Bankruptcy & Family Law

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1. Introduction

Bankruptcy. This is perhaps the most frightening word a family law practitioner can hear. After all, once issues of custody and access are set aside, the remaining claims between husband and wife are all of a financial nature: alimentary support, partition of the value of the family patrimony, compensatory allowance, and last but not least, attorney's fees.

This paper does not purport to be a comprehensive review of bankruptcy law in Canada. Yet, lawyers who specialize in bankruptcy often know little about family law; conversely, family law lawyers rarely have adequate experience dealing with bankruptcy issues. Insofar as the family law practitioner must be able effectively to execute judgments of the Superior Court against bankrupt individuals (invariably the husbands), and must at the same time have his fees paid, this paper will address the practical considerations involved in confronting the obstacles a bankruptcy may create.

1.1 A brief review of what bankruptcy is

A bankrupt is an insolvent person who has literally fallen over the cliff of his mounting personal debt load. One may become bankrupt either by making a voluntary assignment in bankruptcy, or by being petitioned into bankruptcy by an annoyed creditor. A bankrupt is an insolvent person who fails to pay his current bills or whose liabilities exceed his assets (if these conditions are later discovered not to be fulfilled, an annulment of the bankruptcy may be sought – s.181).

Once bankrupt, seizin of the debtor's property immediately devolves to a trustee (s.71(2)). A trustee is a person charged with administering the affairs of the bankrupt, in the interest of the mass of creditors. The rights and obligations of the trustee are carefully delineated in the *Bankruptcy Act* (ss. 13, 14 16-41) and merit considerable study, as do the rights and obligations of the other actors in this area of law (registrars, inspectors and so on).

The assets which formerly comprised the "patrimony" of the debtor (to use a Québec term) now are said to form the "estate" of the bankrupt. Assets which a debtor may hold in trust for another do *not* devolve to the trustee (s. 67(1)(a)); such creditors (beneficial owners of the trust assets) are not affected by the bankruptcy. Similarly, secured creditors are *not* affected by the bankruptcy (ss. 69.3(2), 127(1)). The qualification of existing or "after-acquired" assets and income in ss. 67 and 68 of the *Act* is critical to determine whether the trustee's reach exceeds his grasp. The heart and soul of the *Act* may be found in these two sections which determine the inclusion or exclusion of assets from the bankrupt's estate, and these two sections have been the inspiration of two recent Supreme Court decisions, *Marzetti vs. Marzetti* [1994] 2 S.C.R. 765 and *Royal Bank of Canada vs. North American Life Assurance Company and Balvir Singh Ramgotra* [1996] 1 S.C.R. 325.

Ordinary creditors are no longer entitled to proceed with ordinary lawsuits against the property of the debtor. An ordinary creditor must file a proof of claim with the trustee in the bankruptcy (ss. 121(1), 124(1)), and his rights and recourses are then determined by the clear structure of the *Bankruptcy Act*, again, which merits reading, since ordinary creditors often neglect to pursue their legitimate rights. Of course, the generally poor realizable value of the debtor's assets often discourages

creditors from participating in the process.

As part of the ordinary process of the bankruptcy, proceedings against the debtor are stayed in the civil courts (s. 69), and the special proceedings of the *Bankruptcy Act* take place in their stead. The trustee amasses the debtor's assets, determines with him the monthly contribution to the estate he must make – taking into account the bankrupt's family obligations – and then turns to examine pre-bankruptcy transactions. The trustee must deal with settlements, preferences or other reviewable transactions (ss. 91-100) to determine what assets must be recovered for the estate, and the trustee has considerable power to act to pursue this end.

Creditors have their voice once they file a proof of claim, in that they may attend and vote at creditors' meetings (ss. 102 *et seq.*), and they have the power to appoint inspectors who oversee the trustee's work (s. 116). Similarly, creditors have direct rights of examination and action (*e.g.* s. 38).

Once this process of amassing the assets of the estate of the bankrupt is concluded, the *Act* foresees a scheme of distribution by which the secured creditors are paid first (insofar as the assets against which they hold their security are sufficient, else they rank with ordinary creditors), then preferred creditors are paid next (s. 136) (and this includes the trustee's fees), and finally ordinary creditors share rateably any moneys which are left over, a rare event indeed.

Once the assets are distributed, the bankrupt may apply for his discharge (s. 169). A bankrupt in a small estate is discharged automatically without need for an application after six months. Creditors who seek to oppose the discharge must do so in timely fashion, by means of notice of opposition (s. 170(7)). Once discharged, the bankrupt is liberated of all claims against him, save for the exceptions set out in s. 178, which, fortunately, includes support claims. Once the bankrupt is discharged, any unrealizable property is returned to him (s. 40(1)), and the trustee is then himself discharged (s. 41(1)).

Certainly, the courts may take a dim view of a spouse who uses the *Bankruptcy Act* to avoid a judgment in a matrimonial proceeding: in *Re Bobyk* (1995) 37 C.B.R. (3d) 25 (Ont. Ct.), the wife had won a significant equalization order against her husband, who promptly made a voluntary assignment in bankruptcy. Feldman J. granted a husband a conditional discharge, predicated upon requiring the husband to continue monthly payments until payment of 70% of proved claims was completed (this being principally to the wife), and with the further condition that the monthly payments would only commence when the child support due the oldest child had ceased (no doubt to avoid prejudicing his ability to make the child support payments).

Although *Re Bobyk* is a well-reasoned decision, and achieves a just result pleasing to one's sense of fair play, it is nonetheless impractical to rely on an opposition to discharge as an effective means of safeguarding a spouse who is a judgment creditor of the bankrupt. The conditions which a judge may impose when granting a discharge to the bankrupt are completely discretionary, and hence, are more than likely to be inadequate to protect the interest of a judgment creditor.

How then may an ex-spouse pursue claims in the event of the bankruptcy of the other ex-spouse? When parties are still married, spouses are considered to be "related persons" (ss. 3-4) and transactions between them in the year preceding bankruptcy are reviewable (s. 100), and if one spouse becomes a bankrupt, the other spouse has limited powers in the bankruptcy proceedings: for example, a spouse cannot vote at the meeting of creditors (s. 109(6), (7)) nor can the spouse vote on the appoint-

ment of the trustee or the inspectors (s. 113(3)). When a couple divorces, evidently, these restrictions do not apply. However, whether or not one has a "power" to vote, what is most at issue is the ability to pursue and secure one's rights and claims against a bankrupt spouse.

Let us begin with the question of alimentary support. We will then examine the particular situation of legal fees, and we will conclude with the analysis of patrimonial claims in matrimonial law. For the sake of sociological reality and linguistic simplicity, and without intending to generalize, I shall presume that the alimentary creditor is "she" and the alimentary debtor is "he". Complaints to the author will be duly ignored.

2. Alimentary Support

2.1 General Rules

Alimentary support is not a claim provable in bankruptcy. As a result of this proposition, the alimentary creditor is not a "creditor" within the meaning of the *Bankruptcy Act*. She is not subject to the "stay of proceedings" which prevent ordinary creditors from pursuing execution of their judgments. She may not vote at creditors' meetings and may not oppose the discharge of the bankrupt (*Re Dimitroff* (1966) 8 C.B.R. (N.S.) 253 (Ont.S.C.)). In this latter regard, she has no need to oppose the discharge, since s. 178 of the *Act* tells us that:

> 178. (1) An order of discharge does not release the bankrupt from
>
> (b) any debt or liability for alimony;
>
> (c) any debt or liability under a support, maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt;

To understand the historical development of this reasoning, we begin with the concept that the "provability" of a claim in a bankruptcy is viewed to be a function of the certainty and calculability of the claim (s. 121). A claim which is imprecise or contingent or indeterminable is said historically not to be "provable". This provides the justification for the proposition (which we will examine later in this article) that a claim for a compensatory allowance is not "provable" in bankruptcy (*Lacroix vs. Valois* [1990] 2 S.C.R. 1259), since it must be *created* by the eventual trial judge (*i.e.* quantified), and is not simply *declared* by him (at page 1281).

In this vein, alimentary support "enjoys" the unique status of being endlessly indeterminate. Alimentary support is always subject to variation, both under the *Divorce Act* and the *Civil Code of Québec*. Even arrears of alimentary support may be varied at any time. Alimentary support which is payable by periodic payments or lump sum may be varied with equal juridical validity. This is the Heisenberg Uncertainty Principle, as applied to family law: if we know what the alimentary pension is, we do not know what it will be, and conversely, what the alimentary pension will be, may change what we know it to be now.

In Canada, the first precedents to state this reasoning were the judgments in *Abraham vs. Abraham* (1890) 19 O.R. 256 (Q.B.), aff'd (1891) 18 A.R. 436 (Ont. C.A.) and *Kerr vs. Kerr* [1897] 2 Q.B. 439, 66 L.J.Q.B. 838, 77 L.T. 29, thereby adopting in part the existing English jurisprudence then prevailing (the English jurisprudence permitting the provability of accumulated arrears of alimentary support, on the basis that these are, in fact, quantified). In *Kerr vs. Kerr*, it was explicitly stated that the uncertainty inherently attaching to the quantum of on-going *and past* alimentary pension preclude it from being viewed as "property" but rather as a mere "fund" for maintenance, and thus not a crystallized claim provable in bankruptcy.

Thereafter in *Re: Freedman* [1924] 5 C.B.R. 47, 55 O.L.R. 206, 3 D.L.R. 517 (C.A.), the Ontario Court of Appeal prohibited a wife from petitioning her husband into bankruptcy by reason of

the unpaid arrears of alimentary support. The wife is not a creditor and her debt may not be proved in bankruptcy. As such, she may not juridically present a petition for a receiving order against her husband.

In *Re: Dimitroff* (1966) 8 C.B.R. (N.S.) 253 (Ont. S.C.), the court held that since periodic payments of alimentary support are subject to review and variation, they may not be viewed as a claim provable in bankruptcy. Indeed, logically, the claim not being provable in bankruptcy, it is natural that the debtor is then not liberated from the debt when discharged. The court went on to apply the non-provability of the alimentary claim to the wife's attorney's costs which the husband may be condemned to pay, as part of his *alimentary* obligation, since the costs incurred to obtain the alimentary support are an accessory of the principal suit. (We will return to the authority of *Re: Dimitroff* later in this article.)

In *Saberi vs. Saberi* (1979) 30 C.B.R. (N.S.) 314 (Ont. C.A.), the Ontario Court of Appeal again confirmed the non-provability in bankruptcy of claims for payment of arrears of alimentary support and claims for current alimentary support (interim alimony was at issue in that case). In *Simon vs. Simon* (1984) 50 C.B.R. (N.S.) 161 (Ont. C.A.), lump sum alimentary support was held not to be provable in bankruptcy, with the result that the wife was not a creditor, and as such, her claim was not stayed by her husband's bankruptcy.

One of the best-reasoned in the long stream of cases on non-provability of alimentary support in bankruptcy is the Court of Appeal decision in *Dudgeon vs. Dudgeon* (1980) 34 C.B.R. (N.S.) 308, 17 R.F.L. (2d) 204 (Alta. Q.B.). This decision explains the rationale of historical jurisprudence to the effect that alimentary support and its arrears are subject to variation by the court at all times, and thus may not be viewed as a "crystallized" debt. As such, a claimant wife is not a creditor within the meaning of the *Bankruptcy Act*. A claimant wife's proceedings in execution for support are thus not stayed by s. 69 of the *Act*. As such, the claimant wife does *not* require any leave of the bankruptcy court (in Québec, the Superior Court in any event) in order to continue execution proceedings.

In other words, bankruptcy does not stay the suit, whether in demand or in defence insofar as an alimentary pension is concerned. In demand, a trustee has no interest in obtaining an alimentary pension which is unseizable for the mass of the creditors (s. 67(1)(b) of the *Act*, art. 553 *C.C.P.*), and if in defence, the trustee has no involvement because of the unprovability of the alimentary pension and the fact that the debtor will not be discharged from his alimentary obligations by the bankruptcy (s. 178(1)(b-c)).

This judgment is also authority for the proposition that insofar as a claimant wife has garnished the salaries and wages of her husband, such garnishment may continue without interference by the trustee in bankruptcy, who does *not* have seizin of such salaries and wages, absent a specific court under rendered under the *aegis* of s. 68 of the *Act*.

2.2 Particularities in Québec Caselaw

This proposition once evoked controversy in the province of Québec, due to an odd concatenation of published decisions in this area.

In *Re: Paré; Bourgeois vs. Michaud* (1980) 35 C.B.R. (N.S.) 199 (Que. S.C.), the registrar properly quoted the stream of caselaw I have cited herein, and concluded that the wife's claim for ali-

mony was not provable in bankruptcy, and as such, he granted her leave to continue her proceedings (since she had received a notice of suspension of proceedings from the trustee). Interestingly, the registrar also correctly notes that the alimentary claim of the wife must be viewed as *intuitu personae*, and he also notes that the scheme of the *Bankruptcy Act* includes as one of its primordial elements the recognition of the right and obligation of the debtor to support his family. This is a proper statement of the law as it now stands, as we will see in the later decision of the Supreme Court in *Marzetti vs. Marzetti* [1994] 2 S.C.R. 765.

In *Laurence vs. Daoust & Ass*. [1982] S.C. 475, Honourable Mr. Justice Perry Myer cited this stream of jurisprudence, including two unreported judgments of his colleague Honourable Mr. Justice Dionne in *Percepteur des pensions alimentaires vs. Proulx* (C.S.Q. 200-11-000482-81) and *Marcoux vs. Cassista* (C.S.Q. 200-11-000066-81) which follow the principal caselaw, including, notably the judgment in *Dudgeon*. He nonetheless chooses to conclude that arrears of alimentary support *are* provable claims in bankruptcy. With all due respect, this proposition is *wrong*, in light of the preceding and subsequent caselaw.

As well, he concludes that although current alimentary support does *not* constitute a claim provable in bankruptcy (right), and thus that permission to continue proceedings is *not* required (right), it is nonetheless "wise" to obtain leave of the Superior Court in bankruptcy division nonetheless (wrong).

He then correctly concludes that the collector of alimentary pensions may continue the seizure of the debtor's wages for the seizable portion as per article 553 *C.C.P.*, which is 50% of his gross wages, *less* such sum as the Court may order the debtor to pay into the bankruptcy. In the absence of any order of the court enjoining the debtor to deposit a portion of his salary and wages with the trustee, the alimentary creditor may continue any proceedings by garnishment of same to the full extent permitted by law, without interference by the trustee. As to the question of which comes off the debtor's salary *first* – his (court-ordered) contribution to the trustee or his alimentary payments to his ex-wife – this must be examined in light of the later decision in *Marzetti* (see below).

In *Droit de la Famille 82* [1983] S.C. 1099, Honourable Mr. Justice Ovide Laflamme seeks to shed some light on confusion which may be engendered by the judgment in *Laurence vs. Daoust*. He is clear that the proposition in the latter decision pertaining to the "wisdom" of obtaining leave to continue execution proceedings is *incorrect* and he states at page 1103 that the Court may *not* be called upon to grant authorizations not required by law. As such, execution proceedings for alimentary support may continue without leave of the court, since the support itself – whether for arrears or current support – does *not* constitute a claim provable in bankruptcy, and is *not* subject to the stay of proceedings which otherwise applies to ordinary creditors of the bankrupt.

Furthermore, Honourable Mr. Justice Laflamme cites *Dudgeon* with approval, and notes that even the portion of the salary and wages of the debtor withheld at source by his employer for distribution to the collector of alimentary pensions must inure to the benefit of the alimentary claimant. In other words, such garnished salary and wages are considered never to have entered into the patrimony of the debtor before the bankruptcy, and cannot after the fact suddenly be claimed by the trustee as composing part of the bankrupt's estate.

Then, in *Re: Guidi* (1986) 61 C.B.R. (N.S.) 130 (Que. S.C.), the registrar granted permis-

sion to the claimant wife to continue proceedings to fix the alimentary pension, whether by periodic payments or by lump sum. He reasoned that since these claims are not erased by the debtor's discharge, the wife may pursue them. The registrar also granted permission for the claimant wife to continue her proceedings to fix a compensatory allowance, even though once such allowance were to be determined, it *would* constitute a claim provable in bankruptcy, subject to the debtor's eventual discharge. In this latter regard, the registrar's reasoning is no longer valid in light of the Supreme Court judgment in *Lacroix vs. Valois* [1990] 2 S.C.R. 1259, in which the Supreme Court unanimously held that a claim for compensatory allowance is *not* provable in bankruptcy since it is only created by the eventual divorce judgment (page 1281, opinion of Gonthier J., for the court). We may forgive the registrar in *Re: Guidi*, he was relying on the then current authority of the Court of Appeal decision in *Lacroix vs. Valois*, cited as *Droit de la Famille 176* [1985] C.A. 5, later overturned by the Supreme Court.

Of course, in *Lacroix*, the bankruptcy preceded the claim for a compensatory allowance by many years, and the discharge therein logically could not be viewed to be an estoppel of a current claim for a compensatory allowance which had never been quantified in the first place. In *Re: Guidi*, the wife was in a more precarious position, in that her proceedings in divorce claiming a compensatory allowance had already begun. Of course, Gonthier J.'s analysis clearly puts the moment to determine "provability" in bankruptcy as being the date of the assignment or receiving order, as per s. 71(1) of the *Act*. In other words, if the compensatory allowance has not been quantified when the husband fall into bankruptcy, the claimant wife is safe, in that the husband cannot be liberated from a debt which is not "provable" because it has yet to be *created* by the divorce court judge.

For many years, the fact of these two contradictory published decisions of the Superior Court engendered considerable confusion as to which one was correct (*Laurence vs. Daoust & Ass*. and *Droit de la Famille 82*).

2.3 Seizures of Salaries and Wages by the Alimentary Creditor – The Supreme Court in Marzetti vs. Marzetti (the regime of s. 68 BIA)

The matter has now been definitively resolved by the Supreme Court decision in *Marzetti vs. Marzetti* [1994] 2 S.C.R. 765. This unanimous decision of the Supreme Court dealt with the disposition of a bankrupt husband's post-bankruptcy income tax refunds: it was held that the alimentary claim of the wife, as exercised by the Director of Maintenance Enforcement, took precedence over the claim of the trustee.

The trustee's reasoning was simple. As per section 71(2) of the *Act*:

> **71. (2) Vesting of property in trustee** – On a receiving 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 *his property*, which *shall*, subject to this Act and to the rights of secured creditors, *forthwith pass to and vest in the trustee* named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer. [italics added]

Once the trustee has seizin of the debtor's property, section 70(1) comes into play, giving precedence to the trustee's claim over that of the Director of Maintenance Enforcement, as follows:

> **70. (1) Precedence of receiving orders and assignments** – Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.

The trustee's view was that the income tax refund constituted "property" in a broad but common sense, and thus within the grasp of the trustee. This case then hinged on the definition of the concept of "property" of the bankrupt, which is set out in ss. 67 and 68 of the *Bankruptcy Act*, as follows:

> **67. (1) Property of bankrupt** – The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person,
>
> (b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,
>
> but it shall comprise
>
> (c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
>
> (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.
>
> **68. (1) Salary, wages, etc., to bankrupt** – Notwithstanding subsection 67(1), where a bankrupt
>
> (a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt, or
>
> (b) is in receipt of, or is entitled to receive from a person any money as payment for or commission in respect of any services performed by the bankrupt,
>
> the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

Ostensibly then, were one to look at s. 67 alone, a bankrupt's ordinary wages would be within the grasp of the trustee, at least insofar as the provincial rules governing the unseizable portion of wages in article 553 *C.C.P.* so permit. However, the Supreme Court held that s. 68 creates a complete code in respect of a bankrupt's wages, and soundly *rejected* the proposition that insofar as salaries and wages are concerned that the differing provincial legislative schemes would apply to determine which portions of any given debtor's wages would or would not vest in the trustee, in accordance with the debtor's province of residence (page 792).

Iacobucci J., speaking for the Court, considers that insofar as the legislature sought to create a uniform, substantive code pertaining to a debtor's salary and wages in s. 68 of the Act, then one should

conclude that such wages do *not* vest with the trustee in the absence of an application before the court, and furthermore, that the family responsibilities of the debtor must be taken into account when application is made to the court to determine what the debtor's monthly payments should be to the trustee.

In other words, and this is often forgotten by practitioners, *family responsibilities come first in the eyes of the federal legislator*, and this is consistent with the notion in s. 178 that a debtor is never liberated of his alimentary obligations by reason of bankruptcy (for example, in *Provencher (Syndic de)* [1996] R.D.F. 271, where Honourable Mr. Justice Paul Vézina refused to liberate a husband of his liability to pay lump sum alimentary support to his wife). If a debtor is never liberated, how can he be viewed not to have to pay his alimentary support as it comes due, from month to month?

As such, it is respectfully submitted that Honourable Mr. Justice Perry Myer's reasoning in *Laurence vs. Daoust & Ass. (supra)* to the effect that the alimentary creditor may seize 50% of the bankrupt's wages *less* the contribution to the trustee, is incorrect; this puts the proposition backwards. Rather, it is the Court, which must determine the contribution to the trustee once deduction has been made *first* of the bankrupt's regular alimentary obligations to his ex-wife and children. *Marzetti* is as such indeed helpful to trustees, because insofar as a sizable portion of a bankrupt's wages may have to be considered primarily available to meet support obligations (up to 50% in Québec),, the Court is *not* held to the provincial limits of seizability of wages (found in art. 553 *C.C.P.* in Québec) in determining the bankrupt's monthly payments to the trustee.

Of course, a surprised bankrupt may find that his total monthly pay-outs to his trustee and his ex-wife may readily exceed the conventional upper limit to which we have been heretofore accustomed of 50% of gross wages.

Certainly, bankrupt husbands may also be naturally reticent to consider their alimentary obligations first. This is short-sighted. A typical bankrupt husband still earns an income, even if he is unable to pay the mass of his creditors. It is to his fiscal advantage to continue to pay the alimentary support, and benefit from the income tax deductibility of same. One might also mention it is to his moral advantage to continue to honour his obligations to support his ex-wife and children. Surely the "mass of creditors" should be viewed to be less important to a bankrupt than his ex-wife and children.

Unfortunately, trustees in bankruptcy and bankruptcy lawyers invariably seek to protect the mass of creditors – and their own fees, which are "preferred" in the bankruptcy – rather than consider the rights and claims of the ex-wife and children, whose interests they do *not* represent as a matter of law.

As such, unless the wife takes the steps to defend herself in bankruptcy court and intervene on a trustee's application to fix the contribution of the debtor – a proceeding in which she has an interest within the meaning of article 208 *C.C.P.* – she may find herself in a precarious position. As we have seen, past authorities of the lower courts are to the effect that her ability to seize 50% of her husband's salary is subject to deduction of the amount he must otherwise remit to the trustee, so that the debtor's total contributions to *both* wife and trustee do not exceed the provincial limit of 50% of gross pay. Of course, we have now come full circle, because in *Marzetti*, we are told that the trustee must not view himself limited by the provincial rules pertaining to unseizability, since these are found in s. 67, which must be viewed *not* to apply to salaries and wages.

Nonetheless, *Marzetti* does *not* directly address the specific problem of what would happen to a wife's execution proceedings if a bankrupt is suddenly required to make a large monthly contribution to the trustee, an adjudication having taken place without regard for her pre-existing judgment for support – hence, the advisability of a wife's timely intervention in the bankruptcy proceedings so that any judgment rendered against the bankrupt explicitly follows the requirement of *Marzetti* (and s. 68) that family obligations be considered *first*. In light of the explicit requirement of s. 68, I believe that even if a wife may not be said to have a provable claim in bankruptcy for her alimentary support judgment, she nonetheless has *locus standi* as an interested party within the meaning of article 208 *C.C.P.* to present a declaration of aggressive intervention in s. 68 proceedings, to ensure the quantum of the bankrupt's monthly contributions is not set too high.

In my view, the impact of *Marzetti* is such that a bankrupt may find himself in a precarious situation, if wife and trustee have not had a meeting of the minds on the disposition of his salary. A wife may seize 50% of a debtor's salary, without regard for the bankruptcy, as explained above. A trustee may obtain a court order for a contribution of part of the debtor's salary, without regard for the provincial limits on seizability (otherwise fixed at 30% over a basic weekly deductible, as per article 553 *C.C.P.*). If the combined amounts lead to an inequitable result, the debtor may petition the family court for relief – which I think should manifestly be denied, since the *Bankruptcy Act* clearly puts the onus on the trustee and the Court sitting in bankruptcy division to determine the debtor's monthly contribution as a function of his available income *after* payment of the alimentary support.

As Iacobucci J. states, at page 801 of *Marzetti*:

> In s. 68 of the *Bankruptcy Act*, Parliament has indicated that, before wages become divisible among creditors, it is appropriate to have "regard to the family responsibilities and personal situation of the bankrupt". This demonstrates, to my mind, an overriding concern for the support of families.
>
> Moreover, there are related public policy goals to consider. As recently recognized by L'Heureux-Dubé in *Moge v. Moge*, [1992] 3 S.C.R. 813, "there is no doubt that divorce and its economic effects" (p. 854) are playing a role in the "feminization of poverty" (p. 853). A statutory interpretation which might help defeat this role is to be preferred over one which does not.

As such, the Supreme Court is clear that the wife, who is held to the 50% limit of article 553 *C.C.P.* is permitted to collect "first" against the husband's gross salary. The trustee, who is *not* held to any provincial limit on seizability, may obtain a s. 68 order for any given sum of money, having strict regard for the pre-existing support order. The bankrupt may then find himself with well *over* 50% of his income in effect "garnished" to his wife and trustee.

In closing, the Court concluded that the post-bankruptcy income tax refund retained the same character as the original wages the debtor had earned, income taxes on which had been retained at source by his employer, and later refunded to him by the tax department. From the Court's point of view, although these funds did not vest automatically in the trustee by the operation of s. 67, the trustee was nonetheless free to have applied to the court under s. 68 for an order pertaining to same. Since he had failed to do so, priority was given to the Director of Maintenance Enforcement's garnishment of same, for the benefit of the unpaid alimentary creditor.

We have now established that a claimant wife may seize a bankrupt husband's salary, wages

and income tax refunds with impunity, for unpaid alimentary support, even during the bankruptcy (as in *Re Burrows* 42 C.B.R. (3d) 89, confirming that the bankrupt should pay support including arrears if possible out of earned income <u>during</u> the bankruptcy). One should also note that the words "salary and wages" are broadly defined in s. 68, and include "other remuneration" from an employer, as well as commission income, and any "payment for any services…performed by the bankrupt."

<u>2.4 Seizures of Other Income by the Alimentary Creditor</u>

A bankrupt wife may find herself well-protected by the simple operation of law. Her trustee will *not* acquire the seizin of any alimentary pension she is receiving, in accordance with the exemption of s. 67(1)(b) of the *Act* read with article 553 C.C.P. This will preserve the integrity of her alimentary support in the face of claims by the mass of creditors, in that the trustee does not acquire more rights against her than the original creditors had.

However, if her husband has a judgment claim against her for a compensatory allowance or for the partition of the value of the family patrimony, he has a quantified claim which is provable in bankruptcy, and which is ordinarily stayed by operation of s. 69.3(1) of the Act. The husband will be materially prejudiced if he has continued to pay the wife alimentary support, while incapable of constraining the trustee to seize the support in execution of his judgment award, and the wife will eventually be discharged in her bankruptcy, and liberated from the obligation to pay him.

As such, the husband should petition the Court under s. 69.4 of the *Act* for permission to continue execution proceedings in first instance. In this fashion, he will be able to seize the alimentary support otherwise payable to his wife, by operation of article 553 *in fine C.C.P.*, which *permits* such seizure to 50% of the support in execution of claims for compensatory allowance or family patrimony.

In *Demers (Syndic de)*, J.E. 95-1743 (S.C.M. 500-11-000589-958, judgment of the registrar Me. Pierre Pellerin dated August 24 1995), the registrar held that a bank of sick leave hours which a bankrupt had accumulated at his place of employment did *not* automatically devolve to the trustee, pursuant to the authority of *Marzetti*. The trustee could not exercise more rights than the bankrupt himself had prior to the bankruptcy. Unless and until those sick leave hours became moneyable for the bankrupt, the trustee could only then make an application under the aegis of s. 68 of the *Act*. The corollary of this principle is that the alimentary creditor may herself seize a bank of moneyable hours, without regard for the trustee who has yet to present an application under s. 68 before the Superior Court sitting in bankruptcy division.

Insofar as other assets are concerned, an alimentary creditor may seize with impunity all assets of the bankrupt in respect of which the trustee in bankruptcy cannot have seizin. Since we are now under the *aegis* of s. 67 of the *Act*, we know that assets or income considered unseizable by provincial legislation (art. 553 *C.C.P.* insofar as we are concerned), do *not* devolve to the trustee. However, this very provincial legislation makes board and sweeping exceptions to benefit alimentary creditors.

For example, a wife may seize up to 50% of the unemployment insurance proceeds collected by her ex-husband (by operation of article 553(11.1) *C.C.P.* read in conjunction with s. 24 of the *Loi d'aide à l'exécution et des ententes familiales* L.R.C. 1985, 2e suppl., ch. 4 and s. 3(c) of this law's regulations). If she in turn becomes bankrupt, her trustee may *not* obtain seizin of those unemployment

insurance proceeds held by the Collector of Alimentary Pensions, since the latter holds such funds *qua* alimentary support, which is in turn unseizable also by the operation of article 553(4) *C.C.P.* read in conjunction with s. 67(1)(b) of the *Act* (*Menuiserie Chibougamou inc. vs. Paré* J.E. 96-1570 C.Q.M. 170-02-000019-957, judgment rendered by Mr. Justice Maurice Abud dated July 08 1996).

In *Re Saccary; Re Green Haley & Pye Inc.* (1989) 72 C.B.R. (N.S.) 57 (N.S. S.C.), Burchell J. determined that post-bankruptcy professional income does not vest with the trustee, so the bankrupt is entitled to sue a debtor for unpaid fee income, without intervention by the trustee. This does *not* apply to any receivables due and unpaid on the date of the bankruptcy; these vest with the trustee. Of course, the corollary of this proposition is that if such a debtor has a wife to whom arrears of support are owed, she would be in a position to garnish those funds in her husband's debtor's hands, without regard for the trustee either.

2.5 Seizures of "Unseizable" Assets by the Alimentary Creditor – The Supreme Court in *Royal Bank of Canada vs. North American Life Assurance Co. & Ramgotra* (the regime of s. 67 *BIA*)

In *Droit de la Famille 2468*, J.E. 96-1560, S.C.M. 500-12-149611-869, a judgment of Honourable Mrs. Justice Ginette Piché dated June 20 1996, a seizure for unpaid arrears of alimentary support was declared to apply to an immobilized pension fund («compte de retraite immobilisé»), notwithstanding the conventional unseizability of same, and the statutory unseizability provided for in art. 553(7) *C.C.P.* Unfortunately for the wife in that case, her seizure, although valid for 50% of the said plan (as per art. 553(12) *in fine C.C.P.),* would only have practical effect when the annuity flowing from the fund would eventually be payable; she had no power to force the collapsing or cashing of the said fund immediately.

Turning now to the most recent decision in this area, there is the Supreme Court decision in *Royal Bank of Canada vs. North American Life Assurance Company and Balvir Singh Ramgotra* [1996] 1 S.C.R. 325 [hereinafter "Ramgotra", for clarity of reference], Dr. Ramgotra transferred the funds he held in his RRSPs into an RRIF, designating his wife as beneficiary of this fund. Annuity payments began on a monthly basis, and Dr. Ramgotra went bankrupt two years later. The trustee sought to have this transaction declared a "settlement" within the meaning of s. 91(2) and thus void against the trustee.

North American Life Assurance Company and Dr. Ramgotra both argued that an RRIF with a spousal beneficiary is unseizable under provincial law, and hence the trustee may not claim the seizin of the fund, pursuant to s. 67(1)(b) of the *Act*.

The trustee's application was dismissed at trial. Similarly, the Royal Bank's appeal (*qua* creditor in the bankruptcy) to support the trustee's original application was dismissed. Finally, in a unanimous judgment of seven justices, penned by Gonthier J., The Royal Bank's appeal was dismissed.

As in *Marzetti*, the Supreme Court in *Ramgotra* chooses to take a purposive approach in legislative analysis, which is a marked departure from a lengthy stream of often unsatisfying bankruptcy jurisprudence which has historically construed narrowly the provisions of the *Act* with often inequitable consequences.

Gonthier J. opens his analysis at page 338 with an important statement of principle which the family law practitioner neglects at his peril:

> Why should Dr. Ramgotra's bankruptcy place creditors like the bank in a better position than they would be in absent the bankruptcy? The bank's position before this Court appears to conflict with the principle that creditors should not gain on bankruptcy any greater access to their debtors' assets than they possessed prior to bankruptcy: *M.N.R. v. Anthony* (1995), 124 D.L.R. (4th) 575 (Nfld. C.A.), at p. 580.

The position of the alimentary creditor is uniformly privileged vis-à-vis ordinary commercial creditors: more assets are seizable; more kinds of income are seizable; greater percentages of ordinary income are seizable. This privileged position should manifestly not be viewed as being adversely affected by an intervening bankruptcy, else the purpose of both federal and provincial legislation which gives priority to alimentary claims is subverted and defeated (indeed, the *Bankruptcy Act* itself recognizes this primacy in s. 178).

Gonthier J. goes on to state:

> Moreover, the policy of exempting life insurance investments and policies from execution or seizure under the *BIA*, where family members are designated as beneficiaries, is sound. Given the importance of insurance in providing for the welfare of dependents upon the death of the insured, an insurance policy may be characterized as a necessity.

This is an observation which applies to life insurance policies in Québec as well. Article 2457 *C.C.Q.* provides as follows:

> **Art. 2457.** Where the designated beneficiary of the insurance is the spouse, descendant or ascendant of the policyholder or of the participant, the rights under the contract are exempt from seizure until the beneficiary receives the sum insured.

As such, under provincial legislation, it is the designation of the beneficiary which triggers unseizability, and which thus prevents the trustee from obtaining the seizin of such policies, pursuant to s. 67(1)(b) of the *Act*. Yet, such designation is also viewed to be a "settlement" within the meaning of s. 91 of the *Act*. Gonthier J. views no conflict when he states, at page 353:

> Are we really to believe that Parliament intended the very act which renders an asset exempt to be the cause of its losing its exempt status? I do not think so…

and at page 359:

> …the fact a beneficiary designation is void against the trustee under federal legislation necessarily results in it no longer having effect vis-à-vis the claims of creditors under the provincial legislation which s. 67(1)(b) incorporates.

So, even if the designation of a spouse as beneficiary of the RRIF constituted in fact a "settlement" which is inherently inopposable to the trustee, all this entitles the trustee to do is to take possession of the funds. Once in the hands of the trustee, the creditors have no entitlement to the funds, by operation of s. 67(1)(b), and the trustee may only return the funds to the bankrupt. In other words, the exempt status of the asset under provincial law constitutes a juridical obstacle to the claims of creditors (at page 354).

To arrive at this conclusion, Gonthier J. cites *Marzetti* with complete approval, and indeed considers the reasoning therein as to the interpretation of s. 68 explicitly overriding s. 67 simply underscores the validity of viewing this section as having primacy in setting the rules as to which assets of the estate may be distributed among creditors (at pages 355, 356).

As such, the intention of the bankrupt at the time of the "settlement" becomes irrelevant for the purpose of this analysis. Gonthier J. notes that only in the situation of a challenge to the settlement as having been made with intent to defraud creditors would other considerations arise. Each province has its own legislation on fraudulent transactions, ours being the Paulian action provided for in article 1631 *C.C.Q.* At page 362:

> A bankrupt cannot enjoy the benefit of a s. 67(1)(b) exemption where the property in question became exempt by means of a fraudulent conveyance declared void pursuant to provincial law.

In light of this favourable judgment of the Supreme Court, it would be prudent to advise clients of the potential advantages of "creditor-proof" RRSPs – which are boldly advertised in these very terms – as held through life insurance companies, which thereby puts these funds out of reach of creditors in a bankruptcy. As for the wife's alimentary claim, an unseizability of RRSPs (or similar funds, as above) which obtains its unseizable status due to the (typical) designation of the wife herself and/or the children as beneficiaries, should not be a bar to a seizure for unpaid support.

3. Legal Fees

3.1 The Situation under the Common Law

When L'Heureux-Dubé J. speaks of the "feminization of poverty" in *Moge vs. Moge* [1992] 3 S.C.R. 813, (1993) 43 R.F.L. 345 in divorce, she speaks not only to the decline in the standard of living of women and children after divorce, but the relative inability of women to defend their rights and assert their claims before the family courts. There is a truism in the area of law that the Golden Rule applies: he who has the gold, rules. This is often the husband, as a matter of bitter sociological reality.

Insofar as the award of a provision for costs in family matters (generally) permits women to redress at least in part the inherent inequity in the relative ability of husbands and wives (or parents and children) to afford commensurably adequate legal counsel, such award is protected in the event of bankruptcy. As the courts have consistently stated (from *Des Troismaisons vs. Tellier* [1909] S.C. 245 on, *et seq. ad infinitum*), a provision for costs is inherently alimentary in nature, since its award is predicated solely upon the existence of an alimentary obligation between creditor and debtor. In the event of a husband's bankruptcy, the wife's attorney benefits from the same protection and the same analysis as hereinabove, to permit said attorney to execute a judgment for provision for costs.

However, the story does not stop here.

Attorneys have a privilege at common law for the fruits of litigation, being such assets or stream of income as the attorney has been instrumental in creating or conserving. The existence of this privilege is a matter of law; the remedies to give it its full effect are a matter of equity.

Before turning to the caselaw and doctrine justifying this analysis, let us see the advantage which may obtain in the context of bankruptcy of the husband (and/or wife!) and if a lawyer may validly claim the status of secured creditor.

In the definitions set out in s. 2 of the *Act*, a secured creditor includes a creditor who holds a lien or privilege on any income or assets. In s. 69.3(2), we learn that the stay of proceedings does *not* apply to secured creditors, who may deal with their security as they see fit, without regard for the bankruptcy. Indeed, the devolution of the seizin of the debtor's property to the trustee provided for in s. 71(2) explicitly is made subject to the rights of secured creditors in the assets which comprise the security. Finally, s. 127(1) provides that a secured creditor may choose to file a proof of claim for any unsecured portion of his claim (for example, when the proceeds of disposition of the security are insufficient).

Beginning with the caselaw developed in the other Canadian provinces, the early landmark precedent in this area is in *Re: Dimitroff* (1966) 8 C.B.R. (N.S.) 253 (Ont. S.C.), which is authority for the proposition that an award for costs to the wife's attorney constitutes an integral part of the alimentary award in her favour, and benefits from the same protection as the alimony order itself. The costs are considered an accessory of the principal suit for alimony. As a result, the husband is not liberated of his obligation to pay the attorney's costs when he receives his discharge in bankruptcy (at pages 256, 269). As such, the wife has neither the right nor the need to oppose the husband's discharge.

Let us keep in mind, from the outset, that in common law provinces, costs may be taxed on a solicitor-client basis. This jurisprudential analysis is invaluable to practitioners in these provinces, and I will demonstrate its value in Québec. Again, at the outset, this reasoning is readily analogous to the judgment awarding a provision for costs in Québec. The question remains whether we have even more protection than that afforded by the provision for costs award.

The principal authority as to the attorney's secured position was developed outside the area of the family law, in *Re: Tots and Teens Sault Ste. Marie Ltd. and McFarland* (1975) 21 C.B.R. (N.S.) 1, a judgment of the Ontario Supreme Court, which has been unanimously followed by the caselaw over the following twenty years.

In that case, the attorney had successfully defended his clients in a damage suit instituted against them. He obtained a bill of costs, taxed on a party-and-party basis against the plaintiffs in the original suit, and the sum so taxed was collected by seizure. Before the attorney could then collect the funds from his own clients, they fell into bankruptcy. The attorney then sought leave of the bankruptcy court to seek a "charging order" to charge the funds so collected with his solicitor-client privilege. Leave was granted, despite the opposition of the trustee.

Henry J. analyzed the solicitor-client lien as follows, at page 7:

> The solicitor's so-called lien on the fruits of litigation that he has successfully conducted was described in *Dallow v. Garrold* (1884), 14 Q.B.D. 543, by Lindley L.J. in the Court of Appeal, p. 547, as an inchoate right which cannot be defeated by any conveyance or act and was therefore not affected by an assignment of the fund by the client or by a stop order obtained by the assignee. The common law right was recognized and was enforced through the equitable jurisdiction of the court so that it took effect only when the court, in the exercise of its equitable discretion, declared the fund recovered to be security for the solicitor's claim. This was translated into statutory form and extended as I have said by the Solicitors Act of 1860 and in Ontario by what is now Rule 696. So far as I can determine however, the same principles were applied by the courts in making charging orders under these statutory provisions. *It is well established judicially that the solicitor has a prima facie right to his lien, as a particular charge upon the fruits of his endeavours*, which I refer to as "the fund", and that he ought not to be deprived on this remedy by way of charging order in the absence of exceptional circumstances. [italics added]

and further, at page 9:

> …I have reached the conclusion that the fund at the time it was created in the hands of the sheriff was impressed with the inchoate right of the solicitor to apply to the Court and have a declaration that it is charged as security for his costs. This was an inherent right to invoke the equitable jurisdiction of the Court to exercise its discretion in his favour by way of declaring that the fund is charged as security for his claim. As I see it, *the role of the Court is to declare, not to create, the security and even though the bankruptcy has occurred, it is in my opinion still open to the proper Court, in the exercise of its discretion, as I have said, to decide if the lien shall or shall not be recognized.* If the Court makes such a declaration it has the effect, as I see it, of holding that the lien attached to the fund at the moment it was created. *If it had been created prior to the bankruptcy, there would be no question that the funds would stand charged; the fund having been created after the bankruptcy may, in my opinion, in the same way be made the subject of a charge by way of security*, unless of course the Court comes to the conclusion that it would offend the principles of equity, either by reason of the conduct of the solicitor or unfairness to the creditors, to refuse to exercise

the discretion in the solicitor's favour. On the view that I take of the matter, *the lien in law attached to the fund as an inchoate right, the crystallization of the lien requiring only the pronouncement of the court to reveal it.* [italics added]

In *Re: Broadloom Warehouse vs. Dundan & Craig* (1980) 37 C.B.R. (N.S.) 142 (Alta. Q.B.), Hope J. held that the lien avails only in respect of the action or defence undertaken by the attorney which creates or conserves a fund. The right exists even if the attorney has not yet collected the proceeds of the fund so created. Failing such a lien, the attorney is an ordinary creditor in the bankruptcy of his client for such actions undertaken which neither created nor preserved income or assets.

In a similar vein, in *Can. Commercial Bank. vs. Parlee McLaws* (1989) 72 C.B.R. (N.S.) 39 (Alta. Q.B.), it was held that the solicitor's lien only attaches to the specific property created or conserved for the client, and not generally to any of the client's assets. This was a mitigated result for the firm of attorneys in that case, who found themselves protected only insofar as one sum of money held in trust was concerned; other trust funds could not be said to be available insofar as such funds were held for purposes which did not permit a lien to attach.

In *Re Moriseau* (1982) 44 C.B.R. (N.S.) 128 (B.C.S.C.), Bouck J. cites with approval the reasoning in *Tots & Teens*, and extends the applicability of this case to instances of contingency fees. A firm of attorneys had concluded a contingency fee contract with the bankrupt, providing for a 25% collection fee, but that in the event the bankrupt changed attorneys and only collected his claim later, the attorneys would only have the right to tax a conventional bill of costs. The firm of attorneys was successful at trial for their client, who was only then petitioned into bankruptcy, and a new firm of attorneys collected on the judgment.

Bouck J. held that the first firm of attorneys had a statutory privilege under s. 100 of the B.C. *Barristers and Solicitors Act* (which gives legislative effect to the privilege which has existed at common law since antiquity [or at least since before Confederation, which is long enough for our purposes]), and were thus secured creditors within the meaning of s. 2 of the *Bankruptcy Act*.

In *Walker vs. Saunders* (1984) 55 C.B.R. (N.S.) 84 (B.C.C.A.), *Tots & Teens* is again cited with approval, and applied even though, as in *Re Moriseau*, the attorney had not yet actually recovered an asset. The attorney had instituted proceedings on behalf of the wife to preserve and eventually recover assets which the recalcitrant husband had attempted to dissimulate by putting the assets in his girlfriend's name. In first instance, the attorney found his request for a charge for his costs *denied* against both parties' interest in the property recovered in foreclosure as well as against the ex-husband's trust property, because he had not recovered the asset. The Court of Appeal overturned this finding, considering that the institution of the proceedings was in and of itself sufficient to trigger the solicitor's privilege, since it was a necessary step to permit the wife eventually to succeed in her claims before the family courts.

In *Re Booth* (1985) 56 C.B.R. (N.S.) 289 (Ont. S.C.), a firm of attorneys had represented a wife in matrimonial litigation pertaining to custody, maintenance and the disposition of the matrimonial home. The family court judgment held that the wife was entitled to the sum of $ 16,000 of the total value of the matrimonial home, which her husband paid, and which sum was intercepted by her trustee because she had made a voluntary assignment in bankruptcy *prior to* receiving the said funds. Her attorneys sought to have their solicitor's lien apply to this fund in its entirety, a proposition which was refused by Osborne J., since he determined it would be inequitable to do so without first requiring the

attorneys to quantify how much of their unpaid fees could reasonably be held to apply to the issue of the disposition of the family home. Although it would be reasonable that they have secured status vis-à-vis ordinary creditors insofar as their efforts contributed to the creation of the funds, it would *not* be reasonable for them to have such status for non-moneyable efforts such as in respect of the custody litigation.

In *Wilson, King & Co. vs. Lyall* (1987) 65 C.B.R. (N.S.) (B.C.C.A.), attorneys were denied the solicitor's lien when their actions in defending the bankrupt husband neither created nor conserved the assets now held by the trustee, and in fact, the husband was in a worse position as a result of the action having been defended. The Court of Appeal reiterates that the purpose of the solicitor's lien is to protect the attorney from the inherent unfairness of expending efforts to create or conserve an asset but then not deriving payment for such services because of an intervening bankruptcy. It is this consideration of fairness which entitles the court to grant the attorney a charging order, so that he is a secured creditor and privileged as compared with the mass of ordinary creditors.

In *Allen vs. Morrison* (1987) 67 C.B.R. (N.S.) 35 (Ont. S.C.), it was unanimously decided that an attorney who sought a charging order to secure the costs granted him on a solicitor-and-client basis in support proceedings, was necessarily entitled (if not obliged) to quantify those costs to determine what amount thereof was attributable to support obligations (page 39). And, at page 40:

> No proceedings relating to claims provable in bankruptcy may be brought without order of the court and in any such proceedings the trustee in bankruptcy should be made a party. However, support and maintenance are not claims provable in bankruptcy. It follows, in my opinion, that costs are not claims provable in bankruptcy to the extent they are attributable to support and maintenance. There is therefore no necessity for an order from the bankruptcy court to allow the claim to be made under the Family Law Reform Act, nor is there a necessity for the trustee to participate in the proceedings.

In *Lang vs. Soyatt* (1988) 68 C.B.R. (N.S.) 201 (Ont. S.C.), the wife's attorney obtained both spousal and child support from the husband, with costs on a party-and-party basis. He then obtained a charging order against the support payments. Both husband and wife made voluntary assignments in bankruptcy, and were eventually discharged. The attorney then sought to enforce his charging order against the husband.

Citing *Re Dimitroff* and *Allen vs. Morrison* with approval, Stortini L.J.S.C. held that both the support order and the costs were liabilities of the husband for which he could *not* be liberated by a discharge in bankruptcy. As such, a creditor's right of action in respect of such a debt which is not released by the discharge, is simply to recover the debt through the ordinary civil courts, and not in bankruptcy court (page 203). None of these claims should be viewed as "provable" in bankruptcy. If the attorney wishes to protect his claim, he must show that the fees incurred were closely enough identified with the support proceedings as to be "embraced by the words 'order for support or maintenance'".

Turning to the issue from the bankrupt wife's perspective, Stortini L.J.S.C. cites with approval *Re Tots & Teens* to the effect that the solicitor's lien on the fruits of litigation is a secured claim under the *Bankruptcy Act*. As such, the portion of the fund (to wit, the support payments) which is charged by the solicitor's lien belongs to him, and *not* to the client herself nor to her trustee or the ordinary creditors. As such, the wife's discharge does not affect the security which exists in the solicitor's favour.

Since the discharge of both husband and wife in no way disqualified the attorney's claim, the attorney was permitted to pursue his claim for one-third of his total fees, being the portion reasonably attributable to the question of obtaining the alimentary support in the first place.

Otherwise, the attorney is an ordinary creditor vis-à-vis his own client, whose bankruptcy and subsequent discharge extinguishes his claim. The lawyer may certainly file a proof of claim for any unsecured portion of his fees, and may oppose his client's discharge like any other creditor. It is only if he benefits from a solicitor's lien that he may literally escape his client's bankruptcy. If the lien is on property which would vest in a trustee in the event of the husband's bankruptcy, again, the lawyer is left to file a proof of claim for his fees subject of a bill of costs in the husband's bankruptcy. The authority in *Lang vs. Soyatt* is simply illustrative of a not necessarily uncommon situation in which an attorney may successfully protect himself notwithstanding the bankruptcy of both spouses.

In *Re Fredda Moore* (1992) 15 C.B.R. (3d) 289 (Ont.C.J.), a debtor owned a one-half property interest, which was the subject of litigation commenced prior to his bankruptcy. Rutherford J. granted a firm of solicitors a lien on an $ 85,000 fund resulting from the judicial sale of this property which the solicitors has successfully preserved after the debtor's bankruptcy, in the interest of the mass of creditors.

3.2 The Situation in Québec

Turning now to the Québec jurisprudence, which is remarkably opaque on this subject, we are constrained to draw our attention back a full century to the decision of the Cour de Révision in *Belleau et al. vs. Ennis* [1894] R.J.Q. 194. This is the only case I have found which explicitly recognizes the concept of the solicitor's privilege on the fruits of litigation, a concept derived from the common law existing in this province prior to Confederation. In that case, a firm of attorneys had obtained an alimentary pension for a wife, and when their fees were unpaid by her, they seized the alimentary pension in the hands of the payor husband.

In reading this judgment of Casault, Routhier and Andrews JJ., we must set aside the antiquated notion – then a matter of considerable discussion – that a "provisional" alimony order is purely unseizable since it is of a temporary nature, whereas the eventual alimentary "pension" is of a permanent nature, and its unseizability must be tempered. This distinction no longer exists juridically (as we will see below), and the comments about this topic were in any event *obiter dictum* in that case, which upheld the attorneys' seizure of the alimentary pension in the hands of the husband.

The Court unanimously held that the attorneys were entitled to a privilege on the fruits of litigation, in the following terms:

> Quant aux pensions accordées par justice…je crois que nous devrions, au moins quant aux frais qui les ont fait obtenir, en permettre la saisie, puisque ce sont ces frais qui leur ont donné l'existence et que, sans eux, le crédit-rentier ne les aurait pas obtenues: aussi parce que ces pensions ayant un caractère et une durée permanents, il serait injuste que celui qui a ainsi assuré l'existence du crédit-rentier, et fait les frais requis pour lui obtenir la pension, fût la victime de son ingratitude. *Les frais de justice, et ceux faits pour la conservation ou la création d'une chose, sont privilégiés au premier degré. Et à ces deux titres les frais faits pour obtenir une pension doivent être privilégiés sur cette pension.*

> Je serai disposé à admettre, pour les provisions alimentaire accordées par justice, la règle qui, en France, paraît les faire insaisissables, même pour les frais qui les ont fait obtenir, et pour les raisons qu'on y donne; mais je crois que les pensions ne méritent pas la même faveur, que *les frais qui les ont créées doivent être considérés comme dette de la même nature que la chose qu'ils ont produite, c'est-à-dire comme dette alimentaire, et* que, dussions-nous étendre aux pensions créées par justice l'exception pour leur saisie que l'article 558 fait pour les provisions, *elle n'en seraient pas moins sujettes à saisie pour les frais qui leur ont donné l'existence.* [italics added]

In the later decision of *Pinard vs. Cloutier* [1931] R.P. 339, Stein J. of the Superior Court had to struggle with the authority of the judgment in *Belleau vs. Ennis*, which he cites with approval, and the now obsolete proposition that "provisions" for alimony and for costs are purely unseizable. He determines that the "provision" for costs granted to the wife is an integral part of her alimentary claim against the husband (which reflects current thinking as well), but that insofar as this award and the alimony also granted were "provisional", the classical rule of pure unseizability applied, and the wife's attorney was not permitted to invoke a privilege on this fund, as follows at page 347:

> Comme l'on voit, l'on a fait ici une distinction entre la pension alimentaire *provisoire* accordée par justice, et la pension alimentaire *définitive*, et l'on a admis que les pension alimentaires provisoires, comme celle qui nous occupe en ce moment, sont tout à fait insaisissables, même pour les frais qui ont contribué à les obtenir. *Mais, quant aux pensions alimentaires définitives, la Cour a admis que les frais qui les ont créées doivent être considérés comme dette de la même nature que la chose qu'ils ont produite, c'est-à-dire comme dette alimentaire.* [italics added]

(Although this precedent is otherwise obsolete, it provides sound practical advice in commenting that it is prudent for the practitioner to claim the provision for costs to be payable by the husband directly to the attorney.)

In *De Gage vs. Séguin and Arcand* C.Q.M. 500-02-023621-902, judgment of Honourable Mr. Justice Jacques Désormeau dated September 14 1994; motion for leave to appeal denied), plaintiff attorney had obtained a support order for the wife against the husband. Unpaid by the wife, the attorney sought and obtained judgment against the wife for the legal fees incurred in representing her, and then seized the alimentary pension in the payor husband's hands.

The court upheld the plaintiff attorney's seizure, based on the authority in *Pinard vs. Cloutier*, which only really comments upon the solicitor-client privilege in *obiter dictum*, in citing *Belleau vs. Ennis* with approval. It has taken literally a century for the authority in *Belleau vs. Ennis* to be rediscovered, albeit in the terse form in *De Gage*.

In *Re Mineau & Chauret Inc.; Druker & Ass. Inc. vs. Chevalier et al.* (1982) 42 C.B.R. (N.S.) 62 (Que. S.C.), Brassard J. held that a guardian named by the court is a "secured creditor" within the meaning of s. 2 of the *Act*, since art. 1812 *C.C.L.C.* (now art. 2293 *C.C.Q.*), because he holds property as a depository within the meaning of the civil law, and has a right of retention upon the property so held. In this regard, he cites with approval the article of Me. Yoine Goldstein in *The Québec Law of Privileges or Alice in Wonderland Revisited* (1976) 22 C.B.R. (N.S.) 12, as follows:

> As well, privileged creditors having a right of retention, such as warehousemen, customs brokers and others, rank as secured creditors in bankruptcy.

Insofar as article 2293 *C.C.Q.* states as follows, in protecting the depositary with secured creditors status,

> **Art. 2293**. The depositor is bound to reimburse the depositary for any expenses he has incurred for the preservation of the property, to indemnify him for any loss the property may have caused him and to pay him the agreed remuneration.
>
> The depositary is entitled to retain the deposited property until he is paid.

then surely the analogous provisions on mandate would provide secured creditor status for attorneys, as follows, at article 2185 *C.C.Q.:*

> **Art. 2185**. A mandatary is entitled to deduct what the mandator owes him by reason of the mandate from the sums he is required to remit.
>
> The mandatary may also retain what was entrusted to him by the mandator for the performance of the mandate until payment of the sums due to him.

In the unanimous Court of Appeal decision in *Spiegel Sohmer vs. Chaussures Bruno Scola (1985) Inc.* C.A.M. 500-09-001833-946, judgment of Honourable Mssrs. Justice Gendreau, Proulx and Moisan dated March 24 1995, a wonderful opportunity was missed to re-state explicitly the concept of the solicitor's lien on the fruits of litigation, although the entire juridical underpinning of this judgment in predicated upon this simple legal concept.

In this case, the plaintiff attorneys had represented the defendant company in an insurance claim, which they succeeded in prosecuting and obtained judgment for their client in the sum of $ 775,000. The principal officer of the defendant company tried surreptitiously to collect the judgment award from the insurance company while bypassing his company's attorneys, the plaintiffs, hoping thereby (no doubt) to avoid the 20% contingency fee which would otherwise be owing to these attorneys.

The client had long ago tried to obtain the attorney's consent that the original contingency fee contract be modified to permit the client to collect the eventual winnings directly, a proposition which the attorneys soundly refused, invoking their right to receive funds in trust, in order to secure their legal privilege on the sums so deposited into a trust account.

As such, when the legal firm discovered their client's manoeuvres, they promptly issued a lawsuit against their own client, and seized before judgment the original judgment proceeds in the hands of the insurance company. They alleged a "peril" within the meaning of art. 733 *C.C.P*. Their seizure was quashed in the Superior Court, but then restored by the Court of Appeal, because of the client's manifest bad faith in his efforts to bypass his attorneys and collect the judgment proceeds without paying his lawyers their 20% contingency fee.

Although the analysis of the Court of Appeal appears to rely heavily on the factual underpinning for an objective assessment of "peril" of the attorneys' claim against their client, I believe the case must be read more closely. The Court of Appeal cites with approval the initial letter the plaintiff attorneys wrote to their own client to the effect that it is only by receiving funds in trust that an attorney may be permitted to "crystallize" his solicitor's lien.

And if we reflect for a moment, it is a simple matter of ethics that the *only* means by which an attorney may collect a fund created or conserved by him is by an immediate deposit into a trust account. Once such funds are in the trust account, the privilege obtains, as indicated by s. 3.09 of the Bar by-laws on Trust Accounts, as follows:

> **3.09** L'avocat conserve toujours son recours par voie de privilège, compen-sation ou autrement relativement aux sommes déposées dans un compte en fidéicommis.

Section 3.09 must be read together with the provisions of art. 2185 *C.C.Q.*, which codify both the privilege on fruits of labour and the real right of retention for mandataries in general (cited above). The Court of Appeal may then be viewed as implicitly recognizing that s. 3.09 merely reflects this "crystallization" of the solicitor's lien, which exists from the moment the attorney begins proceedings to create or conserve a fund on behalf of his client (the concept of the inchoate privilege, dating back to before Confederation, as stated above).

In the absence of a statutory codification of the solicitor's lien in our *Bar Act*, Québec attorneys do not have the equitable remedy of the "charging order" as our pan-Canadian colleagues do. However, I believe that the authority of the judgment in *Spiegel Sohmer* simply permits a Québec attorney to proceed by way of seizure before judgment to give effect to his security as against a fund. Again, in the event of bankruptcy, it really does not matter whether the security has "crystallized" before or after the bankruptcy, since the caselaw is consistent that an attorney may request his equitable remedy of a charging order (and hence, his equitable remedy of a seizure before judgment in Québec courts) against the fund created or conserved. Evidently, this may be the subject of agreement between the attorney and the trustee in bankruptcy, since both parties may be anxious to avoid unnecessary costs particularly when it is uncontested that a certain quantum of the fees was incurred to create or conserve a clear asset.

Insofar as the fund created is an alimentary pension, the attorney may completely disregard <u>both</u> parties' bankruptcy (as in Lang vs. Soyatt, *supra*).

Finally, in *Vechsler vs. Robinson and Hammerschmid,* S.C.M. 500-12-134813-843, judgment of Honourable Mr. Justice Victor Melançon dated June 19 1996), the petitioner husband sought a declaratory judgment of the Superior Court with respect to a voluntary cession which the respondent wife had signed in favour of her attorney, assigning the child support payments owed to her to her attorney, in payment of arrears of legal fees.

Melançon J. first considered that the respondent wife could not contractually cede the child's claim to support, a reasonable statement at first blush, but nonetheless odd since it undermines the custodial parent's natural right and obligation to disburse child support funds for any purposes which she determines necessary, at her discretion.

In any event, this judgment does not turn on this narrow issue, since Melançon J. also held that «Même s'il est exact que les honoraires et frais de l'avocat participent de la nature alimentaire d'une cause de ce type et jouissent de ce fait de certains privilèges», the respondent attorney had <u>failed</u> to prove to the court's satisfaction that the unpaid balance of legal fees pertained strictly to the child support. As in the stream of caselaw cited above, it is incumbent upon the claimant attorney to show that the fees in respect of which a privilege is claimed must be intimately bound up with the funds created or conserved.

In this particular case, since the respondent attorney had already obtained prior provisions for costs totalling $ 19,000, and it was only her remaining $ 4,800 in fees which were at issue (after payment of some other sums by the client herself as well), the judge considered that the remaining fees could also be considered to have been tied up with other contentious issues which the spouses had litigated, including completely non-moneyable issues such as custody and access rights. Fees incurred for such litigation cannot be considered secured by the fruits of litigation privilege.

However, in *Re Bobyk* (1995) 37 C.B.R. (3d) 25 (Ont. Ct.) *(supra)*, the wife had obtained both a child support order and an equalization order against her husband. Ancillary to these orders was a costs order, $ 27,000 of which pertained to the patrimonial claim and $ 14,000 of which pertained to the child support claim. When the husband filed for bankruptcy for the principal purpose of avoiding payment of these orders, he evidently was unable to avoid the child support costs order, which was the object of continued execution proceedings as being an inherent part of the child support order itself.

Insofar as the balance of the costs order was concerned, Feldman J. granted the bankrupt husband his conditional discharge based on an obligation to pay 70% of this claim over time, for the following reasons, at pages 26, 27:

> It appears that this is a situation where Mr. Bobyk elected to go bank-rupt in order to avoid paying his wife the legal costs he was ordered to pay.
>
> …the *Bankruptcy Act* is not to be permitted to be used to avoid a judgment for tort or for a matrimonial proceeding.…our court process cannot condone a situation where spouses force each other through the financially and emotionally onerous burden of matrimonial litigation without taking responsibility for the financial consequences of losing.

4. Patrimonial Claims

Insofar as a spouse is a registered owner of his or her own assets, he evidently has nothing to fear from the bankruptcy of a spouse. In a situation of undivided co-ownership of a property, for example, the solvent spouse may simply find himself with a new "partner" in the form of the trustee of his bankrupt spouse, and the ordinary rules pertaining to the end of indivision would obtain (art. 1030 *C.C.Q.*). In the same vein, where the matrimonial regime of the spouses is such that ownership vests in one or both spouses as a natural result of the regime, again, bankruptcy has no impact: bankruptcy affects the creditor-debtor relationship; it does not change <u>ownership</u> rights (which explains why vendors prefer conditional sales contracts and leasing contracts to outright sale, where full payment by the purchaser is deferred for any reason).

Insofar as a marriage contract provides for gifts from one spouse to the other, such gifts may be viewed as of little practical significance in contemporary matrimonial litigation: in the event of separation and divorce, these gifts are invariably annulled by the courts (art. 510, 519, 520 *C.C.Q.*), and so bankruptcy of a spouse is of no relevance. In the event of bankruptcy outside the context of matrimonial proceedings. s. 92 of the *Act* explicitly provides that all unexecuted gifts may only constitute provable claims in the bankruptcy, which claims rank *after* all ordinary creditors have been paid.

There then remain the two principle patrimonial claims which a spouse may make in matrimonial proceedings: the compensatory allowance and the partition of the value of the family patrimony. (The other major financial claim a spouse may advance is for lump sum alimentary support, which has already been discussed, above). These claims certainly resemble ordinary financial claims which are provable in bankruptcy, in that:

– they are determinable (as compared with support claims, which are viewed as necessarily ephemeral, inchoate and indeterminable);
– they are readily quantified (dangerous indeed if this means a trustee may make a s. 121(2) petition to quantify);
– they are manifestly *not* exempt from discharge under s. 178 (unlike alimentary support, from which one is never liberated).

Unless these claims may be viewed to confer a real right to the claimant spouse, or otherwise to grant the claimant spouse "secured creditor" status, there will be *no* protection in bankruptcy. After all, if a judgment granting a spouse a compensatory allowance creates thereby a simple personal claim against the debtor spouse, then the bankruptcy of the latter will eventually liberate the obligation to pay the claim, and effectively defeat the judgment in favour of the claimant spouse.

Since it is a matter of simple sociological reality that most family assets (or any assets acquired during a marriage) are generally registered in the name of the husband, then it is the wife who generally benefits from the claims for compensatory allowance or partition of the value of the family patrimony. If these non-support claims put forward by a wife against a husband are viewed *not* to yield or create any real right in the wife's hands, then there is the negative result that a wife is really not protected in the event of a husband's bankruptcy, because family assets registered in his name in whole or in part are automatically vested with the trustee by operation of s. 71(2) of the *Act*.

There are two well-known judgments to the effect that such claims do *not* indeed confer any real rights in favour of the claimant spouse: *Maroukis vs. Maroukis* [1984] 2 S.C.R. 137, and *Droit de la Famille 977* [1991] R.J.Q. 904. However, insofar as *Maroukis* and *Droit de la Famille 977* are authorities for the proposition that remedial provincial legislation does *not* provide effective recourse for aggrieved wives (whether under the *Family Law Reform Act* as it then was in *Maroukis*, or whether under our family patrimony rules as they now are in articles 414 to 426 *C.C.Q.*), perhaps we should learn to use this disappointing jurisprudence against itself. Let us first examine what the judgments may teach us.

4.1 The Supreme Court in Maroukis vs. Maroukis (Absence of right *in rem*)

In *Maroukis*, the wife had commenced matrimonial proceedings against her husband, seeking her share of the family assets, under the Ontario *Family Law Reform Act* (as it then was), which is not dissimilar to our contemporary family patrimony legislation in Québec. Since she was already co-owner of the matrimonial home, she sought and obtained ownership of the entire home, in settlement of her claim.

However, in the interim, and unbeknown to her, the Bank of Nova Scotia had commenced proceedings against her husband for unpaid loans, had obtained judgment, and had taken execution proceedings against the matrimonial home.

As a result, the wife made a further motion in the matrimonial file, by which she sought and obtained retroactive effect of the original order by which she had obtained the ownership of the home, and this, in order to void the execution proceedings of the Bank.

In a unanimous seven judge decision of the Supreme Court – made by a panel of judges the composition of which has changed radically since 1984, to say the least – it was held that the trial judge had no business granting retroactive effect to the judgment conferring the property interest to the wife, which would thereby defeat the attachment order of the Bank. As McIntyre J. tersely put it, at page 142 of the judgment:

> …until the court order is made the right is only a personal right to require the court to determine the ownership of family assets. The vesting in a spouse of the specific property making up his or her respective share takes place upon the date the court order is made. There is no authority in the [Family Law Reform] Act for an order retroactively vesting property in a spouse as the appellant contends and as Judge Luchak ordered.

In *obiter dictum*, McIntyre J. went on to analyze the provisions in s. 42 of the *Family Law Reform Act* which provide for the restrictions on alienation and hypothecation of the matrimonial home, akin to our provisions in articles 401 to 405 *C.C.Q.* The wife had sought to argue that the husband's actions (in failing to pay the bank loan and permitting the bank to sue, obtain judgment and seize the home) constituted a voluntary encumbrance by him of the interest in the family home. At page 144, McIntyre J. concluded:

> Furthermore, the prohibition in s. 42 is against a disposition or an encumbrance of an interest in a matrimonial home by a spouse. Giving those words their plain meaning in the context in

> which they are used in s. 42, it is my opinion that they cannot be extended to include an execution taken by creditors of one of the parties to the marriage.

4.2 The Court of Appeal in Droit de la Famille 977 (Absence of right *in rem*)

In *Droit de la Famille 977*, the husband made a voluntary assignment in bankruptcy, and the wife then instituted an action in separation as to bed and board. She registered a declaration of family residence against the matrimonial home, and sought to pursue her claim for partition of the value of the family patrimony. The spouses were married under the regime of separation as to property, and the matrimonial home was registered in the husband's name.

Lest we overstate the impact of this judgment of the Court of Appeal, it is important to consider that it was decided on the narrow issue presented by the trustee in the husband's bankruptcy: was the trustee entitled to obtain the radiation of the declaration of family residence? In first instance, Harvey J. had dismissed the trustee's petition on the basis that the provisions of law governing the family patrimony created a real right in favour of the wife, which permitted her to have a vested property right in the matrimonial home.

Baudouin J. (Nichols and Mailhot JJ. concurring) followed the authority of *Maroukis*, chapter and verse, even if this Supreme Court decision is not explicitly cited in the judgment. At page 909, Baudouin J. states:

> Avec la plus grande déférence pour l'opinion contraire, je suis d'avis que le droit des conjoints sur le patrimoine familial n'est pas un droit réel, emportant un droit de propriété, mais constitue au contraire un droit de créance général et personnel pour les raisons suivantes.

and then goes on to analyze how the structure of the family patrimony is akin to an accounting exercise by which it is the *value* of the family assets which is partitioned, according to certain rules, without in any fashion changing the attribution of *ownership* or administration of those assets. Certainly the doctrine published by Québecois authors cited in the judgment supports Baudouin J.'s view that:

> Je ne vois rien dans les textes du code qui me permettrait de conclure que le législateur ait entendu créer, par le seul fait du mariage, un droit de propriété indivis sur les biens faisant partie du patrimoine familial.

Then, in language which unerringly echoes that of McIntyre J. in *Maroukis (supra)*, Baudouin J. goes on to state, at page 910:

> Certes, le partage du patrimoine familial peut permettre de conférer un droit de propriété sur certains biens, notamment sur la résidence familiale. Toutefois, ce droit de propriété résulte soit de l'entente des parties, soit d'une attribution judiciaire qui en est faite au moment du partage. L'article 462.7 C.C.Q. le permet, en effet. Il autorise le Tribunal à «attribuer» certains biens à l'un des époux. En posant ce geste, le Tribunal ne reconnaît pas un droit de propriété antérieur qu'il sanctionnerait ainsi rétroactivement: il le crée. Le jugement me semble être constitutif et non déclaratif de ce droit de propriété.

We must stop here, to take a judicial – if not judicious – pause. This is not only the language of *Maroukis* (*i.e.* that property rights may be created at the time of judgment, but not before),

but more importantly for Québec jurists, this is precisely the language of *Lacroix vs. Valois* [1990] 2 S.C.R. 1259 *(supra)*: Gonthier J. used these terms to describe the compensatory allowance as being "created" by the trial judge, and not merely "declared" by him. This means that we must view both the compensatory allowance and the claim for the partition of the value of the family patrimony being of similar juridical structure; this will have great importance in structuring our eventual strategy to defeat the intolerable authority of *Maroukis* and *Droit de la Famille 977*.

The Court of Appeal went on to conclude, as the Supreme Court did in *Maroukis*, that the wife has *no* protection vis-à-vis either the bankruptcy trustee or third party creditors, in the following terms, at page 911:

> L'enregistrement d'une déclaration de résidence familiale ne fait cependant que dénoncer l'existence d'un éventuel droit de créance. Il ne confère pas de droit réel sur l'immeuble, ne le rend pas insaisissable ou exempt d'exécution et ne donne pas non plus au créancier le statut de créancier garanti au sens de la *Loi sur la faillite*. Le fait que désormais la résidence familiale fasse partie du patrimoine familial ne me paraît pas avoir changé quelque chose.

<u>4.3 A Brief Commentary on *Droit de la Famille 977*</u>

Before turning to our examination of how to defeat the precedent created by *Droit de la Famille 977*, four observations must still be made about this frustrating precedent:

(1) It seems that no matter what steps the legislator takes to protect the family residence, nothing seems to deter doctrinal and jurisprudential interpretation which persists in viewing a wife as nothing more than a maid in her own home (and in the case of *112212 Canada Inc. vs. Proulx and Hart*, S.C.M. 500-05-013541-949, judgment dated September 29 1995, Décarie J. specifically stated in his reasons for judgment that if one were to view a wife as a possessor in law entitled to notice before a hypothecary creditor may give the notice of intention to realize («préavis d'exercice»), then this would lead to a requirement for notice to be given *to the maid*.). The legislator has used the language of real rights in the original provisions protecting the family residence: prohibitions of alienation and hypothecation; obligation of joint administration; registration (now 'publication') of the declaration of family residence (and isn't publication the mechanism designed to give real rights opposability to third parties?); right of the court to attribute real rights of use, habitation and/or ownership in the broadest terms – and all this, in the few articles running from art. 401 through 413 C.C.Q. Yet, this has not been viewed as good enough to permit wives to have rights at least as secure as those of, say, the car mechanic vis-à-vis the gear shift he has repaired.

(2) Then the legislator created the family patrimony provisions, as amorphous as the words "partition of the *value* of" may otherwise be. In this regard, the Court of Appeal in *Droit de la Famille 977* examined the possibility that the legislator really intended to create a "patrimony by appropriation" (at pages 910, 911), only to conclude that this was far too extravagant a proposition in light of the <u>*then*</u> Civil Code's natural allergy to patrimonies by appropriation.

This view must manifestly be re-examined in light of the current Civil Code's provision, at article 2:

> **Art. 2.** Every person has a patrimony.
>
> The patrimony may be divided or *appropriated* to a purpose, but only to the extent provided by law. [italics added]

If then we turn to Book Two – The Family, Title One – Marriage, Chapter Four – Effects of Marriage, then Section III – Family Patrimony, tell us that:

> **§ 1 — Establishment of patrimony (art. 414-415)**
>
> **Art. 414.** Marriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property.
>
> **Art. 415.** The family patrimony is composed of the following property owned by one or the other of the spouses: the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan.
>
> This patrimony also includes the registered earnings, during the marriage, of each spouse pursuant to the Act respecting the Québec Pension Plan or to similar plans.

And if we then compare the language of the conventional patrimonies by appropriation, which are now explicitly permitted under Québec civil law (and which now make Baudouin J.'s comments in *Droit de la Famille 977* completely irrelevant):

> **TITLE SIX — CERTAIN PATRIMONIES BY APPROPRIATION (art. 1256-1298)**
>
> **CHAPTER ONE — THE FOUNDATION (art. 1256-1259)**
>
> **Art. 1256.** A foundation results from an act whereby a person irrevocably appropriates the whole or part of his property to the durable fulfillment of a socially beneficial purpose.
>
> It may not have the making of profit or the operation of an enterprise as its main object.
>
> **CHAPTER TWO — THE TRUST (art. 1260-1298)**
>
> **SECTION I — NATURE OF THE TRUST (art. 1260-1265)**
>
> **Art. 1260.** A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.

Surely it is impossible to consider the Court of Appeal's 1991 decision as being meaningful today. This would have the absurd and inequitable result of perpetuating the second class status of a wife's rights under the *Civil Code*, while an unscrupulous husband may readily resort to articles 2 and 1260 to constitute a "family trust" wherein he may places all realizable assets, and thereby renders himself judgment-proof in matrimonial litigation (while the bewildered wife is left to wonder how one may skip from article 2 to 1260 without the intervening articles 414 and 415 constituting the slightest barrier!).

(3) Most distressing of all is that once again we have an authority of the Court of Appeal which has been adjudicated upon without the voice of the affected wife being heard. In *Droit de la Famille 977*, just as in *Droit de la Famille 1549* ([1992] R.J.Q. 855 (C.A.); at page 862: «L'enfant est une «personne» visée par la charte et à ce titre il a un droit strict d'être représenté par avocat», yet the mother herself filed no factum because she could not *afford* to), the Court found itself commenting, at page 907:

> En appel, malheureusement, le procureur de l'intimée n'a pas jugé utile de produire de mémoire au soutien du jugement entrepris. Le pourvoi porte cependant sur certains points de droit importants et mérite plus qu'un simple examen sommaire.

This means that the Court of Appeal undertook the analysis of legislation explicitly drafted to provide an equitable remedy to protect wives in marriage (*«Loi modifiant le Code civil du Québec et d'autres dispositions législatives afin de favoriser l'égalité économique des époux»*), without even hearing from the very person whose economic equality the legislator sought to promote and protect. If the Court were genuinely concerned about the bitter reality of the economic disadvantages women face in marriage and the ensuing litigation when marriage comes to a premature end, then it perhaps the justices should have questioned whether the wife was simply unable to *afford* to prepare a factum to advance her rights and claims.

(4) It is far from clear as to why the courts and doctrinal authorities believe that banks and merchants merit more protection than wives and children. After all, it remains of the essence of a free and capitalistic society that banks and merchants are free to seek contractual protection to secure the moneys, goods and services they provide, whereas women and children are necessarily dependent on statutory protection to secure their rights and interests. Banks, for example, have long ago chosen to protect themselves by requiring wives to co-sign loans and mortgages with their husbands. Why then do the courts not view the wife to have some kind of power, title and authority to conserve family assets, as the legislation surely intended?

4.4 How to Defeat Maroukis and *Droit de la Famille* 977 – The Potential Use of *Droit de la Famille* 871

At first blush, it appears a wife is completely without protection, insofar as these cases are authority for the proposition that she has no real rights and is not a secured creditor. However, from another perspective, we may note that the claim for the partition of the value of the family patrimony is "created" by the eventual judgment (*Droit de la Famille 977*), just as the claim for the compensatory allowance (*Lacroix vs. Valois*), and as such, *until* the trial judge has so created the claim, there is nothing but the inchoate and indeterminable right to pursue the claim – and this is *not* a claim provable in bankruptcy (*Lacroix vs. Valois*).

Indeed, *Lacroix vs. Valois* is explicit to the effect that a pre-existing bankruptcy and discharge therefrom do not constitute a barrier to a claim brought today for a compensatory allowance. As such, the same must be said to apply to the claim for the partition of the family patrimony: if no real right is created (*i.e.*, a right *in rem*), then it is irrelevant to the wife whether the property itself still subsists. All

that is relevant is the accounting exercise involved, and the date of the "triggering event" (to borrow the common law expression): as per article 416 *C.C.Q.*, this is either the date of separation of the parties *or* the date proceedings are instituted, at the discretion of the Court. As long as one of these events has occurred, it is irrelevant whether the asset is then lost to the trustee; the right to the claim subsists.

Of course, it defeats the purpose if the claim is pursued too promptly, and its quantum "created" by the divorce judgment, prior to the husband's discharge. In *Syndic de Gagnon vs. Houle* [1991] R.J.Q. 1026 (Que. S.C.), Frenette J. held that once the compensatory allowance has been determined by judgment of the Court, it becomes an asset for the claimant spouse who had then become bankrupt prior to collecting on her judgment. The trustee had the obligation to execute the judgment in the interest of the mass of creditors. The corollary of this reasoning is that if it is the *debtor* spouse who is bankrupt, he will be liberated from the debt arising from the claimant spouse's winning judgment.

In *McJannet vs. McJannet* (1988) 72 C.B.R. 184 (Sask.Q.B.), both husband and wife had made an assignment in bankruptcy, and both were discharged. During the husband's bankruptcy, he had consented to a $ 25,000 judgment in favour of the wife. MacLeod J. held that the critical moment was not when the wife had instituted her proceedings (*prior to* the bankruptcy of her husband), but rather the moment she obtained her judgment against him (*during* his bankruptcy). This permitted the order of discharge in the husband's bankruptcy to liberate him from the obligation to pay the wife her now quantified judgment claim.

In *Droit de la Famille 871* [1990] R.J.Q. 2107 (C.A.), the husband had instituted an action in divorce against the wife. The wife then fell into bankruptcy, was discharged, and only then counter-claimed for a compensatory allowance. The husband argued that her claim had vested in the trustee. The Court of Appeal disagreed. Given the equitable and remedial nature of the compensatory allowance, it must be viewed as a right which is *intuitu personae*, and which does not vest in the trustee. Such a right is intimately bound to the marital status of the spouses, and may only be exercised by them or by their successors in accordance with due provision of law. This precludes the trustee from acting. Baudouin J., writing for the Court (Monet and Rousseau-Houle JJ. concurring), opines, at page 2113:

> …la créance de la prestation compensatoire est toutefois intimement *liée*, bien que patrimoniale, *au statut personnel des parties*, créancière et débitrice. On constate, en effet, d'abord, qu'elle ne peut prendre naissance que dans le cadre d'un mariage…ensuite, c'est la qualité d'époux qui en justifie l'octroi, ensuite qu'elle ne peut être obtenue que dans la seule hypothèse de la rupture ou de la dissolution du lien matrimonial, ensuite, que la somme n'est due que pour les apports *personnels* en biens ou en services. L'état matrimonial est donc une condition *sine qua non* à son existence, la rupture du lien, une condition *sine qua non* à son exigibilité; l'apport personnel, une condition *sine qua non* à sa réalisation.…

and at page 2114:

> …Notre droit connaît cependant déjà des droits de créance qui, tout en ayant un caractère patrimonial, tout en ne créant pas de patrimoine d'affectation, tout en demeurant saisissables et accessibles, sont cependant «exclusivement attachés à la personne» du créancier, justifiant ainsi le refus de leur exercice par une personne autre que celle en faveur de qui ils ont été créés.
>
> Je suis donc d'avis…que le droit à la prestation compensatoire est un droit de créance patrimonial, général, sans caractère alimentaire, mais attaché à la personne de son titulaire

> et que ce faisant, il ne peut donc être exercée que par lui ou par la ou les personnes que le législateur autorise de façon spécifique à le faire.
>
> Dans la présente instance donc, le syndic, à mon avis, n'avait pas le pouvoir de réclamer au nom de l'appelante la prestation compensatoire qui pouvait lui être due.

Of course, this language is wholly consistent with both *Lacroix vs. Valois (supra)*, and *M.E.M. vs. P.L.* [1992] 1 S.C.R. 183, the latter decision clarifying that the compensatory allowance must *not* be viewed narrowly as a re-creation of the doctrine of unjustified enrichment, but must be viewed broadly as remedial legislation which permits the courts to examine in a global fashion the contributions of the spouses *to the marriage* (and not just to each other's assets).

Furthermore, the language of *Droit de la Famille 871* is also directly applicable to the claim to the partition of the value of the family patrimony, *mutatis mutandis*, so to speak. The family patrimony was created as remedial legislation to equalize economic rights between spouses. The claim itself, when exercised, requires the court to "create" any property rights, rather than "declare" them (*Droit de la Famille 977*). Indeed, the intimate purposes and intentions of the spouses are necessarily determinant in order to qualify included and excluded assets and liabilities: Was the country chalet occupied by the family? Was the second mortgage on the home contracted to pay for the purchase of a new car, or to finance the husband's business? Was the living room set a gift, or purchased with funds from a succession? Should there be an unequal partition, to avoid an "injustice"? These are questions which any third party would be ill-received to try to answer; surely it was intended that only the spouses could and would litigate such issues.

Such a claim, when exercised by a spouse, may be a personal right (as opposed to a real right); it may be patrimonial as well; but it remains *intuitu personae*, by analogy to the authority of the Court of Appeal judgment in *Droit de la Famille 871* (which, after all, reconciles well with the stream of Canadian bankruptcy court jurisprudence marked by decisions such as *Cherry vs. Ivey* (1982) 136 D.L.R. (3d) 381 to the effect that personal injury and slander claims are *intuitu personae*, and so are exercised by the bankrupt himself, and *not* by the trustee).

Nonetheless, there is the judgment of Forget J. in *Droit de la Famille 1809* [1993] R.J.Q. 1522, in which the spouses had already separated and the wife had already instituted the action in divorce – these would be conventionally viewed as the necessary "triggering events" to bring the claim for partition of the value of the family patrimony into play, insofar as the husband's ensuing bankruptcy was concerned.

The trustee in bankruptcy concluded an agreement with the wife, a "sweetheart" deal, which permitted her to settle the family patrimony claim of the husband for a modest sum. The husband sought to contest this transaction, unsuccessfully. Forget J. viewed there to be a distinction between a claim for a compensatory allowance – which he did allow the husband to pursue, and which he also dismissed – and a claim for the partition of the family patrimony, which he viewed to have vested with the trustee, thereby empowering the latter to conclude a transaction with the wife.

With all due respect for the contrary view, I believe a confusion arose in this case, which in any event, remains less than consistent with the train of thought of the higher courts (notably Forget J. does not mention the judgment of the Court of Appeal in *Droit de la Famille 871*). Forget J. was manifestly influenced by the bad faith of the husband, and by a clear judicial wish to favour the wife's

voluntary transaction with the trustee, in light of the fact that this minimized the tremendous financial loss *this particular wife* would otherwise have endured as a result of her husband's bankruptcy. I am far from convinced Forget J. would have had the same opinion had the trustee been in a position adversarial to the wife, and had, for example sought to pursue the husband's family patrimony claim, to the detriment of the wife and children.

Indeed, when Forget J. cites with approval Me. Sénécal's text [as he then was] to the effect that the trustee may exercise the bankrupt spouse's claim because, at page 1525:

> Comme la créance du conjoint failli est à cette étape née et actuelle et non seulement éventuelle, elle fera partie de l'actif de la faillite.

This statement remains quite misleading. I challenge any family law practitioner to be able to state with certainty the quantum of the family patrimony claim prior to a trial judge's eventual adjudication. The "quantifiability" of the family patrimony claim is a far cry from a simple calculation of the balance due for an unpaid loan, for example (capital plus accrued interest). The imponderables which the court is called upon to ponder remain numerous and not readily pleaded, in demand or in defence, by the trustee.

4.5 A Practical Approach

In light of this caselaw, timing is of the essence. If there is a bankruptcy of one of the spouses *prior to* the institution of divorce proceedings, there is no question the trustee has no rights to exercise insofar as *potential* claims for a compensatory allowance or partition of the family patrimony are concerned.

From the wife's point of view, she has absolutely no interest in instituting either of these claims against her husband, until he has been discharged, else she risks obtaining a judgment, which once rendered, would be subject to an order of discharge in the bankruptcy. If she waits until discharge, she is still free to seek a compensatory allowance without regard for the discharge; if she is fortunate enough to have separated from her husband prior to the bankruptcy, she may also pursue a family patrimony claim, and seek to have the valuation date declared to be the date of separation. This is taking advantage of her *lack* of real rights: she may legitimately argue that the loss of the actual assets registered in the husband's name subsequent to the separation should not be held to affect her.

Of course, if the wife is a co-owner of an asset with her bankrupt husband, such as the matrimonial home, it may be in her interest to institute proceedings immediately, if the trustee is cooperative, so that she may buy out her husband's share of the home from the trustee for a discounted price, as in *Droit de la Famille 1809*. What trustee has the time or funds available to start litigating with an undivided co-owner as to the disposition of a house, where he is likely dependent as well on the wife's good graces for the property to be able to sell at an optimum price (since she lives in the home, her "collaboration" with a real estate agent and prospective purchasers may be less than ideal).

Lest I hear cries of despair that in the interim assets are being lost in the trustee's hands, I suggest we consider the issue from another point of view. Insofar as a wife may protect both her support and her patrimonial claims from discharge in the husband's bankruptcy, his bankruptcy will generally

have the effect of permitting *some* assets to be liquidated to settle liabilities of a far *greater* value. Once discharged, the husband is then a perfect, debt-free debtor for the wife's sole executing pleasure. Indeed, as Me. Miriam Grassby points out in her article *Women in Their Forties: The Extent of Their Rights to Alimentary Support* (1991) 30 R.F.L. (3d) 369, for most families, it is the husband's earning power which is the single biggest family asset (at page 373), and this earning power is the one most readily seized by the wife in execution of any of her claims (even article 553 *in fine C.C.P.* recognizes that 50% of the husband's gross salary may be seized in execution of a compensatory allowance or family patrimony claim, as well as for an alimentary pension).

If a bankruptcy ensues after divorce proceedings have been instituted, matters may be more ticklish, in that the "triggering events" have occurred: separation and institution of proceedings. Nonetheless, for the reasons I have stated above, I believe that the trustee is still *not* empowered to intervene actively, whether in demand or in defence, to deal with the compensatory allowance or family patrimony claims. As such, it again behooves the wife to wait for the husband's discharge, prior to permitting the matrimonial proceedings to come to trial, in order to avoid a premature quantification by the divorce judgment of a claim, which, once quantified, becomes provable in bankruptcy and hence subject to discharge.

I still maintain that, as long as a wife has the wherewithal to hold her breath until the bankruptcy has passed, her right to claim and obtain judgment for both the compensatory allowance and the partition of the value of the family patrimony must necessarily succeed (if justified), without regard for the bankruptcy at all: the critical valuation date for each of these claims should be viewed as the date of separation or the date of proceedings (since in this situation the wife has the option of either date), and the subsequent insolvency of the husband and loss of actual assets is immaterial.

We must take advantage of the views in *Lacroix vs. Valois*, and *Droit de la Famille 977*, both of which seem to ascribe such great importance to the concept of the judgment *creating* the right (le jugement constitutif) as opposed to *declaring* an already existing (albeit inchoate) right (le jugement déclaratoire). The wife must simply avoid quantifying her claim until after the bankrupt husband has been discharged. As long as her claim is not quantified, it is not provable in bankruptcy. Once quantified, it is a provable claim for the unfortunate creditor, and similarly the trustee may exercise a quantified claim against a solvent debtor on behalf of the insolvent judgment creditor.

It remains my view that this approach should *preclude* a trustee from exercising a recourse under s. 121 to have "contingent" claims quantified by the Superior Court sitting in bankruptcy division. The quantification of a contingent claim cannot be said to apply to a situation where a Court, exercising another area of its competence, must *create* a right based on a wife's or husband's claim, which, in the bargain, is reasonably argued to be *intuitu personae (Droit de la Famille 871, supra).*

Now, we already know by the authority of *Lacroix vs. Valois (supra)* that an old bankruptcy will not preclude a compensatory allowance claim and, I believe, it will not preclude a family patrimony claim either. As such, the only remaining moment which remains critical for such claims to succeed is at the moment of judgment, whether after trial or whether rendered upon the consent of the parties. This is *truly* the dangerous moment, since a bankruptcy which ensues at any moment thereafter has all the nasty elements which one would wish to avoid: the claimant spouse will be defeated by the eventual discharge of the debtor spouse, who will be liberated of the debt; the trustee may intervene to collect the unpaid judgment award on behalf of the bankrupt claimant spouse; and so on. (Of course, if it is the

claimant spouse who is bankrupt, the debtor spouse may be delighted to deal with the trustee, who is likely to be amenable to a negotiated settlement of the judgment award, in order to avoid execution costs and risks.)

Even if one is in the unpleasant position of having a favourable judgment rendered whether after trial or upon the consent of the parties for a patrimonial claim, followed by the debtor's bankruptcy, this does not mean that the claim should be abandoned or neglected.

In *Re Ng* 39 C.B.R. (3d) 59, a wife benefited from a separation agreement providing that the husband was to pay the mortgage payments, taxes and insurance on the matrimonial home, which had been transferred to her. The husband declared bankruptcy. The wife was defeated (in a prior decision) on her claim that such payments by the husband should be considered in lieu of alimony – an odd defeat, given that the wife had renounced to support in exchange for accepting this settlement. Undaunted, the wife opposed her husband's discharge in his bankruptcy (she now had the status of only an ordinary unsecured creditor, with a provable claim). The registrar held that the wife's claim should be given special consideration given it arose out of a separation agreement (even if not strictly alimentary in nature), and as such, he granted the husband a discharge conditional upon payment of a further $ 25,000 to the trustee.

A more radical solution succeeded in *Re Wale* 45 C.B.R. (3d) 15. The husband had filed a voluntary assignment in bankruptcy literally ninety minutes before the commencement of the divorce trial. He engaged in typical unpleasant conduct we unfortunately see all too often: he emptied the family home of its furniture, sold assets without colour of right, stopped working in his business although he still had customers, and so on. Although technically "insolvent" within the meaning of the law, his intentions with respect to his wife were clear. O'Connor J. had this to say in accepting to annul the bankruptcy, at pages 22 and 23:

> Under s. 181 the Court has a wide discretion when considering an annulment application. …
>
> …The visceral antipathy toward his former wife, as evidenced by the mobile sign he left at the property, the holy war that has raged between them since separation, his egregious conduct in selling assets and pocketing the cash shortly prior to the assignment, contrary to an order of the Court, and his removing and hiding the contents of the matrimonial home all overwhelmingly demonstrate male fides by him. I have little difficulty concluding he made his assignment with the intention of removing assets from the reach of the Court and his former wife so as to frustrate her claim for an unequal division of them. The assignment was an abuse of the process of the bankruptcy court and a fraud on at least one of his creditors, his former wife.

O'Connor J. then declared the wife owner of the matrimonial home pending its sale and distribution, thereby protecting this asset from the grasp of the trustee.

There is no question that the only sure way to avoid a bankruptcy defeating a judgment award is to provide real security or a transfer of ownership (as in *Re Wale, supra*). The Court is amply endowed with the power to grant a right of ownership to settle a claim for compensatory allowance or partition of the value of the family patrimony: articles 411 to 413, 419, 420, 429 *C.C.Q.*, just as the Court has the power to order that security be given to guarantee the payment of the claim: article 420(2) *C.C.Q.* Lest we forget, the Court is also empowered to order that security be provided to secure an

alimentary pension, and even that a trust be constituted for this purpose: article 591 *C.C.Q.*

The best security is then to sign consents to judgment on accessory measures by which real rights are created in the assets held by the husband, whether these are rights of ownership or rights which confer a secured creditor status. There is so broad a scope of conventional hypothecs which may be created, on immoveables and moveables, on particular assets or universalities of assets, that it is simply to the practitioner's imagination to conclude to a broad enough security to guarantee the husband's payment of the sums owed to the wife.

Furthermore, a consent to judgment on accessory measures, once given acte to by a Superior Court judge, becomes an integral part of a judgment. This is a considerable advantage. In the case of *Bank of Montreal vs. Coopers Lybrand Inc.* 23 R.F.L. (4th) 415, a creditor of the husband's bankruptcy attempted to attack the consent to judgment favouring the wife, on the basis it was a voidable settlement or conveyance or preference within the meaning of the *Bankruptcy Act*. The Saskatchewan Court of Appeal ruled that the summary proceedings provided in the *Bankruptcy Act* for the protection of creditors are <u>not</u> available in such a scenario, because the consent to judgment, once ratified by the Court, may only be attacked by means of a motion to vary (within the meaning of the *Divorce Act*), an appeal on the merits (to the Court of Appeal), or by means of a separation action to set aside the judgment on the basis it was obtained by fraud. The first two recourses of course would entail a creditor succeeding in obtaining intervenor status in the divorce proceedings; and the third recourse is available on only limited grounds.

5. Conclusion

There is no question that in difficult financial times, there are legitimate situations in which bankruptcy is the only means by which a creditor may be freed from a crushing mountain of debt, in order to be eventually rehabilitated. Where a family remains intact, there is sufficient trust between husband and wife that the couple will work together to face the challenges which must be met to keep a household intact and the children clothed and fed, despite the requirements of the trustee to collect income and assets for the benefit of the unpaid creditors. The law is clear that the family must be left with reasonable income to survive.

However, this does not mean that there are not many improper and abusive bankruptcies. If women and children find themselves often ill-represented and ill-prepared to deal with the challenges presented by ordinary matrimonial litigation, they are all the less prepared to face the bankruptcy trustee, and to face the often omnipotent secured creditors (such as the hypothecary creditor), who as a matter of ordinary business dealings have taken steps contractually to provide themselves with a degree of protection which to this day, the legislator has attempted but failed to provide to women and children in our society.

Furthermore, the loss of the ordinary sense of trust which may have prevailed during the marriage means that the husband will not likely take the ordinary steps with the trustee which might lead to a more reasonable balance between the rights and claims of family as opposed to those of third party creditors.

Bankruptcy then may wreak havoc in the lives of the members of the disjointed family. The wife acquires *two* opponents: her husband and his trustee. The sometimes unconscionable limitations on the wife's rights are all too well-known in the legal community; the strengths of a wife's position and the means by which the frailties may be defeated, are unfortunately all too rarely considered and pleaded (as in *Droit de la Famille 977*, where the wife likely did not have the means to plead before the appellate court).

The steps we take to foster the respect and the integrity of the judgments we obtain – whether for alimentary support, provision for costs, compensatory allowance or partition of the value of the family patrimony – are essential to promote in our communities the primacy of judgments of the family courts, and the respect of the family unit as the most important entity worth of legislative and judicial protection.

The challenge is ours to meet.

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