

DIFFICULT FINANCIAL CIRCUMSTANCES

- What do you do when the other side is in debt/ bankrupt/ addicted/ mortgaged to the hilt?
- What do you do when the other side is starting up/ winding down a business?
- And how do you avoid throwing good money after bad?

This talk is intended to offer practical tips, and a bit of law, covering some sadly familiar situations:

- The bankrupt spouse
- The fraudulent spouse
- Struggling businesses and start-ups (*'I'm not earning now – but I will be'*)
- Burn-out (*'I'm not going to earn ever again because I've had enough'*)
- Overspending: lifestyle not (or only just) supported by income
- Reckless spending and addbacks

Bankruptcy : the basics

- Insolvency Act 1986 and Insolvency Rules 1986 (new rules from April 2017)
- Bankruptcy may be granted on debtor's petition or creditor(s)' petition
- Bankruptcy limit (minimum debt) is £5,000
- Statutory discharge after 12 months: IA 1986, s279 – unless bankrupt is failing to comply with obligations in which case Trustee may apply for suspension of discharge
- Bankrupt's property automatically vests in the Trustee from the date of the bankruptcy order – including (most) foreign property : IA 1986, s306
- Limited exceptions: tools of his trade, domestic essentials : IA 1986, s283
- Joint tenancies are automatically severed by bankruptcy order
- As a general rule, orders made by the Insolvency Court will take precedence over orders made by the Family Court:

'The Family Division is concerned with the division of the cake, but the size of the cake is liable to be diminished by any order made by the Insolvency Court'

Albert v Albert [1997] 2 FLR 791

Imminent bankruptcy proceedings

- Beware of **transactions at an undervalue** (caught if within 5 years prior to the presentation of the bankruptcy petition): IA 986, s339-340
- Bad faith/ intention to defeat bankruptcy **is not required**
- Leading case is Hill v Haines [2008] 1 FLR 1192. Orders made under MCA 1973 are usually safe, but not if parties have 'colluded' to put assets beyond reach of creditors: Re Jones (A Bankrupt) [2008] 2 FLR 1969; or if property undervalued within the divorce
- Lump sum orders may be proved as a debt within the bankruptcy; but the recipient spouse will have to wait in line with the other creditors
- Beware of '**preferences**': transfers less than 6 months prior to bankruptcy may be caught even if not at an undervalue, if they put the other spouse in a better position than s/he would otherwise have been: IA 1986, s340

Top tips where bankruptcy is imminent

- Record the consideration in the order (especially if other spouse on the face of it is receiving much more than half the assets – eg via a ‘Duxbury’ award)
- Don’t delay between reaching an agreement and getting the court to approve it – an agreement to compromise is not a transaction for purposes of IA s339
- Beware of deferring interests in property (eg Mesher charges) – Trustee is entitled to apply to realise the interest, ie by order for sale, prior to the trigger events

Concurrent bankruptcy proceedings

- Any disposition made between presentation of the (bankruptcy) petition and vesting of the estate in the Trustee in Bankruptcy is **void** unless made with consent of the Insolvency Court or subsequently ratified by that court (for ratification see Re Mordant [1996] 1 FLR 334)
- Making a **property adjustment order** (by consent or not) amounts to a 'disposition'
- Insolvency Court has **power to stay** proceedings in another court against property of the debtor (ie the Family Court) while a bankruptcy petition is pending: IA 1986, s285(1)
- Family Court also has power to stay its proceedings on same ground: IA 1986, s285(2)

Post-bankruptcy: what orders can be made?

- **No property adjustment order** (all property vests in the Trustee): Ram v Ram (No 2) [2005] 2 FLR 75
- **Lump sum** orders (and costs orders) may be made after discharge if there is a residue, or prior to discharge if the judge has a 'clear picture' of what the residue will be: Hellyer v Hellyer [1996] 2 FLR 579, or if lump sum is to be paid out of income: Re G [1996] 2 FLR 171
- Pension rights do not vest in Trustee so **pension sharing/ attachment orders** can be made (and no power in Trustee to require bankrupt to draw down from his pension: Horton v Henry [2016] EWCA Civ 989)
- **Periodical payments** orders can be made, but any income payments order made within the bankruptcy will take priority

Post-bankruptcy: dealing with the Trustee

- Trustee may require bankrupt to surrender privileged documents and may also order disclosure **by solicitors**: Re Murjani (A Bankrupt) [1996] 1 WLR 1498
- Can the Trustee be persuaded that the **other spouse's share** in jointly-owned property is more than 50%?
- Equitable accounting: can the other spouse meet some/ all/ none of the mortgage payments?
- Can the other spouse avoid paying the Trustee occupation rent?

The family home

- Spouse's **rights of occupation** cannot be terminated without court order; court has a discretion but heavily weighted in favour of creditors after 12-month 'grace' period: IA 1986, s336 and see Grant and another v Baker [2016] EWHC 1782
- If not sold by the Trustee **within 3 years** of the bankruptcy, the bankrupt will **regain his interest in the family home** unless the Trustee makes an application to the court/ takes other active steps: IA 1986, s307
- This may give Trustee an incentive to negotiate with the other spouse the purchase of the bankrupt's interest
- Conversely, where value is disputed, beware of impact of Trustee's costs on amount the other spouse will ultimately receive

Annulment of bankruptcy

- Bankruptcy is not a 'reviewable disposition' under MCA 1973, s37 – even where bankruptcy order made on a debtor's petition and the debtor intended to defeat a financial remedy claim
- This means that the other spouse must apply to the Insolvency Court to annul the bankruptcy.
- Usual ground is that on the grounds existing at the time, the order ought not to have been made: IA 1986, s282 – ie the debtor was **not in fact insolvent**
- It may be appropriate to apply (to the Insolvency Court) to transfer the application to the Family Division to be heard together with the financial remedy claims: *Arif v Zar* [2012] EWCA Civ 986; but the application must be made promptly: *Mekarska v Ruiz and Boyden* [2011] EWHC 913

The fraudulent spouse

*This section does not cover fraud within the financial remedy proceedings themselves
– the topic of a whole other lecture!*

Fraud and other criminal behaviour: what is the court's approach?

- Faced with fraud on the part of the other spouse, practitioners usually have to consider two questions:
 - What do my professional conduct rules require me to do?
 - What will the court do?
- The focus here is on the second question
- The court's approach usually requires a balancing of two considerations:
 - The public interest in maintaining the confidentiality of financial remedy proceedings
 - The public interest in investigating crimes/ ensuring taxes are paid/ whatever the case may be

Some examples of the balancing exercise

- On the whole, the court has tended to err on the side of protecting the confidentiality of the proceedings:
 - A v A; B v B [2000] 1 FLR 701 (Charles J: no disclosure to HMRC on the basis that the parties guilty of tax evasion had agreed to make some disclosure themselves)
 - HMRC v Charman [2012] EWHC 1448 (Coleridge J: HMRC seeking transcripts of evidence, in dispute with H over unpaid tax; the fact that H not accused of tax evasion/ criminal behaviour relevant to decision not to disclose)
 - But see Lykiardopolu v Lykiardopolu [2010] EWCA Civ 1315
 - 'Different considerations apply where the information and documents provided by a litigant are false. That litigant has no entitlement to confidentiality in respect of that information or those documents. They do not evidence his private life. In general there is no good reason why his conduct should not be made public.'*

PoCA 2002 Confiscation Orders

- Which is to be heard first, the financial remedy proceedings or the PoCA proceedings?
 - Webber v Webber [2007] 2 FLR 116: financial remedy proceedings heard first to determine W's claims (esp re respective shares in FMH) before criminal judge decides what assets are available to H to satisfy confiscation order; BUT
 - Stodgell v Stodgell [2009] 2 FLR 244: H already subject to confiscation order; W not permitted to proceed with her financial remedy claim (for lump sum) until confiscation order discharged
 - Relevant considerations in Stodgell:
 - Confiscation order (c.£900,000) related to tax/ penalties H ought to have paid years ago; if he had paid what he owed, the amount available to W would have been reduced
 - W not complicit in tax fraud, but had benefited from the enhanced lifestyle it produced

'By giving people the power to share, we're making the world more transparent.'

'A squirrel dying in front of your house may be more relevant to your interests right now than people dying in Africa.'

'I think a simple rule of business is, if you do the things that are easier first, then you can actually make a lot of progress.'

Things can only get better: entrepreneurs and start-ups

- Where one spouse has spent years supporting the other in building up a business which is on the brink of bearing fruits, is there any mechanism for the supporting spouse to receive a future share?
- Deferred lump sums are unpopular, general adjournment of lump sum claims even less so:
 - Davies v Davies [1986] 1 FLR 497: adjourning generally only permissible where ‘**real possibility**’ of capital ‘**in the near future**’ ‘**from a specific source**’
 - R v R [2011] EWHC 1393: matrimonial capital tied up in businesses in which H had minority shareholding. Fixed sum awarded, deferred with interest accruing – no time limit
 - MT v MT [1992] 1 FLR 362: parties had lived for years in expectation of H’s inheritance from his father (aged 83); W’s claims adjourned because without access to inheritance she would be left after long marriage unable to re-house

Burned-out Bankers

When a formerly high-earning spouse is choosing not to exercise his/her earning capacity, how coercive are the courts prepared to be?

- No reported decision exactly on point but consider the discussions about the rationale for pps orders and the markers towards each party achieving **financial independence** in the following cases
- SS v NS [2014] EWHC 4183 (note H reduced income having taken less challenging job for health reasons) – see Mostyn J’s discussion of purpose of spousal pps at paras 21 – 46
- H v W [2013] EWHC 4105 (capped % share of discretionary bonus)
- And the practical reality that the court will rarely make an order which it knows it will be impossible to enforce (if the yoga teacher sticks to his/her guns and declines to return to the rat race)

The money barely covers one household, let alone two...

- The cases on modest money 'standard of living' are likely to be helpful (albeit some are old):
- *Wills v Wills* [1984] FLR 672: not ok for court to find H's housing needs are met because he is living with his parents
- *M v B* [1998] 1 FLR 53: stretch to provide two homes if at all possible
- And see also FJC guidance on financial needs on divorce, pp 19 – 23:
'it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyles'

le sharing the pain...

The addback cases

- Martin v Martin [1976] Fam 335 – money diverted to new partner
- Norris v Norris [2002] EWHC 2996: reckless overspending
- Vaughan v Vaughan [2007] EWCA Civ 1085: ‘gambling or other improvidence’
- MAP v MFP [2015] EWHC 627: cocaine, escorts, therapy, rehab but ‘not deliberate or wanton’ - ???
- JS v RS [2015] EWHC 29212: £90-100,000 ‘unexplained’
- Rapp v Sarre [2016] EWCA Civ 93: ???