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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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We do not yet know what type of impact COVID-19 is going to have on the Canadian economy in both the short term and the long term. While we certainly hope that the economy will bounce back quickly once the crisis has abated, there is no question that we are going to see a significant increase in the number of bankruptcies in the weeks and months to come.

So, we thought this week's edition of the *Newsletter* would be a good opportunity to discuss three recent decisions that have dealt with various bankruptcy issues: (1) the Ontario Court of Appeal's decision in *A.A. v. Z.G.*, 2020 CarswellOnt 3469 (Ont. C.A.); (2) Justice Gilmore's decision in *Rusinek & Associates v. Arachchilage & Baliah*, 2020 CarswellOnt 2176 (Ont. S.C.J. [Commercial List]); and Justice Penny's decision in *Infusino, Re* (2019), 35 R.F.L. (8th) 467 (Ont. S.C.J.).

But before we get to the bankruptcy cases, we wanted to report on another case about urgency in family law during the COVID-19 pandemic - Justice Pazaratz's decision in *McNeil v. McGuinness*, 2020 CarswellOnt 4833 (Ont. S.C.J.).

COVID-19 Update

Given the number of cases that have already been released about COVID-19 and urgency in family law cases, [1] lawyers and litigants by now should have a good sense of what types of matters the courts are prepared to deal with during the COVID-19 pandemic, and the likely potential outcomes. [2] Hopefully, knowing the principles that the courts are applying and the types of orders they are prepared to make will help parties resolve their disputes during the pandemic without the need for litigation.

But for those parties who are still intent on taking unreasonable positions, they need to seriously and carefully consider Justice Pazaratz's recent warning in *McNeil v. McGuinness*, 2020 CarswellOnt 4833 (Ont. S.C.J.) that how people behave now will likely have a significant impact on their cases once the courts have re-opened:

> [17] . . . Perhaps I can give high conflict parents a bit of a warning.
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> a. Just because a Triage judge decides an issue isn't urgent, it doesn't mean the issue isn't important. It simply means we have to prioritize which issues we currently have the resources to deal with.
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> b. The suspension of most court activities during the COVID-19 crisis means that - temporarily - separated parents are largely going to be on "the honour system."

c. **We're counting on parents to be fair and helpful with one another. To rise to the challenge and act in good faith.**

d. Because now more than ever, children need parents to be mature, cooperative, and mutually respectful. In these times of unspeakable stress and anxiety, children need emotional reassurance from both parents that everything is going to be okay.

e. **How parents conduct themselves during this time of crisis will speak volumes about parental insight and trustworthiness.**

f. **Your reputation will outlast COVID-19.**

g. **So please don't try to take advantage of the current situation.**

h. **In the long run, self-help will turn out to be a big mistake.** [emphasis added]

Bankruptcy & Family Law: Rock Beats Scissors; Scissors Beat Paper; Paper Beats Rock; Equitable Trusts Beat Bankruptcy?

A.A. v. Z.G., 2020 CarswellOnt 3469 (Ont. C.A.) - Tulloch, Benotto, and Jamal, JJ.A.

This short decision from the Ontario Court of Appeal reminds us that property that a bankrupt holds in trust for a third party - in this case by equitable trust - does not vest in his/her Trustee in Bankruptcy. However, for reasons detailed below, the case does have to be considered carefully, and perhaps viewed with some skepticism.

The decision is very short, and it would have been helpful for the Court of Appeal to have set some parameters for using an equitable trust in the bankruptcy context. However, decisions about bankruptcy and equitable trusts are so rare that we will take what we can get.

The appeal arose out of a long-standing, high-conflict family law dispute that was tried before Justice Kruzick in 2015 (2015 CarswellOnt 10976 (Ont. S.C.J.)).

The parties were married in 1991. They purchased a property together and built a new house. The husband's father advanced them nearly $900,000 for the construction costs, and they gave the husband's father an $800,000 mortgage against the property.

When the parties separated in 2008, the husband's father tried to enforce his mortgage. He obtained a default judgment against the husband, but the wife defended the mortgage action, and it was ultimately consolidated with the family law proceedings.

In 2009, the wife purchased the husband's interest in the matrimonial home. The husband's interest in the home was held as security for support payments.

The wife then sold the home to third parties, and $800,000 was paid to the husband's father from the sale proceeds. The parties agreed that the husband's father would post a letter of credit to secure the Equalization Payment and the ongoing support that the husband owed the wife.

The consolidated case was tried over 64 days from 2012 to 2014, and Justice Kruzick released a 425-paragraph decision in 2015.

Justice Kruzick ordered the husband to pay taxable/deductible periodic spousal support of $7,000 a month or - at the husband's option - a tax free lump sum payment of $585,000. He also ordered the husband to pay retroactive child support of $196,462, an Equalization Payment of $489,354, and interest dating back to 2008, and to provide a letter of credit to secure his obligations.

Justice Kruzick also dismissed the husband's father's mortgage claim against the wife on the basis that the mortgage was a sham.

The husband's father appealed. Although the Court of Appeal did not agree that the mortgage was a sham, it dismissed his appeal because the husband's father had not established that he made advances on the mortgage - an interesting and well-written read on mortgage enforcement: *A. (S.) v. A. (A.)* (2017), 93 R.F.L. (7th) 42 (Ont. C.A.).

The husband also appealed, but the Court of Appeal refused to hear his appeal because he did not comply with the trial judge's support order, or obtain a stay of the support order pending the appeal: (2016), 85 R.F.L. (7th) 322 (Ont. C.A.) and 2017 CarswellOnt 15318 (Ont. C.A.). This seems to be happening with increasing frequency. See, for example: *Brophy v. Brophy* (2004), 45 R.F.L. (5th) 56 (Ont. C.A.); *Dickie v. Dickie* (2006), 39 R.F.L. (6th) 1 (Ont. C.A.); *Hokhold v. Gerbrandt* (2015), 64 R.F.L. (7th) 54 (B.C. C.A.); *Aalbers v. Aalbers* (2015), 71 R.F.L. (7th) 291 (Sask. C.A.); *Ainslie v. O'Neill* (2018), 17 R.F.L. (8th) 120 (Ont. C.A.); and *Siddiqui v. Anwar* (2018), 22 R.F.L. (8th) 92 (Ont. C.A.). See also *Murphy v. Murphy* (2015), 56 R.F.L. (7th) 257 (Ont. C.A.) where the Ontario Court of Appeal refused to hear submissions from a respondent to the appeal who was in breach of an order because doing so "would be to reward his deliberate and wilful misconduct."

In what will come as no surprise to anyone, the husband filed for bankruptcy in 2017. When the husband was ultimately discharged, the wife received approximately $44,000.

By 2019, the husband's support arrears had grown to more than $1 million. At that point, the husband decided that he wanted to take advantage of the $585,000 lump sum option that had been originally offered by Justice Kruzick at trial, and brought a motion in the Ontario Superior Court of Justice for:

> 1. Advice and directions regarding the lump sum payment and spousal support provisions in the original judgment; and
>
> 2. An order that the wife be required to provide a satisfaction piece upon payment of certain sums, and consent to release the $800,000 letter of credit to the husband's father.

In response, the wife brought a motion seeking to draw on the letter of credit to pay the massive support arrears that the husband owed her.

The husband's motion ended up being heard by Justice Kruzick. His Honour dismissed the husband's motion, and clarified that his trial order meant that:

> (i) The husband owed the wife $7,000 a month if the lump sum was not paid; and
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> (ii) The purpose of the letter of credit was to secure the payments the wife was owed on account of both support and equalization.

In Justice Kruzick's decision, which has not yet been reported, he found that the husband had missed the opportunity to satisfy his support obligation by way of a lump sum. He also rejected the husband's argument that he no longer owed the Equalization Payment that he had been ordered to pay as it had been discharged by his bankruptcy:

> 1. The husband's bankruptcy was well after the sale of the matrimonial home which gave rise to the $800,000 amount and the letter of credit as ordered.
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> 2. The June 14, 2015 final order which also predated the bankruptcy in paragraph 8 provides that the equalization payment owing to the wife shall be satisfied from the proceeds of sale held in trust by the husband's counsel. Those funds are now depleted. The same paragraph of the final order provides for the letter of credit as posted by the father, S.A., "to be notionally divided equally between the parties." I agree with the submission that the husband's portion of the $800,000 wrapped in and protected by the letter of credit creates an equitable trust in this share, as is argued by the wife. The last sentence in paragraph 8 reads, "A.A.'s 50 % shall forthwith be paid to Z.G. in partial satisfaction of the monies owed pursuant to this judgment."

> 3. In reviewing the husband's proposal under the *BIA*, his statement of assets in the bankruptcy proceeding does not include his $400,000 share of the $800,000. Either he was less than honest in those proceedings or he failed to include his portion because he knew it would be paid to the wife to satisfy his equalization payment obligation. The husband's evidence offers no explanation as to why this credit was not included in his list of assets in the bankruptcy.

As a result, Justice Kruzick dismissed the husband's motion, and ordered the money drawn on the letter of credit to be paid to the wife.

On appeal, the husband and his father argued that Justice Kruzick had erred by:

1. essentially varying the judgment when he was *functus officio*;

2. terminating the lump sum spousal support order and converting it into an obligation to pay periodic support indefinitely;

3. misapprehending the impact of the husband's bankruptcy; and

4. ordering the letter of credit to be paid to the wife.

The Court of Appeal did not accept any of these arguments.

First, the Court of Appeal determined that Justice Kruzick had not been *functus officio*, and had not "converted" the lump sum payment into an indefinite support obligation. In his motion, the husband had asked for "advice and direction" on the support payment provisions in the original judgment. The judgment required periodic payments, but provided that "the husband may if he chooses, satisfy the periodic support obligation by a lump sum payment in the amount of $585,000". The Court of Appeal reasoned that Justice Kruzick was perfectly positioned to provide the "advice and direction" that the husband had requested, which he did by concluding that:

> The order speaks for itself. The husband has an obligation to pay periodic support of $7,000 a month to the wife which *he could have satisfied* by a lump sum. . . . he did not make a lump sum payment so that the periodic support obligation continues.

Therefore, Justice Kruzick did not "convert" the lump sum payment into a periodic support payment. The periodic support payment was in the judgment. The husband's failure to pay the lump sum meant that the periodic support continued.

Furthermore, opined the Court of Appeal, by resolving the issues before him, Justice Kruzick was following the primary objective of the *Family Law Rules* to "deal with cases justly" by ensuring that the procedure is fair to all parties, saving time and expense, and dealing with the case in the way that is most appropriate to its importance and complexity. The Court of Appeal also noted that Rule 2 "specifically grants judges some procedural freedom to resolve family law disputes fairly and expeditiously", and that "[t]he motion judge's approach was both fair and expeditious in the true spirit of r. 2."

It may not actually have been necessary for the Court of Appeal to rely on Rule 2, as Courts clearly have authority to interpret their own orders, and the judge who made the order in question is particularly well-positioned to interpret it: *Wessel v. Wessel* (1978), 5 R.F.L. (2d) 397 (Ont. C.A.); *Children's Aid Society of London & Middlesex v. P. (M.)*, 1999 CarswellOnt 3569 (Ont. S.C.J.); *Sutherland v. Reeves*, 2014 CarswellBC 1661 (B.C. C.A.); *Campbell v. Campbell* (2016), 78 R.F.L. (7th) 64 (Sask. C.A.). Furthermore, Rule 2 was not meant to overcome significant procedural or jurisdictional issues, but some could interpret this decision otherwise. Respectfully, had Justice Kruzick been *functus officio* for the purposes of interpreting his own order (and we do not think he was), we do not believe Rule 2 would have helped overcome that problem. Rule 2, while expansive and important, is not a panacea.

The appellants also submitted that Justice Kruzick misapprehended the effect of the bankruptcy by finding that the Equalization Payment was still owed, and claimed that the bankruptcy extinguished the husband's obligation to pay it. Again, the Court

of Appeal disagreed. Instead, it noted that "[t]he motion judge indicated that the line of credit was to secure equalization and support and this 'creates an equitable trust'", and that "[a]s an equitable trust it did not form part of the bankrupt's estate."

We do not entirely understand why the Court resorted to relying on an "equitable trust" to deal with the issues that were before it. Subsection 67(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") is clear that property held by a bankrupt in trust for a third party does not fall into the bankruptcy estate for distribution to creditors. However, an order or agreement for a spouse to pay an Equalization Payment from his share of the net proceeds of sale of a property does not necessarily create a trust relationship, and it has been held that such wording, without more, does not create an interest enforceable against a Trustee: *Thibodeau v. Thibodeau* (2011), 5 R.F.L. (7th) 16 (Ont. C.A.).

Given that cases involving equitable trusts rarely arise, and that bankruptcy after separation is fairly common, it would have been helpful for the Court of Appeal to have provided more detailed reasons about why an equitable trust was appropriate in this case, particularly given its own conclusion in *Thibodeau* that courts should generally refrain from circumventing the operation of the *BIA* by imposing an equitable trust to try to retroactively convert a spouse with an unsecured judgment for an Equalization Payment into a secured creditor:

> [43] Accordingly, in my view, an order providing that an equalization payment to one spouse is to be made out of the payor spouse's share of the proceeds of the sale of the matrimonial home, without more, does not create "property rights" in the payee spouse - equitable, securitized, or otherwise. **Absent clear language pointing to the trier of fact's intention to order the transfer or vesting of a payor spouse's assets, or the creation of security, or the imposition of a trust-like obligation, in satisfaction of the equalization payment, courts should be wary of giving effect to a proprietary right form of disposition**, lest (a) what the legislature has clearly decided is to be an equalization regime is inadvertently transformed into a division of property regime under the guise of protecting a payee spouse's right to receive the equalization payment awarded, and (b) otherwise legitimate claims of third parties be subverted and bankruptcy priorities reversed.
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> . . . . .
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> [49] I have described above why **I am not persuaded that an order for payment of a debt out of the proceeds of sale of a matrimonial home, without more, creates a trust-like relationship, or a charge, in relation to the proceeds**. It does not effect a division of the payor's portion of the sale proceeds. It is not equivalent to an order pursuant to s. 9(1)(b), (c) or (d) of the *Family Law Act*. A payee spouse entitled to an equalization payment is an unsecured creditor of the payor spouse in Ontario, and Parliament has specifically declined to enhance that status to one of preferred or secured creditor in the scheme of distribution provided for under the BIA which brings the concerns of other legitimate creditors into play as well. **To reiterate, judges should be wary about interpreting orders that are principally designed to assist one spouse in his or her efforts to enforce the order vis-á-vis the other spouse in a fashion that gives the payee spouse an advantage over third parties whose interests are at stake and who were not before the arbitrator or court at the time the award/order was made**. [emphasis added]

We also wonder whether the same outcome might have been achieved had the Court concluded that because the letter of credit stood as security for the husband's spousal support obligations *and* the Equalization Payment he owed the wife: (a) the wife had actually been a secured creditor when the husband went bankrupt; and accordingly (b) she was still entitled to use part of the money that was available from the $800,000 to satisfy the almost $500,000 Equalization Payment that the husband owed her (with the balance of the funds from the letter of credit to be credited against the spousal support arrears that the husband still owed her). It seems to us that this line of reasoning, while wholly supported by the facts, might have been preferable, so as to avoid casually approving an equitable trust at the crossroads of family law and bankruptcy.

Bankruptcy & Family Law: This Can't Be Right - Can It?

Rusinek & Associates v. Arachchilage & Baliah, 2020 CarswellOnt 2176 (Ont. S.C.J. [Commercial List]) - Gilmore J.

In Ontario, a Trustee in Bankruptcy has authority to ***continue*** a claim for an Equalization Payment for the benefit of the bankrupt spouse's creditors if the claim was started prior to the bankruptcy. See e.g.: *Schreyer v. Schreyer* (2011), 1 R.F.L. (7th) 1 (S.C.C.) at paras. 20-21; and *Thibodeau v. Thibodeau* (2011), 5 R.F.L. (7th) 16 (Ont. C.A.) at para. 11.

Rusinek, however, deals with the slightly different question of whether a Trustee in Bankruptcy can actually ***commence*** a claim for an Equalization Payment against the non-bankrupt spouse. The motion judge, Justice Gilmore, concluded that the answer to this question is "no". And, as discussed below, we are not sure that is correct.

The basic facts of the case were as follows:

- The husband and wife were married in 2003 and separated in February 2015.
- Their most significant asset when they separated was their matrimonial home, which was owned solely by the wife.
- In November 2015 (i.e. about nine months after the parties separated), the husband made an assignment in bankruptcy. His unsecured debts at that time were in excess of $280,000.

As a result of the husband's assignment, all of his assets vested in his Trustee pursuant to s. 71 of the *Bankruptcy and Insolvency Act* (the "*BIA*"), which provides as follows:

> 71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

Since the husband's only material asset was his claim for an equalization payment against the wife, his Trustee sought to commence a claim for equalization against the wife in an effort to recover some money for the husband's creditors. The wife, however, took the position that the Trustee had no standing to commence a claim for an Equalization Payment. She argued that since s. 7(2) of the *Family Law Act* specifically provides that a claim for equalization claim is "personal" between spouses, it can only be started by one of the spouses, and ***cannot*** be commenced by the Trustee.

In concluding that a Trustee ***cannot*** commence a claim for an Equalization Payment, Justice Gilmore relied on *Bosveld v. Bosveld* (unreported) and *Bolliger v. White*, 2016 CarswellOnt 15837 (Ont. S.C.J.), both of which indicate that a claim for an Equalization Payment needs to be "exercised" or "articulated in a court proceeding" by the bankrupt spouse before it can become available to the bankrupt spouse's creditors:

> [28] I find that, similar to the right to elect under s. 5(2) of the *FLA*, an equalization claim is one that is inchoate until exercised. Once exercised, it takes on a new form as "property" and is subject to the provisions of the *BIA*. Until that point, the right is not assignable and remains only as an amorphous possibility.
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> [29] I therefore find that the right to an equalization of net family property does not become property within the meaning of the *BIA* unless and until the right to commence such a claim is exercised by a spouse.

While Justice Gilmore's decision *may* be correct in law, it is unfortunate that she did not explain why the fact that a claim for an Equalization Payment is personal between the spouses means that it cannot be commenced by a Trustee, given that the *BIA* could certainly be interpreted to authorize a Trustee to commence this type of claim. In particular:

- A claim for an Equalization Payment appears to fit under the incredibly broad definition of "property" found in ss. 2(1) and 67(1)(d) of the *BIA*, which provide:
  - **Subsection 2(1)**: "property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable,

> as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property[.]
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> • **Subsection 67(1)(d)**: a bankrupt's property includes "such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit."

• Section 72 of the *BIA* gives a Trustee in Bankruptcy authority to commence a court proceeding (it provides that a Trustee "is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this *Act*.").

Furthermore, while there is case law to the effect that personal claims for non-pecuniary losses (e.g. pain and suffering and mental distress) belong solely to the bankrupt and do not vest in his or her Trustee (see e.g. *Meisels v. Lawyers Professional Indemnity Co.*, 2015 CarswellOnt 8558 (Ont. C.A.) at para. 13), in *Blowes v. Blowes*, 1993 CarswellOnt 232 (Ont. C.A.) ("*Blowes*") the Ontario Court of Appeal rejected the bankrupt wife's argument that her claim for an Equalization Payment against her husband did not vest in her Trustee because it was personal in nature, and noted as follows:

> [The wife's lawyer] sought to support the wife's position by reference to s. 7(2) of the *Family Law Act*, which provides that entitlement under the relevant provisions of that statute is "personal as between the spouses." **Whatever the meaning of that expression in the context of its constituent statute, it does not convert the wife's claim - which is, in essence, a claim in respect of family property and the equitable division of its value - to a claim "personal in nature" within the meaning of the authorities to which we were referred**. The equalization claim asserted on the application instituted by the wife against her husband prior to her bankruptcy fell within the very broad statutory definition of "property" in the *Bankruptcy Act* and the right thereby asserted, passed, upon her assignment in bankruptcy, to her trustee. [emphasis added]

While Justice Gilmore distinguished *Blowes* on the basis that the wife in that case had actually commenced a claim for an Equalization Payment before she went bankrupt, the *obiter* in *Blowes* certainly appears to support the conclusion that a Trustee can, in fact, commence a claim for an Equalization Payment.

Finally, there does not appear to be *any* rational policy basis (in family law or bankruptcy law) for not allowing a Trustee to *commence* a claim for an Equalization Payment but allowing a Trustee to *continue* a claim that was commenced prior to the bankruptcy. Respectfully, there does not appear to be any logical basis for placing a spouse of a bankrupt who has not started a claim for an Equalization Payment in a significantly better position than a spouse of a bankrupt who has already started a claim.

In fact, there are strong policy reasons to *allow* a Trustee to claim an Equalization Payment. As set out below, preventing a Trustee from claiming an Equalization Payment is an invitation to mischief.

A claim for equalization is property, and equalization is a claim provable in bankruptcy. Upon an assignment, the claim vests in the Trustee, and is ultimately discharged by bankruptcy: *Blowes*; *Daemore v. Von Windheim* (2011), 98 R.F.L. (6th) 497 (B.C. S.C.); *Knott v. Pemberton*, 2011 CarswellOnt 1352 (Ont. S.C.J.); *Liddell v. Liddell* (2011), 100 R.F.L. (6th) 418 (Ont. S.C.J.); *Kinsella v. Mills* (2017), 3 R.F.L. (8th) 489 (Ont. S.C.J.). These assertions seem well-settled and beyond question.

A true "inchoate" claim - such as a claim for equalization or a trust interest when the spouses have not separated - is *not* property and *does not* vest in the Trustee: *Blackman v. Davison*, 1987 CarswellBC 508 (B.C. C.A.); *Elkaim v. Markina* (2010), 79 R.F.L. (6th) 149 (Ont. S.C.J.).

Now let us review the rationale advanced by the Court in this case in finding that an equalization claim is not "property" until the claim is actually advanced. Again:

> [28] I find that, similar to the right to elect under s. 5(2) of the *FLA*, ***an equalization claim is one that is inchoate until exercised. Once exercised, it takes on a new form as "property" and is subject to the provisions of the BIA. Until that point, the right is not assignable and remains only as an amorphous possibility***.

> [29] I therefore find that ***the right to an equalization of net family property does not become property within the meaning of the BIA unless and until the right to commence such a claim is exercised by a spouse***. [emphasis added]

However, this must mean that an unexercised equalization claim is not "property." If it is *not* "property" then the inchoate equalization claim *does not* vest in the Trustee because only "property" vests in the Trustee (see s.71 *BIA*, above). Therefore, upon discharge, the discharged spouse is free to claim equalization against his/her spouse, having disposed of the claims of all his/her other creditors (but perhaps claiming those obligations as date of separation debts). That just cannot be right.

Furthermore, this situation presumes the spouses have actually separated and are not acting in concert. "Co-operating" spouses could game the system to the prejudice of all other creditors by putting all assets in the name of one spouse (say the wife) and all debt in the name of the husband. Upon "separation", the husband would simply not advance an equalization claim against the wife, make an assignment in bankruptcy, avoid all his other creditors - and then reconcile with the wife.

These issues could be avoided if a Trustee is free to claim equalization. And perhaps that is the way it should be.

Bankruptcy & Family Law (and a bit of baseball)

Infusino, Re (2019), 35 R.F.L. (8th) 467 (Ont. S.C.J.) - Penny J.

Unlike in *Rusinek*, in *Re: Infusino* the Trustee unquestionably had authority to pursue the bankrupt husband's claim for an Equalization Payment, because the claim was started *before* the husband went bankrupt. Instead, in *Re: Infusio* Justice Penny had to decide whether to approve the trustee's decision to sell the husband's equalization claim to the wife for just over $25,000 even though, at least according to the husband, the claim was actually worth almost $800,000.

The husband and wife separated in 2016, and in March 2017 the wife started an Application for, among other things, equalization of net family properties.

In November 2017, after separation, the husband made an assignment in bankruptcy, and advised his Trustee that he thought the wife owed him an Equalization Payment of almost $800,000 based on the value of her pension and the fact that she was the sole owner of their matrimonial home.

The Trustee did not have enough money to pursue the husband's claim for an Equalization Payment. Furthermore, none of the husband's creditors were prepared to bankroll the Trustee to pursue the equalization claim or to do so on their own under s. 38 of the *BIA* which, as the Ontario Court of Appeal noted in *Green v. Green* (2015), 65 R.F.L. (7th) 291 (Ont. C.A.) at para. 54, allows individual creditors to pursue a claim that belonged to the bankrupt, and entitles those creditors "to recovery of the value of its claim in the bankruptcy and its costs incurred in the proceeding", with "[a]ny surplus is to be remitted to the bankrupt estate."

In an attempt to recover at least some money for the benefit of the husband's creditors, the Trustee gave both the husband and the wife an opportunity to purchase the husband's equalization claim. The wife offered to pay just over $25,000 for the claim. The husband, however, did not make an offer to purchase the claim, and sent a letter to the Trustee stating that, "I have to apologize for the NO BID, it is not that I do not care, I just do not have any funds. I'm done."

Unfortunately for the husband, it does not appear that he got advice from a bankruptcy lawyer about the potential consequences of allowing the wife to purchase his equalization claim from the Trustee. In any event, as the wife made the only offer to purchase the claim, and as $25,000 for the benefit of the husband's creditors was definitely better than nothing, the Trustee accepted the wife's offer.

As the wife and husband were "related" parties under the *BIA*, pursuant to s. 30(5) of the *BIA* the Trustee was required to obtain court approval before it could complete the sale. When the Trustee brought a motion to have the court approve the sale, the husband realized that if the sale went through, he would lose the ability to try to obtain part of the wife's pension. Accordingly, at this somewhat late stage, the husband decided to oppose the motion, and argued that:

1. As pensions are "exempt assets" in bankruptcy, the Trustee had no authority to sell the husband's interest in the wife's pension; and

2. The process that the Trustee had used to sell the husband's claim for an Equalization Payment "was not fair or reasonable in the circumstances."

Justice Penny rejected the husband's argument that the Trustee could not sell his interest in the wife's pension because the husband did not have an interest in the wife's pension that he could sell in the first place. All he had was,

> . . . a highly contingent claim which is the subject of contentious litigation in family court proceedings and the further contingency that a judge of the family court would be satisfied that payment could not be made of an equalization and that an order in the exercise of discretion would be made under s. 9(1) of the FLA [to transfer money out of the wife's pension to satisfy all or part of the equalization payment, if any].

That is, it was nothing more than a contingency upon a contingency. The husband's claim was to equalization, not to a share of the wife's pension. The wife's pension would only possibly come into play when considering how to satisfy any equalization obligation of the wife. Strike one.

Justice Penny also rejected the husband's claim that the sale process had not been fair and reasonable. Although s. 37 of the *BIA* gives a bankrupt person or his/her creditors the right to challenge a trustee's decision, the husband had not established any basis for the court to interfere with the sale of the husband's equalization claim to the wife in the particular circumstances of this case:

> [23] **The Trustee is allowed to administer the estate without interference unless there has been an excess of power, fraud, a lack of bona fides, or the actions of the trustee are "unreasonable from the standpoint of the estate":** s. 37 BIA; *Groves-Raffin Construction Ltd. (No. 2), Re*, [1978] 4 W.W.R. 451?(B.C. S.C.) at para. 23. Importantly, **the conduct of the trustee must be judged in light of the circumstances as they existed at the time**: *Cole, Re* (1995), 32 C.B.R. (3d) 213 (B.C. S.C.) at para. 17.
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> [24] The Bankrupt was well aware of the Trustee's position that the equalization claim had vested in the Trustee. **The Bankrupt made no complaint about the procedure or the tender process at the time**. Although the Trustee presumably knew the Bankrupt lacked ready funds, the tender permitted others to bid as well. Further, the Bankrupt had the option, employed by Ms. Barone, of financing a bid by borrowing from family, or friends.
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> [25] The Bankrupt's chief complaint, now with the benefit of hindsight, is that he ought to have been given the opportunity to take an assignment of this claim for equalization back from the trustee following which he could have pursued his equalization claim in the family court proceedings. There are at least three problems with this argument.
>
> [26] First **on at least two occasions, the Bankrupt had offered to abandon his equalization claim (which could be potentially generated benefit for his creditors) in exchange for Ms. Barone abandoning her spousal and child support claims (which would only benefit the Bankrupt).**
>
> [27] Second, given the Bankrupt's theory that a large portion of his equalization claim involved an exempt asset (the pension), it is not clear what "benefit" would accrue to his creditors by permitting him to proceed with it.
>
> [28] Finally, as noted earlier, the Bankrupt's equalization claim is hotly contested. The outcome is by no means certain. **Having admitted he has no ready cash, and given the Trustee was not going to finance the claim it is not clear how the Bankrupt would ever have been able to prosecute its equalization claim in the family court proceedings**. All of this now taken into account by the Trustee. For these reasons, I do not accept the objections of the Bankrupt to the process or the result. **There is no evidence that what the Trustee realized was not the best realization reasonably available**. [emphasis added]

That was strike two.

Bankruptcy can be complicated, counterintuitive and complex. This is a reminder to family law lawyers that, when dealing with bankruptcy issues, it is critical that your clients get advice from bankruptcy counsel as soon as possible. Had the husband in this case obtained such advice earlier, he might have found a way to retain the ability to try to divide the wife's pension instead of having lost this potentially valuable claim, getting nothing for it in return.

Sometimes you only get two strikes. This isn't baseball.

Footnotes

1 Justice Pazaratz's decision in *Ribeiro v. Wright*, 2020 CarswellOnt 4090 (Ont. S.C.J.) has already been cited in almost 50 other reported decisions since it was released on March 24, 2020.

2 The Covid-19 Chart available on Family Source also continues to be updated.