element, must then be considered before a final order is made.

The interaction of s. 74 maintenance orders and s. 79 property orders has been a vexed issue for the Family Court. In *Anast and Anastopoulos*[63] the Full Court of the Family Court considered the appropriate course of action where, for example, a wife makes applications for maintenance and property orders. The Full Court held that the court should consider the wife's property application, including the relevant matters in s. 75(2), before considering the wife's

61 (1945) 13 A.B.C. 238.
62 Family Law Act 1975 (Cth) s. 74.
63 (1982) F.L.C. 91-201.

application for maintenance. The court must then consider the maintenance application 'in the light of the impact of the property order on the parties' financial circumstances.'[64] The starting point would then be s. 72 and it may well be that the wife could establish a 'need' in herself and a capacity to pay in her husband. On the other hand, if a property application leads to a substantial order based on past contribution and future need, the question of future need of the wife may become irrelevant[65] and the possibility of a maintenance order negligible.

In light of the above discussion, it seems specious to argue that there is a well-based or logical reason in principle for any distinction between the position of a spouse who is entitled to amount or amounts under a maintenance order and a spouse who is entitled under a property order.[66] If a maintenance creditor is entitled to prove for arrears and yet retain the right to pursue other remedies during the bankruptcy[67] and possibly after its discharge,[68] there appears to be no valid reason why a spouse entitled under a s. 79 property order should not be entitled to the same benefits.

If the legislature takes the view that spouses are to have particular advantages, it should ensure that the privileges apply equally to all spouses who are entitled to the payments from the other spouse pursuant to Family Court orders.

Apart from the fact that there appears to be no valid reason for the distinction in principle, the application of the distinction will often be very difficult in practice. Judgments of the Family Court sometimes fail to specify whether a particular order is made pursuant to the power to make maintenance orders under s. 74 or to the power to make property orders under s. 79. Often it is possible to infer from the judgment itself whether the order was made under s. 74 or s. 79.[69] However, in other instances it is difficult, or even impossible, to determine the provision under which the court made its order. The issue is further complicated by the claim of the Bankruptcy Court, expressed in the case of *Re Jensen; Ex parte Jensen*,[69a] to impose its own independent characterization upon a given Family Court order. Thus, practical considerations alone make it imperative that liabilities arising from orders under the Family Law Act 1975 be treated in the same manner in bankruptcy proceedings.

64 (1982) F.L.C. 91-201, 77,062.

65 See *Albany and Albany* (1980) F.L.C. 90-905.

66 See also the discussion on maintenance agreements *infra*. Where property matters are dealt with in a maintenance agreement rather than a s. 79 order, the creditor spouse has all the same protections as the creditor spouse under a maintenance order. There is no logical reason for treating the creditor spouse in these situations differently.

67 Bankruptcy Act 1966 (Cth) s. 58(5A).

68 Bankruptcy Act 1966 (Cth) s. 153(2)(c).

69 *Sanders v. Sanders* (1967) 116 C.L.R. 366, 380; *Branchflower and Branchflower* (1980) F.L.C. 90-857; *Taylor and Taylor* (1979) F.L.C. 90-674; *Re Jensen; ex parte Jensen* (1982) F.L.C. 91-282.

69a (1982) F.L.C. 91-282.

(c) *Section 87 Agreements*

Section 87 of the Family Law Act 1975 provides for the making of maintenance agreements. In relation to the financial matters dealt with in the agreement, a s. 87 maintenance agreement operates in substitution for any rights the parties to the agreement have under Part VIII of the Act. By s. 4(1) 'financial matters' are defined as the maintenance of one of the parties, the property of one of the parties or either of them or the maintenance of the children of the marriage.

Section 82(1A) of the Bankruptcy Act 1966 now makes it clear that provable debts include periodical sums that became payable by the bankrupt under a maintenance agreement before, but not more than one year before the date of bankruptcy and lump sums (whether payable in one amount or by instalments) that became payable by the bankrupt under a maintenance agreement before the date of bankruptcy. The section fails to make any provision with respect to future payments of periodical sums or future payments that may be payable under a lump sum by instalment order and seems to provide that arrears of periodic maintenance accruing more than one year before the date of bankruptcy cannot be proved.

In introducing s. 82(1A), the legislature appears to have taken the view that obligations arising pursuant to maintenance agreements were not previously provable in bankruptcy. Nevertheless, s. 82(1A) specifically states that its provisions are not to limit the generality of s. 82(1) and thus in order to determine if such amounts are incapable of proof, it is necessary to consider whether these amounts fall within the general ambit of s. 82(1).

Obligations arising under a maintenance agreement are essentially contractual in nature. The agreement must be approved by the court[70] and such approval removes the possibility that the agreement can be avoided under common law principles.[71] At common law, an agreement between husband and wife providing for the maintenance of the wife could be avoided by the wife: the wife was seen as being in need of special protection and such agreement tended to oust the jurisdiction of the court to make proper orders for the maintenance of the wife.[72] A s. 87 agreement is made in final substitution for rights under Part VIII and it is only in special circumstances that the agreement can be revoked. Whether the agreement deals with maintenance and/or property matters, revocation can only be effected within the strict and narrow grounds as set out in s. 87. It should be noted that the Family Law Amendment Act 1983 has expanded the grounds for revocation. A maintenance agreement may be revoked if, first, the approval of the court was obtained by fraud, secondly, both parties desire revocation, thirdly, the agreement is void, voidable or unenforceable, or, finally, circumstances which have arisen since the agreement

70 Family Law Act 1975 (Cth) s. 87(2).
71 *Vandyke and Vandyke* (1976) F.L.C. 90-139.
72 *Hyman v. Hyman* [1929] A.C. 601; *Brooks v. Burns Philp Trustee Co. Ltd and Another* (1969) 43 A.L.J.R. 131.

was approved demonstrate that it is impracticable for the agreement, or part of it, to be carried out.[73] The inclusion of the third ground for revocation in the 1983 Amendment Act recognizes and reinforces the contractual nature of the agreement. Previously, circumstances had arisen where the agreement was of no effect under ordinary contract law and yet s. 87 contained no basis upon which the approval of the court could be revoked.[74]

The contractual nature of a s. 87 agreement is reiterated further in the 1983 Amendment Act. Before the Act came into force, there was uncertainty as to whether the enforcement of s. 87 maintenance agreements was within the exclusive jurisdiction of the Family Court or within the concurrent jurisdiction of the Family Court and State Supreme Courts.[75] The new expanded definition of 'matrimonial cause' in s. 4(1) of the Family Law Act 1975 provides that the enforcement of maintenance agreements is within the exclusive jurisdiction of the Family Court.[76] However, s. 87(11) of the Family Law Act 1975 ensures that the Family Court has a wider range of powers for enforcement than are available with respect to orders of the Family Court. It provides that the Family Court has the same powers for enforcement of approved s. 87 agreements as the High Court has in its original jurisdiction in respect of proceedings in connection with contracts or purported contracts.

It is suggested that even before the introduction of s. 82(1A) into the Bankruptcy Act 1966, all payments pursuant to a s. 87 maintenance agreement were provable in bankruptcy. These amounts fall within the purview of s. 82(1) of the Bankruptcy Act 1966 as debts or liabilities, present or contingent, in nature. The traditional reasons for holding that future payments and arrears of maintenance payable pursuant to a court order were not provable, are inapplicable where the payments are due under a s. 87 type agreement. The liability is as certain as any other liability, present or contingent, in an ordinary contract. It is interesting to note that amounts due under the old separation deeds were always considered capable of proof in bankruptcy.[77]

One reason may be advanced in support of the proposition that liabilities arising under a s. 87 maintenance agreement should be treated differently from obligations arising under an ordinary contract. As the court has a power to revoke its approval of the agreement and make new orders as to maintenance and/or property, the liability under a maintenance agreement is too uncertain to be capable of proof in bankruptcy. The discussion above makes it clear that revocation of approval will only occur in a very limited set of circumstances. In fact, the grounds for revocation can be closely aligned to the grounds for bringing a contract to an end under ordinary contract law. Thus it

73 Family Law Act 1975 (Cth) s. 87(8).
74 See *C.C.H. Family Law and Practice Reporter*, Vol. 1, 24,052.
75 See *Carew and Carew* (1979) F.L.C. 90-698; *Ellinas v. Ellinas* (1978) F.L.C. 90-419; (1979) F.L.C. 90-649; *Perlman v. Perlman* (1983) F.L.C. 91-308. The uncertainty was resolved in the High Court in *Perlman v. Perlman* (1984) F.L.C. 91-500, where it was held that State Supreme Courts did have jurisdiction with respect to the enforcement of s. 87 maintenance agreements.
76 Family Law Act 1975 (Cth) s. 4(1)(ea).
77 *Victor v. Victor* [1912] 1 K.B. 247.

is submitted there is nothing inherent in the nature of a debt or liability arising under a s. 87 maintenance agreement which distinguishes it sufficiently from a debt under an ordinary contract such that it is taken out of the general purview of s. 82(1) of the Bankruptcy Act 1966. If it is legitimate to conclude that all obligations arising under a s. 87 maintenance agreement are capable of proof, a creditor spouse entitled under such an agreement is, in relation to the question of maintenance liabilities which are capable of proof, in a superior position to the spouse attempting to prove liabilities arising under a maintenance order.

It is argued in this article that, wherever possible, equality of treatment should be afforded by the bankruptcy court to creditor spouses whether liabilities arise pursuant to a maintenance order, a property order or a s. 86 or s. 87 maintenance agreement. Perhaps the superior position of the creditor spouse in this instance is justifiable. The spouse who is entitled to payments under a s. 87 maintenance agreement is totally reliant upon the provision made pursuant to that agreement: in future years, whether before or after the discharge from bankruptcy of the other spouse, she cannot apply to the Family Court for upward variation. In contrast, the spouse entitled under a maintenance order is always able to apply for variation and may well seek to do so if the bankrupt spouse successfully re-establishes himself after discharge from bankruptcy. However, the better view is that spouses who are creditors pursuant to a s. 87 maintenance agreement should not have such an advantage. As explained below,[78] such creditors, like spouses who prove pursuant to liabilities arising under a maintenance order, can pursue other remedies against the bankrupt during the bankruptcy and after discharge from the bankruptcy: some protection is provided for this creditor spouse over other unsecured creditors. If future sums, which could be very large, are capable of proof, the spouse who can so prove could substantially reduce the payments made to other unsecured creditors who do not enjoy the other benefits conferred on the creditor spouse.

The analysis above demonstrates that parties who enter into a s. 87 maintenance agreement are giving up the right to have their financial familial rights and obligations determined according to the principles set out in ss 72, 74, 75 and 79 of the Family Law Act 1975. In exchange, the parties can agree what their financial rights and obligations will be and set them out in a binding contract.[79] Although only enforceable in the Family Court,[80] the usual range of contractual remedies is available in the enforcement of approved s. 87 maintenance agreements.[81] In one sense, the Family Law Act 1975 seems to be giving the parties to a marriage, the right to make a contract with respect to financial matters just as ordinary persons can enter a contract.

78 *Infra* p. 233-4.

79 In order to be effective, the agreement must be approved: Family Law Act 1975 (Cth) s. 87(2).

80 Family Law Act 1975 (Cth) s. 4(1)(ca).

81 Family Law Act 1975 (Cth) s. 87(11).

However, the legislature has not been prepared to treat the parties to a marriage who contract in a maintenance agreement in exactly the same manner as wholly independent contracting parties. For example, s. 87(2) provides that a s. 87(1) maintenance agreement has no effect unless it has been approved by the Court. In proceedings for the approval of an agreement the Court must be satisfied that the provisions in the agreement with respect to financial matters are proper.[82] *Inter alia*, the Court must consider whether there has been a full disclosure of property and financial resources, whether the agreement appears to be a fair adjustment, whether the interests of minor children have been protected and whether both parties fully understand their rights and obligations under Part VIII of the Family Law Act 1975.[83] In view of the far-reaching and final effect of s. 87 agreements, it seems quite appropriate that the Family Court should consider whether a particular agreement is proper before it becomes binding. The provision safeguards the position of a spouse who may have been induced to sign an improper agreement by the other unscrupulous spouse.

The failure of the legislature to treat s. 87 agreements in the same manner as ordinary contracts is also reflected in s. 58(5A) and s. 153(2)(c) of the Bankruptcy Act 1966. By s. 58(5A), a creditor under a maintenance agreement is permitted to use all other available means of enforcing the liability in addition to proving the debt in bankruptcy. Other creditors do not enjoy this privilege. Further, by s. 153(2)(c) upon discharge the bankrupt is not automatically released from liability under a maintenance agreement. Section 153(2A) provides that the court may order that the discharge from bankruptcy releases the bankrupt from part or all liability to pay arrears. It seems that the public policy consideration of ensuring that family financial obligations are adhered to outweighs the policy of rehabilitating the bankrupt even where the liability arises from a contract between the parties rather than from a court order.

It may be argued that a spouse who has voluntarily given up the right to a court order and elected to contract with the other spouse on an independent basis should *not* be placed in a better position than other creditors. On the other hand, it seems reasonable to treat family liabilities, whether arising pursuant to a court order or to an agreement, in the same way. It would be undesirable for a spouse who is entitled to payments under a maintenance agreement to be in a worse position in the bankruptcy proceedings concerning her spouse than a spouse who is entitled to payments pursuant to a court order. It is suggested that there should not be any disincentives to the making of maintenance agreements.

The privileges in s. 58(5A) and s. 153(2)(c) extend to the 'property part' of a maintenance agreement. That is, where there is an agreement in substitution for the rights under s. 79 of Family Law Act 1975, the spouse entitled to payment under the agreement can prove the debt in the bankruptcy of the other

[82] Family Law Act 1975 (Cth) s. 87(4).
[83] See *e.g. Wright and Wright* (1977) F.L.C. 90-221.

spouse and at the same time pursue other remedies for enforcement. Further, the liability is not automatically released upon discharge of the bankrupt. This reveals an obvious inconsistency. A spouse who is entitled to an amount from the other spouse pursuant to a s. 79 court order can prove the liability in the bankruptcy of the other spouse but is not entitled to the privileges in s. 58(5A) and s. 153(2),(3). There appears to be no valid reason for the distinction.

(d) *Section 86 Maintenance Agreements*

In addition to s. 87 maintenance agreements, the Family Law Act 1975 provides for maintenance agreements to be registered under s. 86. These agreements may make provision with respect to financial matters but they are not in substitution for rights under Part VIII. Once registered, the maintenance agreement can be enforced as if it were an order of the court.[84]

The maintenance component of a s. 86 maintenance agreement can be varied in the same way as a maintenance order.[85] Thus, in the same way as future payments and arrears of maintenance payable pursuant to a court order could not be proved in the bankruptcy of the other spouse before the Bankruptcy Amendment Act 1980, neither could maintenance liabilities under a s. 86 agreement be proved. The maintenance component of a s. 86 agreement was subject to all the same vagaries as a maintenance order. The Bankruptcy Act 1966 as amended now ensures that certain maintenance liabilities under a s. 86 agreement are provable[86] and further provides considerable advantages for a maintenance creditor.[87] In short, a spouse entitled to maintenance under a s. 86 agreement is in exactly the same position in bankruptcy proceedings concerning the other spouse, as a spouse entitled to maintenance pursuant to a court order.

Section 82(1A) of the Bankruptcy Act also ensures that certain liabilities arising from a s. 86 agreement concerning property are provable in bankruptcy. Any lump sum (whether payable in one amount or by instalments) that became payable under a maintenance agreement before the date of bankruptcy is provable. Lump sum instalments due after the date of bankruptcy seem to be incapable of proof. However, a question arises as to whether all liabilities, including future instalments of lump sum amounts under the property section of a s. 86 agreement, are capable of proof under the general provision, s. 82(1), setting out debts provable in bankruptcy. At first glance, it would seem that a s. 86 agreement as to property matters, being enforceable as if an order of the court under s. 79,[88] would only be capable of variation within the strict limits of s. 79A. If this were the case, that part of a s. 86 agreement relating to property would be as capable of proof as a liability arising pursuant to a s. 79 order.

[84] Family Law Act 1975 (Cth) s. 88.
[85] Family Law Act 1975 (Cth) s. 86(2) and s. 83.
[86] Bankruptcy Act 1966 (Cth) s. 82(1A) and see *supra* p. 222 and 230.
[87] Bankruptcy Act 1966 (Cth) s. 58(5A), s. 153(2)(c), see *supra* p. 233.
[88] Family Law Act 1975 (Cth) s. 88.

However, two decisions of the Family Court have stated that the combined effect of ss 86 and 88 is not such that a court can regard the provisions of the agreement as orders of the court under s. 79.[89] Pawley S.J. in *Sykes and Sykes* stated:

> [It] would be a mistake to regard [terms dealing with property matters] as orders under s. 79 . . . . They lack the very important ingredient which orders made under s. 79 and indeed agreements approved under s. 87 possess. They have not been arrived at by an exercise of the Court's discretion. Indeed they have been arrived at without any exercise of the judicial process.[90]

Further, both Pawley S.J. in *Sykes* and the Full Court of the Family Court in *Burgoyne and Burgoyne* took the view that the effect of a s. 86 agreement relating to property could be varied or extinguished by a subsequent order of the court under s. 79. Therefore, on balance, it seems that s. 86 agreement as it relates to property matters is not certain or final enough to be capable of proof under s. 82(1) of the Bankruptcy Act 1966. The only parts of a s. 86 agreement which can be proved in bankruptcy are those specifically covered by s. 82(1A).

Section 58(5A) and s. 153(2)(c), discussed above,[91] apply to a spouse who is entitled to an amount from the other spouse pursuant to the property component of a s. 86 maintenance agreement.

3. *Issuing of a Bankruptcy Notice*

The issue of a bankruptcy notice and service of it upon the debtor is one way in which a creditor can attempt to enforce payment of a debt. If the debtor complies with the notice and pays the debt, the creditor of course recoups his money. If the debtor fails to comply with the notice, he commits an act of bankruptcy and proceedings for the sequestration of the debtor's estate can be commenced.[92]

The question which will be analyzed here is whether or not a spouse who is entitled to a payment, pursuant to a Family Court order or a maintenance agreement under s. 86 or s. 87 or the Family Law Act 1975, can issue a bankruptcy notice. This issue has been examined recently in several Federal Court decisions[93] and by a commentator in the Australian Law Journal.[94] As is the case with respect to proof of debts in bankruptcy, the relevant law has developed in an *ad hoc* and unstructured manner. Some debts arising from family obligations are capable of founding the issue of a bankruptcy notice whilst others are not. One of the problems is that the relevant provisions in the Bankruptcy Act 1966 are dependent upon the interpretation of other statutory provisions, the Family Law Act 1975 being particularly relevant to this analysis. If a

89 *Sykes and Sykes, Dotch and Others* (1979) F.L.C. 90-652; *Burgoyne and Burgoyne* (1978) F.L.C. 90-467.

90 (1979) F.L.C. 90-652, 78, 446.

91 *Supra* p. 233.

92 Bankruptcy Act 1966 (Cth) s. 40(1)(g).

93 *Re Maddox; ex parte the debtor* (1979) F.L.C. 90-630; *Re Stehbens; Ex parte Stehbens* (1982) F.L.C. 91-229; *Re Jensen; Ex parte Jensen* (1982) F.L.C. 91-282.

94 See Allen, R.A., 'Bankruptcy Notices and Family Court Judgments' (1983) 57 *Australian Law Journal* 626.

thorough rationalization is to be made, the legislature must examine carefully underlying principles and determine whether debts arising from family obligations should be just as capable of founding a bankruptcy notice as ordinary debts.

There is a strong argument that a creditor spouse should at the least not be disadvantaged *vis-à-vis* other unsecured creditors of the debtor spouse and therefore should have a right to issue a bankruptcy notice. On the other hand it may be argued that allowing one spouse to bankrupt the other would increase disharmony between the parties.[95] Although conciliation is an avowed aim of the Family Law Act 1975,[96] it is suggested that in most cases where the Family Court has ordered one spouse to make payments to the other, there is little likelihood of reconciliation or the marriage will already have been dissolved. It is submitted the better view is that creditor spouses should be able to issue bankruptcy notices, particularly given the acknowledged difficulties encountered in enforcing maintenance payments.

Two questions arise in an analysis of whether or not a liability arising from a Family Court order or a s. 86 or s. 87 maintenance agreement can found the issue of a bankruptcy notice. First, it must be considered whether the issue of a bankruptcy notice on the basis of a failure to comply with a Family Court order or a maintenance agreement is in fact a 'matrimonial cause'. If it is a matrimonial cause, a bankruptcy notice probably cannot be issued because proceedings with respect to a matrimonial cause are within the exclusive jurisdiction of the Family Court.[97] Secondly, the ground upon which a bankruptcy notice can be issued is defined specifically and strictly in s. 40(1)(g) of the Bankruptcy Act 1966 and it may be that certain Family Court orders do not satisfy the criteria in s. 40(1)(g).

(a) '*Matrimonial Cause*'?

The first issue involves a consideration of the relevant provisions of the Family Law Act 1975. Section 4(1) defines the meaning of 'matrimonial cause'. *Inter alia*, matrimonial cause is defined as:

> (ea) proceedings between —
> (i) the parties to a marriage; or
> (ii) if one of the parties to a marriage has died — the other party to the marriage and the legal personal representative of the deceased party to the marriage, being proceedings —
> (iii) for the enforcement of, or otherwise in relation to, a maintenance agreement that has been approved under section 87 and the approval of which has not been revoked;
> (iv) in relation to a maintenance agreement the approval of which under section 87 has been revoked; or
> (v) with respect to the enforcement under this Act of a maintenance agreement that is registered in a court under section 86 or an overseas maintenance agreement that is registered in a court under regulations made pursuant to section 89;

95 This is the argument supported by Allen, *op. cit.* 631.
96 Family Law Act 1975 (Cth) s. 43(d).
97 Family Law Act 1975 (Cth) s. 8(1)(a). See *infra* p. 237*ff*.

(eb) . . .
(f) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (eb), including proceedings of such a kind pending at, or completed before, the commencement of this Act.

In *Re Maddox*,[98] a bankruptcy notice was issued claiming the sum taxed as the amount payable pursuant to a cost order made in proceedings in the Supreme Court of New South Wales in its Family Law Division. An application was made to set aside the bankruptcy notice. It was argued that the bankruptcy notice could not be founded validly on the order of the Supreme Court because the provisions of the Family Law Act 1975 operate to prohibit proceedings for enforcement of the order except under the Family Law Act 1975.

The application involved a consideration of two matters. First, it had to be decided if the issue of a bankruptcy notice were a 'proceeding' as defined in s. 4(1) of the Family Law Act 1975. If, and only if, the issue of the bankruptcy notice were held to be a 'proceeding', the court had to consider the second matter of whether the issue of a bankruptcy notice 'answers the description of a "a matrimonial cause" within the meaning of s. 4(1)'.[99]

'Proceedings' are defined in s. 4(1) as 'a proceeding in a court, whether between parties or not, and includes cross proceedings or an incidental proceeding in the course of or in connexion with a proceeding'. In determining whether the issue of a bankruptcy notice fell within this definition, it was necessary for the court to analyze the nature of a bankruptcy notice and the capacity in which the Registrar acts in issuing it. Several earlier decisions had held that the issue of a bankruptcy notice was purely administrative in nature. In *Bond v. George A. Bond & Co. Ltd & Bond's Industries Limited*,[1] the High Court considered the relevant provisions of the Bankruptcy Act 1929 and found that there was legislative power for a Supreme Court exercising federal jurisdiction in bankruptcy to grant Registrars in bankruptcy 'powers, duties and functions of an *administrative* nature exercisable by the Court'.[2] The High Court held that the issue of a bankruptcy notice was an administrative act. Similarly, Gibbs J. in *Re Moss; Ex parte Tour Finance Limited*[3] held that the issue of a bankruptcy notice under the Bankruptcy Act 1966 was not a part of judicial proceedings. His Honour stated:

> [I]n the broadest sense, and for some purposes it may be said that bankruptcy proceedings are commenced by the making of an application for the issue of a bankruptcy notice . . . It is, however, begging the question to say that judicial proceedings are commenced by such an application. An application for the issue of a bankruptcy notice is made for the purpose of forcing the debtor either to comply with the notice or to commit an act of bankruptcy.
>
> [If the debtor fails to comply and thereby commits an act of bankruptcy,] a creditor may . . . present a petition for the making of a sequestration order [and thus commence judicial proceedings].[4]

98 (1979) F.L.C. 90-630.
99 (1979) F.L.C. 90-630, 78, 274.
1 (1930) 44 C.L.R. 11.
2 Bankruptcy Act 1924-1929 (Cth) s. 23
3 (1969) 13 F.L.R. 101.
4 (1969) 13 F.L.R. 101, 105-6.

Having considered these decisions, Lockhart J. in *Re Maddox* held that the issue of a bankruptcy notice did not fall within the term 'proceedings' as defined in s. 4(1) of the Family Law Act 1975. His Honour stated:

> The act of the registrar in issuing a bankruptcy notice is not a step in any proceeding in the court. The judicial process which leads to the making of a sequestration order is commenced with the presentation of the petition . . . [Further] not only is the issue by the registrar of a bankruptcy notice not a proceeding in a court, . . . nor is the issue of a bankruptcy notice 'an incidental proceeding in the course of, or in connexion with a proceeding' . . . [T]he 'incidental proceeding' must itself be an incidental proceeding in a court in order to fall within the statutory definition of the word 'proceedings'.[5]

Because his Honour held that the term 'proceedings' did not encompass the issue of a bankruptcy notice, Lockhart J. did not have to consider whether the issue of a bankruptcy notice answered the description of a 'matrimonial cause'.

Although it is clear now that the issue of a bankruptcy notice does not impinge upon the exclusive jurisdiction of the Family Court, a question arises as to whether the subsequent presentation of a petition for sequestration may do so. A spouse who validly issues a bankruptcy notice pursuant to unpaid amounts owing under a Family Court order or a maintenance agreement may wish, if the amount remains unpaid, to present a creditor's petition for sequestration of the debtor's estate. Would these judicial proceedings amount to a 'matrimonial cause'? They may be considered to fall within para.(f) of s. 4(1) being proceedings (including proceedings for the enforcement of a decree) in relation to concurrent, pending or completed proceedings of a kind referred to in paras. (a) to (eb) or proceedings for the enforcement of a maintenance agreement under para. (ea) of s. 4(1). There are a number of judicial statements to the effect that such proceedings are not 'proceedings with respect to the enforcement of a decree'.[6] These cases suggest that the presentation of a petition for sequestration is not a method of enforcing a judgment but rather the commencement of proceedings of much wider effect. A creditor who presents a petition for sequestration 'is proceeding to a new alternative mode of recovering her debt, a mode by which she no longer seeks to recover for herself alone but for the benefit of all creditors'.[7] Such a proceeding is not a proceeding to execution on, or a proceeding for the enforcement of, a judgment.[8]

Although not deciding the issue, Fitzgerald J. in *Re Jensen* was of the opinion that it may be possible for the presentation of a petition to be viewed as a proceeding *in relation to* concurrent, pending or completed proceedings within para. (f) of the definition of matrimonial cause.[9] In *Perlman v. Perlman*[10] decided after *Re Jensen*, the High Court considered the meaning of the phrase 'in relation to' in para (f).

5 (1979) F.L.C. 90-630, 78, 277.

6 *Opie v. Opie* (1951) 84 C.L.R. 362; *In re a Bankruptcy Notice* [1907] 1 K.B. 478, 482; *In re a Company* [1915] 1 Ch. 520, 526 and 528. Similar reasoning as used in these decisions can be applied to reach the conclusion that such proceedings are not proceedings for the enforcement of a maintenance agreement.

7 *In re a Company* [1915] 1 Ch. 520, 528 *per* Phillimore L.J.

8 *In re a Company* [1915] 1 Ch. 520, 526 *per* Lord Cozens-Hardy M.R.

9 His Honour relied upon the wide definition of the phrase 'in relation to' given by the High Court in *Fountain v. Alexander* (1982) 56 A.L.J.R. 321.

10 (1984) F.L.C. 91-500.

In this case, the wife commenced proceedings in the Supreme Court of New South Wales seeking the enforcement of a s. 87 maintenance agreement. The husband objected that the Supreme Court had no jurisdiction to entertain the proceedings as they constituted a matrimonial cause. This was the sole issue that had to be determined by the High Court. It should be noted that the case had to be determined on the law as it stood before the introduction of the Family Law Amendment Act 1983 which, *inter alia*, amended the definition of the term 'matrimonial cause'. The whole Court held that proceedings for the enforcement of a maintenance agreement did not fall within para. (f) of the definition of matrimonial cause as being proceedings for the enforcement of a decree. Although a maintenance agreement could be enforced as if an order of the Family Court under s. 88, there was no provision in the Family Law Act 1975 which converted the agreement into an order of the Court.

The Court considered whether the proceedings instituted in the Supreme Court could be deemed 'proceedings . . . in relation to . . . completed proceedings' under para. (d) for the approval of the maintenance agreement so as to fall within para. (f).[11] In analyzing the meaning of the phrase 'in relation to' Gibbs C.J. stated that:

> The words 'in relation to' import the existence of a connection or association between the two proceedings . . . An appropriate relationship may exist if the order sought in the proceedings in question is consequential on or incidental to a decree made in the completed proceedings . . . It may exist if the order sought in the later proceedings would reverse or vary the effect of an order made in the former . . . [A]n application to enforce the maintenance agreement in the present case . . . was not consequential on or incidental to the order approving of the maintenance agreement and it did not vary, reverse or otherwise affect the order giving the approval.[12]

On the basis of this reasoning, the whole Court held that the proceedings instituted in the Supreme Court by the wife were not proceedings in relation to the proceedings for the approval.

It is suggested, *a fortiori*, that the presentation of a petition for sequestration whether based on non-payment pursuant to a property order or a maintenance agreement would not be considered to constitute a matrimonial cause under para. (f) as being proceedings in relation to completed proceedings.

Even if such a submission is wrong and proceedings for a sequestration order were held to be 'a matrimonial cause', it is not beyond doubt that a court exercising jurisdiction under the Bankruptcy Act 1966 has no jurisdiction to hear the matter. Fitzgerald J. adverted to this problem in *Re Stehbens; Ex parte Stehbens*.[12a] He stated:

> It would no doubt be necessary to seek to construe the *Bankruptcy Act* and the *Family Law Act* harmoniously, and special consideration might have to be given to the real meaning of sec. 8(1)(a) of the *Family Law Act*. . . . I mention without comment *Milland and Milland* (1981) F.L.C. 91-065 in which the Full Family Court held that the Family Court had jurisdiction under s. 85 of the *Family Law Act* to set aside a deed of arrangement under Pt.X of the *Bankruptcy Act*, notwithstanding this Court's powers with respect to such matters under the *Bankruptcy Act*.[13]

[11] The Court also considered whether the proceedings could be 'proceedings . . . in relation to . . . completed proceedings' under the definition para.(c)(i) or (ca) so as to fall within para.(f). The whole court concluded that they could not be so interpreted.

[12] (1984) F.L.C. 91-500, 79,056 *per* Gibbs C.J.

[12a] (1982) F.L.C. 91-229.

[13] (1982) F.L.C. 91-229, 77,246.

The provision conferring jurisdiction under the Bankruptcy Act 1966 is less emphatic than s. 8(1)(a) of the Family Law Act 1975. Section 27 of the Bankruptcy Act 1966 simply sets out the courts which are to have jurisdiction under the Act. The conferral of power upon a court to hear a particular matter does not indicate by itself that that power is to be exclusive.[14] In *Milland and Milland,*[15] the Full Court of the Family Court took the view that s. 27 of the Bankruptcy Act 1966 did not confer exclusive powers on bankruptcy courts. Unlike s. 27 of the Bankruptcy Act 1966, s. 8(1)(a) of the Family Law Act 1975 clearly purports to confer on the Family Court the exclusive power to hear proceedings relating to 'matrimonial causes'. If sequestration proceedings instituted by a spouse were considered to be a matrimonial cause, it is suggested that a court exercising jurisdiction under the Bankruptcy Act 1966 would have no jurisdiction to hear the matter.

(b) Compliance with s. 40(1)(g)

Section 40(1)(g) of the Bankruptcy Act 1966 provides:—

> (1) A debtor commits an act of bankruptcy in each of the following cases:
> (g) if a creditor who has obtained against the debtor a final judgment or final order, being a judgment or order the execution of which has not been stayed, has served on the debtor in Australia or by leave of the Court, elsewhere, a bankruptcy notice under this Act and the debtor does not —
> (i) where the notice was served in Australia — within the time fixed by Registrar by whom the notice was issued; or
> (ii) where the notice was served elsewhere — within the time fixed for the purpose by the order giving leave to effect the service,
> comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt or sum payable under the final order, as the case may be, being a counter-claim, set-off or cross demand that he could not have set up in the action or proceeding in which the judgment or order was obtained.

By s. 40(3) certain judgments or orders are deemed to satisfy s. 40(1)(g). Section 40(3)(b) provides:

> (3) For the purpose of paragraph (g) of sub-section (1) of this section —
> (b) a judgment or order that is enforceable as, or in the same manner as, a final judgment obtained in an action shall be deemed to be a final judgment so obtained and the proceedings in which, or in consequence or which, the judgment or order was obtained shall be deemed to be the action in which it was obtained.

Section 40(3)(b) was inserted in the Bankruptcy Act 1966 in order to overcome the decision in *Opie v. Opie*,[16] discussed above.[17] Although clearly widening the range of judgments and orders which can found the issue of a bankruptcy notice, the combined effect of s. 40(1)(g) and s. 40(3)(b) is not such that all familial obligations arising pursuant to Family Court orders or maintenance agreements are capable of founding a bankruptcy notice.

14 *Milland and Milland* (1981) F.L.C. 91-065; *Webster v. Breadcarters' Union of N.S.W.* (1930) 30 S.R. (N.S.W.) 267.
15 (1981) F.L.C. 91-065.
16 (1951) 84 C.L.R. 362.
17 *Supra* p. 219-20.

(i) *Maintenance Orders*

It is clear that at present[18] amounts owing under a maintenance order cannot found the issue of a bankruptcy notice under s. 40(1)(g) of the Bankruptcy Act 1966. A maintenance order is subject to retrospective variation[19] and the enforcement of arrears is discretionary.[20] The order lacks the degree of finality necessary to be considered a final judgment or final order within the meaning of s. 40(1)(g).[21]

In *Re Jensen*,[22] the Family Court made a consent order 'as and by way of property settlement' under which the husband agreed to pay the wife $5,000 in instalments. The husband defaulted in the payments and the wife issued a bankruptcy notice claiming $4,500. Several months later a creditor's petition was presented. The petition was dismissed by Fitzgerald J. of the Federal Court. His Honour held that the consent order did not have the necessary elements to be a property order authorized by s. 79.[23] It did not require the payments to be made out of a particular fund and it did not otherwise relate to particular property. Therefore the order was a maintenance order under s. 74. Without hesitation, Fitzgerald J. held that a maintenance order is not a final order within s. 40(1)(g) of the Bankruptcy Act 1966. The Family Court has wide powers to vary, to suspend or to discharge the order under s. 83 of the Family Law Act.

Further, his Honour held that such a maintenance order cannot be deemed to be a final judgment under s. 40(3)(b) of the Bankruptcy Act 1966. On this occasion Fitzgerald J. stated that '[i]t seems sufficient to do no more than observe the well established doctrine that enforcement of maintenance arrears is discretionary'.[24] On this ground alone, his Honour took the view that a maintenance order cannot be enforced 'as, or in the same manner as, a final judgment in an action' as required by s. 40(3)(b).

A spouse who is able to prove arrears of maintenance may wish to be in a position to institute bankruptcy proceedings against the other spouse by the issue of a bankruptcy notice. In a case where there is no other creditor willing or able to issue a bankruptcy notice, the inability of the creditor spouse to issue a bankruptcy notice will effectively prevent that spouse from issuing bankruptcy proceedings as a means of recouping the arrears. Thus it is important to determine whether there is any further action which the spouse can take in order to be in a position to issue a bankruptcy notice with respect to the arrears of maintenance.

18 See, however, *infra* p. 244 where a proposed amendment to the Bankruptcy Act 1966 (Cth), is discussed. This amendment would enable some arrears of maintenance to found the issue of a bankruptcy notice.

19 Family Law Act 1975 (Cth) s. 83.

20 *Biggs v. Dienes* (1977) 12 A.L.R. 590; *Letizia and Swinhoe* (1979) F.L.C. 90-666. See also Family Law Act 1975 (Cth) s. 107.

21 See *supra* p. 218-20.

22 (1982) F.L.C. 91-282.

23 (1982) F.L.C. 91-282, 77, 609.

24 *Ibid.*

It has been suggested that a spouse may be able to use particular provisions of the Family Law Act 1975 and Family Law Regulations to achieve a similar result as was achieved in the case of *Re Morris*.[25] In that case the court considered the effect of particular provisions in State maintenance legislation on a spouse's ability to issue a bankruptcy notice with respect to arrears of maintenance. The particular maintenance legislation in question enabled a spouse who was owed maintenance pursuant to a maintenance order under the Act, to obtain a certificate from a magistrate stating the amount due and to file that certificate in the Supreme Court.[26] The Prothonotary then entered judgment for the amount due. The amount owing under this judgment could not be considered a final judgment within the meaning of s. 40(1)(g): it was not a final judgment in an action.[27] However, it was held that a bankruptcy notice could be issued under the deeming provision, s. 40(3)(b). This was a judgment that could be enforced as, or in the same manner as, a final judgment in an action and thus by s. 40(3)(b) was deemed to be a final judgment for the purposes of s. 40(1)(g).

It has been suggested that the use of regulations 133(12), 134(5)(a) and 135(6) of the Family Law Regulations may operate in a similar manner to the issue of the certificate and the entering of judgment in *Re Morris*.[28] Regulations 131A-139B set out the means of enforcement of Family Court orders. The person who is in default may be summonsed for an oral examination. He must appear before the court and a failure to do so may lead to the issue of a warrant that he be taken into custody. By regulation 133(12) where a person attends or is brought before the court, the court may, on being satisfied that the person has failed to comply with a financial order of the Family Court, *inter alia*, make '(a) an order for the payment of the arrears or any other unpaid portion of the moneys payable under the first-mentioned order'.

It is argued that reg.133(12) has a two-fold effect — it is a determination by the court to exercise its discretion as to enforcement by deciding to enforce and it makes the obligation certain in the same way as any judgment in another court would. Similarly, it has been argued that reg.134(5)(a) implies that an order for garnishment under reg.134 determines the amount due and an order under reg.135 for the seizure of personal property is a determination of the amount due under the original maintenance order.[29] Thus, the conclusion is reached that if orders are made under any of these regulations there is 'a final judicial determination of the amount due sufficient to found a bankruptcy notice'. The clear inference is that the right to issue the notice arises pursuant to s. 40(3)(b).

25 (1973) 22 F.L.R. 460. See *C.C.H. Family Law and Practice Reporter*, vol. 2, para.55-700.
26 Maintenance Act 1964 (N.S.W.) s. 45(1).
27 See *Opie v. Opie* (1951) 84 C.L.R. 362.
28 *C.C.H. Family Law and Practice Reporter*, vol. 2, para.55-700; Wade, J.H., *Property Division Upon Divorce* (1982) 308.
29 *Ibid.*

This analysis gives rise to certain difficulties because the relevant procedure as set out in *Re Morris* and the suggested procedures under the Family Law legislation contain divergences. In *Re Morris* the court stated that in order to come within s. 40(3)(b) there had to be a judgment or order that could be enforced as a final judgment in an action. The original maintenance order could not be so enforced because of its inherent nature: it was liable to be varied, suspended or even discharged. A judgment entered subsequently on the strength of a certificate stating the amount due 'solidified' the arrears and converted them into a judgment debt: any powers of the original court to modify the order were not available once this conversion had occurred. In a sense, the court in *Re Morris* envisaged a three-part process comprising a maintenance order, a subsequent judgment with respect to arrears and, finally, the use of enforcement procedures (with respect to the second judgment) which are the same as those used to enforce a final judgment in an action.

The suggested process under the Family Law Act 1975 contains a convolution of the *Re Morris* approach. Regs 133, 134 and 135 are used as a means of enforcing the original maintenance order. It has already been determined that such a maintenance order in itself is incapable of being treated as a judgment or order enforceable as a final judgment because of the possibility of modification. This problem may be resolved by saying that a prerequisite to the use of these enforcement procedures is a final finding or 'order' that a particular sum is payable.[30] Although there are not three distinct phases, as in *Re Morris*, the principle of *Re Morris* does appear to be satisfied: there is a final determination that a particular sum is due. However, in order to be capable of issuing a bankruptcy notice pursuant to s. 40(3)(b), the strict wording of the provision must be complied with. In the circumstances outlined is there a judgment or order enforceable as a final judgment in action? Perhaps the coupling of the original maintenance order with the preliminary 'determination' in the enforcement procedures that a particular amount is due, is sufficient.

A further problem may arise where a spouse who is owed maintenance under a maintenance order wishes to issue a bankruptcy notice under the deeming provision, s. 40(3)(b). The judgment or order must be enforceable as, or in the same manner as, a final judgment in an action. Once the court decides to exercise its discretion to enforce the payment of arrears under a maintenance order and thus makes final and certain the amount owing, the question arises as to whether the maintenance order is enforceable as a final judgment in an action. Certainly, all the methods of enforcement available under the Family Law Act 1975 are available with respect to such a maintenance order.

The methods of enforcement are equally available with respect to all 'judgments in actions' under the Family Law Act 1975. However, it has been argued that in order to fall within s. 40(3)(b), orders under the Family Law Act 1975 must be enforceable in an identical manner to judgments at common law.[31]

30 See *C.C.H. Family Law and Practice Reporter*, vol. 2, para.55-700.
31 Allen, *op. cit.* 628.

Even a cursory glance at the methods of enforcement available under the Family Law Act 1975 reveals that the means of execution are more limited than the forms of execution available at common law and equity.[32]

It is submitted that s. 40(3)(b) does not have to be interpreted in the manner suggested. There is nothing in s. 40(3)(b) to suggest that the term 'final judgment in an action' is to be confined to judgments in common law actions. An action is a generic term which comprehends all legal proceedings and contemplates the existence of a right, an infringement of that right and a court competent to adjudicate on the matter and enforce a remedy.[33] Once arrears of maintenance have been made a certain and final amount, then payment may be enforced as any other final judgment of the Family Court, as a final judgment in an action.

There is an argument to suggest that in some cases, any difficulties involved in using the deeming provision, s. 40(3)(b) as a means of founding a bankruptcy notice pursuant to arrears of maintenance may be overcome by a straightforward use of s. 40(1)(g). An order of the court under regulation 133(12) may be sufficient to found a bankruptcy notice under s. 40(1)(g). Where an order is made under reg.133(12) for the payment of arrears or any other unpaid portion of the moneys payable under a first court order, it is arguable that there is a debt owing under a final order in a proceeding.

It should be noted that clause 11 of the Bankruptcy Amendment Bill 1984 (Cth)[33a] will, if enacted, resolve the problems described above. It provides that s. 40 of the Bankruptcy Act 1966 is to be amended by the addition of para (f) into sub-section (3) of section 40. Paragraph (f) would provide:

> a maintenance order made after the commencement of this paragraph under the Family Law Act 1975 for the payment by a person of arrears of maintenance for another person, being maintenance that was —
>
> (i) payable periodically where any periodic payment was payable at a time during the 12 months immediately preceding the making of the order; or
>
> (ii) payable (whether in one amount or by instalments) as a lump sum,
>
> shall be deemed to be a final order against the first-mentioned person obtained by the other person.[34]

Clearly, a creditor spouse who wishes to issue a bankruptcy notice must have obtained a Family Court order for the payment of arrears.[35] Undoubtedly the twelve month limitation was included in clause 11 because of the general practice applied in the Family Court of not enforcing arrears of maintenance more than twelve months old at the date of the application for enforcement. Clause 11 demonstrates that the legislature took the view that it would be inappropriate that arrears more than twelve months old, which may be unenforceable under the Family Law Act 1975, should found the issue of a bankruptcy

32 *Ibid.*

33 Cairns, B.C., *Australian Civil Procedure* (1981) 3.

33a This bill has now been enacted as the Bankruptcy Amendment Act 1985 (Cth). Its operation is to commence on a date to be fixed by proclamation.

34 A consequential amendment to the definition section would ensure that para.(f) would have the operation it is intended to have. C1.3 of the Bankruptcy Amendment Bill 1984 provides that the definition of maintenance order includes 'an order with respect to the payment of arrears'.

35 See Family Law Regulations (Cth) reg. 133.

36 See *Explanatory Memorandum on Bankruptcy Amendment Bill* The Senate 1985 para.41.

notice.[36] Although such a view must be correct, it is suggested that the insertion of the twelve month limitation in this provision in the Bankruptcy Act 1966 is unnecessary. Before being able to issue a bankruptcy notice, the maintenance creditor must have a Family Court order for the payment of arrears. The Family Court has a discretion as to whether it will enforce the payment of arrears more than twelve months old: in the unlikely event that it chooses to enforce the payment of such arrears, its order as to enforcement of arrears of more than twelve months' standing should be capable of founding the issue of a bankruptcy notice.

(ii) *Property Orders*

It has been implied, if not directly decided, that a liability arising pursuant to an order under s. 79 of the Family Law Act 1975 (Cth) is capable of founding the issue of a bankruptcy notice.[37] Apart from the provisions contained in s. 79A such an order is final. The wide powers of the court with respect to variation and enforcement of maintenance are inapplicable to property orders.

The Family Law Amendment Act 1983 increased the powers of the court to set aside property orders under s. 79A. It has been suggested that these increased powers may render a property order not 'final' or 'certain' enough to found a bankruptcy notice under s. 40(1)(g).[38] Before the 1983 amendment to s. 79A, the court had power to set aside a s. 79 order if it was satisfied that there had been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance. The court could substitute another order if it thought fit. The amended s. 79A(1) and (1A) provides for new grounds upon which a property order can be set aside and also enables the court to *vary or* set aside the original order. It provides:

> 79A(1) Where, on application by a person affected by an order made by a court under section 79 in proceedings with respect to the property of the parties to a marriage or either of them, the court is satisfied that —
>
> (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;
>
> (b) in the circumstances that have arisen since the order was made it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out;
>
> (c) a person has defaulted in carrying out an obligation imposed on him by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order to set the order aside and make another order in substitution for the order; or
>
> (d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the welfare of a child of the marriage, the child or, where the applicant has the custody of the child, the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order the court may, in its discretion, vary the order or set the order aside and, if it thinks fit, make another order under section 79 in substitution for the order so set aside.
>
> 79A(1A) A court may, on application by a person affected by an order made by a court under section 79 in proceedings with respect to the property of the parties to a marriage or either of them, and with the consent of all the parties to the proceedings in which the order was made, vary the order or set the order aside and, if it thinks fit, make another order under section 79 in substitution for the order so set aside.

[37] *Bateman and Patterson* (1981) F.L.C. 91-057; *Re Jensen; Ex parte Jensen* (1982) F.L.C. 91-282.

[38] Allen, *op. cit.* 628-9.

Most importantly, the provision shows that s. 79 orders may be varied or set aside in circumstances other than where the order was unjustly obtained. Some changes in circumstances, although clearly circumscribed by s. 79A(1)(b), (c) and (d), will be sufficient for the court to vary its original order. As yet, the precise range of circumstances which fall within the amended s. 79A are uncertain. Nevertheless, it is clear the court's power to vary or set aside property orders has been considerably widened. It thus cannot be stated categorically that a liability arising pursuant to a s. 79 property order is capable of founding a bankruptcy notice. However, it is suggested the better view is that such a liability can found the issue of a bankruptcy notice.[39] No wide general power to vary property orders exists in the Family Law Act 1975 and s. 81 of the Act demonstrates that there is a philosophy of putting an end to the financial relations of the parties.

(iii) *Maintenance Agreements*

In *Re Stehbens*,[40] Fitzgerald J. had to consider whether a debt or liability owing under a s. 87 maintenance agreement was sufficient to found the issue of a bankruptcy notice under s. 40(1)(g) of the Bankruptcy Act 1966. An approved s. 87 agreement entered into on 8 February 1980 provided that the husband was to pay the wife $1,500 in satisfaction of all her claims for a maintenance and property order. The husband failed to pay and on 16 February 1982 a bankruptcy notice was served on the husband. It claimed that the sum of $1,500 was due by the husband to the wife under a final order obtained by the judgment creditor. Subsequently, a petition was presented based upon the husband's failure to comply with the notice.

Fitzgerald J. refused to grant the sequestration order on the basis that a bankruptcy notice under s. 40(1)(g) could not be validly founded on a maintenance agreement. There was no final judgment or order within the meaning of s. 40(1)(g). 'A maintenance agreement approved by the Family Court is not a final judgment or final order which will support a bankruptcy notice'.[41] Section 88, as it was before the introduction of the Family Law Amendment Act 1983, provided that a maintenance agreement that has been registered could be enforced as if it were an order of the court. However, his Honour held that s. 88, although empowering enforcement by a court exercising jurisdiction under the Act, did nothing to convert the agreement into an order of the court.[42] The reasoning employed in *Re Stehbens* would apply equally to s. 86 maintenance agreements.

The Family Law Amendment Act 1983 amended s. 87. Section 87(11), discussed above,[43] gives the Family Court a wider range of options with respect to the enforcement of maintenance agreements than it has in relation to the en-

39 *Re Jensen; Ex parte Jensen* (1982) F.L.C. 91-282; Wade, *op. cit.* 628. *Cf.* Allen *op. cit.* 628-9.
40 (1982) F.L.C. 91-229.
41 (1982) F.L.C. 91-229, 77,247.
42 Following *Re Masterton* (1978) 37 F.L.R. 75 and *Ellinas v. Ellinas* (1979) F.L.C. 90-649.
43 *Supra* p.231.

forcement of orders of the Family Court. However, s. 87(11)(c), drafted in similar terms to s. 88, provides that the court may order that the agreement be enforced *as if* it were an order of the court. Just as s. 88 is ineffective to convert the agreement into an order of the court, so too is s. 87(11)(c). Section 88 remains in the Act for the purposes of a s. 86 maintenance agreement. The inclusion of s. 87(11)(c) does not alter the operation of the principle as expressed in *Re Stehbens*.

Although a liability arising under a s. 87 maintenance agreement cannot, *per se*, found the issue of a bankruptcy notice, there may be methods by which the liability can be converted into a 'final judgment or order' for the purposes of s. 40(1)(g) of the Bankruptcy Act 1966.

Before the introduction of the Family Law Amendment Act 1983 there was a division of opinion between the State Supreme Courts and the Family Court as to whether a covenant in a maintenance agreement could be enforced in the state courts.[44] The State Supreme Courts took the view that proceedings for the enforcement of the terms of a maintenance agreement were not proceedings which fell within the definition of 'a matrimonial cause' under s. 4(1) of the Family Law Act 1975 and therefore such proceedings were not within the exclusive jurisdiction of the Family Court. Para.(f) of s. 4(1) defined a matrimonial cause as any proceedings (including proceedings with respect to the enforcement of a decree) in relation to concurrent, pending or completed proceedings of the type referred to in paras (a)-(e) of the definition of a matrimonial cause. The State Supreme Courts took the view that proceedings for the enforcement of a maintenance agreement were not proceedings with respect to the enforcement of a decree[45] and were not proceedings in relation to completed proceedings. The Family Court, on the other hand, held such proceedings were constituted a matrimonial cause within para. (f) of the definition of a matrimonial cause as being proceedings with respect to the enforcement of a decree.[46] The way was therefore open for a spouse entitled under a maintenance agreement to institute proceedings for breach of contract in the State Supreme Court and obtain a final judgment. If need be, such a judgment could found the issue of a bankruptcy notice under s. 40(1)(g) of the Bankruptcy Act 1966. The Family Law Amendment Act 1983 amended the definition of a matrimonial cause and it is now clear that the enforcement of maintenance agreements is within the exclusive jurisdiction of the Family Court: a spouse cannot obtain judgment for breach of the agreement in a State Supreme Court. However, it appears that a spouse attempting to enforce the terms of a s. 87 maintenance agreement in the Family Court may be able to obtain a judgment, sufficient to found the issue of a bankruptcy notice. Section 87(11)(a), discussed above, provides that in proceedings relating to the

[44] See *e.g. Carew and Carew* (1979) F.L.C. 90-698 (Family Court) and *Ellinas v. Ellinas* (1979) F.L.C. 90-649 (N.S.W. Supreme Court).
[45] *Ibid.*
[46] *Ibid.*

enforcement of a maintenance agreement, the Family Court has the same power and may grant the same remedies as the High Court has or may grant in proceedings in connection with contracts or purported contracts being proceedings in which the High Court has original jurisdiction. Thus, the Family Court could *inter alia* enter judgment for the amount owing under a s. 87 maintenance agreement.[47] It is submitted that such a judgment would be sufficient to found the issue of a bankruptcy notice.[48]

With respect to the issue of a bankruptcy notice, it seems that a spouse who is entitled to payment under a s. 79 property order is in a stronger position than a spouse entitled under a s. 87 maintenance agreement. The liability *per se* under a s. 79 property order founds the issue of a bankruptcy notice; the liability *simpliciter* under a s. 87 maintenance agreement will not found a bankruptcy notice. It may be argued that these liabilities should be treated in the same manner in relation to a matter such as the issue of a bankruptcy notice. Each is providing for the finalisation of particular financial affairs of spouses. On the other hand, the distinction simply reflects a recognition of the essentially different nature of the liabilities: one arises pursuant to a court order, the other pursuant to a contract between the parties. It seems the better view is that non-payment pursuant to either a maintenance agreement or a property order should be capable of founding the issue of a bankruptcy notice.

[47] Judiciary Act 1903 (Cth) s. 31.

[48] See also regs. 133-135 of the Family Law Regulations (Cth) discussed *supra* p. 242. With respect to s. 86 maintenance agreements, it may be possible to use regs. 133-135 in the manner described above to come within s. 40(1)(g) of the Bankruptcy Act 1966. See also Hardingham, I.J. and Neave, M.A., *Australian Family Property Law*, (1984) 487 where the authors suggest that owing to the wording used in para.(ea)(v) of the definition of 'matrimonial cause', the Family Court may not enjoy exclusive jurisdiction in relation to the enforcement of s. 86 maintenance agreements.