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BUSTED! Property Rights in the Family Home and Insolvency

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CHAMBERS

Topics

1. Why is bankruptcy relevant to matrimonial finance and private client practitioners?
2. Status of a non-bankrupt spouse / family member in bankruptcy proceedings.
3. Status of the bankrupt or prospective bankrupt in matrimonial and inheritance proceedings.
4. Status of the Trustee in Bankruptcy in Family Proceedings.
5. Rights and Causes of Action available to the non-bankrupt spouse.
6. What occurs when bankrupt is discharged?

PUMP COURT CHAMBERS

Why is bankruptcy relevant to matrimonial finance and private client practitioners? (1)

- Serious financial difficulties and marriage breakdown go hand in hand.
- Bankruptcy law is historically hostile to position of spouse and relatives of bankrupt – bankruptcy legislation is framed to prevent property being put into hands of relatives to the disadvantage of creditors - *Debtor, A, Re, ex p Official Receiver, Trustee of the Property of Debtor v Morrison [1965] 3 All ER 453, [1965] 1 WLR 1498 per Stamp J.*
- Court is directed under s.25 MCA to have regard to financial needs, obligations and responsibilities of spouses – unsecured creditors have little confidence their interests will properly be taken into account. FR court is not there to provide for the discharge of a spouse's debts over and above the claims of the other spouse and the children - *Mullard v Mullard* (1982) 3 FLR 330, 12 Fam Law 63 CA.
- Spouses' rights under ss 23 and 24 MCA are not vested in the Trustee in Bankruptcy – *Robert v Woodall* [2016] EWHC 2987 (Ch) – FR proceedings are not property as defined under IA 1986, s.436.
- Spouses sometimes use tactical bankruptcy to avoid meeting their obligations.

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Why is bankruptcy relevant to matrimonial finance and private client practitioners? (2)

- IA 19867 s.279(1) – discharge from bankruptcy one year from the date on which it commences, unless B has failed or is failing to comply with statutory obligations to comply with the OR or his trustee, in which case discharge is suspended for a specified period or until fulfilment of a specified condition or conditions – s.279(3) & (4). Relevant as to when B can start to rebuild his life.
- Release from debts under IA 281 does not include, except to such extent and on such conditions as the bankruptcy court may direct, release of B from any bankruptcy debt arising under any order made in family proceedings or under a maintenance assessment made under CSA 1991 – s.281(5)(b) and (8) IA.
- Lump sum orders and costs in family proceedings are provable debts – IR 2016, r.14.2(c)(ii).

PUMP COURT CHAMBERS

Status of a non-bankrupt spouse / family member in bankruptcy proceedings. (1)

- Lump sum and costs orders already made but unsatisfied prior to presentation of a bankruptcy petition are provable debts in the bankruptcy, so rank for distribution of a dividend (IA 1986 ss 322-332; IR 2016 r.14.2(c)(ii)), provided the spouse with the benefit of the order submits a claim in the bankruptcy.
- After the making of a bankruptcy order, no creditor with a provable debt has any remedy against the property or person of the bankrupt in respect of that debt and they cannot bring any action / legal proceedings against B without the leave of the Court before B's discharge (IA 1986 s.285(3)), but the family liability provable debts remain enforceable after discharge – two opportunities to enforce lump sum and costs orders.
- If it is clear that there will be a surplus at the end of the administration of the bankruptcy after costs are paid (to which surplus B is entitled under s.330(5)), then the Court can make a lump sum order before the surplus becomes available – *Hellyer v Hellyer* [1996] 2 FLR 579, CA.
- *Young v Young* [2014] 2 FLR 786 – Moor J ordered that B pay W £20m lump sum plus costs of £6m after finding there would be a surplus of assets after discharge of B. Her contingent debt in the bankruptcy could be quantified. She used her creditor's voting rights calling upon the trustee to convene a meeting for his removal. He refused and sought court directions. Court ordered the meeting but on condition of payment of outstanding costs by W to the TIB (she did not comply) – *Re Scot Young, David Ingram v Michelle Young* [2014] EWHC 4315 (Ch). She, however, holding majority of the debt, could use her voting rights to remove the TIB and nominate another more to her liking (s.298(1)).

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Status of a non-bankrupt spouse / family member in bankruptcy proceedings. (2)

- Property adjustment orders under s.24(1)(a) MCA confer on the recipient spouse an equitable interest in the property at the moment when the order takes effect – upon decree absolute / nullity / final order – s.24(3) MCA – this is so even where the transfer is not to be made until sometime thereafter – *Mountney v Treharne* [2002] EWCA Civ 1174; [2003] Ch 135.
- Where final decree is made before a bankruptcy petition is presented, the bankrupt's estate takes property subject to a PAO subject to W's rights in it (s.283(5)). Likewise orders effecting the variation of any settlement take effect on the making of a final divorce order – *Harper (a bankrupt), Re, Harper v O'Reilly* [1997] 2 FLR 816; *Omielan v Omielan* [1996] 2 FLR 306, CA.
- A consent order providing for payment of a lump sum with sale of property in default of payment gave W an immediate equitable interest in the properties notwithstanding the delay in their sale – *DW v CG* [2016] EWHC 2965 (Fam).
- An FR order giving specific security creates an immediate equitable charge in favour of the recipient party (*Maclurcan v Maclurcan* (1897) 77 LT 474; *Hyde v Hyde* [1948] P 198; *Mosey v Mosey and Barker* [1956] P 26, [1955] 2 All ER 391). The same applies where a trust is imposed on a future fund to be received by the paying party (*Nunn (bankruptcy: divorce: pension rights), Re* [2014] 1 FLR 1123.
- The creation of a trust / security takes the property out of the bankrupt's estate (ss.283(3) and 283(5)).
- C.F *Turner v Avis* [2009] 1 FLR 74 – a Martin order did not provide an absolute right of occupation under s.30 FLA 1996 but still gives the other party the right to apply for a sale under TLATA, including by the TIB under s.335A IA 1986.

PUMP COURT CHAMBERS

Status of a non-bankrupt spouse / family member in bankruptcy proceedings. (3)

- *Gudmundsson v Lin* [2024] EWHC 1576 (Fam) – Peel J: H appealed against an FR order made on 4 March 2020 by HHJ Meston QC wherein he was required to transfer his 50% share of the FMH to W. On 26 February 2020 H had been made bankrupt. H did not pursue the appeal as it was overtaken by his bankruptcy, but Peel J had to set aside the order and substitute a fresh decision to ensure it was sound. Decree absolute was pronounced in April 2020. W remained in the FMH. H had concealed his bankruptcy from HHJ Meston QC as well as making incoherent financial disclosure. In his application for permission to appeal he did not mention his bankruptcy. H's concealment meant that W and the FR court could not take steps to prevent the bankruptcy. Para.25 of the judgment dealt with decisions concerning bankruptcy law. On 6 April 2020 W applied to annul the bankruptcy and applied for the annulment application to be transferred from the BPR to the FRC.
- Transfer of annulment application refused by Peel J as the application should be made to the BPC – *Arif v Anwar* [2012] EWCA Civ 986 –(although there can be a transfer by the registrar to the FRC (see para 21 of the *Arif* judgment). Annulment application dismissed on 21 April 2021.
- TIB and W entered into a dispute about W's interest in the FMH and whether it should be sold.
- On 10 April 2024 the ICC Judge dismissed W's claim she owned 100% of the FMH. W was recorded as a creditor in the bankruptcy for £290,925. If H had informed HHJ Meston QC of the bankruptcy, the order might have been made earlier so that W would have received 100% of the FMH prior to bankruptcy order. The circumstances were exceptional so the FMH should not be sold before August 2032 when the youngest child turns 18.
- Decision: W owned 50% of the FMH and if there was any surplus after the property was sold, after costs and creditors paid, W gets that surplus. He declined to upwards vary the nominal PPs order.

PUMP COURT CHAMBERS

Status of a non-bankrupt spouse / family member in bankruptcy proceedings. (4)

- *Reid-Roberts v Lin* [2026] EWHC 49 (Ch) Cawson J: Appeal and cross-appeal against ICC judge in H's bankruptcy. TIBs argued no exceptional circumstances warranting a sale of the FMH in 2032. W argued that the ICC judge should have found H transferred his beneficial interest in the FMH prior to bankruptcy via WhatsApp and email exchange per *Hudson v Hathway.* Appeals dismissed, but vacant possession of the FMH to be delivered up by 31 July 2027, as the ICC judge could find exceptional circumstances, but sale delayed for too long.
- The exceptional circumstances actually concerned HHJ Meston QC providing his judgment months after the contested FR hearing, rather than in the 3 months following it, which would have then been handed down well before the statutory demand leading to the bankruptcy petition had been served.
- The appeal court reconsidered the "appropriate balance between the interests of the creditors and the requirement to meet the costs and expenses of the bankruptcy, as against the undesirable and difficult position W and the children found themselves in" and reduced the timeframe for sale of the property by 5 years.

PUMP COURT CHAMBERS

Status of the bankrupt or prospective bankrupt in matrimonial and inheritance proceedings (1).

- Loses autonomy.
- IA 1986, s.283(1)(a) provides that the bankrupt's estate comprises all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, but s.283(1)(b) goes on to provide that the bankrupt's estate also comprises 'any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling within the preceding paragraph'.
  - any disposition of property by a person subsequently adjudged bankrupt in the period between presentation of the bankruptcy petition and the vesting of the bankrupt's estate in a trustee is void unless made at the time with the consent of the bankruptcy court or subsequently ratified (IA 1986 s.284);
  - after-acquired property (s.307);
  - receipt of sums under income payment orders or income payment agreements (s. 310 / 310A);
  - recoveries by the trustee in respect of preferences, transactions at an undervalue and excessive pension contributions (ss.339-342 and 342A-342F).
  - B's house (their or their spouse's sole or principal residence at the date of bankruptcy (s.287A(2)) ceases to be part of their estate at the end of 3 years beginning with the date of the bankruptcy – house needs to be sold or possession taken by TIB within 3 years.
  - 1 year after the date of the bankruptcy the needs of the bankrupt and their children are overridden by the needs of the TIB, save in exceptional circumstances, so any house sale is likely to be ordered notwithstanding its effect (s.336, 336(5), and see factors in s.335A which will be considered by Court in TLATA applications for orders for sale by TIB).

PUMP COURT
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Status of the bankrupt or prospective bankrupt in matrimonial and inheritance proceedings (2).

- *Pickard v Constable* [2017] EWHC 2475 (Ch): bankrupt had significant medical issues and needed to remain at home. He got a further 12 months postponement of sale but was warned he needed to produce far more cogent evidence to prevent a sale after that.
- *Grant v Baker [2016] EWHC 1782* - sale proceeds would meet the trustee's fees alone. Sale would still take place despite the bankrupt's daughter's medical needs. B was given the ability to file further evidence in 12 months' time as to his family circumstances.
- Can be subject to income protection orders providing for all income over what is necessary to meet reasonable domestic needs of B and his family to be paid to TIB (s.310(1) and (2). “Family” means the persons who are living with B and are dependent on him (s.385(1)). IPOs can extend beyond discharge for up to 3 years (s.310(6)). IP Agreements can also be made to same effect.
- Transactions at an undervalue with third parties **and** preferences – can be reversed on application by TIB within certain time limits:

PUMP COURT
CHAMBERS

Status of the bankrupt or prospective bankrupt in matrimonial and inheritance proceedings (3).

Section 341:

(1) Subject as follows, the time at which an individual enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into or the preference given—

(a) in the case of a transaction at an undervalue, at a time in the period of 5 years ending with the day of the [making of the bankruptcy application as a result of which, or (as the case may be) the presentation of the bankruptcy petition on which, the individual is made] bankrupt,

(b) in the case of a preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee), at a time in the period of 2 years ending with that day, and

(c) in any other case of a preference which is not a transaction at an undervalue, at a time in the period of 6 months ending with that day.

(2) Where an individual enters into a transaction at an undervalue or gives a preference at a time mentioned in paragraph (a), (b) or (c) of subsection (1) (not being, in the case of a transaction at an undervalue, a time less than 2 years before the end of the period mentioned in paragraph (a)), that time is not a relevant time for the purposes of sections 339 and 340 unless the individual—

(a) is insolvent at that time, or

(b) becomes insolvent in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by an individual with a person who is an associate of his (otherwise than by reason only of being his employee).

(3) For the purposes of subsection (2), an individual is insolvent if—

(a) he is unable to pay his debts as they fall due, or

(b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

PUMP COURT CHAMBERS

Status of the bankrupt or prospective bankrupt in matrimonial and inheritance proceedings (4).

- S.339(3) – Transactions at an undervalue are gifts / transactions where a prospective bankrupt receives no consideration **or where the consideration is marriage / CP**, or for consideration, the value of which is significantly less than the value of the consideration provided by the prospective bankrupt.
- If H transfers his interest in the FMH to W when he cannot pay his business debts or builds a house for her but requires no payment for so doing, then that is a vulnerable transaction at an undervalue.
- If H repays a loan to a relative or gives security for such a loan in preference to paying other debts as they fall due, then that is a preference vulnerable to reversal. If the preference is to an "associate" (including spouses / CPs) within the period of 2 years prior to the presentation of the petition leading to the BO, B is presumed to be insolvent unless the associate proves to the contrary (s.341(1) and (2). If the preference is to a non-associate, then the period is 6 months and the onus of proving insolvency and the desire to prefer falls on the TIB.
- Any person can apply to set aside a transaction at an undervalue if the Court would be satisfied that the transaction was entered into for the purpose of putting assets beyond the reach of a person who is making or who may at some time make a claim against the transferor or where the victim otherwise has his interests prejudiced. There is no time-limit for set aside in this regard – s.423.
- The victim can include a former spouse owed non-provable debts, such as arrears of PPs. The effect is that the property is restored to the estate – it does not go direct to the victim. Non-provable debts can only be met if there are surplus assets in the bankruptcy (*Ram v Ram* [2004] EWCA Civ 1452, [2005] 2 FLR 63. *Trowbridge v Trowbridge* [2002] EWHC 3114 (Ch); [2003] 2 FLR 231 – a party seeking relief under s.37 MCA or s.10 1975 Act can make an application under s.423 IA 1986.

PUMP COURT CHAMBERS

Status of the bankrupt or prospective bankrupt in matrimonial and inheritance proceedings (5).

- S.284(1)-(3) – any disposition of property or cash made by a person subsequently adjudged bankrupt between presentation of petition and vesting of the estate in the TIB is void, save to the extent is it made with the consent of the court or is subsequently ratified by it.
- No remedy for the TIB against a person where a disposition was made before the date of the bankruptcy order (s.278) in good faith, for value and without notice that the petition had been presented (s.284(4)(a)).
- Where a court orders a transfer of property by a person against whom a bankruptcy petition has been presented, the order constitutes a disposition of property by the bankrupt, not by the court, and is void under s.284 – *Flint (a bankrupt)* [1993] Ch 319, [1993] 2 WLR 537 (the *Flint* case), approved in *Mountney v Treharne* [2002] EWCA Civ 1174, [2003] Ch 135.
- In *Flint* H transferred his interest in the FMH to W by consent in the FR proceedings when he owed over £120k. The disposition was held not to be ratifiable unless it was desirable in the interests of unsecured creditors generally (see also *Re Grays Inn Construction Co Ltd* [1980] 1 All ER 814, CA).
- In *Treharne v Forrester* W presented a divorce petition and 19 months later H was presented with a bankruptcy petition for unpaid tax. W heard of that petition the following month. She persuaded a FR judge to direct a transfer of H's share in the FMH to her forthwith upon final decree and obtained decree absolute. She then sought and obtained a transfer of further assets and for the previous transfer to be executed. H was made bankrupt the following day. She was made aware of that at the hearing for the further assets to be transferred to her. The TIBs applied to set aside the transactions as they were void under s.284. W argued the Court had made the transfer, not H. The Court disagreed since it was H transferring – the Court had no interest in the property itself. The Court might, however, ratify expenditure by W amounting to £115k where she had done some of the TIB's job for him by identifying, collecting and preserving H's assets, so saving the TIB money.

PUMP COURT
CHAMBERS

Status of the Trustee in Bankruptcy in Family Proceedings.

- Takes over bankrupt's estate on TIB's appointment after the making of the bankruptcy order.
- Has to identify and gather in all estate before distributing it to creditors in order of their security.
- A subsequently appointed trustee in bankruptcy cannot appeal a financial order as it is not a party to the marriage.
- Can and does force sale of homes, notwithstanding the reasons for which that home is held.
- Can set aside dispositions of property by the bankrupt for up to 5 years where they were made at an undervalue. Where the disposition was made to defeat the claims of other creditors there is no time-limit.
- Can completely upset dispositions made to settle FR proceedings, 1975 Act proceedings and orders making provision for children under Schedule 1 Children Act 1989.
- Can take control of the majority of bankrupt's income to satisfy creditors with an ongoing stream of cash through an IPA or an IPO.
- The TIB can claim surplus income above reasonable domestic needs (determined subjectively).
- Mortgage payments might be in excess of reasonable domestic needs (*Malcolm v Official Receiver* [1999] BPIR 97)).
- Recent example in *DDR v BBR* [2024] EWHC 278.

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Rights and Causes of Action available to the non-bankrupt spouse.

- The bankruptcy court can annul a bankruptcy order – IS 1986, s.297(7) – see below.
- In cases where damages for PSLA have been awarded or otherwise there is a PI claim ongoing then:
  a. Causes of action personal to the bankrupt by reference to which damages are to be estimated by immediate reference to pain felt by the bankrupt in re his body, mind or character and without immediate reference to his rights of property do not vest in the trustees unless they form part of a claim related to property in which event it is a hybrid claim and the trustee holds on constructive trust for the bankrupt the right to recover damages for PSLA and other personal issues – *Heath v Tang* [1993] 4 All ER 694; [1993] 1 WLR 1421.
  b. *Ord v Upton (as trustee to the property of Ord)* [2000] Ch 352; [2000] 1 All ER 193, CA – general damages belong to the bankrupt and special damages belong to the trustee. Thus the PSLA award belongs to the bankrupt as a resource and may be divisible in the divorce.
- IPOs can be discharged on application by B where they fail to meet reasonable domestic needs, including school fees (test is not "what is necessary to enable B to live" – *Re Rayatt* [1998] 2 FLR 264.
- If a TIB has not applied for an IPO, W can apply for periodical payments, but on an application for an IPO, the bankruptcy court is not affected by the making of the PPs order – *Albert v Albert (a bankrupt)* [1997] 2 FLR 791.

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Rights and Causes of Action available to the non-bankrupt spouse - Annulment.

a. If a spouse allows a bankruptcy to arise by failing to pay a debt he can afford to pay then he is not insolvent.

b. Objection to a bankruptcy order cannot be made under s.37 MCA as a reviewable disposition since the disposal occurs by operation of law under s.306 IA 1986 and not by the act of a debtor – *Woodley v Woodley (No.2)* (1993) 2 FLR 477, CA.

c. But a bankruptcy order fraudulently obtained to defeat a claim for FR can be annulled under s.282(1)(a) on the ground that the order ought not to have been made since he was not insolvent at the time he presented his application.

d. The applicant for an order has to show that the bankrupt can pay his debts. If they can show there is no balance sheet insolvency, then the debtor has to show that nonetheless, he cannot pay his debts – *Paulin v Paulin* [2009] EWCA Civ 221, [2009] 3 All ER 88 – balance sheet insolvency v commercial insolvency.

e. Issue in bankruptcy court whereafter that court is likely to transfer the application to the FRC – *Arif v Zar* [2012] EWCA Civ 986; *F v F (divorce: insolvency: annulment of bankruptcy order)* [1994] 1 FLR 359; IR 2016 r.12.32.

f. Make application promptly as otherwise fees and expenses incurred by TIB makes it impractical and unfair on TIB and creditors for the bankruptcy to be annulled – *Re Ruiz* [2011] EWHC 9213 (Fam); [2011] 2 FLR 1351.

g. Bankruptcy court retains a discretion to refuse to annul an order if there are insufficient assets to pay the costs and debts in the bankruptcy.

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Rights and Causes of Action available to the non-bankrupt spouse – Fending off a set-aside

- *Haines v Hill* [2007] EWCA Civ 1284; [2008] 2 All ER 901 – re transactions at an undervalue, where the order is made by the court exercising the matrimonial jurisdiction, that constitutes the transaction and it is entered into by the bankrupt, however unwillingly – avoids a distinction consequential on an order for FR made by consent or after a contest – there is no need for a contested final hearing.
- Where there has been no collusion, the money or property transferred is the measure of the value of the "right" under one or more of the MCA orders.
- If the TIB can show fraud, mistake or misrepresentation, then the balance between the property transferred and the right is not the true one and the transaction could be set aside.
- *Ball v Jones* [2008] 2 FLR 1969 – any collusion relied upon by the TIB as vitiating a property adjustment order must be dishonest. A consent order cannot be considered collusive or dishonest. Orders are sanctioned by a court in possession of relevant facts, notably the existence of creditors.
- Payment of a lump sum could still be susceptible to challenge by a TIB if made by consent and without real contest and payment is made within 2 years of presentation of the bankruptcy petition with the debtor being insolvent at the time.

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What occurs when bankrupt is discharged?

- Lump sum and costs orders are provable in bankruptcy and are bankruptcy debts (s.382), such that the bankruptcy court has power to release the bankrupt from any bankruptcy debt arising under orders made in family proceedings or under a CMS maintenance assessment (s.281(5)(b)).
- Default position is that family orders are required to survive the discharge of the bankrupt and remain enforceable – no guidance given in the statute.
- Strike a balance between prejudice to creditor spouse of releasing the obligation if there is any prospect of it being met and the prejudice to the bankrupt's realistic change of building a viable financial future for himself and his dependents.
- The burden is on the bankrupt to say that the balance should fall in his favour.
- Unless satisfied that the balance favours his release, the obligation should remain in place – *McRoberts v McRoberts* [2012] EWHC 2966 (Ch); [2013] 1 WLR 1601; and *Hayes v Hayes* [2012] EWHC 1240 (Ch).

THANK YOU

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