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BANKRUPTCY: ITS CONSEQUENCES FOR FAMILY PROPERTY

1. INTRODUCTION

> 'In relation to the Bankruptcy Act 1966, the traditional dual goals of the financial rehabilitation of the honest debtor and the equitable treatment of his unsecured creditors remains paramount. The need to maintain a minimum standard of living for the bankrupt and his dependants is also recognised in certain specified exclusions from the property which vests in the trustee in bankruptcy for distribution to proving creditors . . . Nevertheless, the Bankruptcy Act, 1966, largely reflects the 19th Century socio-economic assumptions on which its legislative antecedents were based. Certainly its essential framework pre-dates many important social and legal developments in relation to the status of women, family structure and marriage dissolution . . .' (Dodds and MacCallum, 1985)[1]

This article pursues the question whether bankruptcy law has, without justification, failed to keep pace with current socio-legal developments by examining the consequences of bankruptcy for matrimonial assets in the context of an *on-going marriage.* The claims of the family of the bankrupt are frequently in conflict with those of the trustee and the general body of unsecured creditors. This article reviews the most common instances of such conflict and considers the nature and adequacy of legislative and judicial attempts to resolve the competing entitlements. More specifically, it deals with some of the problems which arise on the bankruptcy of a spouse with respect to family chattels, claims against the bankrupt by the spouse (or other relative) in respect of money or property advanced to the bankrupt, and finally, the matrimonial home. For convenience, it is presumed through-out the paper that the couple are married and that it is the husband who is bankrupt.

2. OUTLINE OF BANKRUPTCY PROCEEDINGS

Before proceeding to consider the consequences of bankruptcy on family assets, it is desirable to outline the nature of bankruptcy and the course that a bankruptcy administration will usually take.

A succinct description of the nature of bankruptcy law is provided by Halsbury's Laws of England in the following terms:-

> 'Bankruptcy is a proceeding by which possession of the property of a debtor is taken for the benefit of his creditors generally by an officer appointed for the purpose, the property being realised and, subject to certain priorities, distributed rateably amongst those creditors, that is to say, the persons to whom the debtor owes money or has incurred pecuniary

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1 Dodds and MacCallum, 'Bankruptcy and Matrimonial Claims' (1986) 15 MULR 211. See also Hand, 'Bankruptcy and The Family Home' (1983) 47 The Conveyancer 219; Palley, 'Wives, Creditors and The Matrimonial Home' (1969) 20 NILQ 132; Bennett, 'Bankruptcy and Matrimonial Assets' (1982) 132 NLJ 991.

> liabilities. In bankruptcy proceedings, the debtor obtains protection from suits by the persons to whom he has incurred debts or liabilities, subject to certain exceptions. After he has been publicly examined and his examination is concluded, he may apply for an order of discharge, by which he will be released from his debts and liabilities subject to certain exceptions. The grant of the discharge is discretionary, and dependent upon an assessment of the debtor's conduct, both before and during the bankruptcy proceedings.'[2]

This statement sets out clearly the three objectives of modern bankruptcy law, namely:-

(a) To Assist the Debtor

The debtor is assisted by being released from the liabilities incurred by him before his bankruptcy. The debtor, relieved from such obligations, upon his discharge from bankruptcy, may start afresh and earn his living by means of new undertakings which might otherwise have been impossible with the burden of past debts. For these undeniable advantages, however, he must pay a price. Virtually all his property is taken from him and realised for the benefit of his creditors, although he is allowed to retain the essentials, such as necessary clothing and household property, tools of the trade, professional instruments and reference books and policies of life insurance in certain circumstances.[3]

(b) To Protect Creditors

The protection of creditors is achieved by those provisions of the act which prevent the debtor from disposing of his property (to his family for instance) when bankruptcy is imminent, thereby ensuring that all the property of the bankrupt is available for the payment of creditors' claims. Also, preferential treatment of some creditors at the expense of others by the bankrupt is prevented and the proceeds of the realisation of the debtor's property are distributed amongst all the creditors in the manner prescribed by the Act. All of this is carried out and supervised by bankruptcy officials.

(c) To Benefit The Community as a Whole

The community as a whole benefits in that the debtor being allowed to make a new start does not become a charge upon the community or an anti-social element and in such circumstances, his family structure will have a greater opportunity to survive his insolvency. Also, the law of bankruptcy promotes an atmosphere of order and confidence in business relations generally for it fosters the expectation that when a misfortune occurs, a debtor's remaining assets will by and large be salvaged and distributed fairly.

Any initiative to afford greater protection to matrimonial assets must address these accepted objectives of bankruptcy law and provide compelling reasons why the present law should be changed in order to confer greater rights to the bankrupt and his on-going family.

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2 *Halsbury's Laws of England* vol 3. (4th edn 1973) para 201.
3 Refer generally the Bankruptcy Act 1966 (Cth) s116.

3. EFFECT OF BANKRUPTCY ON FAMILY PERSONAL ASSETS

(a) Introduction

The essential effect of bankruptcy is expressed in ss58(1) of the Bankruptcy Act 1966 (Cth) which states that upon a debtor becoming bankrupt 'the property of the bankrupt . . . vests forthwith in the . . . trustee' who is then concerned to realise such property for the benefit of creditors. 'The property of the bankrupt' which is divisible amongst his creditors is defined in s116. This section also provides that certain classes of property are to be excluded from the divisible property of the bankrupt. What is the rationale for the exclusion of such assets from the administration?

(b) Exempt Property

In determining the categories of exempt property, account has been taken of a) the need for rehabilitation of the bankrupt and providing him with the opportunity to resume a productive role in society; b) the consequences of insolvency upon the members of the bankrupt's family and their continued need of the communal property; and c) the fact that debts nonetheless should be paid.

With these factors in mind, the Bankruptcy Act exempts, for example, *necessary* wearing apparel and *necessary* household property such as bedding, furniture and household equipment. There is widespread agreement that a bankrupt should be entitled to retain sufficient of such items to satisfy the basic domestic needs (as a reasonable man would perceive them) of himself and his family. Any item which is not 'necessary' however, or is exceptionally elaborate and valuable should be available for the benefit of his creditors. Although not expressly recognised by the Bankruptcy Act, further concessions seem desirable where a necessary item has been seized because of its exceptional value — for example, an antique lounge. It would seem reasonable in such circumstances to allow the bankrupt from the proceeds of realisation the cost of a more appropriate and less expensive replacement.

With items of this nature, it is desirable to provide the trustee with a wide discretion as to what is 'necessary', for to establish a prescribed list of items within this category is not a feasible task and would entail the trustee in every administration undertaking a time consuming and costly inventory. Also, it is appropriate with such household items to avoid setting a monetary limit (compare with tools of trade where a $2,000 limit is prescribed), one reason being that a single amount in respect of such excluded goods fails to differentiate between a family with one child and one with ten, for example.

It is commonly the case that trustees will take a sympathetic view of the needs of the family because frequently the cost of removing such goods for sale and selling them — usually at auction — is very great in relation to their realisable value which is usually far less than their value to the debtor and his family. Clearly, the removal of such items has considerable impact on the family members who have not been responsible for the insolvency and not merely on the bankrupt. In view of such consequences, the trustees will invariably prove compassionate in their assessment. Should the trustees be perceived as unduly favouring the bankrupt and his family, there is always recourse to the Court by any creditor aggrieved by their decision.[4]

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4 s178.

Although it is not appropriate to discuss further the various categories of exempt property under ss116(2), mention should be made of the fact that that provision establishes some potentially significant exemptions from available property, including damages for personal injury or wrong done to the bankrupt or his family members, and the proceeds of certain life assurance or endowment policies provided that they have been in force for a specified time. Also the property vesting in the trustee does not include the bankrupt's income derived from personal exertion, thereby ensuring that the on-going family will benefit from any income derived by the bankrupt in such a manner.[5] However, should such income be more than adequate to meet the reasonable requirements of the bankrupt and his family, the trustee may apply to the Court for an order that part of it shall be paid by the bankrupt to the trustee and be available for distribution amongst the creditors.[6]

Finally, it has been suggested that the bankrupt's interest in his house property should be an exempt asset. This issue, together with other matters concerning the matrimonial home, will be the subject of separate consideration later in this article.

(c) Establishing Good Title Against The Trustee

It would appear trite to state that the trustee in bankruptcy does not acquire title to property which the bankrupt has ceased to own sometime before the commencement of bankruptcy. Nevertheless, the proposition merits some consideration, not least because it is an imperfect statement of the true position in law. In several instances, which will be discussed in due course, the trustee is able to impeach pre-bankruptcy transactions by which the bankrupt has divested himself of the title to property.

A further qualification of considerable importance concerns the precise nature and details of the transaction and the manner in which the bankrupt is alleged to have transferred his title to property. To be effective the transaction must involve an outright transfer of title to some other party. It is apparent therefore that should a wife, for example, assert title to any of the family personal property which would otherwise be available to the trustee, she will need to establish title in accordance with the orthodox principles of property law. And so in relation to chattels such as furniture or jewellery, the wife must show either that she originally acquired the property, or that it was transferred to her by her husband with the intent that the beneficial interest should belong to her. Moreover, the gift, in these circumstances, must be perfected either by a deed or by delivery.

The legal difficulties arising in respect of personal gifts inter vivos between husband and wife are well evidenced by *In Re Cole.*[7] In July 1945, the husband acquired a long lease of a large mansion at Hendon which he proceeded to furnish at a cost of 20,000 pounds. In due course his wife joined him. The husband met her at the station and took her to the new home. He brought her into the house, took her into a room, put his hands over her eyes and then uncovered them saying 'look'. He then accompanied her into other rooms on the ground floor where she handled certain of the articles — silk carpet and an in-laid card table;

5 s131.
6 ss131(2).
7 (1964) 1 Ch 175.

next she went upstairs and examined the rest of the house. When she came down again, the husband said: 'It's all yours'. In 1961, the husband was adjudicated bankrupt and the contents of the matrimonial home 'or their sale proceeds' were claimed by his trustee in bankruptcy. The wife sought a declaration that the contents of the house sold by her in 1962 had belonged to her and accordingly she was entitled to retain the proceeds of their sale (notwithstanding that the house and its contents remained insured in the bankrupt's name).

The essential issue was whether there was a sufficient delivery of the contents of the house to the wife to complete the gift. The issue was not without precedent for Lord Esher MR in *Bashall v Bashall*[8] was confronted with a similar problem. There, he said:-

> 'It was clear law that in order to pass property in chattels by way of gift mere words were not sufficient but there must be a delivery and this requirement was as essential in a case of husband and wife as in a case of two strangers. But a difficulty arose when them came to consider how a husband was to deliver a chattel to his wife so as to pass the property in it. The difficulty arose not from the legal relation between them but from the fact of their living together. When a husband wished to make a present of jewellery to his wife, he generally gave it into her own hands, and then it was easy to see that there was a delivery. But in the case of a horse or a carriage that would not be so. In such a case, it was true the husband might wish to make an absolute gift to his wife, but, on the other hand, he might wish to keep the horse or carriage as his own property and merely let his wife have the use of it. In an action by the wife, it was necessary for her to show that the husband had done that which amounted to a delivery.'

In the present case, the Court of Appeal found that the mere words of gift were not enough to perfect a gift of the furniture. Notwithstanding the fact that the husband brought the wife to the chattels, and that the nature of the chattels was such that handing over would not be a natural mode of transfer, and that the wife handled some of the chattels in the husband's presence, the court was of the opinion that these acts were equivocal and consistent equally with an intention of the husband to transfer the chattels to his wife or with an intention on his part to retain title but give to her the use and enjoyment of them as his wife. As Pearson LJ states:

> 'If the act in itself is equivocal — consistent equally with an intention of the husband to transfer the chattels to his wife or with an intention on his part to retain possession but give to her the use and enjoyment of the chattels as his wife — the act does not constitute delivery.'[9]

We may conclude from this decision that a wife will be well advised to ensure that a transfer of the contents of the matrimonial home is effected by her husband executing a Deed of Gift thereby at least avoiding the doubtful aspects of symbolical delivery.

8 (1894) 11 TLR 152 (CA) at 152-153.
9 Above n 7 at 192.

(d) Voluntary Settlements on Family Members

Even when the wife succeeds in establishing an effective transfer of title there are various statutory provisions to which the trustee may have recourse to recover the property so transferred. Most importantly, s120 of the Bankruptcy Act entitles a trustee in bankruptcy to avoid a 'settlement' of property if the settlor becomes bankrupt within a stipulated period from the date of settlement. All settlements, for the purpose of s120 will be voidable where the settlor becomes bankrupt within two years after the date of the settlement. Such a settlement will also be voidable by the trustee if the bankruptcy occurs at any time within five years following the date of the settlement; although where bankruptcy occurs after two years but within five years from the date of the settlement the parties claiming under the settlement may avoid the claim of the trustee if they can prove that the settlor was at the date of making the settlement able to pay all his debts without the aid of the property comprised in the settlement.[10]

Although the trustee in bankruptcy under this provision is not required to show any intention on the part of the settlor to defeat or delay his creditors, it is necessary for him to establish that the transfer of property involved a 'settlement' within the meaning of s120. This requirement has given rise to a long line of authority which supports the proposition that not every gift will amount to a settlement within the meaning of s120 (or its UK equivalent).

The foundation decision is *Re Player; ex parte Harvey*.[11] In that case, a father, the bankrupt, made within the statutory period provided by the section, a gift of money to his son to enable him to purchase stock in trade and to commence carrying on a business. The trustee claimed to trace the funds provided by the father and to recover the whole of the assets of the business of the son but giving credit to the son for the value of his own initial contribution.

Matthew J rejected the claim saying:-

> 'the Act of Parliament never intended to give such a right as the trustee claims, because if transactions of this kind, which certainly are not morally wrong are included in the operation of (the section) all gifts from a father to a son for his advancement in life could be recovered from the unfortunate son at any time within (the statutory period) if the father became bankrupt, unless the son could show that his father was able to pay all his debts without the aid of the gift at the time it was made.'[12]

Cave J who agreed said:-

> 'The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person. Thus a purchase by the father of shares, which are registered in the son's name, and upon which the son receives the dividends, is within the statute. But where the gift is of money to be expended at once, the transaction is not, in my opinion, within . . . the Act . . .'[13]

10 ss120(2)
11 (1885) 15 QBD 682.
12 Ibid 684.
13 Ibid 687.

This decision (and others to this effect) has been followed in Australia. In *Jack v Smail*[14] a trustee sought to recover moneys saved by a wife of a bankrupt out of a house-keeping allowance made to her over a number of years. The High Court dismissed the claim, Griffith CJ and Barton J both expressly relying upon the approach taken in *Player* and the subsequent English decisions. Barton J quoted with approval the test used by Wright J in *Re Tankard*[15] namely:-

> 'The retention of the property in some sense must . . . be contemplated and not its immediate alienation or consumption'.

On the other hand in *Williams v Lloyd*[16] the trustee successfully avoided the transfer of the beneficial interest in a mortgage to the daughter of the bankrupt and the transfer of a sum of money to a savings bank account held in the names of the bankrupt's wife and daughter. Starke J said:-

> A settlement of property is a conveyance or transfer of property and voluntary settlements to which this section applies are only such conveyances or transfers of property as are in the nature of settlements . . . where the donor contemplates the retention of the property by the donee, either in its original form or in such a form that it can be traced'.[17]

Dixon J added:-

> 'but it does not mean that there shall be any restriction on the donee's power of disposal, but merely that the retention of the property in some sense must be contemplated and not its immediate dissipation or consumption'.[18]

Recently in *Re Ward*[19] Wilcox J took the opportunity to question the desirability of adhering to traditional tests pointing out that ss120(8), introduced to the Act in 1966, offers a new and wider definition of settlement which no longer has the connotation of permanent benefit suggested by the terms 'conveyance or transfer' of property. That provision now states that 'settlement of property includes any disposition of property'. Wilcox J was of the opinion that

> 'It ought to be enough that the relevant transaction is a deliberate disposition of a capital fund. It ought to be immaterial whether the settlor contemplates that the capital fund will be held indefinitely *in specie*, converted to some other form of capital, or spent by the settlee'.[20]

These observations of Wilcox J were merely obiter for he found that in any event the disposition of property in the case before him met the test of permanency specified by earlier authorities.

Nonetheless, the requirement of permanency was questioned and the fact that an outright gift to family members is not, on established authority, a settlement within the meaning of s120 of the Bankruptcy Act has given rise to concern. It is difficult for example to see the rationality of a distinction between, say, the provision of an outright gift of a

14 (1905) 2 CLR 684.
15 (1899) 2 QB 57, 59.
16 (1904) 50 CLR 341.
17 Ibid 364.
18 Ibid 375.
19 (1984) 55 ALR 395.
20 Ibid 401.

capital sum to enable a son to commence business on his own account (which is *not* caught by s120), and the transfer of a savings bank account to a son to enable him to purchase shares in his name and upon which he is to receive dividends (which has been held to be caught by s120). It is for reasons for this kind that insolvency practitioners have argued that it is reasonable to expect that s120 would embrace the most obvious of voluntary settlements of property — the outright gift, particularly of money to family members.

It is suggested however, that should the law encompass such outright gifts, it will need to address the hardship which such a rule will inevitably cause. For, given the nature of an outright gift, it will often be immediately consumed. To subsequently demand repayment will give rise in many cases to hardship on the innocent recipient. (It is important to emphasize that these comments are confined to the 'good faith' recipient and not a family member who is aware or ought reasonably to have been aware that the gift would have the effect of defeating the claims of the settlor's creditors). In the event that the courts allow the provisions to apply to such outright gifts, consideration will need to be given to the amendment of the provision to ensure, for example, that such gifts are only recoverable where the proceeds remain in the recipient's hands at the time of the bankruptcy or in such a form that it can be traced. In the event that the proceeds can be traced to the purchase of a specific asset, in an appropriate case a statutory lien over the asset could be provided for so as to ensure that on the subsequent realisation of the asset, the amount of the original settlement would be payable to the trustee from the sale proceeds.

One further matter under s120 arises when the recipient of property seeks to establish that valuable consideration was provided thereby avoiding the nature of a 'voluntary' settlement, s120 being expressed so as to exclude any settlement which is made in favour of a purchaser in good faith and for valuable consideration. The purchase of property at a price provides the most straightforward example, and such a sale may be validly concluded between members of the same family, for instance between father and son.[21] However, the term 'purchaser for valuable consideration' is employed in the real commercial sense, rather than in a conveyancing sense and ultimately, the courts, in considering the validity of any alleged purchase, shall have regard to the fact that s120 is intended to prevent properties from being put in the hands of relatives to escape the claims of creditors.

This judicial attitude can be observed in *Barton v The Official Receiver.*[22] The Official Receiver was the trustee in the bankruptcy of Thomas Barton, whose estate was sequestrated on the 23rd August 1974. The Official Receiver instituted proceedings seeking a declaration that a payment of $170,000 made on the 14th April 1973 by the bankrupt to the bankrupt's uncle, Terrence Barton, was void as against him by reason of ss120(1). The recipient had promised to repay the amount on the expiration of 20 years. The loan was unsecured and interest at the rate of 4.25% per annum was payable at 5 yearly rests. It was not disputed that the payment was a settlement 'within the meaning of s120'. It was

21 *Re Denny* [1919] 1 KB 583.
22 (1986) 66 ALR 355.

however, contended that the settlement was in favour of a purchaser for valuable consideration given the terms of repayment associated with the advance. The High Court dismissed the argument holding that

> 'a beneficiary under a settlement is not a purchaser within the meaning of the section unless he has given such valuable consideration as is sufficient in all the circumstances to make him a buyer in a commercial sense . . . We would therefore accept that a 'purchaser for valuable consideration' within the meaning of s120(1) is one who has given consideration for his purchase which has a real and substantial value, and not one which is merely nominal or trivial or colourable . . . Having regard to the very substantial size of the loan, the fact that it was unsecured, that it was made for a term of 20 years, that no part of the principal was repayable until the appellant was 82 years of age, his modest means, the fact that no interest was payable until 5 years had elapsed and then at a low rate of 4.25% per annum, and the effect of inflation, the finding that the appellant was not a 'purchaser for valuation consideration' within the meaning of s120(1) of the Act must be affirmed.'[23]

It can be seen from the foregoing operation of s120 that Australian Courts will continue to recognise that we are concerned with social legislation with an underlying principle that 'persons must be just before they are generous'[24] and must not confer liberalities upon those to whom they are well-disposed, where this must take place at the ultimate expense of creditors whose debts remain unpaid.

(e) Fraudulent Dispositions to Family Members

A further ground for the avoidance of a transfer of family personal assets is provided by s121 of the Bankruptcy Act which states that a disposition of property made with intent to defraud creditors shall, if the person making the disposition subsequently becomes a bankrupt, be void as against the trustee in bankruptcy.

For a transaction to come within the terms of this provision, the intent to defraud creditors — which in this context means to delay, hinder or defeat the lawful claims of creditors — must be established. Actual fraud, that is an actual intention to defeat or delay creditors, on the part of both assignor and assignee must be established, and whether the existence of such an intent should be inferred from the circumstances will be a question of fact in each case.[25] Most significantly, s121 does not operate within the prescribed statutory time limits (compare with s120) providing the trustee with potential to avoid long standing dispositions. For instance, s121 may apply to the case where one spouse, fearing insolvency, or about to enter a risky commercial venture, settles his or her assets on a trustee in respect of which trust the settlor's family are the principal beneficiaries. In such circumstances where the spouse subsequently becomes bankrupt — albeit several years after the settlement — the trustee in bankruptcy will be in a position to avoid the settlement provided he is able to satisfy the court that the trust was created as

23 Ibid 362.
24 *Freeman v Pope* (1870) 5 Ch 538 at 540.
25 *Re Barnes; Ex parte Stapleton* (1961) 19 ABC 126 at 131.

a result of the settlor's intention to defeat the claims of his or her future creditors.

> 'The principle . . . is that a man is not entitled to go into a hazardous business and immediately before doing so settle all his property voluntarily, the object being this:- 'if I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss'. . . . the object of the settlor was to put his propery out of the reach of his future creditors. He contemplated engaging in this new trade and he wanted to preserve his property from his future creditors. That cannot be done by a voluntary settlement'.[26]

The operation of s121 in respect of family personal assets is well illustrated by the decision in *Official Receiver v Marchiori.*[27] The Official Receiver applied for orders under s121 setting aside the transfer by the bankrupt of a motor vehicle to his daughter. At the time of the transfer, the bankrupt was receiving only $322.00 per fortnight by way of sickness benefits and had actual monthly commitments of about $700.00. About one month after the transfer, the bankrupt became a bankrupt on his own petition. The bankrupt's statement of affairs did not disclose the existence of the motor vehicle. At the time of the transfer, the daughter was a school girl aged 16 years, had no license and no source of income. The court found that the bankrupt had made the disposition of the motor vehicle to his daughter expressly for the purpose and with the intention of defrauding his creditors. The transaction was only capable of explanation on the basis that the bankrupt wished to retain the benefits of ownership and use the vehicle, whilst at the same time placing the assets beyond the reach of his creditors. The court also found on the facts that the daughter was aware of the financial difficulties of the bankrupt and appreciated the bankrupt's reasons for the transfer of ownership of the vehicle (thereby preventing the operation of a 'good faith' defence).

4. THE MATRIMONIAL HOME

(a) Introduction

The house in which a debtor is living with his family, (or, more accurately, the residual value of such a house after the repayment of the mortgage debt) is frequently the only substantial asset available for distribution amongst the bankrupt's creditors and is often the subject of conflict between the trustee and the bankrupt's family. As the question of realising this asset may be of such importance to the creditors and the bankrupt's family, it is appropriate to deal with this topic separately from the general treatment of the bankrupt's property divisible amongst his creditors.

A shortage of domestic accommodation has become a persistent feature of modern times. Houses for rent are particularly scarce and if one is unable to secure Housing Trust accommodation, rent payable is a high cost. Most people find it necessary or financially advantageous to buy freehold. However, prices are high and loans on mortgage — a necessity for most — are correspondingly great and not always readily available.

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26 *Ex parte Russell* (1882) 19 Ch Div 588 at 598.
27 (1983) 69 FLR 290.

Changing house therefore is not easy and to buy a house without the proceeds from the sale of another is even more difficult.

Eviction from the family home without recourse to its sale proceeds will often be a disaster, not only for the bankrupt himself, but also for those dependents who are living with him. It is therefore crucial to identify the proprietary rights of the bankrupt's spouse, which will in turn determine a trustee's rights of possession and sale of the family home.

(b) Determining the Extent of the Bankrupt's Interest

(1) *Where the Bankrupt is the Sole Registered Proprietor*

In cases where the bankrupt is sole registered proprietor, a spouse may nevertheless establish an equitable interest in the home by virtue of a resulting or constructive trust. A resulting trust arises from direct financial contributions to the purchase price. A constructive trust has traditionally been based on the parties' actual intention to create a trust, that intention being capable of manifestation in a variety of ways by words or conduct, including financial contributions to the property.[28] The most recent decisions of the High Court of Australia in this field suggest a different approach to the constructive trust : one based, irrespective of intention, on the unconscionable retention of contributions made to a joint relationship.[29]

The inter-action of trust principles and bankruptcy law is well illustrated by *Re Densham.*[30] In this case, the bankrupt and his wife were married in November 1970. Before that date, they had lived together in rented premises intending to marry when they could buy a house. In January 1969 the wife commenced to work, earning approximately 10 pounds per week. The husband gave her 30 pounds per week house keeping allowance. From this total of 40 pounds she saved 10 pounds per week for the deposit on a house. They regarded it as joint savings. In October 1970 they bought a house for 5,650 pounds. The wife withdrew from their joint savings the sum of 565 pounds required for the deposit, the balance of the purchase price being raised on mortgage. The fact that both parties treated their savings as joint, and also letters written shortly before the contract was signed, indicated that they regarded the purchase of the new house as a joint purchase. The purchase of the house was completed in November 1970 whereupon it was transferred into the *sole* name of the husband. In January 1974 the husband was adjudicated bankrupt. A statement of affairs showed the house as being his only substantial asset. The wife applied in the bankruptcy proceedings for a declaration that the husband held the house on trust for herself and the trustee in bankruptcy as tenants in common in equal shares.

In the first instance, Goff J determined whether the husband became a constructive trustee of the house so as to give effect to the understanding between husband and wife. He states:

> 'on this aspect of the matter . . . the law is settled by the decision in *Gissing*, the effect of which I take to be as follows.

28 *Pettitt v Pettitt* [1970] AC 477; *Gissing v Gissing* [1971] AC 886.

29 *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 62 ALJR 29.

30 (1975) 1 WLR 1519.

> If the parties have not in fact agreed about the ownership, the court cannot make an agreement for them and give them such interest as it feels they would have determined upon had they thought about it or which the court thinks fair in the circumstances. On the other hand, the court may infer from the circumstances and the conduct of the parties . . . that there was an agreement and if it does, the court will give effect to that agreement. On the question of fact — was there an agreement — I have no doubt at all. Both the bankrupt and the wife say they treated the savings as joint and the purchase as joint . . . However, I am not left with their oral testimony only. There is contemporary correspondence which is in my judgment conclusive.'[31]

Goff J then considered whether the agreement giving rise to a constructive trust could be challenged under the Bankruptcy Act so as to deprive the wife of her beneficial interest which he found existed in fact and was otherwise good in equity. He was concerned in particular with the operation of the UK equivalent of s120 stating:-

> 'The trustee has to show that there was a settlement . . . if he succeeds the wife can escape only if she brings the case within the proviso at the end of the section and there the onus rests on her.
>
> Now in my judgment, it is clear on the facts that apart from the agreement which I have found, her share on any footing must be less than half and therefore the agreement to give her joint ownership must be a settlement within the section.'[32]

Goff J concluded that the Bankruptcy Act operated in such a way that the agreement between husband and wife is a voidable settlement if the wife by means of constructive trust acquires joint ownership on a footing equal with her husband and yet has not made a contribution to the purchase price equal to this magnitude. And so in *Densham* where it was accepted as against the husband that the wife was entitled by virtue of an agreement to a half share in the matrimonial home, her relevant contributions only sufficed to justify a one-ninth share and only that one-ninth share was excluded from the application of the section for it was only to that extent that the wife was a purchaser of her interest in good faith and for valuable consideration.

(2) *Where the Bankrupt's Spouse is the Sole Registered Proprietor*

In some cases, the trustee will consider setting aside the title of the bankrupt's spouse notwithstanding that she is the sole registered proprietor. *Re a Debtor*[33] is an example. Early in 1961 the bankrupt's wife entered into a contract to purchase a house and in due course it was conveyed to her. Although she was the sole purchaser under the contract, the greater part of the purchase price was in fact provided by an insurance company on mortgage (the bankrupt and his wife were both parties to the mortgage) with the balance of the purchase price being paid by the husband. The husband was made bankrupt in December

31 Ibid 1524.
32 Ibid 1526.
33 [1965] 3 All ER 453.

1961. Until then he had paid all the monthly instalments under the mortgage. The Court held that the conveyance of the house to the wife was a settlement within the terms of the UK equivalent of s120. Stamp J stated:-

> 'I cannot hold that [s120] may be defeated by the conveyancing machinery adopted for carrying out a transaction . . . The fact that Mrs Morrison's was the hand that signed the contract, did not in my judgment affect the matter and the bankrupt did, in my judgment, settle the property in favour of his wife.'[34]

Note that here unlike in *Densham* the wife did not contribute at all to the purchase price and as a result, she was unable to claim any proportion of the sale proceeds on the basis of a 'purchaser for valuable consideration' within the terms (of s120) of the Bankruptcy Act.

Similar decisions have been made in cases where the husband before his bankruptcy, transferred his interest (whether it be sole or joint) in the house property to his spouse with the result that at the date of bankruptcy, the spouse is the sole registered proprietor. Again the trustee will be concerned to avoid this conveyance under Bankruptcy Act provisions.

Re Windle[35] illustrates the situation. Here there was a transfer by the bankrupt of his marital home (in which he was the sole registered proprietor) 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 (s120) of the Bankruptcy Act. It appeared that the spouses had previously 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 the Act with the result that the settlement was void as against the trustee.

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 purchase for valuation consideration, he considered nonetheless that the claimant should be a person who, in a commercial sense, provides a quid pro quo which he found did not arise in these circumstances.[36]

In such cases however, the trustee will be required to give credit for any mortgage repayments made by the wife.[37] Also not only will such dealings invariably give rise to a voluntary settlement within the terms of s120 (as occurred in *Windle*[38]) but further, they may often be caught by s121 of the Bankruptcy Act as a fraudulent disposition carried out with the intent to defeat the claims of existing or future creditors by endeavouring to put the house property beyond bankruptcy jurisdiction.

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34 Ibid 457.
35 [1975] 1 WLR 1628.
36 Ibid 1637.
37 See *Leake v Bruzzi* (1974) 2 All ER 1196 for a statement of the applicable principles.
38 Above n 35.

(3) *Where the Bankrupt and his Spouse are Joint Owners*

Most commonly today the husband and wife buy a house in joint names holding it as joint tenants. Both will often contribute to the purchase moneys, although not necessarily in equal shares. Should the husband become bankrupt, the wife will probably assume that half the house is hers notwithstanding the unequal (if any) contribution to the purchase moneys.

The equitable rules relating to such cases were recently considered by the High Court in *Calverley v Green*.[39] For present purposes it is sufficient to state them as follows. Where, on a purchase, a property is conveyed to two persons whether as joint tenants or tenants in common, and one of those persons has provided the whole or a greater proportion of the purchase money, the property is presumed to be held on resulting trust for that person who may, for convenience be described as 'the real purchaser'. However, a resulting trust will not arise if the relationship between the real purchaser and the other transferee is such as to raise a presumption that the transfer was intended as an advancement, or in other words, a presumption that the transferee should take a beneficial interest. Where both transferees have contributed to the purchase money (although in unequal shares), the intentions of both are material, but where only one has provided the money it is his or her intention alone that is to be ascertained. The evidence admissible to establish the intention of the real purchaser will comprise 'the acts and declarations of the parties before or at a time of the purchase . . . or so immediately thereafter as to constitute a part of the transaction'.[40]

In view of the operation of the presumption of advancement, should the husband subsequently become bankrupt, the wife will be concerned to establish that half the house is hers. But as already observed the provisions of s120 of the Bankruptcy Act enable the trustee to avoid certain settlements made in the prescribed period preceding bankruptcy. The effect of this section means the wife will only receive a proportion of the proceeds in accordance with what she has paid (if any) notwithstanding that in the ordinary course of events, the presumption of advancement may operate so as to establish for the wife an interest in the property equal to that of her husband's.

In such circumstances, if the bankruptcy occurs in the two years after the purchase of the house, ss120(1) operates so as to establish a voluntary settlement which may be avoided by the trustee. If the bankruptcy took place after the expiration of two years but within five years after the purchase of the house the wife may be able to avoid the provisions of s120 by demonstrating that her husband was solvent at the time of the purchase.[41]

(c) Realising the Bankrupt's Interest in the Matrimonial Home

Once it is established that the wife has a proprietary interest in the matrimonial home (even if it is less than she thought) a new and separate issue arises: whether she has any right thereby to continue in occupation of the house.

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39 (1984) 56 ALR 483.
40 *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 365.
41 ss120(2).

The issue confronting the trustee and the wife in such circumstances was recognised in *Re Turner*[42] in the following terms:-

> 'on the one hand, the wife as part owner of the house asks: why should she as co-owner be turned out merely because her husband, the other co-owner is bankrupt? On the other hand, the trustee in bankruptcy says he is not only entitled to realise the husband's interest but is bound by statute to do so'.[43] In the normal course of events, the trustee should extend to the wife the opportunity to put forward realistic proposals for the purchase of the bankrupt's interest from him. However, where no such proposals from the wife are forthcoming, the trustee in order to enhance the chance of sale of his interest and to obtain the optimum price will invariably prefer to sell the whole of the property and divide the net proceeds between himself as trustee and the wife.
>
> In the event that the wife is unwilling to join in a sale, the trustee may apply to the Court pursuant to partition provisions in the Law of Property Act 1936 (SA) to obtain an order for sale of the jointly held property. Under these provisions[44] the Court is given a discretion to order a sale and give such other directions as may be necessary, for example an order for vacant possession where the wife is unlikely to co-operate with land agents and the like in selling the property.
>
> The guiding principle in the exercise of the court's discretion was stated by Goff J in *Re Turner* as follows:-
> 'the guiding principle . . . is not whether the trustee or the wife is being reasonable but, in all the circumstances of the case, whose voice in equity ought to prevail . . . In my judgment, weighing the two conflicting claims, that by the trustee, based on his statutory duty, gives him the stronger claim and requires me to treat his voice as the one that ought to prevail in equity'.[45]

So in that case and in subsequent cases, the fact that the trustee has a statutory duty to get in and realise the bankrupt's assets has been held to be a weightier consideration than the interests of the wife and children in staying in the home unless there are exceptional circumstances.

Thus in *Re Bailey*[46] the court rejected the argument that in cases where dependent children were involved, the welfare of the children was the over-riding factor. Appropriate as such an argument is in cases where only husband and wife are concerned, where a bankruptcy occurs, the interests of the children are only 'incidentally to be taken into account'. Walton J stated;

> 'counsel for the wife submitted . . . the children's welfare is now the over-riding factor . . . all the cases to which he referred on that topic are cases in which the competing voices are those of husband and wife. It probably is perfectly correct now to say that the children's welfare is, if not the over-riding factor,

42 [1975] 1 All ER 5.
43 Ibid 7.
44 ss69(2).
45 Above n 42 at 7.
46 [1977] 2 All ER 26.

> certainly a very big factor to be taken into account in such cases but when one has cases which are between the trustee in bankruptcy and an existing spouse of the bankrupt, then the situation is vastly different'.[47]

It is worthwhile emphasising that the court in *Bailey* recognised that the situation of children — although incidentally to be taken into consideration — was nonetheless not to be ignored. Walton J offered the example of a house which had been specially adapted to suit the needs of a handicapped child suggesting that this was obviously a special circumstance and that undoubtedly the court would hesitate long before making an immediate order for sale. Similarly in *Re Lowrie*[48], Walton J stated;-

> 'one can very well see the case . . . put up where the children are going to be interrupted at a sensitive stage in their schooling, for example . . . when taking their A levels. There the court, I think, has always hitherto been sympathetic if it can be shown that the eviction will necessarily entail the children having to change schools. The court will always be sympathetic to the extent of allowing a year or something of that nature before the order for sale is carried out'.[49]

In this particular case, there were young pre-school children living in the house and although they and the wife of the bankrupt would suffer hardship as a result of being rendered homeless, such circumstances were seen by the Court as regrettably 'of every-day incidence and occurrence in this type of jurisdiction' and as such, were not 'exceptional circumstances'[50] such as to allow their (and the bankrupt's) continued occupation of the house.

Re Holliday[51] seems to be the only reported case in which the application of the trustee has not succeeded and the making of an order for sale has been postponed for any significant length of time. The facts in *Holliday* were that the marriage had broken down and the wife had petitioned for a divorce. On the same day that she gave notice of intention to proceed with her application for a property adjustment order, her husband filed his own petition in bankruptcy at a time when none of his creditors appeared to be pressing. The wife tried to have the bankruptcy annulled on the ground that it was an abuse of the process of the court as its real purpose was to prevent her obtaining a property adjustment order. She was unsuccessful in this claim, in view of the unavoidable fact that her husband was insolvent, but succeeded in persuading the Court of Appeal to postpone the sale requested by the trustee in bankruptcy for five years by which time the two eldest children would be over 17 years and the court thought that she would be in a better position to obtain housing. The court was clearly influenced by the fact that it was the husband's own petition which resulted in his bankruptcy and that his creditors had not, despite his insolvency, been pressing him for payment. Moreover, postponement of sale would not, it seems, present great hardship to his creditors, the only creditors being

47 Ibid 31.
48 [1981] 3 All ER 353.
49 Ibid 356.
50 Ibid 358.
51 [1980] 3 All ER 385.

his former solicitors to whom he owed approximately 1,260 pounds and a bank to whom he owed approximately 5,000 pounds. At the end of the hearing the house had been valued at about 34,000 pounds, subject to a mortgage of 6,864 pounds.

The court was plainly impressed by the position of the wife in these circumstances. Buckley LJ said:-

> 'In these circumstances, the wife finds herself saddled with the burden of providing a proper home for her children, which she would be incapable of doing from her own resources, taking into account the value of her one-half share of the equity in the (former matrimonial home in which she was living). That situation is attributable to the former conduct of the bankrupt in leaving the wife and family and going to make a home for himself with another lady. This seems to me to afford the wife strong and justifiable grounds for saying that it really would be unfair then at this juncture and in these circumstances, to enforce the sale.'[52]

The exceptional nature of *Re Holliday* was referred to by Walton J in *Re Lowrie* when he stated:-

> 'in exceptional circumstances, there is no doubt that the trustee's voice will not be allowed to prevail . . . an example of just such a situation is to be found in *Re Holliday* where the petition in bankruptcy had been presented by the husband himself as a tactical move . . . to avoid a transfer of property order in favour of his wife . . . at a time when no creditors whatsoever were pressing and he was in a position in the course of a year or so out of a very good income to discharge whatever debts he had. He had gone off leaving the wife in the matrimonial home, which was the subject matter of application, with responsibility for all the children on her own. One can scarcely, I think, imagine a more exceptional set of facts and the court gave effect to those exceptional facts.'[53]

In view of the clear direction from the case law (expressed by Walton J in *Re Bailey* as 'This may be yet another case where the sins of the father have to be visited on the children, but that is the way in which the world is constructed, and one must be just before one is generous.'[54]) — one may suggest that the trustee's application for an order for sale will prevail unless the wife can establish substantial and exceptional hardship for herself or the children and that the hardship will be ameliorated by a reasonably brief period of postponement. The prospect of the bankrupt and his wife continuing to occupy the home which may be the only major asset in the estate will be of great concern to the unpaid creditors, and the courts have consistently endeavoured to confine such occurrences to the most exceptional cases.

In its recent Discussion Paper the Australia Law Reform Commission, in putting forward proposals for reform of insolvency law, has made several recommendations relating to the disposal of the matrimonial

52 Ibid 397.
53 Above n 48 at 355-356.
54 Above n 46 at 32.

residence.[55] Their recommendations offer some slight strengthening of the position of the wife and children. In proposing that provision should be made for a postponement of sale of the matrimonial residence, the Commission suggests that such a provision might have the following features:-

— there should be no entitlement to obtain possession and proceed to sale of a family home in the 6 months' period immediately following the commencement of the bankruptcy;
— prescribed dependents of the bankrupt occupying the matrimonial residence may apply for an order extending the minimum statutory period. Factors to be taken into account by the Court in exercising its discretion are as follows:-
  — the welfare of dependent children, having regard to their ages and needs, the desirability of avoiding unnecessary emotional damage or interruption of their schooling;
  — the interests of the community in keeping the family together in suitable accommodation;
  — the means available to the family, including the debtor, to find alternative accommodation;
  — any offer by the debtor to move if given help in rehousing the family;
  — the amount likely to be realised by the sale of the debtor's interest in the family home in relation to the disturbance caused;
  — the need for the family to remain in a specific area;
  — any personal hardship caused to an individual creditor by a proposed postponement;
  — whether the relevant members of the bankrupt family would be able to remain in occupation of the property despite the realisation of the bankrupt's interest.

It is apparent that although the Commission has recognised that postponing the sale of a residence will lead to delays in winding up of the affairs of a bankrupt's estate, nonetheless the major social policy considerations such as avoidance of family stress and preservation of access to the neighbourhood, places of employment and schools have led the Commission to favour the introduction of a postponement of sale provision.

A more radical reform which has not found favour with Anglo-Australian law-makers is the suggestion that the family home should be exempted up to a certain value from the provisions of bankruptcy law. Anglo-Australian bankruptcy law provides far less protection for the position of an insolvent debtor's family than the laws of many other common law jurisdictions under which the family home may be exempted from legal execution. For instance, in the United States[56] under federal law, if the home is sold pursuant to execution of a judgment or as a result of bankruptcy, a certain portion of the proceeds is exempt from the claims of creditors.

Such innovations are unlikely to be introduced into this country in view of the widespread opinion that although some discretion may be called

55 Australian Law Reform Commission, *General Insolvency Inquiry* (Discussion Paper No 32, 1987) paras 608-613.

56 US CA 522 introduced by Bankruptcy Amendment Act 1978. Refer generally Shiff and Waters, 'Bankruptcy and Family Law; First Come, First Served?' (1985) 8 UNSW LJ 40.

for in the timing of sale, the house property ought, nonetheless, remain an asset available to the trustee for the benefit of unpaid creditors. Not only is the prospect of an exempt interest in the family home seen as having unreasonable consequences for creditors, but in an indirect way, such provision would be a fetter on the freedom of all property owners to use the full value of their home to obtain credit. Lenders would be reluctant to lend at present levels where the family home is the main asset or would be obliged to charge higher rates of interest in view of the increased risk of an unsecured advance. Most home owners do not go bankrupt, and whether such a reform would be advisable depends, to some extent, upon whether the drastic consequences for the families of those who do become bankrupt, are such as to outweight the freedom of those who do not.

Shiff and Waters[57] recognise other difficulties associated with an exemption of the family home to a certain value. They state that such exemptions

> 'provide a very rough social measure of a debtor's needs or the needs of a spouse or family . . . At what level should the exemption be set? The more substantial the sum, the greater the infringement of the rights of unsecured creditors . . . A sum set uniformly throughout Australia would not reflect the enormous differences from one State to another in the cost of private housing or the availability of public or private rented accommodation. A further problem is the basis of eligibility for the exemption. Not all spouses are financially dependent and for them the protected interest will be a welcome but unrequired 'windfall' . . . Also to be considered is the extent to which . . . the home itself has been acquired or improved with funds or benefits provided by unsecured creditors'.[58]

The authors conclude (in similar terms to the Australian Law Reform Commission proposals) that because an exempt interest in the home is not designed to save the home from sale, but rather to compensate for loss of housing equity by means of cash payment, it would seem more appropriate to have reform directed at preserving a roof over the bankrupt's family by means of restraints upon sale. This may be seen as a more effective way of providing for the more needy cases.

5. THE SPOUSE AS DEFERRED CREDITOR

Prior to March 1988 the Bankruptcy Act 1966 provided in s111 that any money or other property of the spouse of the bankrupt lent or made available by the spouse to the bankrupt was to be treated as assets of the bankrupt's estate, and further that the spouse was not entitled to any dividend as a creditor in respect of that money or other property until all claims of other creditors had been satisfied. In other words the claim of a spouse to prove in the bankruptcy of his or her spouse was postponed to the claims of other creditors.

The Bankruptcy Amendment Act 1987, introduced into Federal Parliament on 15 September 1987 and assented to on 16 December 1987,

57 Ibid.
58 Ibid 60-61.

made amendments to the Bankruptcy Act in response to the changing circumstances of insolvency administrations in the 1980's, including the repeal of the foresaid s111. The amendment which resulted in the repeal of this provision was proclaimed to commence on 1 March 1988.

The reason offered for the repeal of s111 is as follows:

> 's111 postpones the claims of spouse creditors to those of other creditors. The philosophy which underlies s111, that the marriage partnership should be treated analogously to a commercial partnership and that therefore a spouse creditor should not compete against other creditors, does not reflect the erosion in law and in fact of the former legal and economic unity of spouses. This philosophy is outmoded and there is therefore no justification in retaining the provision.'[59]

It is understandable that a spouse should not be treated any differently at law than others who have dealt with the bankrupt and should not have his or her claim postponed on the basis of marital status. Nonetheless, in many bankruptcies the advances of money or property by a spouse to the now bankrupt spouse will be considerably different in nature to dealings between the bankrupt and outsiders. In particular such dealings between the spouse and the bankrupt may give rise to the question whether the advances made amounted to a contribution to the capital of the bankrupt's enterprise.

No doubt there will be cases where money or property advanced by a spouse to the bankrupt will be the subject of comprehensive documentation setting out the terms of advance by the spouse and the bankrupt's repayment obligations including repayment of interest. However, in many cases the spouse will have advanced money or property to the bankrupt spouse without any agreement for repayment. Such advances will most often be on the basis that each spouse stands to benefit from the success of the bankrupt spouse's activities. An advance of that nature may be seen as capital introduced by the spouse. In fact this concept has in the past been utilised at common law to defer the claims of parties other than the spouse of a bankrupt (it having been unnecessary to employ this reasoning in the case of a spouse in view of the operation of s111), such as a de facto spouse or a father advancing money to a son.

In *Re Meade*,[60] for instance, although not married to the bankrupt, the applicant involved lived with him. She had advanced to the bankrupt sums which were used by him to establish a residential riding academy. There was no agreement between the parties for the repayment of the monies, the payment of any interest thereon, or the giving of any security or to the sharing of profits. The enterprise, however, was intended to provide her as well as the bankrupt with a home and a living. After bankruptcy the applicant lodged a proof of debt claiming the money advanced had been a loan. In rejecting her claim Romer J stated:

> 'It seems to me impossible to regard the appellant as a creditor of the bankrupt . . . in respect of the monies which she advanced for the purpose of the riding academy and, unless she was such a creditor, she cannot prove in competition with

59 Bankruptcy Act Amendment Bill, Explanatory Memorandum (1987) 243.
60 (1951) Ch 774.

> people who are. If she was, in fact, such a creditor, she could have sued the bankrupt for the return of the monies at any time prior to bankruptcy. Her evidence, however, shows how remote from reality any conception such as this would be. It shows that the enterprise into which her money went was intended to provide both him and her with a home and with a living, and also, if it proved successful, possibly with an occupation for her daughter and she admitted that no word was ever said with regard to repaying sums which she advanced in furtherance of this enterprise from time to time. The truth of the matter is that the whole foundation of the argument for Counsel for the appellant is undermined by the realisation that the monies which she advanced did not constitute, and were never intended to constitute a loan at all. They represented her contribution to the capital of a business enterprise in which she plainly had an interest herself, and, in my judgment, she is no more entitled, as against the ordinary creditors of the business, to prove in respect of her contribution than the proprietor is entitled to prove in respect of his'.[61]

This decision is a realistic and useful one given the nature of the capital investment, the connection between the parties involved and the nature of the return on that investment. Moreover, in view of its commercial justification, it is also consistent with the principle of the separate legal and economic identity of spouses which has emerged principally in matrimonial claims between the spouses themselves.

It is felt that the commercial community will be greatly concerned when it begins to learn of the repeal of s111. It has always been widely believed that the deferral of a spouse's claim on the basis that marriage was a form of partnership was justified. Such a notion was recognised by the United Kingdom Cork Report when the committee under that Report stated:

> 'We are attracted by the argument that as each spouse will normally stand to benefit from the success of a business carried on by the other, property provided by one to the other for use in his or her business should be regarded, in effect, as if it were capital introduced by a partner and available for the discharge of the liabilities of the business in the event of insolvency. We regard it not only as satisfactory, but as necessary that the spouses should for business purposes and in relation to the insolvency be treated as partners'.[62]

Given that s111 has been repealed it is anticipated that we shall see 'partnership' arguments of the kind raised in *Re Meade* in an attempt to characterise a loan from a spouse as a contribution to the capital of a business enterprise which may only be repaid after trade creditors have been settled in full.

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61 Ibid 783.

62 Great Britain, Insolvency Law Review Committee (Cork, Chairman) *Insolvency Law and Practice* (1982).

6. CONCLUSION

When one party to a marriage becomes bankrupt, the rights of the bankrupt and his ongoing family are frequently in conflict with those of the trustee and the general body of creditors. There can be no winners in bankruptcy. All parties involved — whether it be the bankrupt himself, his family or creditors — must suffer hardship and loss as a result of the financial collapse. This article has discussed the manner in which the legislature and the courts have sought to allocate the burden of loss between the bankrupt, his ongoing family and the creditors.

It is apparent that there is no easy solution in this exercise. The trustee is under a statutory duty to realise the bankrupt's assets on behalf of creditors, who want their money as soon as possible. The family on the other hand wishes to retain those assets which are necessary to maintain a satisfactory standard of living. Their respective claims are difficult to balance or evaluate since their respective positions are so widely disparate and are not amenable to ready comparison. It therefore seems inevitable that the law-makers will continue to address these competing interests on the basis of 'whose voice in equity shall prevail'[63] with the perception of fairness and reasonableness being influenced by social, economic and political considerations as they emerge from time to time.

63 *Re Bailey,* above n 46 per Walton J at 30.