

CITY INSOLVENCY DISCUSSION GROUP

Wednesday, 11 March 2020

TOPICS:

*Keeping it in the Family... Court:
Navigating insolvency matters involving the Family Court*

PRESENTED BY

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Keeping it in the Family... Court: Navigating insolvency matters involving the Family Court

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Introduction

- Traditional approach for insolvency practitioners and financial institutions is to avoid the Family Court.
- View was that the jurisdictions didn't mix.
- Pre-2005, no power for Family Court to make orders in relation to vested property.
- Now, increased intermingling of matters of the 'heart' and 'head'. Family Court may impact your practice more than ever.
- Need to be aware of and alive to:
 - Family breakdown in the context of or on the periphery of an insolvency event.
 - Family Court as a tool to pursue as an insolvency practitioner where someone has divested assets.

Introduction

- We will be discussing the role of the Family Court as a potential ‘friend or foe’.
- Two senior members of the Family Law team at Lavan.
- Hopefully conclude ‘friend’ (or at least ‘acquaintance’).
- Discussion around:
 - Jurisdiction.
 - Transfer of proceedings.
 - Compulsive powers against third parties under s90AE.
 - Restraining conduct impacting on third parties under s114.
 - Reversal of transactions to defeat claims under s106B.
 - Setting aside/varying Family Court orders under section 79A in the context of corporate matters.
 - Some general issues concerning bankruptcy matters.

Jurisdiction of the Family Court

- A significant aspect of the Family Court’s jurisdiction is to adjust property interests between parties following separation.
- In essence, its role is to balance and appropriately determine the financial and non-financial obligations and contributions of the parties for the purposes of facilitating a property settlement.
- The aim of the accrued jurisdiction of the Family Court enables disputes involving family property divisions, bankruptcy and corporations to be resolved in one court.

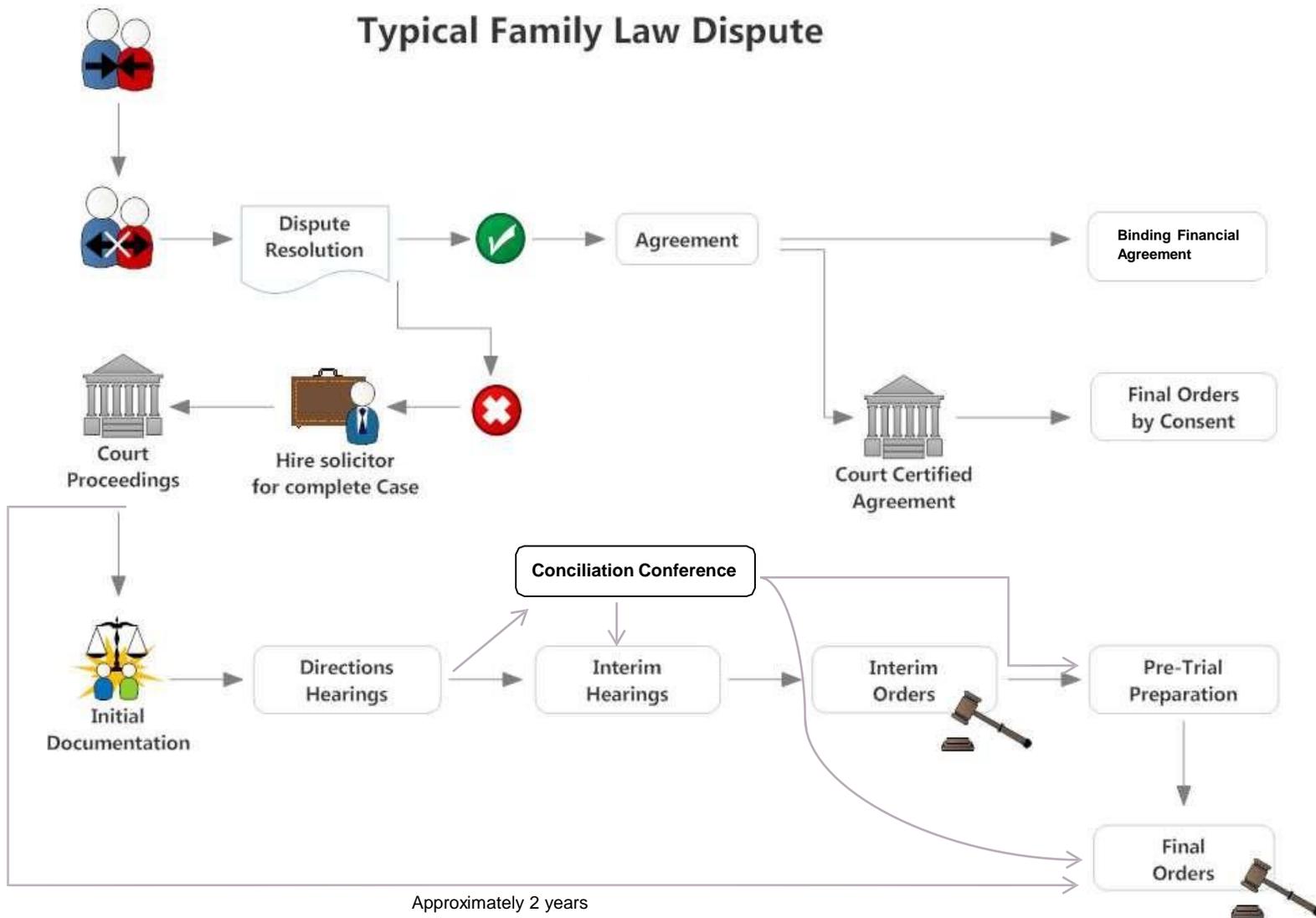
- Moreover, when exercising powers in connection with the *Bankruptcy Act 1966* (Cth) (**BA**) or *Corporations Act 2001* (Cth) (**CA**), the Family Court has the same powers as the Supreme or Federal Courts.
- If a party does not like the exercise of powers by the Family Court, they cannot simply follow a different pathway into the relative ‘safer territory’ of those Courts to get a second opinion.
- Finally, while the BA specifically recognises the interests of parties altered as a result of Family Court orders¹. There is no equivalent recognition under the CA, which can cause confusion.

[1] *Bankruptcy Act 1966* (Cth) s 59A.

Transfer of proceedings to Family Court

- Supreme Court and/or Federal Court may, if it considers it more appropriate, transfer relevant proceeding to the Family Court, where there is a dispute involving property interest.
- When deciding whether to do so, the court will have regard to the:
 - Extent to which the matters for determination are not within the jurisdiction of the court, apart from the CA or the BA; and
 - Interests of justice.
 - Note that if the matter is already in the Family Court there is power to make orders under the CA or BA without any ‘transfer’.

Typical Family Law Dispute



Family Court property alteration



Step 1

Is it just and equitable to make an order altering the parties' legal and equitable interests?



Step 2

Identify the assets available for division.



Step 3

Assess financial and non-financial contributions of the parties.



Step 4

Consider the factors listed in section 75(2) of the *Family Law Act 1975* (Cth).



Step 5

Practical Effect – Is it Just and Equitable?

Power to bind third parties

- Family Court has power to make orders binding third parties where the order is in relation to property of a party to the marriage, provided the order is in exercise of the court's power pursuant to section 79 (property alteration) and section 114 (injunctions) of the *Family Law Act (1975)* (Cth).
- Has effect despite anything to the contrary in any other law (written or unwritten) of the Commonwealth, State or Territory, and anything in a trust deed or other instrument.
- Any third party may be heard in respect of any proposed orders that may affect its rights, liabilities and property interests.
- The Family Court can make orders affecting a third party, even where the third party chooses not be involved in the proceedings.

The process to join a party

Application in a Case

FORM 2 Family Law Rules - RULE 5.01

Filed in:
 Family Court of Australia
 Family Court of Western Australia
 Federal Magistrates Court of Australia
 Other (specify) _____

Filed on behalf of:
 Full name: **John Smith**

MARK (X) IN THE BOX THAT APPLIES TO YOU:
 Husband/father
 Wife/mother
 Other (specify) _____

Client ID: _____
 File number: (P) PTW 123/2020
 Filed at: Perth
 Filed on: _____
 Court location: 150 Terrace Road
 Perth WA 6000
 Next Court date: 14 May 2020

Part A About the parties

<p>1 APPLICANT 1 Family name as at Item 2 of the Application in a Case SMITH</p> <p>Given names John</p>	<p>RESPONDENT 1 Your family name as used now SMITH</p> <p>Given names Mary</p>
<p>APPLICANT 2 Family name as at Item 2 of the Application in a Case</p> <p>Given names</p>	<p>RESPONDENT 2 Your family name as used now Perth Banking Corporation</p> <p>Given names</p>

2 What is your contact address (address for service) in Australia?
You do not have to give your residential address. You may give another address at which you are satisfied that you will receive documents. If you give a lawyer's address, include the name of the law firm.

Lavan		
Level 18, 1 William Street, PERTH	State: WA	Postcode: 6000
Phone: 9205 6002	Fax: 9208 6001	
DX		
Lawyer's code: LAV4361374		
Email: contactus@lavan.com.au		

* Please do not include email or fax addresses unless you are willing to receive documents from the Court and other parties in that way.

“A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute in a case, must be included as a party to the case.”

Rule 6.02 of the Family Law Rules 2004

Compulsive Orders – s 90AE

- Example of compulsive orders against creditors/third parties:
 - To substitute one party for both parties in relation to the debt owed to the creditor.
 - To substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor.
 - That the parties be liable for a different proportion of the debt owed to the creditor than the proportion that the parties are liable to before the order is made.
 - A director of a company or to a company to register a transfer of shares from one party to the other party.
 - Third party to do a thing in relation to the property of the marriage.
 - Alter the rights, liabilities or property interests of a third party in relation to the marriage.

Injunctions – section 114

- Only if it is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage, and the third party has been accorded procedural fairness.
- If the order or injunction concerns a debt of a party to the marriage, the court may only make the order if it is satisfied that it is not foreseeable the order or injunction would result in the debt not being paid in full (s [90AF\(3\)\(b\)](#)).
- Restrain a person from repossessing property of a party; or grant an injunction restraining a person from commencing legal proceedings against a party.
- The court may also make any other order, or grant any other injunction that directs a third party to do a thing in relation to the property of a party, or alters the rights, liabilities or property interests of a third party in relation to the marriage or de facto relationship.

Transactions to defeat claims

- Section 106B gives the court power to set aside or restrain transactions which avoid orders or anticipated orders or which are likely to have that effect.
- When s106B is successfully applied in the context of a debt, the creditor may find itself either unsecured or only partially secured.
- There are numerous limitations to the operation of s106B, i.e.:
 - Cannot stand by itself.
 - Relief under s 106B is purely discretionary.
 - Only applies to setting aside instruments or dispositions which defeat (or are intended to defeat) an order or an anticipated order
 - Protection of a bona fide purchaser or other person interested.

Protections for creditors

- Orders must be “reasonably necessary”, or “reasonably appropriate and adapted”, to effect a division of property between the parties.
- It is not foreseeable at the time that the order is made that the order would result in the debt not being repaid in full.
- The third party must be afforded procedural fairness.
- The order is “in all the circumstances ... just and equitable”
- The court take into account the taxation effect and the third party’s administrative costs in relation to the order.
- The court take into account the capacity of a party to repay the debt after the order is made.
- The court take into account the “*economic, legal or other capacity of a third party to comply with the order*”.
- The court take into account any other matter raised by the third party.

Application for separate decision

- RULE 10.13 – A party may apply for a decision on any issue, if the decision may:
 - dispose of all or part of the case;
 - make a trial unnecessary;
 - make a trial substantially shorter; or
 - save substantial costs.

- RULE 10.14 - What the Court may Order:
 - dismiss any part of the case;
 - decide an issue;
 - make a final order on any issue;
 - order a hearing about an issue or fact; or
 - with the consent of the parties, order arbitration about the case or part of the case.

FAMILY LAW ACT 1975 - SECT 79A

Setting aside of orders altering property interests

(1) Where, on application by a person affected by an order [made](#) by a [court](#) under section 79 in [property settlement proceedings](#), the [court](#) is satisfied that:

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant [information](#)), the giving of false evidence or any other circumstance;

the [court](#) may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.

(5) For the purposes of this section, if:

(a) an order is [made](#) by a [court](#) under section 79 in [proceedings](#) with respect to the [property](#) of the parties to a [marriage](#) or either of them; and

(b) either of the following subparagraphs apply to a [party](#) to the [marriage](#):

(i) when the order was [made](#), the [party](#) was a [bankrupt](#);

(ii) after the order was [made](#), the [party](#) became a [bankrupt](#);

the [bankruptcy trustee](#) is taken to be a person whose [interests](#) are affected by the order.

(6) For the purposes of this section, if:

(a) a [party](#) to a [marriage](#) is a [bankrupt](#); and

(b) an order is [made](#) by a [court](#) under section 79 in [proceedings](#) with respect to the [vested bankruptcy property](#) in relation to the [bankrupt party](#);

the [bankruptcy trustee](#) is taken to be a person whose [interests](#) are affected by the order.

(7) For the purposes of this section, if:

(a) an order is [made](#) by a [court](#) under section 79 in [proceedings](#) with respect to the [property](#) of the parties to a [marriage](#) or either of them; and

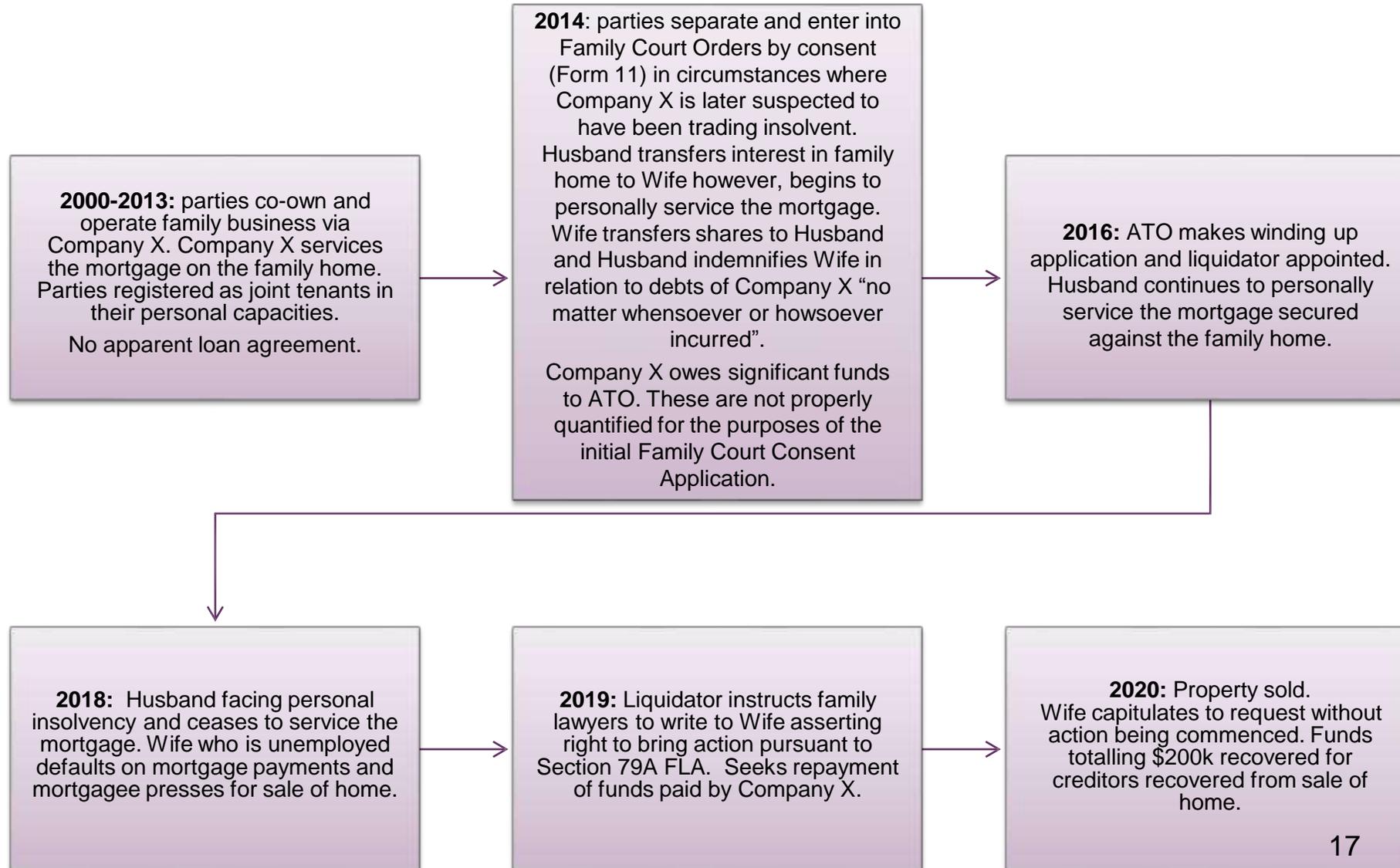
(b) either of the following subparagraphs apply to a [party](#) to the [marriage](#):

(i) when the order was [made](#), the [party](#) was a [debtor subject to a personal insolvency agreement](#);

(ii) after the order was [made](#), the [party](#) became a [debtor subject to a personal insolvency agreement](#);

the [trustee](#) of the agreement is taken to be a person whose [interests](#) are affected by the order.

s79A Application – Working Example



Bankruptcy

- When a bankruptcy occurs, all of the property of the bankrupt vests in the trustee in bankruptcy.¹⁹ ‘Property’ is defined broadly by the BA with the intention of capturing a broad range of proprietary rights including the right to commence or continue most legal proceedings commenced in the name of the bankrupt.
- The most significant implication of the Family Court’s jurisdiction is to make orders in respect of:
 - property that has vested in the trustee; and

[19] *Bankruptcy Act 1966 (Cth) s 58(1)*.

- exempt property, which may be available for distribution between the spouses, yet is not available to the trustee in bankruptcy on behalf of unsecured creditors,²⁰ such as:
 - superannuation entitlements;
 - property held on trust for another person;
 - life insurance;
 - household property; and
 - property used by the bankrupt in earning income.

- This includes the power to order a bankruptcy trustee to make, for the benefit of both or either of the parties to the marriage, or a child of the marriage, such settlement or transfer of property as the Family Court determines.²¹

[20] *Family Law Act 1975 (Cth) s 79(1)(b)*.

[21] *Family Law Act 1975 (Cth) s 79(1)(d)(ii)*.

Standing of bankruptcy trustee in proceedings

- If an application is made for orders altering the property interests of the parties, and one is (or becomes) a bankrupt, the trustee may apply to be joined as a party to the proceedings²².
- If the Family Court is satisfied that the interests of creditors may be (or have been) affected by any orders made by the Family Court, it must join the trustee as a party to the proceedings.²³ If the trustee is joined, the bankrupt party is not entitled to make submissions (except in exceptional circumstances).²⁴
- The trustee has rights to vary or set aside orders.²⁵ However, the trustee cannot exercise any rights not otherwise vested in him or her, in relation to maintenance orders and to appeal generally orders of the Family Court.

[22] *Family Law Act 1975* (Cth) s 79(11). | [23] *Family Law Act 1975* (Cth) s 79(11)(d).

[24] *Family Law Act 1975* (Cth) s 79(12). | [25] *Family Law Act 1975* (Cth) s 79A(5).

What can't a trustee do?

- A trustee in bankruptcy cannot wholly stand in the shoes of the bankrupt. For example, the trustee cannot institute proceedings for property orders on behalf of the bankrupt spouse as a means of trying to enlarge the assets in the bankrupt estate available for creditors because they are not a party to the marriage.²⁶
- A non-bankrupt spouse can bring an application to try to increase their entitlements by claiming against property that has vested in the trustee. They may also invoke section 106B of the FLA to set aside arrangements made in bankruptcy such as Part X agreement where the effect of the agreement is to defeat the non-bankrupt spouse's claim.
- Where that occurs, the trustee can apply to be joined as party and if the Family Court is satisfied that the interests of creditors may be affected by an order, the Family Court must join the trustee to the proceedings.²⁷

[26] *Needham and Trustee of Bankrupt Estate of Needham* [2017] FamCAFC 94.

[27] *Family Law Act 1975* (Cth) s 79(10).

Using the claw back provisions of the BA

- Where a transfer of property that would otherwise be considered an undervalued transaction or a transfer to defeat creditors is made pursuant to orders made by the Family Court, it is the orders that have the dispositive effect, not the transfer made pursuant to that order.
- Consequently, sections 120 and 121 of the BA cannot be used to set aside transactions pursuant to pre-existing orders under the FLA. The only remedy available to the trustee is to apply to the Family Court to set aside that order under section 79A of the FLA.²⁸
- The clear exception to this is where the FLA orders are made after the commencement of the bankruptcy. Once the bankruptcy commences, all of the bankrupt's property vests in the trustee and the bankrupt has no property to deal with a property settlement. Consequently, the trustee may challenge the orders made by the Family Court under section 79A of the FLA.

[28] *Corporations Act 2001* (Cth) s 1337H, 1337J, 1337K; *Official Trustee in Bankruptcy v Matteo* [2003] FCAFC 26.

Conclusion

- Family Court has broad powers to deal with, alter and transfer interests in marital property, including property that has vested by virtue of the bankruptcy of a party, as well as the property of companies.
- Importantly, the Family Court has many of the same powers under the CA as the Supreme Court and the Federal Court.
- Insolvency practitioners must be mindful of the jurisdiction of the Courts where family law disputes are involved and should be aware they can utilise the accrued jurisdiction of the Family Court and its powers where available.
- Lavan has expertise in Family and Insolvency Law across a wide range of matters.

Questions?

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DISCUSSION GROUP

Next CIDG Session

Wednesday, 1 April 2020



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Willis Towers Watson 