

## FAMILY LAW PROPERTY AND THIRD PARTY CREDITORS

At the recent FCAWA Conference His Honour Stephen Thackray, the Chief Judge of the Family Court of Western Australia gave an address relating to the development of the way family law courts have dealt with situations in which the interests of a third party creditor are in competition with the interests of a dependent spouse, in many cases with dependent children. As the matter is of particular relevance to many clients of financial counsellors, I have prepared this note on the subject.

### The Traditional View

For many years, the orthodox view was that the property to be divided between parties to a marriage was the **net** property, that is the property of the parties after deduction of their liabilities. The High Court decision of Ascot Investments Pty. Ltd. v Harper and Others in 1981 (1) established the proposition that the court could not make an order if its effect will be to deprive a third party of an existing right, or to impose on a third party a duty which they would not otherwise be obliged to perform.

This principle was applied in many family law cases. The Full Court of the Family Court ruled that in proceedings for an alteration of property interests only the net property of the parties is available for division between them. This had the effect that one party, in many cases a mother with children from the marriage, was left with very little after the husband's creditors scooped the pool of assets. Examples of this are the cases of Rowell and Rowell in 1989 and Re Bailey and Bailey in 1990 (2).

### Challenges to the Traditional View

Many people thought it unjust that creditors, in many cases the Australian Taxation Office, should be at the head of the queue, and leave a dependent spouse and children with very little. The contrary view was the "roller-coaster" principle: the argument that if the dependent spouse had enjoyed the good times, spending household income which should have been put aside to meet liabilities, then she should share the burden

in the bad times. An argument was advanced that during a marriage a wife builds up an interest in matrimonial property which makes her a variety of secured creditor, entitled to priority over other creditors. This view was rejected by the Full Court of the Family Court in Re Chemaisse (3).

### Legislative Change

In 2004 and 2005 major changes were made to the Family Law Act. In December 2004 Part V111AA of the Act came into operation. This enables the Court to make orders binding third parties. This overturned the principle the High Court had laid down in Ascot Investments Pty. Ltd. mentioned above. In 2005 the Act was further amended to harmonize the law relating to family law property settlements and bankruptcy (4). In Western Australia the Family Court Act 1997 was amended with effect from 2006 to enable the Family Court of Western Australia to make orders binding third parties in disputes of a property nature between former de facto partners. Western Australia has not, as yet, enacted legislation to enable the Family Court of Western Australia to make orders relating to bankruptcy of former de facto partners (5).

### The Present Law

With the amendments to legislation described above the Family Court and the Family Court of Western Australia are able to decide matters without the constraint of the High Court decision in Ascot Investments Pty. Ltd. described above. An example of how the Family Court decides matters involving third party creditors is Commissioner of Taxation & Worsnop and Anor. (6). In this case the only significant asset of the parties was the former matrimonial home valued at \$4,750,000. The husband had a tax liability of \$12,031,124, and his company had a tax liability of \$421,756. At trial, the judge ordered the former matrimonial home be sold, and the net proceeds to be divided equally between the wife and the Commissioner of Taxation. The Commissioner appealed to the Full Court of the Family Court, arguing that the source of money used to buy the former matrimonial home was income on which tax had not been paid. The Full Court dismissed the appeal.

## Significance for Financial Counsellors

It is quite common for financial counsellors to encounter clients with large tax debts, and in many cases the large tax debt may lead to strains on the clients domestic relationship, and the clients may be impelled towards bankruptcy. In those circumstances, it is very useful for counsellors to be aware of the possibility that the Family Court may make orders that give preference to a spouse over third party creditors, particularly when the spouse has care of children of the relationship. Counsellors can provide information to clients about this possibility, and refer them to other agencies which may be able to assist them to pursue this avenue.

### NOTES

1. Ascot Investments Pty. Ltd. v Harper and Harper (1981) FLC 91 -000
2. Rowell and Rowell, DFC of T (Intervener) 1989 FLC 92 -026 and Bailey and Bailey (executor of the estate of Bailey) 1990 FLC 92 - 117
3. Re Chemaisse: Federal Commissioner of Taxation (1990) FLC 92 - 133
4. Bankruptcy and Family Law Legislation Amendment Act 2005 (Commonwealth)
5. See Family Court Act 1997 (WA): Notes - provisions that have not come into Operation - Part 4
6. Commissioner of Taxation & Worsnop and Anor. (2009) FLC 93 - 392

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