Bankruptcy and Matrimonial Claims — The Spouse as a Competing Creditor

Part II

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[This is the second part of an article first appearing in Volume 15. The authors examine the relationship between the Bankruptcy Act *1966 (Cth) and the* Family Law Act *1975 (Cth), point to the anomalies which can result, and suggest possible solutions.]*

In addition to the problems encountered by Family Court litigants seeking to issue a bankruptcy notice or to prove their claim in the bankruptcy of the liable spouse (or former spouse) discussed in Part I, particular difficulties are encountered by the current spouse and familial dependants of a bankrupt in an on-going marriage.

As Part I has indicated, modern Australian bankruptcy law has a beneficial application to some types of Family Court litigants in that additional means of recovery are conferred without the usual disadvantages imposed on ordinary proving creditors. While claimants under certain types of Family Court orders may fare badly in bankruptcy, recent amendments to the Bankruptcy Act 1966 demonstrate the legislature's general concern for the financial security of a bankrupt's familial dependants in circumstances where ancilliary relief has been granted under the Family Law Act 1975. Such relief is normally, though not exclusively, sought in cases of marriage dissolution or separation.

In contrast to the express provisions aimed at ameliorating the position of such familial claimants, as yet, there has been no attempt to improve the position of the on-going spouse and dependants of a bankrupt provider. Unlike claimants with Family Court orders or agreements, the on-going family is completely excluded from the property vesting in the trustee. Its members are confined to resources outside bankruptcy and accordingly, do not compete in any sense with unsecured creditors for the assets of the insolvent. While

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New United Kingdom insolvency legislation has been enacted since the completion of this article. The Insolvency Act 1985 (U.K.), enacted on 30th October, 1985 (but only partially proclaimed on going to press), repeals, *inter alia,* all of the Bankruptcy Act 1914 (U.K.) except for sections 121 to 123. Although it has not been possible to incorporate an examination of the Insolvency Act 1985 into the text of this article, its application should now be considered where references to the provisions of the Bankruptcy Act 1914 appear in either the text or the footnotes.

Further, since the completion of this article the Family Law Regulations referred to in Part I (Regulations 133 (12), 134 (5)(a) and 135 (b)) have been repealed. The substance of these provisions, however, has been re-enacted in the Family Law Rules in Order 33, Rules 3 (9), 4 (6) and 5 (6) and the argument advanced at pages 242-245 of Part I remains valid. (Note that by Order 33, Rule 5 the seizure and sale of real property is now possible).

the on-going family will benefit from any income gained by the bankrupt, the bankrupt's equity, if any, in a matrimonial home, vests in the trustee.

Not only are no advantages or exemptions framed for the benefit of the bankrupt's continuing family, the spouse of the bankrupt is expressly disadvantaged pursuant to s.111 of the Bankruptcy Act 1966, a traditional provision directed at increasing the assets available to creditors at the expense of a spouse. Furthermore, while complete immunity from the doctrine of relation back and associated 'claw back' provisions of the Bankruptcy Act 1966 applies to Family Court maintenance orders and maintenance agreements, and there is at least some protection for property orders, settlements or dispositions by a bankrupt to an on-going spouse who has sought no Family Court relief remain completely vulnerable.

IV *The Spouse as Deferred Creditor*

Section 111 of the Bankruptcy Act 1966 provides that:

> any money or other property of the spouse of a bankrupt lent or made available by the spouse to the bankrupt shall be treated as assets of the bankrupt's estate, and the spouse is not entitled to any dividend as a creditor in respect of that money or other property until all claims of the other creditors (other than claims in respect of excess interest under section 112 and claims for interest on interest-bearing debts in respect of a period after the date of the bankruptcy) have been satisfied.

Pursuant to ss.231(2) and 237(2), s.111 also applies to deeds of assignment and deeds of arrangement executed under the Bankruptcy Act 1966.

Section 111 is the most radically expropriating provision in the Australian Bankruptcy Act 1966, in that it contemplates not only the deferral of spouse creditors, but augmentation of the insolvent estate for the benefit of ordinary creditors by money or property neither lent nor given to the insolvent, but simply 'made available'.

In as much as the postponement or expropriation implied by s.111 depends upon the property owner's familial relationship with the bankrupt, the retention of this severe provision seems in conflict with those amendments recently enacted to improve the position of a claimant spouse *vis-à-vis* other creditors and certainly seems at odds with expressed views that familial claimants should be advantaged creditors in the context of the Bankruptcy Act 1966. As a privative provision, s.111 would probably be construed narrowly to exclude its application to *de facto* spouses, but on a plain reading would extend to estranged legitimate spouses who had maintained a relevant proprietary connection with the bankrupt. Adverse discrimination against the formally married seems unjustifiable in this context.[1]

[1] In the United Kingdom cases of *Re Beale* (1876) 4 Ch. 246 and *Re Meade* (1951) Ch. 774, arising under s.36 (2) of the Bankruptcy Act 1914 (U.K.) (and its earlier equivalent), the court in each case was able to avoid preferential treatment of the unmarried by applying the independent principle that someone who provides part of the capital of a business may not call for payment until the creditors of that business have been paid. While this principle might avoid discrimination consistently under United Kingdom legislation, in which the postponement of spouses is limited to a trade or business context, it would not apply in every case arising under s.111 of the Bankruptcy Act 1966, as there is no corresponding limitation.

As the cases demonstrate, most difficulties of interpretation surround the meaning of 'made available'. It is this limb of the section which embodies the expropriating potential, for although spouse loans are postponed, the spouse creditor's *chose in action* is transmuted by bankruptcy in the same sense as those of all other creditors.

Whereas the doctrine of relation back and the other 'claw back' provisions of the Bankruptcy Act 1966 expropriate third parties only in the limited sense of recalling property or money transferred from the estate,[2] the 'made available' limb of s.111 operates to supplement the bankrupt's estate with property in which the bankrupt has never had a beneficial interest. While in the case of a spouse loan, also covered by the section, the money lent has become the bankrupt's property, the concept of 'made available' does not imply that property in the subject matter has passed to the insolvent, either by way of gift or on terms contemplating ultimate repayment. As such, the potential to divest individuals of their beneficially owned property on the basis of a marital relationship with the bankrupt clearly exists, and has been realized in cases such as *Gosling v. McCombie*.[3] In the sense that s.111 facilitates the transfer of property owned by the bankrupt's spouse to his unsecured creditors, the provision seems to be underpinned by the concept of a 'bankrupt married couple' which does not accord with revised presumptions about marital status.

Brief History of the Section

An examination of its antecedents confirms that s.111 was conceived in a superseded socio-economic context, which its continued operation indirectly perpetuates. Prior to the passage of the Married Women's Property Act 1882, a woman's personal property largely vested in her husband upon marriage.[4] Her legal capacity was limited, and the husband was viewed as the legal, social and economic representative of a family unit. Accordingly, on the husband's bankruptcy, all his property would pass to his creditors, whether obtained from his wife on marriage or through other sources. However, it was the circumstance of marriage, rather than the husband's insolvency, which expropriated a married woman, who could not 'own' the subject property even prior to her husband's bankruptcy, although it may have been applied for her benefit.

The introduction of unprecedented property rights for married women accordingly generated concern that the husband's creditors might be prejudiced as a consequence.

While formerly, credit could be advanced to a husband on the safe assumption that most family property would be available to creditors in case

[2] Infra 469-475.

[3] (1972) 126 C.L.R. 487.

[4] In fact, there were three successive Married Women's Property Acts. At common law, prior to the passage of the Married Women's Property Acts from 1870 to 1882, upon marriage, a woman's earnings and personal chattels vested absolutely in her husband. He also enjoyed her freehold estates for his own benefit during her life and was entitled to dispose of her leasehold properties during his life. R.H. Graveson and F.R. Crane, (eds.) *A Century of Family Law 1857-1957* (1957) 2.

of default, as a result of the new property rights, creditors might find that much of their ostensible security was vested in the wife and accordingly inaccessible, although the insolvent husband could enjoy the benefit.

In order to obviate such a possibility, s.3(2) of the Married Women's Property Act 1882 provided that where the husband of a married woman had been adjudged bankrupt, any money or other estate lent or entrusted to her husband 'for the purpose of trade or business carried on by him' would be treated as assets of the estate. A corresponding but narrower provision directed at bankrupt wives established that although a male spouse was to be deferred, his property would not be treated as assets of the bankrupt female's estate.[5]

In the case of either spouse, the property had to be lent or intrusted for the purposes of trade or business in order to be caught. Clearly, the provisions were intended to preserve the collective economic identity of a family in the limited context of bankruptcy, provided that the relevant assets had been used in business.

However, as a reputed ownership section then applied to anyone who lent goods (as distinct from property generally) to the bankrupt for trade purposes,[6] the predecessor of s.111 was less singularly discriminating against spouses. In one sense, it simply amplified and extended the application of the reputed ownership doctrine in relation to them.

The first Commonwealth Bankruptcy Act also included a section postponing the claims of spouses.[7] While s.85 of the Bankruptcy Act 1924 did not differentiate between male and female spouses, the elimination of the trade or business specification widened the scope of the provision. Thereafter, money or property lent or intrusted in a personal, domestic or other non-trade context was vulnerable to its operation.

The meaning of 'intrusted' in s.85 of the Bankruptcy Act 1924 was considered by the High Court in the case of *Davis v. Mackerras.*[8] The absence of a trade requirement could have indicated that, despite its origins, s.85 was not simply a reputed ownership section, but rather, a legislative vehicle for shifting property from a bankrupt's spouse to his creditors, whether the insolvent's reputed ownership had influenced the advance of credit or not.

In *Davis v. Mackerras*, a wife, knowing that her husband had been served with a bankruptcy notice, handed him money for safe-keeping and eventual deposit in a bank account operable by either spouse, which the husband could use to maintain the family should the need arise.

[5] The distinction between male and female spouses is preserved in s.36 of the Bankruptcy Act 1914 (U.K.), but the Cork Report on Insolvency Law and Practice, June 1982, Command Paper 8558 ('The Cork Report') has recommended that such a distinction is now inappropriate in view of the U.K. Sex Discrimination Act 1975:- Cork Report 260.

[6] A reputed ownership provision is currently embodied in the Bankruptcy Act 1914 U.K., but the Cork Report has recommended its abolition: Cork Report 250.

[7] Section 85 of the Bankruptcy Act 1924 (Cth) provided that a wife's claim as a creditor of her husband would be postponed to the claims of other creditors for valuable consideration in respect of 'any money or other estate of the wife...lent or intrusted by her to him.'

[8] (1930) 43 C.L.R. 488.

The money in question belonged to the wife, but on the subsequent bankruptcy of her husband, the trustee in bankruptcy argued that she had 'lent or intrusted' it within the meaning of s.85. The trustee argued that s.85 constituted a deliberate expansion of the previous Married Women's Property Act provision, designed to catch any property which a spouse had 'parted with', whether for trade or other purposes.

The High Court construed the section more narrowly. It was held that there had been no lending or intrusting in the circumstances, as such a conclusion would support the extreme contention that any permitted physical possession, however limited in terms of time and purpose, would fall within the ambit of the section.[9]

As the word 'intrusted' was placed upon a level with 'lent', and the section operated to augment the assets of the insolvent estate, the High Court held that in this context, 'intrusted' must imply that 'some legal power or some legal authority has been conferred on the bankrupt, enabling him to use or dispose of the property as if it were his own whether he is under any obligation or not to account for it or its proceeds to his wife'.[10]

Accordingly, it was concluded that the requirement of some independent power of disposal precluded the application of s.85 to situations of possession for mere physical custody or service. Clearly, it would also seem to exclude instances of property held in trust by the bankrupt for his spouse, as the accompanying fiduciary duty would preclude use or disposal 'as if it were his own'.

With trust, loan and bailment situations apparently excluded it was difficult to attribute unambiguous substance to the word 'intrusted' in the context of s.85.

In its review of the law relating to bankruptcy, the Clyne Committee objected to the retention of the reputed ownership provision, on the ground that the prevalence of hire purchase transactions had rendered it obsolete.[11] However, no objection was made to the postponement of spouses' claims. Section 111 of the Bankruptcy Act 1966, in which s.85 was re-enacted, was expressed as 'lent or made available', possibly to confirm that trust property was excluded from its ambit. There is no evidence that the altered phraseology was intended to extend or retract the scope of the previous section.

As the general reputed ownership section was not re-enacted, spouses were now particularly disadvantaged in the context of the Bankruptcy Act 1966, as they alone remained subject to the operation of a potential expropriation apparently justified by reference to reputed ownership.

[9] *Ibid.* 491.
[10] *Ibid.*
[11] Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth 1962 (hereinafter referred to as the *'Clyne Report')* pp. 39-40.

In the High Court case of *Gosling v. McCombie*,[12] the majority adopted a liberal construction of the terms of s.111 which gave full effect to the expropriating potential of the provision.

In that case, the wife had purchased several properties with her own funds but had arranged for her husband's registration as joint tenant. Accordingly, the husband held his undivided moieties on trust for the wife. Two of the relevant properties were then mortgaged and the proceeds of the mortgages were paid into a joint bank account which either spouse could operate. A third property was used to secure an overdraft.

On the subsequent bankruptcy of the husband, the trustee in bankruptcy claimed a half interest in the blocks of land which were mortgaged or used to secure the overdraft facility, also operated by both spouses, on the grounds that the relevant half interest had been made available pursuant to s.111.

Menzies and Walsh JJ. found that the real estate in question had been 'made available'. Menzies J. pointed out that s.111 had been extended by amendment and that consequently, its construction should not be limited. He considered that the provision of property to secure an overdraft or fund for another was a simple and obvious way of making real property available as contemplated by the section.[13]

Walsh J. agreed. In interpreting the terms of s.111 he attached no technical meaning to 'made available' but considered that the essential inquiry in this context was whether the transaction enabled the husband to deal with the wife's property similarly to the way in which he might have dealt with his own, so as to confer a benefit or advantage upon him.[14] While conceding that the section would not catch a bare trust (even under the earlier phraseology of 'intrusted')[15] in that it necessarily imported a requirement that the spouse be enabled to use the property for his own benefit in some way, Walsh J. could not envisage any dealing with real estate which *would* be covered by the concept of 'making available' if the present provision of property to secure an overdraft and mortgage funds accessible to the husband were excluded.[16] In short, as the trustee would not need to rely on s.111 in the case of an outright gift, his Honour considered that 'made available' would be meaningless if it did not apply to such a provision of security. The section was not limited to personal property, and should be given effect.

Although on one view the wife in the case at hand may have 'made available' only the funds generated by the mortgage transactions, Walsh J. considered that the real property itself was caught. Indeed, he contemplated that the entire property, rather than the mere half interest claimed by the trustee, may have been 'made available'.[17]

[12] (1972) 126 C.L.R. 487.
[13] *Ibid.* 497.
[14] *Ibid.* 506.
[15] Note that s.116(2)(a) of the Bankruptcy Act 1966 (Cth) expressly excludes property held by the bankrupt in trust for another from the property divisible amongst creditors.
[16] (1972) 126 C.L.R. 487 at 503.
[17] *Ibid.*

His Honour justified the broad interpretation of the section by reference to its antecedents and policy goals, emphasising that the provision derived from the Married Women's Property Acts. As that legislation had introduced new rights for women in relation to property which once would have been their husbands', it was considered appropriate to defer their claims to those of ordinary creditors in cases where property had been made available to the bankrupt spouse. While the current s.111 omitted any reference to trade, Walsh J. considered that the original purpose — namely, protection of people who had been misled by an appearance of affluence made possible by the wife's assistance — could retain validity.[18]

In contrast to the broad view of the majority, the dissenting judgment of Barwick C.J. incorporated a narrow interpretation of s.111 and also indicated implicit disapproval of its significant ambiguities. Unlike Walsh and Menzies JJ., Barwick C.J. held that only the money actually withdrawn by the husband from the joint account had been 'made available' in the relevant sense.[19] In view of the fact that the section was privative of property, his Honour considered a strict construction appropriate, so that only property made available to the *sole purpose* of the bankrupt would be caught. Accordingly, neither the constitution of a bare trust by registering the husband as a joint tenant, nor the subsequent mortgaging of the properties in order to obtain a financial accommodation was sufficient to 'make available' the real estate within the meaning of s.111, because the beneficial fee was not thereby accessible to the bankrupt for his sole purposes. Similarly, in Barwick C.J.'s view, the money resting in the joint account was not 'available' to the husband, as the wife also retained a right to withdraw it.[20]

In the course of his dissenting judgment, his Honour pointed out that the section has a curious operation, in that the wife is apparently to be treated as a creditor to the value of the relevant property, although deferred. It was difficult to reconcile the spouse's status of creditor, albeit deferred, with the characterization of her property as an asset of the bankrupt estate.[21] Walsh J. had also conceded the conceptual ambiguity of s.111, which in one sense supplements s.116 (the provision dealing with property divisible amongst creditors) but also allows for a dividend, without establishing how it will be claimed.[22]

Both Barwick C.J. and Walsh J. acknowledged that the section contemplated that the relevant property should be available at the date of sequestration.[23] Accordingly, even on the broad construction of the majority, it would seem that if the property were withdrawn at any time prior to sequestration, it could be argued that the effect of the section would be avoided. Certainly, Walsh J. apparently considered that had the mortgages in the case at hand

[18] *Ibid.* 500.
[19] *Ibid.* 494.
[20] *Ibid.* 491.
[21] *Ibid.*
[22] *Ibid.* 501.
[23] *Ibid.* 490, 502.

been discharged prior to sequestration, the land no longer would have been 'available'.[24]

Although the view that the property should be available at the point of sequestration seems persuasive and undisputed, it merely intensifies the interpretative problems generated by the section. While it might be possible for the spouse to reclaim property simply 'made available' to the bankrupt, as in *Gosling v. McCombie*, and thus exhaust the force of s.111, if the relevant property had been lent instead, repayment within six months prior to the presentation of a petition could amount to a voidable preference within terms of s.122. It could thus be reclaimed by the trustee, but would the spouse still be deferred? Presumably she would be, despite the fact that s.122 contemplates that an affected creditor may prove,[25] but certainly, the precise relationship of s.111 to s.122 remains unclear.

Moreover, the fact that the application of the section is based on the date of sequestration rather than the date at which credit is advanced, does not ensure consistent pursuit of its avowed policy goal. Credit may have been advanced *prior* to the spouse's property being made available, but the property might still be caught by the section. Conversely, if the spouse regained the property from the bankrupt prior to sequestration, it might not be caught, although its previous availability had influenced the provision of credit to the bankrupt.[26] As the spouse relationship is also crucial to the operation of the section, property made available at the time of the advance of credit by someone who was no longer the bankrupt's spouse at the date of sequestration might not be covered. It would seem that the nexus between the advance of credit and the spouse's contribution to the bankrupt's appearance of affluence must be strengthened if the expresed policy goal is to be attained consistently.

While the various judgments in *Gosling v. McCombie* had indicated the ambiguities inherent in s.111, the majority interpretation gave effect to its expropriating potential. The view of the majority was adopted in *Re Dassos*.[27] In that case, the bankrupt and his wife owned joint assets as partners, which the husband subsequently sold in his name alone, giving a mortgage back of the lease and a bill of sale over the assets. The bankrupt had borrowed money on the securities given by the purchasers and, with the knowledge and approval of his wife, had used it for his own purposes.

Accepting the wife's claim to a beneficial interest in the relevant securities, Sweeney J. nevertheless held that it had been 'made available' to the bankrupt

[24] *Ibid.* 504.

[25] Section 122(5) of the Bankruptcy Act 1966 (Cth) provides that where a conveyance, transfer or charge is set aside or a payment is recovered by the trustee or an obligation is void as against the trustee as a voidable preference, the relevant creditor 'may prove in the bankruptcy as if the conveyance, transfer, charge, payment or obligation had not been executed, made or incurred'. As Barwick J. and Walsh J. in *Gosling v. McCombie* indicated, there is little precise guidance as to how a postponed spouse creditor *would* prove.

[26] Compare with the Cork Report's recognition of the similarly capricious operation of the reputed ownership section in the Bankruptcy Act 1914 (U.K.): Cork Report 249.

[27] (1973) 22 F.L.R. 43.

husband according to the Walsh test in *Gosling v. McCombie*. His Honour found that the wife had 'enabled the bankrupt, by dealing with the properties with her concurrence, to arrange the transactions in the same way as he could have arranged them if he had been the beneficial owner of the interests which he held as trustee'.[28] The wife's beneficial interest in the securities had accordingly been 'made available' and constituted assets of the bankrupt estate.

It might be questioned whether the majority in *Gosling* and Sweeney J. in *Re Dassos* applied the test they endorsed convincingly, as in both cases it seemed unduly harsh to hold that the entire property provided as security, rather than the funds generated, had been 'made available'. It could be argued that the mere provision of security does not 'make available' the property itself in any meaningful sense. On the basis of the Walsh test, an extremely valuable property might be mortgaged by a spouse to secure a very modest financial accommodation for the bankrupt, yet the entire property would be transmuted into assets of the insolvent estate. This would seem an unjustifiably disproportionate consequence.

In the later High Court case of *Thompson v. Smith*,[29] *Gosling v. McCombie* was distinguished, despite the apparent similarity of facts. In the course of his judgment, Gibbs J. evinced a critical attitude to s.111, although he was not prepared to formally reject the Walsh test.

In *Thompson v. Smith*, the husband and wife were registered proprietors as joint tenants of certain land. The wife agreed to a second mortgage in order to provide funds for the husband's business, on condition that the husband would be solely responsible for any liability incurred to the bank, and would repay the amount from his own funds.

When the husband subsequently executed a deed of assignment under Part X of the Bankruptcy Act 1966, the question arose of whether the wife's joint interest in the property had been 'made available' by virtue of the second mortgage transaction.

Gibbs J., with whom Mason and Aickin JJ. concurred, considered that the mortgage did not give the husband any right or power to use or dispose of the wife's interest in the jointly owned land, although he had benefited from it in the sense of obtaining access to the funds.

Acknowledging the resemblance to the facts of *Gosling v. McCombie*, his Honour nevertheless distinguished the case at hand on the ground that in *Gosling*, the husband had no beneficial interest in the mortgaged land and the wife had 'made available' her equitable interest by concurring in the mortgage transaction; whereas the wife in the present case had simply allowed her joint interest to be subjected to a mortgage. Although the husband was consequently benefited by the ability to offer more than his individual moiety as security, and thus obtain the loan, Gibbs J. considered that the wife had not given him any power to use the property itself or to take part in a dealing

[28] *Ibid.* 46.
[29] (1976) 135 C.L.R. 102.

with it for his own benefit. Rather, she had dealt with the property so as to confer a benefit upon him, and the transaction accordingly fell outside the Walsh test in *Gosling v. McCombie.*[30] Although on Gibbs J.'s interpretation, the result in *Gosling* hinged upon the initial trust involved, there is no indication that either Walsh or Menzies JJ. considered that a crucial factor. Walsh J. specifically had contemplated that the trustee may have been entitled to the entire mortgaged property, and certainly, no express requirement of an initial trust was established. Although the fact situation in *Gosling* may have supported a reputed ownership rationale based on a false appearance of affluence, this was generated by the trust, which was acknowledged to be insufficient in itself, rather than by the mortgage transaction. Certainly, the distinction drawn by Gibbs J. is very fine and may have been inspired by his reserved attitude to the operation of s.111. In this context, his Honour observed that

> it is difficult to see any reason in justice why a wife who mortgages her property to provide a benefit for her husband should suffer the penalty of having the property treated as an asset of his bankrupt estate. When she mortgages her own property, she is not likely to mislead others into thinking that the property was really his. If, however, she allows the husband to deal with her property as if it were his own, other persons may be misled and the situation resembles that to which the doctrine of reputed ownership applies.[31]

The combined effect of *Gosling v. McCombie* and *Thompson v. Smith* would indicate that property simply held in trust by the bankrupt will not be affected by s.111, but if the bankrupt is permitted to join in a mortgage of such property, at least the share held on trust, and possibly more, will be 'made available' in terms of s.111. On the other hand, merely subjecting property to a mortgage in order to benefit the bankrupt will not bring it within the ambit of the section.[32]

In the sense that *any* property held by the bankrupt as trustee for anyone might mislead creditors, s.111 does seem to be directed at the preservation of the notion of a bankrupt family group, rather than a consistent application of the reputed ownership doctrine. In as much as it does impose sanctions on reputed ownership in relation to spouses, the section is relatively ineffective and its operation depends on random contingencies. Furthermore, developments in related areas of property law, particularly revised judicial attitudes to constructive notice of a spouse's equitable interest in land, now reflect the erosion of the former united legal and economic personality of spouses.[33] Section 111 seems at odds with modern views on the significance

[30] *Ibid.* 108.
[31] *Ibid.*
[32] See the later case of *Farrugia v. Official Receiver in Bankruptcy* (1982) 43 A.L.R. 700, in which the ratio of *Thompson v. Smith* was found to exclude the application of s.111 of the Bankruptcy Act 1966. In *Farrugia,* the proceeds of a mortgage of a jointly owned home had been applied partly for the benefit of the bankrupt alone.
[33] See, for example, *Hodgson v. Marks* [1971] Ch. 892; [1971] 2 All E.R. 684; and more particularly, *Williams & Glyn's Bank Ltd. v. Boland* [1980] 2 All E.R. 408; [1980] 3 W.L.R. 138; in which Lord Wilberforce specifically rejected the view that a wife's occupation should be regarded as a shadow of her husband's. Accordingly, physical occupation of a property by a wife was not necessarily consistent with a husband's sole beneficial entitlement.

of the status of the spouse in commercial or proprietary contexts.[34] Its discriminatory consequences for the legally and currently married are highly questionable in the context of legislation which confers advantages, albeit unevenly, upon other types of familial dependants.

V *Family Court Settlements and the 'Claw Back' Provisions of the Bankruptcy Act 1966.*

In addition to the problems and anomalies associated with the issuing of a bankruptcy notice, presentation of a petition and proving for an outstanding Family Court claim, there is the further possibility that where property has been transferred or money has been paid in compliance with a Family Court property order, upon the subsequent bankruptcy of the liable spouse the payee or transferee may be vulnerable to the operation of the doctrine of relation back or associated provisions of the Bankruptcy Act 1966 relating to voidable preferences, fraudulent dispositions or voluntary settlements.

A spouse who has benefited pursuant to a Family Court property order within the potentially considerable time spans covered by the various provisions enabling the trustee in bankruptcy to recover the property transferred from the insolvent's estate may thus be liable to restore it, and although she may be able to prove in the bankruptcy along with other unsecured creditors, the bankrupt will secure a release upon discharge. In the absence of any provision in the Family Law Act 1975 conferring a right to further relief when an intended provison is effectively destroyed by the operation of bankruptcy, the spouse of a bankrupt with a small estate would find the right to prove an inadequate but a final remedy.

In contrast, s.123(6) of the Bankruptcy Act 1966 purports to confer an absolute immunity on payments or transfers made in pursuance of a maintenance order or maintenance agreement from the 'claw back' provisions of the Bankruptcy Act 1966.

1 *Maintenance Orders and Agreements.*

Section 123(6) provides:

> Nothing in this Act invalidates, in any case where a debtor becomes a bankrupt, a conveyance, transfer, charge, disposition, assignment, payment or obligation executed, made or incurred by the debtor, before the day on which the debtor became a bankrupt, under or in pursuance of a maintenance agreement or maintenance order.

As 'the date of bankruptcy' implies the date of the sequestration order,[35] any transaction prior to that date would be covered, and accordingly s.122(2)(c), which expressly excepts payments or transfers made in pursuance of a maintenance order or maintenance agreement from recovery as voidable preferences, would appear otiose.

[34] However, it should be acknowledged that the United Kingdom Cork Committee recommended the continued postponement of spouse creditors, on the ground that 'marriage is a form of partnership; and, on normal partnership principles, neither partner should compete with the partners' creditors;' Cork Report 260.

[35] Bankruptcy Act 1966 (Cth), s.5.

An alternative view is that s.123(6) simply establishes protection from relation back. Certainly, s.123 generally is subject to ss.118-122 of the Bankruptcy Act 1966,[36] but the relevant protective sub-section is cast in absolute terms. Perhaps it might be argued that there a conceptual distinction may be drawn between invalidation in terms of s.123(6) and voidability at the instance of the trustee in bankruptcy.[37] If this were accepted, s.123(6) could be interpreted as upholding the validity of a transaction pursuant to a maintenance order or agreement, without protecting it from attack by the trustee under the provisions of other sections of the Act. In that case, a maintenance transaction could be set aside as a voluntary settlement or a fraudulent disposition. The inclusion of express protection from the voidable preference provision (s.122(2)(c)) suggests that an absolute protection may not have been consciously intended. Nevertheless, the better view appears to be that unqualified immunity has been conferred.[38]

Accordingly, as the bankruptcy may relate back to a date well before the sequestration order, unsecured creditors must now be alert to the possibility that Family Court proceedings initiated after the relevant act of bankruptcy and concluded prior to the sequestration order may abstract from the insolvent estate considerable property with which it would normally be augmented by reason of the operation of the doctrine of relation back and associated 'claw back' provisions. In this context, knowledge of insolvency is irrelevant to the immunity of the matrimonial transferee, and there is no requirement of valuable consideration.

As the immunity conferred by s.123(6) is unqualified, the possibility of collusive maintenance agreements or even of unilaterally disingenuous agreements on the part of an insolvent who preferred to benefit a former wife and children, rather than unsecured creditors, arises. The application of s.121, directed at fraudulent dispositions now seems *prima facie* excluded in relation to maintenance orders or maintenance agreements,[39] and, in any event, even

[36] Bankruptcy Act 1966 (Cth), s.123(1).

[37] In ss.120-122, the phrase 'void as against the trustee in bankruptcy' has been interpreted to mean that the relevant transaction is not void as such, but voidable at the election of the trustee. Thus, it might be possible to argue that s.123 (6) simply established that the maintenance transaction was not retrospectively of no effect by reason of the payee's title arising *after* the notional vesting in the trustee pursuant to s.115 (as in *Re Bedford*), but that it would nevertheless be subject to the operation of ss.120-122 where applicable. Section 122(2)(c) apparently recognises the potential application of the voidable preference provision to maintenance payments.

[38] This view is supported by a recent decision of the Western Australian Supreme Court, *Melsom v. Mullen* (1985) F.L.C. 91-611.

[39] See, for example, *Melsom v. Mullen* (1985) F.L.C. 91-611. In this case, the husband and wife separated and subsequently entered into a s.86 maintenance agreement pursuant to which the husband agreed to transfer certain property he held to his wife on trust by way of lump sum maintenance for the children of the marriage. The agreement was registered in the Family Court of Western Australia and several months later the husband was declared bankrupt on his own petition. The trustee in bankruptcy commenced an action for a declaration that the agreement was void pursuant to s.121 of the Bankruptcy Act (Cth) 1966. This case concerned an application by the trustee for an injunction restraining the actual transfer of the property until the main action was heard. Brinsden J. refused to grant the injunction. His Honour took the view that s.123(6) of the Bankruptcy Act (Cth) 1966 resulted in a disposition under a maintenance agreement with intent to defraud creditors not being void as against the trustee in bankruptcy. As a matter of law, the trustee was not in a position to challenge the provisions of the agreement.

if it did apply, s.121 would not catch cases where an insolvent spouse did not collude as such, but simply conferred an 'excessive' benefit on a former spouse who provided consideration and was herself unaware of impending insolvency.[40]

While it might be possible for a Bankruptcy Court to read an implicit qualification into s.123(6) by holding that fraudulent or collusive maintenance agreements or maintenance orders underpinned by misleading information are *not* maintenance agreements or orders within terms of s.123(6), at least to the extent to which they were collusive, that would not provide a satisfactory solution. The problem of construing an agreement which was 'excessively generous' could invite tortuous *pro tanto* interpretations of validity. Alternatively, the entire agreement or order might be found invalid, but this would be equally unsatisfactory in circumstances where the wife was at least partly entitled to a benefit. In such a case, it would be desirable to ensure that she had further recourse to the Family Court, but in any event, the further order or agreement in substitution would then be made *after* the sequestration order and accordingly, would not be protected by s.123(6).

Moreover, the importation of a good faith gloss on the terms 'maintenance agreement' and 'maintenance order' in s.123(6) could hardly justify a finding of invalidity in cases where only the *insolvent's* motives can be impugned.

While the problems of 'unilateral generosity' may ultimately be insuperable in this context, it is clear that fraudulent or collusive agreements and orders should not be immune from reclamation by the trustee on behalf of unsecured creditors, and the issue should be specifically clarified.

Currently, the potential for a matrimonial claimant to engross a considerable proportion of the bankrupt's estate exists, and there is no express legislative recognition of potential abuse.

It might be queried whether the protection was introduced as a result of a deliberate policy to confer an absolute priority on claims of a familial nature, or whether s.123(6) was simply directed at ensuring that the adverse consequences of proving did not apply inappropriately to maintenance creditors in such a way as to deprive them of the newly conferred advantage of a limited admission to the ranks of proving creditors. Obviously, it would be absurd if, as a result of a right to prove for outstanding maintenance claims, spouses were required to restore all benefits already conferred. It would also seem that matrimonial payees always would have been subject to the doctrine of relation back, which is not limited to catching provable claims,[41] (unlike s.122, which is restricted to creditors) and s.123(6) has removed that possibility.

While it is inarguably necessary to ensure that matrimonial payees be afforded some protection against the possible reclamation of benefits conferred as a result of a Family Court order or agreement, and it would be quite unacceptable to insist that the immunity of such claimants, being

[40] *Infra* 472-474.
[41] *Infra* 470-471.

different in kind, should depend upon the protective provisions directed at commercial claimants, it may be questioned whether it is equitable to confer absolute protection without imposing any limit on the property abstracted from what is available to creditors. This issue will be considered below.[42]

2. *Property Orders*

In the absence of a specific immunity analogous to that conferred upon transfers or payments pursuant to a maintenance order or maintenance agreement, transfers or payments made in compliance with a Family Court property order remain vulnerable to the operation of the doctrine of relation back, and associated 'claw back' provisions relating to voidable preferences, voluntary settlements and fraudulent dispositions. Accordingly, unless the transferee can establish that the relevant payment or conveyance is within the ambit of the particular protective provisions of the different sections potentially applicable, the trustee in bankruptcy may reclaim the property for the benefit of unsecured creditors. The potential time spans involved vary according to the specific section on which the trustee attempts to rely.

(a) *Property orders and relation back*

The doctrine of relation back is a traditionally distinctive feature of bankruptcy, although its merits are no longer unquestioned.[43] It operates to augment the insolvent's estate by establishing that the trustee's title retrospectively 'relates back' to the commencement of bankruptcy. This permits the reclamation of property which has been transferred from the bankrupt's estate during the relevant period. The time span involved could extend to the first act of bankruptcy within six months prior to the presentation of the petition,[44] and, allowing a year between the presentation[45] and the making of the sequestration order, the trustee's title could, on occasion, relate back to a period eighteen months prior to sequestration. The trustee does not gain an absolute title, as protective provisions apply to certain transfers.[46] It should be noted that vulnerability to relation back is independent of any right to prove.[47]

Re Bedford; ex parte Official Receiver,[48] a case arising under the Matrimonial Causes Act 1959-1966 (Cth), demonstrates that *prima facie*, a

[42] *Infra* 487-488.

[43] See Cork Report, 63, and *The Australian Law Reform Commission General Insolvency Inquiry* Issues Paper No.6, January 1985, p.26, in which the artificiality of the concept is noted.

[44] Bankruptcy Act 1966 (Cth), s.115(1).

[45] The general rule is that a creditor's petition will lapse after twelve months: Bankruptcy Act 1966 (Cth), s.52(4). Note possibility for extension for a period not exceeding twelve months, pursuant to s.52(5).

[46] The exemptions are quite wide: Bankruptcy Act 1966 (Cth), s.123.

[47] In contrast, s.122 of the Bankruptcy Act 1966 (Cth) is directed specifically at creditors, and s.122(5) provides that a creditor who has been affected by the operation of the section may prove in the bankruptcy.

[48] (1968) 12 F.L.R. 309.

property settlement in favour of a spouse could be invalidated as a result of the doctrine's operation.

In *Re Bedford,* the bankrupt had transferred his interest in the matrimonial home to his former wife in compliance with a property order made pursuant to s.86 of the Matrimonial Causes Act 1959-1966 (Cth).

Although made prior to the sequestration order, the property order in question had been made after the commencement of bankruptcy as retrospectively defined by application of the doctrine of relation back, and the trustee in bankruptcy accordingly sought to have the transaction set aside. It was argued for the applicant wife that the apparent conflict between the relevant provisions of the Bankruptcy Act 1966 and the Matrimonial Causes Act 1959-1966 should be resolved by excluding the application of relation back to matrimonial property orders. In this context, an analogy was drawn between maintenance payments (which were then not provable, and therefore immune from attack as a voidable preference) and property orders made in lieu of maintenance orders. It was argued that as maintenance payments could not be reclaimed as a voidable preference, a settlement of property in substitution should likewise be immune from relation back.[49]

Wanstall J. held that, while the property order had been validly made, in that prior to the sequestration order the bankrupt still had title, as a result of the artificially enlarged concept of commencement of bankruptcy, once the sequestration order had been made, the relevant property was notionally vested in the trustee at the time the order under the Matrimonial Causes Act 1959-1966 had been made. Accordingly, the interest of the wife (apart from any equitable interest based upon her improvements or contributions) had arisen after the date to which the bankruptcy related back. The trustee in bankruptcy therefore took the bankrupt's interest unencumbered by any equity in the wife arising from the order.[50] Presumably, even if the wife could be seen as giving consideration, it was pointless to attempt to bring her claim within the protective provisions applicable to relation back, as she had known of the presentation of the petition and the transaction could not have been established to be in 'good faith and in the ordinary course of business.'[51]

The net effect of the decision in *Re Bedford* was the undercutting of an intended provision for a spouse by the supervening bankruptcy of the transferor, although it must be conceded that the wife had known of the presentation of the petition at the time of seeking an order pursuant to s.86 of the Matrimonial Causes Act 1959-1966. The case indicated that relation back would apply to familial claims despite their special nature and the particularly deleterious consequences to the plaintiff spouse in the circumstances. Although the issue was not specifically addressed in *Re Bedford*, the decision implicitly suggested that any payments made to a spouse

[49] *Ibid.* 311.
[50] *Ibid.*
[51] As required by the relevant protective provisions established by s.123(1).

under Matrimonial Causes Act orders would be, within the relevant time span, vulnerable to reclamation by the trustee, whether characterised as property orders or maintenance orders,[52] in that such payments or transfers could not be established to be 'in the ordinary course of business'.[53] Familial claims could never be immune if required to conform to protective provisions essentially directed at commercial transactions.

The pre-eminence of the title of the trustee in bankruptcy to after-acquired property was similarly upheld in the later decision of *Scharkie v. Scharkie.*[54] In that case, the former wife of an undischarged bankrupt, divorced after the making of the sequestration order, had obtained orders for child maintenance under the Matrimonial Causes Act 1959-1966. Nothing had been paid in satisfaction of those orders when the bankrupt subsequently received a substantial benefit under a will. In exercising her right to apply for maintenance for herself, the wife argued that in view of her present and future needs for adequate housing, lump sum maintenance to facilitate acquistion of a suitable home was appropriate. Conceding that the circumstances would justify a lump sum maintenance award if there were an available asset to meet the order, Carmichael J. nevertheless found that the wife had no access to the proceeds of the bankrupt's benefit under the will. It had vested in the Official Receiver as after-acquired property divisible among creditors. Under the legislation then prevailing the wife could not prove for maintenance liabilities, although it was conceded that she could enforce the debts against the bankrupt's person or any property unaffected by his bankruptcy. The wife's related attempt to argue for enforcement of the maintenance debt in the matrimonial causes jurisdiction, so as to take precedence over creditors in bankruptcy, was decisively rejected. Carmichael J. held that there was no power in the Matrimonial Causes Act 1959-1966 to make orders against property vested in a trustee for creditors. In this context, his Honour stated:

> it has never been part of our law that debts due by a husband and father can take precedence in the distribution of his assets so as to defeat or defer the claims of his ordinary creditors. Within our family law, claims for support have risen and fallen with the fortunes of the one upon whom the liability for support rests. Wives and children, by virtue of their status, are not secured creditors. I think it follows that wives and children cannot be put in the position of a secured creditor after he whose obligation to support them has become insolvent.[55]

His Honour distinguished a United Kingdom authority *Coles v. Coles,*[56] relied on by the wife, as inapplicable to the case at hand. In *Coles v. Coles*

[52] The point was not addressed and, while there are no cases in which the trustee in bankruptcy successfully claimed maintenance payments as a result of relation back, there seemed no theoretical obstacle to the doctrine's application, despite the fact that the provision relating to voidable preferences was clearly inapplicable to maintenance claims prior to admission to proof. However, the trustee is under an obligation to act fairly, and should not take advantage of strict legal rights in circumstances where it would be unconscionable to do so.

[53] The notion of 'ordinary course of business' has not been clearly defined. Although some cases contemplate a business context, others suggest that 'ordinary course of business' is more concerned with the *bona fides* of the relevant transaction, *e.g. Robertson v. Grigg* (1932) 47 C.L.R. 257.

[54] (1971) 18 F.L.R. 89.

[55] *Ibid.* 92.

[56] [1957] P.68.

a writ of sequestration had been issued against a former husband for failure to comply with a maintenance order. Charges on real estate had been executed to secure the writ. The husband committed an act of bankruptcy after the issue of the writ of sequestration and it was held that the bankrupt's property passed into the hands of the trustee encumbered by the relevant charge in favour of the wife. Accordingly, the wife in *Coles v. Coles* was in the position of a secured creditor at the commencement of bankruptcy, despite the fact that the liability underlying the charge was not provable in nature.

In contrast, the applicant wife in *Scharkie v. Scharkie* was confined to remedies outside bankruptcy. It is interesting to note that in enunciating the policy which excluded spouses from competing with the unsecured creditors of an insolvent provider, his Honour did not make any distinction (arguably suggested by the facts) between former spouses and continuing spouses. He simply concluded that all familial claimants would share the changing fortunes of the bankrupt, irrespective of the current status of their relationship with him.

(b) *Voidable Preferences*

In addition to the doctrine of relation back, there is the further possibility that a matrimonial settlement, in the absence of an express exemption, might be set aside as a voidable preference pursuant to s.122. A pre-condition for the application of the section, which operates to recover payments, charges or transfers which have the effect of giving a preference, is that the payee or transferee be a creditor. The section contemplates that a creditor, whose preferential payment is recovered by the trustee, may nevertheless prove for the liability ratably.[57] Accordingly, although it is clear that maintenance payments would be subject to s.122 to the extent to which they were provable apart from the immunity now conferred by s.123(6), and, even more specifically, by s.122(2)(c), property settlements pursuant to a Family Court property order would only be subject to this section if the underlying liability were held to be provable.[58] The giving of a voidable preference is also, in itself, an act of bankruptcy.[59]

Section 122 can catch transfers or payments made up to six months prior to the presentation of a petition,[60] so its operation is co-extensive with that of relation back. However, as relation back does not depend on the ability to prove, the trustee would not need to rely on s.122.

[57] Bankruptcy Act 1966 (Cth), s.122(5).
[58] There is no express inclusion of liability under a property order in s.82 of the Bankruptcy Act 1966 (Cth); see Part I, 227-229.
[59] Bankruptcy Act 1966 (Cth), s.40(1)(b)(iii).
[60] Bankruptcy Act 1966 (Cth), s.122.

(c) *Fraudulent Dispositions*

Section 121 of the Bankruptcy Act 1966 provides that:

> Subject to this section, a disposition of property, whether made before or after the commencement of this Act, with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in bankruptcy.

Section 127(4) establishes that the trustee in bankruptcy may commence an action to impeach a fraudulent disposition within terms of s.121 'at any time'.

The indefinite operation of s.121, which contrasts with the defined limits of other 'claw back' provisions, provides potential for the trustee to avoid long-standing dispositions. For example, where a given transaction might have been attacked as both a voluntary settlement pursuant to s.120 and a fraudulent disposition pursuant to s.121, the trustee could rely on s.121 even when the time available under s.120 had expired.

In the context of s.121, the intent to defraud must be that of the person making the disposition. Some uncertainty surrounds the construction of the section.[61] Several cases, based on the equivalent United Kingdom provision, s.172 of the Property Law Act 1925 (U.K.), have suggested that the necessary intent to defraud may be inferred in circumstances where there has been impending insolvency and a voluntary settlement was made from property which would have been necessary to pay the settlor's debts.[62] However, where the disponee has supplied consideration, the defrauding of creditors is not an inevitable consequence of the transaction, and it would be necessary to establish actual intent.[63] The necessary intent will be inferred readily in circumstances where the disponor retains possession of, or an interest in, the relevant property.[64]

As the application of s.121 to maintenance orders and maintenance agreements is precluded by s.123(6), the question of its application to Family Court property orders arises. In order to retain the benefit of the disposition where the fraudulent intent on the part of the disponor is established, the disponee must show both valuable consideration and good faith.

A consent property order might amount to valuable consideration, for the purposes of both s.121 and s.120, but a contested property order probably would not. In any event, it is difficult to envisage a situation where the disponor spouse had the necessary fraudulent intent in connection with a contested property order.

Accordingly, it would seem that the relevance of s.121 would be limited to circumstances where one spouse, fearing insolvency or about to enter a risky commercial venture, concurred in a generous consent Family Court property

[61] Langstaff, 'The Cheat's Charter?' (1975) 91 *L.Q.R.* 86.
[62] *e.g. Freeman v. Pope* (1980) 5 Ch. App. 538 discussed in *Re Barton; ex parte Official Receiver v. Barton* (1983) 52 *A.L.R.* 95, 126.
[63] Langstaff, *op.cit.* 98.
[64] *e.g. Re Barnes; ex parte Stapleton* (1961) 19 A.B.C. 126.

order, because he preferred to benefit his former wife or family rather than unsecured creditors. Although the benefited spouse may have been entitled to a settlement on any view, it could be argued that such a disposition would involve the relevant fraudulent intent on the part of the disponee. As concurrence in a consent order would probably constitute valuable consideration, if the disponee spouse were also in 'good faith' in the sense that she had no knowledge or suspicion of impending inability to pay debts or intent to defraud creditors,[65] the trustee in bankruptcy would be unable to impeach the property settlement in her favour, even though it was excessively generous.

On the other hand, where a collusive intention could be established between spouses or former spouses, the trustee would be able to avoid a disposition pursuant to a Family Court property order, irrespective of when it had been made. The relevance of this added resource for the reclamation of property on behalf of unsecured creditors is reduced by the fact that if a collusive couple entered into a maintenance agreement embodying the same disposition, s.123(6) would protect it from attack.

(d) *Voluntary Settlements: Section 120*

It has been suggested that a transfer pursuant to a Family Court property order might be subject to relation back and avoidance as a preference or a fraudulent disposition. Even where the transferee could establish good faith and valuable consideration, the transfer may not be considered to be in 'the ordinary course of business'. A further potential threat to such a transferee is s.120, which provides for the avoidance of voluntary settlements. The section applies to settlements made within two years prior to commencement of bankruptcy[66] and extends to cover voluntary settlements made within five years before commencement of bankruptcy where the claimant cannot establish that the bankrupt was able to pay his debts without resort to the relevant property at the time of making the settlement.[67] The potential application of s.120 accordingly covers a much longer period than the doctrines of relation back or voidable preference.

Although there is little specific authority on the application of s.120 to Family Court property orders, guidance is provided by the judicial construction of an equivalent section by United Kingdom courts, accepted as authoritative in a recent Australian case on the provision.

(1) The weight of United Kingdom authority indicates that the section will certainly catch settlements made while a marriage is on foot, in circumstances where a wife has made a contribution to joint property which amounts to less than the interest actually conferred upon her. In this context, an equitable interest under a constructive trust might be reclaimed by the trustee in

[65] *Re Barton; ex parte Official Receiver v. Barton* (1983) 52 A.L.R. 95, 117.
[66] Bankruptcy Act 1966 (Cth), s.120(1).
[67] Bankruptcy Act 1966 (Cth), s.120(2).

bankruptcy, to the extent to which the interest conferred exceeded the contribution made by the claimant spouse.[68]

(2) Furthermore, where a spouse has obtained a contested property order, it is likely that she will be unable to establish the consideration necessary to resist recovery by the trustee on the basis of s.120. In contrast, a consent property order or forbearance to sue could constitute the necessary valuable consideration. Nevertheless, if the settlement were made within the relevant time span, the spouse would be additionally vulnerable to the operation of s.122 and the doctrine of relation back. Accordingly, the establishment of consideration would only avail a transferee seeking to retain a settlement which could not be impugned on the basis of voidable preference or relation back, but *was* within the ambit of s.120.

(i) *Voluntary settlements and matrimonial property where there is no Family Court order.*

Interpretation of an analogous provision, s.42 of the Bankruptcy Act 1914 (U.K.), has suggested that where there has been no threat of litigation from which forbearance to sue may be inferred, or no compromise of proceedings expressed in a consent order, a transfer from a husband to a spouse may be avoided by the trustee, even where the marriage was unstable and the transfer was directed at a function analagous to a transfer which might have been incorporated in an order or agreement, had the wife threatened or initiated proceedings.

Re Windle; ex parte Trustee of Property of Bankrupt v. Bankrupt[69] concerned a transfer by the bankrupt of the marital home (in which he was solely interested) to his estranged wife, eight months prior to the commencement of bankruptcy. The trustee sought to impugn the transfer as a voluntary settlement pursuant to s.42 of the Bankruptcy Act 1914 (U.K.). It appeared that the spouses previously had become estranged, and it was agreed that the husband would transfer the marital home on condition that the wife assume future liability on the mortgage. Although the trustee was unable to establish lack of good faith on the wife's part, he succeeded in his contention that she was not a purchaser for valuable consideration within the terms of s.42.

While Goff J. rejected the view that it would be necessary for a purchaser to actually 'replace' the property extracted from creditors in order to constitute a purchaser for valuable consideration, he considered that the claimant should be 'a person who, in a commercial sense, provides a *quid pro quo*'.[70]

[68] See *Re Densham; ex parte Trustee of The Property of The Bankrupt v. The Bankrupt and Another* [1975] 1 W.L.R. 1519. In that case, the wife was found to have an equitable share in the property of which her husband was sole legal owner on the basis of a *Gissing v. Gissing* type of constructive trust. Although the spouses had agreed that she would have a half interest in the property, her contribution did not equal it. Goff J. found that there was a constructive trust of a half interest, which amounted to a voluntary settlement to the extent to which the interest conferred exceeded the contribution.

[69] [1975] 1 W.L.R. 1628.

[70] *Ibid.* 1637.

As the only conceivable consideration in the case at hand was the wife's assumption of the future mortgage liability, Goff J. found that only where the equity of redemption was of no appreciable value could such an undertaking amount to valuable consideration for a transfer of mortgaged property for the purposes of s.42. His Honour considered that a contrary finding would produce an extraordinary anomaly, in that the settlement of an unmortgaged property would be caught by the section, while the settlement of a mortgaged property would be protected.[71]

Accordingly, the settlement in question was held to be void against the trustee.

The result in *Re Windle* may appear ironic when it is suggested that had the estranged wife (who was originally motivated by concern for her security should her husband leave her) threatened legal proceedings and taken the transfer in compromise, she may have been able to establish the consideration necessary to protect her benefit from reclamation.

(ii) *Compromise of a threatened matrimonial claim*

The preponderance of recent United Kingdom authority would seem to suggest that the compromise of a threatened matrimonial claim might constitute sufficient consideration for the purpose of s.120.

In *Re Pope; ex parte Dicksee*,[72] an early case on the issue, a husband had made a settlement within two years of his bankruptcy upon his wife and children. Although the settlement was expressed to be 'in consideration of natural love and affection', the husband previously had committed a matrimonial offence and the settlement was actually a response to the wife's threat of proceedings in the Divorce Division. For the trustee in bankruptcy it was argued that the term 'purchaser' implies a buyer in the ordinary commerical sense, who must necessarily provide money, property or something capable of being measured by money. Accordingly, it was contended that the mere surrender of a right or release, although it might amount to valuable consideration, could not suffice, as the insertion of the term 'purchaser' introduced a novel additional requirement. The majority, on the contrary, accepted that 'purchaser' in that context simply indicated someone who had provided *quid pro quo*. By entering the agreement, the wife had relieved the husband of possible alimony payments and from public exposure of his conduct in divorce proceedings.

Cozens-Hardy M.R. reiterated that the release of a right or a compromise of a claim could constitute someone a 'purchaser', and he expressly rejected the view that either money or physical property must be conferred.[73]

In contrast, Buckley L.J. (dissenting) considered that the insertion of the word 'purchaser' *had* introduced an additional requirement to the protective

[71] *Ibid.* 1638.
[72] [1908] 2 K.B. 169.
[73] *Ibid.* 173.

provisions of the voidable settlement section. While conceding that 'a purchaser in the ordinary commercial sense' need not give the commercial or market value of the property, and might even purchase for others rather than himself, he thought that it would be pressing the notion of 'the ordinary commercial sense' too far to extend its application to the surrender of rights incapable of being measured by a pecuniary equivalent. As such, his Lordship considered that the surrender of a right to relief for a matrimonial offence was inadequate.[74]

Despite a series of subsequent cases suggesting that a 'doctrine of replacement' was applicable,[75] whereby the consideration provided must replace what had been transferred from the debtor's estate, the broad view of the majority in *Re Pope; ex parte Dicksee* is currently in ascendancy, being expressly approved in *Re Windle* (despite the result on the particular facts of that case).

It was also given effect in the recent case of *Re Abbott; ex parte Trustee of Bankrupt v. Abbott.*[76] In that case, the bankrupt's former wife had obtained, *inter alia*, a property adjustment order which was by consent, and reflected a compromise reached by the parties at a time when the husband knew of his insolvency.

As a result of the order, the wife received more than half the proceeds of the jointly owned matrimonial home and the trustee in bankruptcy claimed the excess over her joint beneficial entitlement as a voluntary settlement.

Peter Gibson J., applying the test of the majority in *Re Pope*, accepted that a *bona fide* compromise of a family matter, whereby a spouse surrendered a right to pursue a claim, did amount to a purchase for valuable consideration. Although the husband was aware of his financial status, the wife was in good faith, and indeed, there was no suggestion that the terms of the consent order were influenced by the husband's knowledge of his insolvency. In this context, it is interesting to note that Peter Gibson J. did not consider that the finality or otherwise of matrimonial relief influenced the consideration issue. He conceded that the wife could seek further relief, but maintained that any surrender of a right to seek the exercise of judicial discretion would suffice.[77] Megarry V. C. agreed that the compromise of a familial claim was not distinguishable from the compromise of any other proceedings, and specifically rejected a replacement theory of consideration.[78]

The trustee in *Re Abbott* had indicated the anomalous possibility that a contested order would not be within the protective provisions of the section, while a consent order or compromise would be upheld. Peter Gibson J. was

[74] *Ibid.* 174-5.
[75] Most notably, in *Re a Debtor; ex parte Official Receiver, Trustee of the Property of the Debtor v. Morrison* [1965] 3 All E.R. 453.
[76] [1982] 3 All E.R. 181.
[77] *Ibid.* 185.
[78] *Ibid.* 187.

'not convinced' that a contested order would be in a worse position, but did not elaborate on the issue.[79]

Nevertheless, no element of valuable consideration as traditionally defined can be detected in circumstances where the claimant spouse neither forbears to sue nor compromises her claim, but instead proceeds to a trial of the action.

In response to the trustee's further suggestion that the adoption of a relatively liberal interpretation of the concept of 'purchaser for value' would render s.42 'a dead letter' in relation to property orders under the relevant matrimonial causes legislation, a result at odds with the 'clear intention' of the section to preclude transfers to relatives to the disadvantage of creditors, Peter Gibson J. simply acknowledged that possibility. He considered that a plain construction of the section, in the light of *Re Pope*, must be maintained; a legislative response to any adverse consequences would be appropriate, rather than an artificially narrow judicial construction implemented to achieve policy goals.[80]

It must be conceded that the voluntary settlement provisions of bankruptcy legislation in both Australia and the United Kingdom were enacted prior to the social phenomenon of widespread marriage dissolution and the consequent prevalence of orders and agreements embodying ancilliary relief. As such, there could be no recognition of any need to discriminate between a compromise of a familial nature and other compromises of threatened litigation, in order to preclude the engrossing of an insolvent estate by relatives to the detriment of unsecured creditors. Accordingly, there is much force in the view, expressed by Peter Gibson J., that the overriding policy issues involved in the determination of such competitions must be addressed by the legislature.

While it is probable that contested orders would not come within the protective provisions, despite the undeveloped doubts of Peter Gibson J. in *Re Abbott*, not all commentators consider such a distinction between consent orders and contested orders anomalous. Catherine Hand, for example, suggests that the distinction would work as an incentive to compromise.[81] It is submitted that such an analysis of legal issues does not accord with the social realities underlying marriage dissolution. The liable spouse may be unwilling to agree to a reasonable compromise, and, in any event, the parties involved should not be expected to appreciate the crucial significance of the legal form of their litigation. It would seem that the substance of the matrimonial provision should be the primary consideration in this context, rather than the legal form in which it is conferred.

Furthermore, the case of *Re Windle* highlights a pernicious anomaly inherent in current legislation; namely, that where a spouse in an unstable relationship fails to make any threat of legal proceedings, but simply proceeds with an agreed transfer, she will be unable to make out the necessary element of consideration. In this sense, the current provisions may be said to encourage the instigation of litigation, though providing an incentive for its compromise.

[79] *Ibid.* 186.
[80] *Ibid.*
[81] Hand, 'Bankruptcy and the Family Home' (1983) *The Conveyancer and Property Lawyer* 219.

The wider and even more disturbing irony demonstrated by the relevant cases and provisions is the clear indication that, in certain circumstances, defined by reference to legal form rather than substance, in the context of Australian legislation, litigious familial tranferees whose marital relationship with the insolvent has broken down, compete as advantaged creditors *vis-à-vis* his ordinary unsecured creditors; whereas non-litigious familial transferees, such as the wife in *Re Windle* and, more significantly, the familial dependants of a bankrupt whose marriage is still on foot, are not only not advantaged, but lack the necessary status to compete at all.

If s.123(6) is correctly interpreted as conferring absolute protection on transfers or payments pursuant to a maintenance order or maintenance agreement, only transfers or payments embodied in Family Court property orders will be vulnerable to the 'claw back' provisions of the Bankruptcy Act 1966. In view of the substantial functional overlap between the available legal forms,[82] a discriminatory application of insolvency law provisions is surely unjustifiable, although the distinction may be of reduced significance if the Bankruptcy Court maintains the right to impose its own independent characterization upon Family Court orders.[83]

VI *Special Position of Sole Occupancy Orders.*

Apart from making orders requiring the transfer of property or the payment of money from one spouse to another, the Family Court has the power to make orders as to the use or occupancy of the matrimonial home.[84] The power to make such orders has been viewed as arising under s.114(1), s.74 or s.79 of the Family Law Act 1975. By s.114(1) of the Family Law Act 1975 in proceedings of the kind referred to in paragraph (e) of the definition of 'matrimonial cause', the court may make such order or grant such injunction as it thinks proper, *inter alia*, relating to the use or occupancy of the matrimonial home. Section 74 provides that in proceedings for maintenance of a party to the marriage or a child of the marriage, the court may make such order as it thinks proper for the provision of maintenance. By s.79(1) the court may, in proceedings with respect to the property of the parties to a marriage or either of them, make such order as it thinks fit altering the interests of the parties in the property.

The provision under which an order for use and occupancy of the matrimonial home is made can be of importance if a question arises later as to its variability. If the order is made under s.79, it is incapable of variation except within the stringent limits of s.79A.[85] If the order is one made under

[82] See Part I.
[83] See Part I, 229.
[84] Family Law Act 1975 (Cth.), ss.74,79,114(1).
[85] For a discussion of s.79A see Part 1, 245-6.

s.114(1) or s.74, it is capable of alteration. Further, and even more significant in the context of this article, the provision under which such an order is made can become vitally important if the non-occupying spouse is declared bankrupt. If the exclusive right of occupancy is embodied in a maintenance order or a maintenance agreement, it amounts to at least an 'obligation' on the part of the bankrupt and accordingly would not be impeached by the trustee in bankruptcy by reason of the protection conferred by s.123(6) of the Bankruptcy Act 1966.[86] In contrast, occupancy orders granted under s.114(1) or incorporated in property orders under s.79 receive no express protection and accordingly, it is necessary to consider to what extent and in what circumstances, if any, they would be binding on the trustee in bankruptcy.

The primary issue, then, is to determine the provision under which a sole occupancy order was made. These orders have been made on a temporary and personal basis before proceedings for principal relief and property settlement have been instituted; they have also been made at the time when either a final property order or a final maintenance order or, alternatively, both types of order together, have been made. Before the High Court decision in *Mullane and Mullane*,[87] it was considered that an order for exclusive occupancy of the matrimonial home which was 'temporary' and 'personal' was one made under s.114(1) of the Family Law Act 1975, whereas such an order made at the time of dissolution and final orders was made as an exercise of the jurisdiction under s.79 of the Family Law Act 1975. In *King and King*[88] the issue arose as to the variability of an order, made at the time of dissolution, giving the wife sole and exclusive occupancy of the jointly owned matrimonial home until her remarriage but making no provision for ultimate disposal. The wife argued that the order as to sole use of the matrimonial home formed part of the maintenance order as it complemented, and was in fact, provision for her future maintenance. She argued that it could not be considered a property settlement as it did not vary or alter the proprietary interests of the parties. However, the Full Court of the Family Court took the view that such an order did effect an alteration of the proprietary interests. It stated:

> [T]he effect of an exclusive occupation order is that the owner, who is otherwise entitled to possession and occupation, is thereafter deprived of the right to occupy during the term of the order. It seems clear that this effects an alteration in the nature of his or her interests in the property. The attributes of ownership have been changed by the order; in effect the right to occupy is settled exclusively on the wife during the term of the order.[89]

However, the High Court in *Mullane and Mullane* applied a different approach. It held that s.79 refers to orders which work an alteration of legal or equitable interests in the property of the parties or either of them. An order which excludes one spouse from the matrimonial home, even though for many years, does not alter the proprietary interests in the property.

[86] *Supra* 466-468.
[87] (1983) F.L.C. 91-303.
[88] (1977) F.L.C. 90-299.
[89] (1977) F.L.C. 90-299, 76, 582.

In *Mullane*, the marriage of the parties had been dissolved under the repealed Matrimonial Causes Act 1959 (Cth). At the time of dissolution, the court ordered, *inter alia*, that the wife have exclusive occupation of the matrimonial home (registered in the sole name of the husband) until all three of the children of the marriage were self-supporting or until the wife's remarriage, whichever event was earlier.

In 1978, the wife applied to the Family Court for an order that at the expiration of her occupancy the husband be required to sell the property and pay the wife two-thirds of the net proceeds of sale. In allowing an appeal from the decision of the Full Court of the Family Court, which had held that the Family Court had no jurisdiction to hear the application, the High Court held that the Family Court did have jurisdiction to hear the wife's application under s.79. The High Court took the view that the exclusive occupancy order made in 1967 under the repealed legislation should not be treated as if it had been made under s.79 of the Family Law Act 1975:

> . . . Section 79 does not authorise a mere modification of a liberty to enjoy property. An order which merely excludes one spouse from the enjoyment of property, albeit for many years, in order to permit its better enjoyment by the other does not alter an interest in that property. . .[90]

Rather the High Court reasoned that orders as to exclusive occupancy are more properly considered as being made under s.114(1) or pursuant to s.74 for the provision of maintenance.

However, the exact ramifications of the decision in *Mullane* as to the potential variability of exclusive occupancy orders remain unclear and it cannot be stated that an order for sole use and occupancy can never be made under s.79. A number of fact situations can be envisaged where a court may consider an order for sole occupancy to be part of an overall property settlement and therefore incapable of variation except pursuant to s.79A. For example, where the wife makes an application under s.79 and requests an order for sale and division of the matrimonial home, the court may consider the application but refuse to make the order in the terms requested. Instead the court may, for instance, order that the wife is to have sole occupancy for a period and a sale and division of proceeds at the expiration of the period.

In such a case, the court has considered a s.79 application and made its order. Unless a court was prepared to sever the order into two parts, the whole of the order, including the part as to sole occupancy would be incapable of variation except pursuant to s.79A. Severance of the order, so that part is capable of variation, has little to commend it. The court has made orders upon a consideration of all the facts, and presumably, each part of the order is an important and integral part of the order as a whole.

The issue as to whether the exclusive use and occupancy order is made under s.114(1) or s.74 is important, as those made under s.74 receive automatic protection against the trustee in bankruptcy. Usually this issue will not be

[90] (1983) F.L.C. 91-303, 78, 072.

difficult to determine in relation to each individual situation. Clearly, if an application has been made pursuant to s.114(1) and there is no related issue of maintenance, an exclusive use and occupancy order would be viewed as having been made under s.114(1). Similarly, where an application is made for maintenance and the court, as part of its order, makes provision for exclusive use and occupancy, the order would be viewed as made under s.74. Sometimes applications may be made under s.114(1) and s.74 and the court may make a general order, without specifying the provision under which it is making the orders, providing that maintenance is to be paid and sole use and occupancy of the matrimonial home is to be given to one spouse. It is suggested that in these circumstances, the order as to sole use and occupancy would usually be viewed as being made under the maintenance provision, for the exclusive occupancy of the matrimonial home would presumably be granted in lieu of a larger sum of maintenance.

On the basis of the discussion above, it is submitted that, even after the decision in *Mullane*, orders as to sole use and occupancy of the matrimonial home may, in the appropriate circumstances, be made under s.74, s.79 or s.114(1). Where such an order is made under either s.79 or s.114(1), it is necessary to consider the enforceability of the order against the trustee in bankruptcy of the spouse liable under such an order.

It has always been the case that an order as to sole use and occupancy made under s.114(1) does not confer any proprietary interest on the occupier. The Family Court has no power under s.114(1) to alter the proprietary interest of the parties.[91] Further, the clear indication in *Mullane* is that a sole occupancy order, whether made in isolation or as part of an overall property settlement, does not confer any proprietary interest on the person entitled to the occupancy. Where the court orders that the wife is to have sole occupancy of the matrimonial home, the wife has an enforceable right as against the husband to remain in occupation of the property. However, the wife's right is merely personal against the husband and she has no legal or equitable interest in the property which is capable of protection by registration or caveat. Thus, where the husband is declared bankrupt subsequent to the Family Court order granting sole occupancy to the wife, the wife has no interest, pursuant to the sole occupancy order, which is enforceable against the trustee in bankruptcy. If the husband is the sole registered proprietor of the property, the property vests in the trustee in bankruptcy and can be sold by him. Where the husband and wife are joint proprietors but the wife is entitled to sole occupancy for a period, the husband's share vests in the trustee in bankruptcy and can be sold by him. The purchaser from the trustee would not be bound by the wife's right of sole occupancy. In order to enhance the chance of sale and to obtain the optimum price for the property, the trustee in bankruptcy may prefer that there be a sale of the whole of the property and division of the proceeds between the trustee and the non-bankrupt spouse. In the States

[91] See *Tansell and Tansell* (1977) F.L.C. 90-307.

which have legislation based on the old English Partition Acts,[92] the trustee in bankruptcy may use the relevant partition provisions to obtain an order for the sale of the jointly held property. For instance, in Victoria, the trustee in bankruptcy could apply for an order for sale under s.222 or s.223 of the Property Law Act 1958 (Vic.). Where the co-owner owns a half or more of the property, the court must order a sale unless there is a good reason to the contrary.[93] In New South Wales and Queensland an alternative approach to the sale or partition of land held in co-ownership has been adopted.[94] On the application of any one or more co-owners, the court can appoint trustees of the property to hold the property on a statutory trust for sale or partition.

The view that such occupancy rights are not proprietary in nature is supported by the English decision, *Re Solomon.*[95] The husband and wife were joint tenants of the matrimonial home. After separation, the wife applied for maintenance and by consent, an order was made. *Inter alia*, the husband undertook to allow the wife during her life to use and occupy the property rent free and to pay the outgoings. Subsequently the husband was declared bankrupt and the trustee in bankruptcy applied for an order for sale and division of proceeds. The wife resisted the sale. Goff J. held that rights of the wife under the husband's undertakings were personal rights enforceable solely against the husband. The wife could not resist the sale unless she could show some proprietary interest in the husband's share in the property; this she was unable to do. His undertaking in no way altered the existing legal and equitable interests in the land.

Uncommonly, the wife who has a sole occupancy order in her favour may be able to demonstrate that the order has effected an alteration of proprietary interests in the property. If the effect of the order is such as to grant the wife a life interest, her life interest is enforceable against the trustee in bankruptcy.

Although the decision in *Mullane* would appear to be binding, it should be noted that a number of English decisions have held that licences to occupy may give rise to more than merely contractual rights and can sometimes be enforceable against third parties with notice. Mostly these licences have been contractual in nature, but not always. For example in *Inwards v. Baker*,[96] a gratuitous licence to occupy which had been acted upon gave rise to a right in the occupier which was enforceable against the grantor's successor-in-title.

[92] Property Law Act 1958 (Vic.), Pt. IV; Law of Property Act 1936-1982 (S.A.), Pt. VIII; Property Law Act 1969-1979 (W.A.), Pt. XIV; Partition Act 1869 (Tas.).

[93] It is suggested that the term 'a good reason to the contrary' would not be satisfied by a finding that a wife, and possibly children, would be forced to find alternative accommodation. The jurisdiction is essentially non-discretionary. See *Bray v. Bray* (1926) 38 C.L.R. 542; *Re McNamara* (1961) W.N. (N.S.W.) 1068; *Peck v. Peck* [1965] S.A.S.R. 293. *C.f. In Re Holliday (a Bankrupt)* [1981] Ch. 405. where the court exercised a wider discretion it had pursuant to s.30 of the Law of Property Act 1925 (Eng.) to postpone a sale of the matrimonial home requested by the trustee in bankruptcy in order to allow the co-owner wife and her children to remain in possession until the youngest child reached 17 years.

[94] See Conveyancing Act 1919-1979 (N.S.W.) Pt. IV, Div.6; Property Law Act 1974-1978 (Qld), Pt. V, Div.2.

[95] [1967] Ch.573.

[96] [1965] 2 Q.B. 29.

Where a licence to occupy is seen as irrevocable, whether by contract or acquiescence, the English courts have been prepared to hold that there is a wider sphere of enforceability, a flavour of property, such that the licence is enforceable against third parties with notice. In this sense, a trustee in bankruptcy is even less than 'a third party with notice' and in one English decision, *Re Sharpe*[97] was held to stand in the bankrupt's shoes.

Lord Denning in *Binions v. Evans*[98] and the Court of Appeal in *D.H.N. Food Distributors Ltd. v. London Borough of Tower Hamlets*[99] held that a contractual licence, irrevocable against the licensor, and under which a person has a right to occupy for life, gives rise to an equitable interest in the licensee. There is little doubt that this development in England has ensued from a willingness on the part of English judges to treat those who would usually be lessees as contractual licensees in an attempt to avoid the Rent Restriction Acts. In turn, this has led to a desire to give these 'licensees' some protection against purchasers. This set of circumstances does not exist in Australia. These decisions were followed in *Re Sharpe*[1] by Browne-Wilkinson L.J. His Honour held that a contractual licence, irrevocable against the licensor, was enforceable against the licensor's trustee in bankruptcy. The debtor had purchased a property for £17,000. His aunt provided £12,000 by way of loan on condition that she could live on the property with the debtor and his wife and that she would be looked after by them. Subsequently, the debtor became bankrupt and the trustee in bankruptcy contracted to sell the property to a purchaser. The aunt then claimed an interest in the property. The trustee claimed possession of the property against the debtor and the aunt. Prior to entering the contract of sale, the trustee in bankruptcy had made enquiries of the aunt as to whether she claimed any interest in the land pursuant to her input of £12,000. He had received no reply to his enquiries. After holding that the aunt had an irrevocable contractual licence *vis-a-vis* the licensor, Browne-Wilkinson L.J. followed the reasoning of Lord Denning M.R. in *Binions v. Evans* and the Court of Appeal in *D.H.N. Food Distributors* and held that such a licence gave the aunt an interest in the land which was binding on a third party acquiring the property with notice. Thus, the trustee in bankruptcy had to take the property subject to the aunt's right to live there until the monies had been returned to her. Australian courts are less likely to hold that a contractual licence, rather than a lease, has been created. It is suggested that Australian courts will be unlikely to follow the reasoning expressed in these cases.

Even if the reasoning in *Re Sharpe* were to find favour in the Australian courts, its applicability to the situation in question, that of a court order for occupancy, is extremely doubtful. The licence in *Re Sharpe* arose pursuant

[97] [1980] 1 W.L.R. 219.
[98] [1972] Ch.359.
[99] [1976] 3 All E.R. 462.
[1] [1980] 1 W.L.R. 219.

to a consensual arrangement. If a sole use and occupancy order arose pursuant to a consent order, the analogy to *Re Sharpe* is closer. Perhaps, it is at least arguable that the circumstances of the licence's origin are less important than its irrevocability and substance as against the trustee in bankruptcy. If the *Re Sharpe* analysis was accepted, then the occupancy right arising under the court order would be analogous to a charge on the property. Even this could fail to benefit the wife as it could, in the absence of express protection, be set aside pursuant to the 'claw back' provisions.

It is unsatisfactory that a spouse with a sole occupancy right granted under s.79 or s.114(1) is vulnerable to having it set aside as merely personal, while a spouse with an identical right under a maintenance agreement or order appears to have a right to remain in the property as against the trustee in bankruptcy. Equality of treatment should be the principle, regardless of the technical provision under which the sole occupancy was granted.

It has been argued above that the absolute protection against the 'claw back' provisions granted to maintenance creditors who have benefited under a maintenance order or agreement is too wide. It is suggested that the obligation incurred pursuant to a sole occupancy order, whatever provision it is granted under, should *per se* be enforceable against the trustee in bankruptcy. However, the absolute protection from relation back currently given to payments made pursuant to maintenance orders and agreements should not continue and should not extend to exclusive occupancy rights. As is suggested below,[2] immunity from relation back should be limited to a realistic sum. In relation to exclusive occupancy rights, where the order was made within the period of time to which the bankruptcy relates back, this suggestion could result in the occupying spouse losing the right to possession of the matrimonial home. However, the *quid pro quo* would be that the spouse formerly entitled to the exclusive occupancy could be compensated out of the sum which enjoyed absolute immunity from relation back.

It should be noted that where an order under s.114(1) for sole use and occupancy of the matrimonial home is granted purely as a means of protecting the occupying spouse from the other spouse and contains no element of maintenance relief, the order should not be enforceable against the trustee in bankruptcy. The basis of such an injunction is not an 'obligation owed' by the non-occupying spouse but rather a directive aimed at protecting the occupying spouse.

VII Conclusion

It is submitted that the current interaction of family law and bankruptcy legislation has produced a number of anomalous results and indeterminate potentials. Accordingly, the policy goals of neither Act are consistently pursued; nor does the current legislation attempt rational reconciliation of the very different policy objectives which underpin the two statutes.

[2] *Infra.*

Recognition of changing patterns of marriage dissolution has crept by a stealthy piecemeal process into the essentially nineteenth century fabric of the Bankruptcy Act, without sufficient assessment of how such amendments will operate in the overall context of the Act, and without a systematic balancing of competing policy goals.

In this context, a number of recommendations for the rationalisation of this area of law are submitted.

1. The anomalous application of present insolvency law to various Family Court claims and transfers is attributable to the significance attached to the technical characterization of the order. No advantages are expressly conferred on transferees under a property order, who, unlike claimants with a maintenance order or maintenance agreement, are subject to all the disadvantages of proving, and must come within the particular protective provisions of each 'claw back' section in order to retain a benefit conferred within a relevant time span.[3] In as much as a spouse who has threatened litigation but has compromised may come within certain protective provisions, whereas a spouse who has either made no threat or has contested an order will not, the application of protective provisions is also anomalous in that context. The distinction between property orders and maintenance orders or agreements also gives rise to the variable treatment of sole occupancy orders in bankruptcy.

Accordingly, it is recommended that whatever advantages or capacities are conferred upon a claimant or transferee under a Family Court order or agreement in relation to the issuing of a bankruptcy notice, proving for the liability and immunity from relation back of other 'claw back' provisions of the Bankruptcy Act 1966, they should apply irrespective of the technical form in which the Family Court claim or settlement was embodied.

2. It is suggested that a provision denying protection to collusive maintenance agreements or orders designed to defraud or unjustly deprive other unsecured creditors be introduced.

3. It should be recognised that while the present provisions of the Bankruptcy Act 1966 may provide an avenue for the retention of family property by certain members of the pre-existing family unit as against unsecured creditors, this mainly depends on the existence of Family Court orders or agreements, and would thus apply almost exclusively to marriages in a state of dissolution. In contrast, no ameliorating provisions at all apply for the protection of the dependants of an insolvent whose marriage is on foot. It seems disturbing that the application of insolvency law to familial needs for housing and maintenance discriminates against intact family units in this regard. Certainly, a recognition of the validity of such claims would seem to be the only policy justification for conferring advantages on Family Court litigants *vis-a-vis* ordinary creditors, but there is no corresponding

[3] They are also exposed to the adverse consequences of proving, should the liability be held to be provable: see Part I, 216-217.

legislative provision for current familial dependants.[4]

4. It should be noted, in this context, that the position of a spouse in an intact marriage is aggravated by the potential application of s.111 (discussed above). Not only is there no possibility of retaining any of the bankrupt's interest in family housing or other assets, but she is also potentially liable to augment the insolvent estate with her own property for the benefit of creditors. Section 111, resting as it does on outdated preconceptions about marital status and reputed ownership, should be repealed.

5. On the question of whether preferential treatment of transferees under a Family Court settlement can be justified in the context of insolvency, it is relevant that, *vis-a-vis* the bankrupt's current dependants, the liability under a maintenance order or maintenance agreement (to which it is suggested the position of property orders be expressly assimilated) does survive discharge, and the claimants may also resort to remedies outside bankruptcy. In substance, the need for maintenance and housing would seem the same, whether marriage to the bankrupt is dissolved or current.

In this context, a possible rationalisation of the relative positions of Family Court claimants, current dependants of the insolvent and ordinary unsecured creditors might be as follows:

Family Court claimants or transferees should be permitted to issue bankruptcy notices, prove ratably as creditors in bankruptcy for claims that are currently due, and should also have access to avenues outside bankruptcy. Liability for any unpaid amount should survive discharge. In addition, such claimants should enjoy an immunity from relation back, but a monetary limit should be imposed,[5] in preference to the absolute immunity that now applies to transfers or payments pursuant to a maintenance order or maintenance agreement. It should be recalled that any amount or transfer made *prior* to the period covered by the 'claw back' provisions will enjoy absolute immunity in any event. Accordingly, if Family Court claimants enjoy the considerable additional advantages of access to income from personal exertion, access to property not vested in the trustee (including compensation for personal injuries, and certain policies of life assurance, pure endowment and annuities) together with the survival of their claim, they already enjoy the *de facto* status of advantaged creditors *vis-a-vis* other unsecured creditors. The further concession of absolute protection from relation back could well threaten one of the fundamental goals of bankruptcy legislation — namely, the equitable treatment of unsecured creditors by ensuring access to a ratable share of the insolvent estate.

[4] See Cork Report, 255-258 for a discussion of whether a share of the family home should be considered exempt property. The Cork Committee noted that frequently, the spouse of the debtor would be a joint owner, but recommended that where this was not so, there should be a power to delay, but not cancel, creditor's rights in relation to eviction and sale. See also *The Australian Law Reform Commission General Insolvency Inquiry* Issues Paper No. 6, January 1985, 23.

[5] Although it is beyond the competence of the authors to suggest a definite sum, or alternatively, a set proportion of the bankrupt estate, given that the spouse will often be a joint owner of any matrimonial home, a relatively small exception of the bankrupt's own share might, in many cases, suffice to allow the property to be retained.

As unsecured creditors do not have access to income in practice, after the abstraction of property by secured creditors and matrimonial claimants (given the frequency of marriage dissolution), in many instances, the remaining property would be so small as to render their right to a ratable distribution valueless. It should be noted that the failure to demand security for a loan might often be attributable to the relative impotence of the creditor, rather than an ability to assume the risk of loss, and 'chains of bankruptcy' are not an unknown phenomenon.[6] The ramifications for the provision of credit and the possible effects on the social and familial situation of the unsecured creditors must be assessed. Given that the sole resource of such creditors is access to property vested in the trustee during the period of bankruptcy, it is difficult to justify an absolute immunity from 'claw back', whereby familial claimants enjoying ancilliary advantages potentially can engross that available property.

Accordingly, it is suggested that immunity from relation back be limited to a realistic sum. Furthermore, in order to facilitate an even-handed treatment of family dependants in the context of an on-going marriage, it would seem desirable that a corresponding sum be included as exempt property, in recognition of the insolvent's needs, assessed by reference to modern standards of living. It would seem unnecessary to apply the exemption specifically to a matrimonial home. The bankrupt may not own a house, so the exemption should apply flexibly to whatever assets are available.

It might be argued that the provision of a corresponding exemption to the bankrupt and/or his on-going family is objectionable, in that the bankrupt himself may benefit personally from it.

However, departure from nineteenth century laissez-faire social theories and punitive attitudes to honest debtors should be confirmed.[7] A minimum standard of living for the bankrupt and his family should be maintained, and it may be that the transaction costs involved in their rehousing would exceed the value of an exemption in a modest family home or other assets.

While it might be objected that the effect of such an exemption is to transfer indirectly, a social welfare obligation of the State to the insolvent's unsecured creditors, this possibility should be taken into account when fixing the amount of the exemption.

There are no real winners in bankruptcy, as the debtor, his dependants and his unsecured creditors are all vulnerable to adverse consequences. The rights and requirements of all relevant groups should be reconsidered in the light of modern living standards, changing divorce patterns, revised views of marital status and the current role of credit.

The application of bankruptcy legislation to all affected groups is currently erratic, unbalanced and uncertain. *Ad hoc* responses to the needs of different claimants has proved inadequate, and an overall legislative resolution of their competing interests is required.

[6] See, for example, recent Annual Reports by the Minister for Business and Consumer Affairs on the Operation of the Bankruptcy Act 1966.

[7] See Cork Report, 54-56 and Ch. 24.