



BANKRUPTCY AND MATRIMONIAL LAW

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The premise of this paper is to examine some recent development in the uneasy relationship between personal insolvency and matrimonial law and highlight the main potential issues that may arise when dealing with the estate of a bankrupt who has recently been divorced or is in the middle of divorce proceedings.

Basic principles of financial provision in divorce

1. The starting point when acting for a bankrupt who has recently been through a divorce is an assessment of where proceedings have reached:

Marriage has irretrievably broken down	Application for ancillary relief on Form A. Made by either spouse (called the applicant) and must be sent to the court where the case is pending, this being either a divorce county court or a High Court. Must indicate if an order for ancillary relief will include any pension arrangements . Upon filing Form A by either spouse the court must:
A party needs to demonstrate this by providing 1 of 5 facts <ul style="list-style-type: none">• Adultery• Unreasonable Behaviour• Desertion for 2 years• 2 years separation with the other parties consent.• 5 years separation (without consent)	<ul style="list-style-type: none">• fix a first appointment not less than 12 weeks and not more than 16 weeks after the date of the filing of the notice;• serve a copy on the other spouse (called the respondent) within 4 days of the date of the filing of the notice.
File divorce papers at court	Within 7 days of receiving notification of the first hearing, parties with pension rights must request information on valuations etc from pension provider and within 7 days of receipt send to the other party
Acknowledgement of service filed at court	Form E must be sent to the court and exchanged no less than 35 days before the date of the first appointment.
Certificate from a judge to confirm there is an entitlement to a divorce and a date set for Decree Nisi	Form G (are parties ready to proceed to FDR) and Form H (costs)
Decree Nisi	First Appointment – determine or give directions on issues, experts, evidence, appointment for FDR (if parties have not agreed to this being the FDR in Form g)
Decree Absolute (can be applied for 6 weeks and 1 day after the Decree Nisi)	FDR hearing
	Final hearing



The final order

2. When making orders under s23, 24 and 24A of the MCA 1973 (financial provision, property adjustment and orders for sale), the court has regard to the following (s25):
 - (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
 - (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
 - (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
 - (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit.

3. The key principles were set out in *Miller v Miller; Mcfarlane v Mcfarlane* [2006] 2 AC 618:
 - (1) The general principles to be applied when making financial awards are need, compensation and sharing.
 - (2) The general approach in the case of short marriages was to consider whether and to what extent there was good reason to depart from equality. Fairness could well require that a claimant should not be entitled to a share of the other's non-matrimonial property, reflecting the instinctive feeling that parties would generally have less call upon each other following the breakdown of a short marriage.
 - (3) As to the approach to be adopted when evaluating the contributions that the parties had made to the welfare of the family, the parties should not seek to promote a case of "special contribution" unless the contribution was so marked that to disregard it would be inequitable.
 - (4) If the relevant assets were not "family assets", or had not been generated by the joint efforts of the parties, then the duration of the marriage might justify a departure from



the yardstick of equality of division. It was necessary to recognise that in a matrimonial property regime that still started with the premise of separate property, there was some scope for one party to acquire and retain separate property which was not automatically to be equally shared.

4. In very limited circumstances, the court can pierce the corporate veil and order the transfer of properties belonging to one party's company (*Prest v Petrodel* [2013] 2 AC 415).
5. Parties can agree a clean break order to conclude all financial claims as between the husband and wife (but not affecting child maintenance) or continuing maintenance payments which are fixed but an application may be made by the paying party if there is a change in circumstance.
6. Where the parties have agreed the terms, the court maintains a quasi-inquisitorial jurisdiction but will be "heavily influenced by what the parties have agreed" (*Sharland v Sharland* [2015] 3 WLR 1070).

Challenging a property adjustment order

7. Once the bankruptcy order is made, the court has no jurisdiction to make a subsequent property adjustment order against the bankrupt's assets¹. If a property adjustment order has already been made but not implemented before the bankruptcy order it is still binding on the trustee as an equitable right to which the bankruptcy estate takes subject as long as the decree absolute has been passed to make the order effective under s24(3) of the Matrimonial Causes Act 1973².
8. Lump sum obligations are provable in the bankruptcy but also survive the bankruptcy. Other financial obligations are not provable and survive. The court does have a discretion to release a party from lump sum obligations post-bankruptcy under s281(5) IA 1986 which it may do in circumstances where there is no likelihood of satisfying it, there is a lapse of time since the order was made and where it may be used as a source of harassment to the discharged bankrupt (*McRoberts v McRoberts* [2013] BPIR 77, *Hayes v Hayes* [2012] BPIR 739).

Void disposition under section 284

9. Financial provision and property adjustment orders under MCA 1973 are valuable rights conferred and recognised by law whereby one spouse will give and the other will receive consideration. A negotiated agreement to settle an application for financial provision is not a disposition because it is subject to the court's discretion in deciding whether accord has been reached. The agreement only becomes effective when the order is made (*Xydhias v Xydhias* [1993] 2 All ER 386). A court order compromising an application for financial provision and

¹ *Re Holliday (a bankrupt)* [1981] Ch 405, *McGladdery v McGladdery* [1999] 2 FLR 1102

² S283(5) of the Insolvency Act 1986, *Mountney v Treharne* [2003] Ch 135



property adjustment is a disposition by the individual and not the court. The order has the effect of vesting beneficial ownership in the recipient and s284 will apply if the disposition is at the relevant time (*Treharne and Sand v Forrester* [2003] EWHC (Ch) 2004 BPIR 338 following *Re Flint* [1993] Ch 319).

10. In *Robert v Woodall* [2016] EWHC 538 (Ch), the TiB sought to set aside a consent order under s284. Petition presented against H on 9 March 2009, consent order signed on 5 June 2009 and approved by the court on 16 July 2009 and H made bankrupt on 7 July 2009. The court held that the provisions in the order for periodical payments from H to W and the children were void under s284.
11. In *Warwick v Yarwood* [2010] EWHC 2272, H and W were married in 1984 and separated in 2004. In September 2004 they obtained a decree nisi and W applied for ancillary relief. Decree absolute pronounced in December 2004 but AR application continued. Assets were H's shareholding in his company, some pension funds in each name and the matrimonial home, Teapot Farm, worth £500,000 net. The beneficial interest was held equally. A statutory demand was served on H in September 2006 for £1.4m on a PG linked to the company. AR hearing was listed for final hearing in October 2006. An offer was made for a clean break with the net proceeds of sale to be divided 75% to W and 25% to H. They reached a firm agreement, vacated the hearing and put the property on the market. A Consent Order was lodged with the court but not approved. Contracts for the sale of the property were exchanged on 19 March, the bankruptcy petition was presented on 20 March, the sale was completed on 23 March and the bankruptcy order was made on 13 September 2007. W argued that the disposition took place in September 2006 when the agreement on shares was reached. The TiB argued that there was no binding agreement, *Xydhias* applied.

Held:

- (1) Some doubt was expressed about how the principle in *Xydhias* sits with the principles of common intention constructive trusts and contract law insofar as if the parties have actually satisfied all the requirements for the latter, there has been a disposition regardless of whether there is an ongoing AR claim
- (2) On the facts there was no binding agreement because it was being negotiated as a package of arrangements to dispose of the AR application and they had not concluded the arrangements with respect to their respective pensions.
- (3) Therefore the "disposition" for the purposes of s284 was the transfer of the sale proceeds to W, which was void.

Transaction at an undervalue/defrauding creditors



12. The right under s24D of the Matrimonial Causes Act 1973 to apply for financial relief constitutes consideration and therefore once a court has made an order or approved a consent order, the Trustee cannot seek to challenge it under s339 IA unless there has been collusion or fraud, mistake or misrepresentation (*Hill v Haines* [2008] Ch. 41, *Re Jones (A Bankrupt)* [2008] BPIR 1051, *Re Kumar (A Bankrupt)* [1993] 1 WLR 224).

13. In *Sands v Singh* [2016] EWHC 636 (Ch), H bought a property in 2006 for £976,000. In 2008, he married W. H then spent £200,000 on building work and apparently owed a further £913,719 plus VAT. In January 2009, H charged the Property to secure a £500,000 loan from his father. In July 2009, W instructed divorce lawyers and registered home rights under FLA 1996. In April 2010, H charged the Property in favour of his sister for the sum of £70,000. A divorce petition was issued on 17 September 2010. The parties signed a consent order in December 2010 on terms that H would put the matrimonial home on trust for the children, pay £375 per child per month, be responsible for the mortgage, pay a lump sum of £50,000 and have rights of occupation. W moved into the property, decree absolute was granted in February 2011, she received £50,000 in June 2011 and H adjudged bankrupt in September 2011. H's TiB challenged the charges to H's relatives as a sham and the consent order and trust deed under s339 and 423.

Held:

(1) the TiB had made out his case that the January charge was a sham as no evidence had been provided that there had ever been a loan

(2) he had not made out his case that the April charge was a sham as there was evidence of a loan

(3) There was no evidence of collusion or that Mrs Kaur was aware of her husband's financial difficulties. The negotiations were not concluded that quickly and H did not agree to W's proposals immediately.

(4) the court could not conclude that a matrimonial court would not have made the order in the terms of the consent order and therefore would be set aside as a TUV.

Can the Trustee bring a claim under MCA

14. In *Robert v Woodall*, the TiB sought to bring a claim for financial provision for the estate of H. W argued that claims for financial provision end when one of the parties die.

Held:

(1) In *Barder v Caluori* [1988] AC 20, it was held that there was no general rule that divorce proceedings end when one of the parties dies. It depends upon the nature of proceedings and construction of the statutory provisions

(2) The Court of Appeal has determined in *Harb v King Fahd Bin Abdul Aziz (Secretary of State for Constitutional Affairs intervening)* ("Harb") [2006] 1 WLR 578 that rights under s27 MCA did not survive death



- (3) A true construction of ss23, 24 or 31 of MCA is that they create rights which can only be pursued by the spouses.
- (4) The court has no jurisdiction to order one party to the marriage to pay the debts of the other party out of the net proceeds of sale of the matrimonial home (*Burton v Burton* [1986] 2 FLR 419) which is at odds with the suggestion that the TIB can pursue the divorce and make an application for the benefit of the creditors (*Milne v Milne* (1981) 2 FLR 286).
- (5) Section 283 cannot vest the right to seek financial provision in the bankrupt estate.

Challenges to the bankruptcy estate from the other party

15. If the husband made himself bankrupt on his own petition and it appears that he did so in order to defeat a family finance order, the wife may in some circumstances apply to annul the bankruptcy under s282 of the IA 1986 on any grounds existing at the time the order was made which mean the order ought not to have been so made. The court may annul a bankruptcy order whether or not the bankrupt has been discharged from bankruptcy.
16. However, a court will only be prepared to annul the bankruptcy where it can be shown that the husband was not insolvent on either a cash flow or balance sheet basis at the time of the bankruptcy order. It is immaterial what his motivation was for presenting the petition³. The evidential burden of demonstrating insolvency will shift if the wife can show that assets exceed liabilities. The husband will then need to prove he was unable to pay his debts as they fell due⁴. The correct forum for the application was the chancery division (*Arif v Arif* [2012] BPIR 948).
17. As the lump sum payment is provable, the other party to the divorce will often be a creditor and entitled to statutory rights (see *Re Scott Gordon Young* [2014] EWHC 4315).

³ *Whig v Whig* [2007] BPIR 1418

⁴ *Paulin v Paulin* [2009] FLR 354, *Ruiz v Mekarska* [2011] BPIR 1139