SEMINAR PAPER

Avoidance by bankruptcy trustees under ss.120 and 121 of the *Bankruptcy Act* of transfers pursuant to financial agreements entered between spouses or de facto couples under the *Family Law Act*

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Introduction to financial agreements under the FLA

1. The *Family Law Amendment Act 2000* which commenced on 27 December 2000, inserted a new Part VIIIA (Financial Agreements) into the *Family Law Act 1975* (Cth) (**the FLA**). Part VIIIA effectively provides for four types of financial agreements between married couples categorised according to the time they are made:

   (a) before marriage (s.90B of the FLA);

   (b) during marriage but before separation (s.90C of the FLA);

   (c) during marriage but after separation (s.90C of the FLA);

   (d) after divorce (s.90D of the FLA).

2. The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* inserted Part VIIIAB into the FLA from 1 March 2009. Under that Part, there are three types of financial agreements categorised according to the time they are made:

   (a) before a de facto relationship commences (s.90UB of the FLA);

(b) during a de facto relationship (s.90UC of the FLA);

(c) after a de facto relationship ends (s.90UD of the FLA).

3. A financial agreement under Part VIIIA or Part VIIIAB may include an agreement that deals with superannuation interests of either or both of the parties to the agreement as if those interests were property (s.90MH(1) of the FLA).

4. Financial agreements can deal with four types of matters:

(a) how property and financial resources are dealt with;

(b) maintenance;

(c) matters "incidental or ancillary to" the above matters;

(d) other matters.

5. The drafting of financial agreements is fraught with difficulty for practitioners and is now one of the greatest sources of claims for professional negligence. Financial agreements may be set aside by a Court exercising jurisdiction in respect of a "matrimonial cause" as per s.39 of the FLA. The power and grounds to set aside financial agreements under the FLA is pursuant to s.90K (in respect of a financial agreement between spouses) or s.90UM of the FLA (with respect to a financial agreement between a de facto couple).

6. More recently, however, trustees have enjoyed some success in setting aside financial agreements entered under the provisions of the FLA, either between a spouse or a de facto couple, pursuant to sections 120 or 121 of the *Bankruptcy Act 1966* (Cth) (**the BA**). These are not sections that family law practitioners ordinarily have an acquaintance with. They permit a trustee to avoid a transfer of property in circumstances where the transfer was for less

than market value consideration or no market value consideration or, in the alternative, there was an intention to defeat creditors.

7. This is not an area of law that will be at the forefront of most practitioners' minds when advising as to financial agreements as it is very rare that a party will anticipate that the other party will be made bankrupt in the future and for up to 5 years from the date of a transfer. Further, it is even more rare that a practitioner of any ethical standing will advise a client to enter into a transaction with the intention of defeating creditors as such an act is clearly anathema to the structure of the BA and sound commercial practice.

8. Nevertheless, in light of decisions of the Federal Magistrates Court pursuant to section 120 of the BA setting aside transfers of property under a financial agreement it is incumbent upon practitioners advising clients entering into financial agreements of the pitfalls that may arise if the transferring spouse or de facto subsequently becomes bankrupt.

9. This paper will address the following:

   (a) the key provisions of the BA; and

   (b) sections 120 and 121 of the BA; and

   (c) application of sections 120 and 121 of the BA to transfers pursuant to financial agreements under the FLA; and

   (d) setting aside a financial agreement that defrauds or defeats creditors under sections 90K or 90UM of the FLA; and

   (e) the effect of a successful application under sections 120 or 121 of the BA on the subject property;

   (f) response by the non-bankrupt spouse or de facto to the setting aside of a transfer under sections 120 or 121 of the BA;

(g) appeal difficulties from a decision of the Federal Magistrates Court.

Key provisions of the BA

10. Section 58(1)(a) of the BA provides that where a debtor becomes a bankrupt, the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or in a registered trustee. Section 58(1)(b) of the BA provides that where a debtor becomes bankrupt, after-acquired property of the bankrupt vests, as soon as it is acquired, or devolves on the bankrupt in the Official Trustee or the registered trustee. "Property" as defined by section 58 includes a chose in action including the right to enforce proper administration of an interest as beneficiary of an estate[1].

11. Where a debtor has a joint tenancy of Torrens system land, section 58 of the BA severs of the joint tenancy in equity on the making of sequestration order and imposes on the non-bankrupt joint tenant a trust in respect of the debtor's interests and for the benefit of the trustee in bankruptcy. To effect severance of the joint tenancy at law the trustee's interest must be registered[2].

12. Section 115 of the BA defines the date of the commencement of bankruptcy. It is from this date that property of the debtor vests in the trustee. The date of bankruptcy depends on the nature of the bankruptcy (i.e.: by a creditor or debtor's petition), when the first act of bankruptcy was committed as defined by section 40 of the BA and whether there were pending creditor's petitions in the case of a debtor's petition. Most bankruptcies are pursuant to a creditor's petition and section 115(1) of the BA will apply such that the date of bankruptcy is the time of the earliest act of bankruptcy committed by the person with the period of 6 months immediately before the presentation of the creditor's petition. Where the bankruptcy is pursuant to a debtor's petition, provided there are no pending creditor's petitions or no act of bankruptcy is committed in the 6 months prior to presentation of the debtor's petition, the

[1] *Official Receiver v Schultz* (1990) 170 CLR 306; *Re Pevsner; Ex parte Official Trustee in Bankruptcy* (1983) 68 FLR 254
[2] *Sistrom v Urh* (1992) 40 FCR 550.

date of bankruptcy is the date of presentation of the petition to the Official Trustee.

13. Section 116 of the BA specifies property that is divisible amongst creditors pursuant to the principles of *pari passu*. Section 116(1)(a) of the BA provides that all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge, is property divisible amongst the creditors of the bankrupt. Section 116(1)(b) of the BA states that the property divisible amongst creditors also includes the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the Bankrupt for his or her own benefit at the commencement of the bankruptcy or any time after the commencement of the bankruptcy and before his or her discharge.

14. There are certain exceptions to the property divisible amongst creditors under s.116(2) of the BA and these include, pursuant to (2)(a), property held by the bankrupt in trust for another person.

Sections 120 and 121 of the BA

15. Sections 120 and 121 of the BA are vital to bankruptcy trustees in recovering property that has been transferred from a bankrupt to another person prior to the date of bankruptcy. They reverse such transfers and allow the subject property to be available for division amongst creditors pursuant to section 116(1) of the BA.

16. Section 120 of the *Bankruptcy Act* which is relevantly as follows:

> **"120 Undervalued transactions**
>
> (1) **Transfers that are void against trustee.** A transfer of property by a person who later becomes a bankrupt (the

transferor) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:

(a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and

(b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.

…

(2) **Exemptions.** Subsection (1) does not apply to:

…

(b) a transfer to meet all or part of a liability under a maintenance agreement or a maintenance order;

(3) **[Transfers not void against trustee]** Despite subsection (1), a transfer is not void against the trustee if:

(a) in the case of a transfer to a related entity of the transferor:

(i) the transfer took place more than 4 years before the commencement of the bankruptcy; and

(ii) the transferee proves that, at the time of the transfer, the transferor was solvent.

…

(5) **What is not consideration.** For the purposes of subsections (1) and (4), the following have no value as consideration:

(a) the fact that the transferee is related to the transferor;

(b) if the transferee is the spouse or de facto partner of the transferor - the transferee making a deed in favour of the transferor;

(c) the transferee's promise to marry, or to become the de facto partner of, the transferor;

(d) the transferee's love or affection for the transferor;

(e) if the transferee is the spouse, or a former spouse, of the transferor - the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* ;

(f) if the transferee is a former de facto partner of the transferor -the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*.

…

(7) **Meaning of *transfer of property* and *market value*.** For the purposes of this section:

(a) ***transfer of property*** includes a payment of money; and

…

(c) the ***market value*** of property transferred is its market value at the time of the transfer."

17. The word "solvent" is defined separately by section 5(2) of the BA to be when a person is able to "pay all the person's debts as and when they become due and payable." A person is defined to be "insolvent" by section 5(3) of the BA when that person is not "solvent".

18. The elements of section 120 are as follows:

(a) that there has been a transfer of property by a person who later becomes bankrupt to another person; and

(b) the transfer took place in the period commencing five years before the commencement of the bankruptcy and ending on the date of the bankruptcy as defined by section 115 of the BA; and

(c) the transferee gave no consideration for the transfer; or

(d) the transferee gave consideration of less than market value of the property.

19. The fact that the property is no longer physically available, in other words no longer exists *in specie*, as at the commencement of the bankruptcy but can be seen to exist as an identifiable substitute in property such as a fund representing sale of proceeds, means that an action may still exist under s.120[3]. That fund may then vest under sections 58 and 116 of the BA.

20. Section 120(3) is a defence to an action under section 120(1) of the BA andprovides that a transfer is not void if, in the case of a transfer to a related entity of the transferor the transfer took place more than four years before the commencement of the bankruptcy and the transferee proves that, at the time of the transfer, the transferor was solvent. A "related entity" is defined by section 5(1)(a) of the BA to include "a relative of the person" and a "relative" is defined by section 5(1) to mean "the spouse of the person". The word "spouse" is given extended definition to include "a de facto partner".

21. Under section 120 of the BA there is no obligation to prove intent on the part of the transferor or the transferee. It is merely necessary to prove either that there was no consideration provided for the transfer or the transfer was of less value than the market value of the property at the time of the transfer.

22. Section 120(5) and (7) of the BA mean that "consideration" for the purposes of section 120(1) is to be construed "in the ordinary legal and commercial understanding of that term" and as "commercial people would construe it"[4]. It is insufficient the transfer was at the end of a long domestic relationship given the fact that subsection (5)(d) expressly excludes such acts as "love or affection". The use of the words "market value" in section 120(1) and the definition of "market value" in section 120(7)(c) means that full market value in cash or in kind must be paid to the transferor, thereby extinguishing contract law concepts that valuable consideration merely be "sufficient" and may

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[3] *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469 per Lindgren J at [43].
[4] *Official Trustee v Lopatinsky* (2003) 30 FamLR 499 at [94], [96].

include a promise by a promisor to do something[5]. An undertaking to forbear from suing for an entitlement to property orders under s.79 of the FLA was held to not be consideration as a spouse cannot, by entering into an agreement with another spouse, preclude him or herself from applying to the Court for an order for maintenance or property adjustment[6]. Further, past acts such as past payments of a home loan/mortgage do not constitute consideration as they are past consideration and therefore no consideration[7].

23. For there to be an effective transfer to avoid the application of section 120 of the *Bankruptcy Act*, the transferee must provide the equivalent of market value to the transferor, whether in cash or in kind. This would necessarily mean that a party taking, for instance, a transferor's interest in land subject to an encumbrance must pay to the transferor the net value of the transferor's interest (calculated as a reasonable market value assessment of the land less the sum of the encumbrance and reasonable sale costs and then the transferor's share of that nett sum) or else provide an equivalent transfer of real or personal property in kind[8].

24. Section 121 of the BA is relevantly as follows:

> "121. **Transfers to defeat creditors**
>
> (1) **Transfers that are void.** A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:
>
> (a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and

[5] As to contractual rules of consideration, see *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 at 193-194 and J W Carter et al, *Contract Law in Australia*, Fifth Edition, Lexis Nexis Butterworths (2007) at [6-23]

[6] *Official Trustee in Bankruptcy v Lopatinsky* (supra) at [105].

[7] *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta, a Bankrupt v Jennifer Ann Byrne-Smith* [2011] FMCA 632 per Driver FM at [27], citing *Official Trustee v Lopatinsky* (supra) at [97] and *Official Receiver v Huen* [2007] FMCA 304 (16 March 2007) per Luce VFM at [31].

[8] Such an approach was adopted by the bankruptcy trustee in submissions and accepted by the Court in *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta, a Bankrupt v Jennifer Ann Byrne-Smith* (supra) at [32].

(b) the transferor's main purpose in making the transfer was:

(i) to prevent the transferred property from becoming divisible among the transferor's creditors; or

(ii) to hinder or delay the process of making property available for division among the transferor's creditors.

(2) **Showing the transferor's main purpose in making the transfer.** The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent.

(3) **Other ways of showing the transferor's main purpose in making a transfer.** Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.

(4) **Transfer not void if transferee acted in good faith.** Despite subsection (1), a transfer of property is not void against the trustee if:

(a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and

(b) the transferee did not know, and could not reasonably have inferred, that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and

(c) the transferee could not have reasonably inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

…

(6) **What is not consideration.** [identical provisions apply with respect to what does not constitute consideration as per s.120(5) of the BA].

…

(9) **Meaning of *transfer of property* and *market value*** [identical provisions apply with respect to what does not constitute consideration as per s.120(7) of the BA]."

25. The words "main purpose" invokes an intention which may necessarily be inferred. While the onus of proving the main purpose lies upon the Applicant to have the transfer set aside, the conclusion can be drawn from all the relevant circumstances[9] and on the balance of probabilities[10]. That intent may be inferred when proper funds available for payment of creditors become insufficient and may be established by reference to future creditors[11]. The "main purpose" is able to be proved from the surrounding circumstances of the transfer, as well as the fact that a transferor was or was about to become insolvent. If a debtor makes a voluntary settlement of property, leaving the debtor without sufficient assets to meet his or her debts, it can be inferred that the debtor's main purpose was to prevent the transferred property from being divisible among creditors since that is the necessary consequence of the disposition of the property[12].

26. Pursuant to section 121(4) of the BA the transferee may defeat an action to void a transfer if the following can be established:

(a) that the consideration given for the transfer was at least as valuable as the market value of the property; *and*

(b) the transferee did not know and could not reasonably have inferred that the transferor's main purpose was to defeat creditors; *and*

(c) the transferee could not have reasonably inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

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[9] *Cannane v J Cannane Pty Ltd (In Liquidation)* (1998) 192 CLR 557 at 566-7 per Brennan CJ and McHugh J.
[10] Section 140 of the *Evidence Act* (Cth).
[11] *P T Garuda Indonesia Limited v Grellman* (1992) 35 FCR 515 at 524; *Barton v DCT* (1974))131 CLR 370 at 374.
[12] *Re Chase; Permfox Pty Ltd v Official Receiver* [2002] FCA 1504; applying *Freeman v Pope* (1870) LR 5 Ch App 538 at 541 per Giffard LJ; followed in *Noakes v J Harvy Homes & Son* [1979] 37 FLR 5 at 10-11 per Brennan J (with whom Deane and Fisher JJ agreed).

27. The cumulative stringency of section 121(4) of the BA means that it is highly unlikely that a de facto or spouse would be able to establish those elements, in particular the absence of knowledge of the main purpose or a reasonable inference of the main purpose to defeat creditors.

28. What is important in section 121 is not the intention of the transferee but the intention of the transferor. The difficulty for a trustee is the bankrupt will usually be unco-operative in the provision of evidence or may be actively hostile and may collude with the transferee to create evidence. The bankrupt will be unlikely to admit the "main purpose" of the transfer was to defeat creditors. Therefore, objective evidence of the surrounding circumstances leading up to transfer as well as contemporaneous communications between the transferee and transferor and any professional advisors will be highly relevant.

Application of sections 120 and 121 of the BA to financial agreements under the FLA

29. The exemption in section 120(2)(b) of the BA applies only to a transfer to meet all or part of a liability under a "maintenance agreement" or a "maintenance order" under the FLA. A "maintenance agreement" is defined by s.5(1) of the BA to mean a maintenance agreement within the meaning of the FLA that has been registered in or approved by a Court in Australia or an external territory but does not include a financial agreement or Part VIIIAB financial agreement within the meaning of the FLA. This exclusion is consistent with the intention of amendments to the FLA and BA by the *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth) to prevent the misuse of financial agreements as a means of avoiding payment to creditors (para [2](b), Explanatory Memorandum, *Bankruptcy and Family Law Legislation Amendment Bill 2004*). The Explanatory Memorandum stated as follows:

> "17. The Bill also proposes amendments to ensure that a bankrupt cannot use financial agreements under Part VIIIA of the Family Law Act to defeat the claims of creditors. One amendment will exclude financial agreements from the

> definition of 'maintenance agreement' in the Bankruptcy Act to ensure that trustees can use that Act's 'clawback' provisions to recover property transferred prior to bankruptcy pursuant to such an agreement. A further amendment will introduce a new act of bankruptcy which will occur when a person is rendered insolvent as a result of assets being transferred under a financial agreement – this will mean that the person's bankruptcy will be taken to have commenced at the time of that transfer which will extend the 'relation back' period. This will allow the trustee to claim property transferred under the agreement as divisible property in the bankrupt's estate."[13]

30. It has been established by at least one interlocutory decision in the Federal Court of Australia that the provisions of section 120 or 121 of the BA may set aside financial agreements under the FLA[14]. It has been accepted in that interlocutory decision that Family Court orders are excluded from the operation of sections 120 and 121 of the BA on the basis that any transfer pursuant to such orders is not "by a person who later becomes a bankrupt" for the purposes of section 120 or 121 of the BA[15]. On this basis, to avoid the application of sections 120 and 121 of the BA, practitioners may advise their clients that a preferred approach would be to apply to the Family Court or Federal Magistrates Court for family law orders. This would create complications that financial agreements were designed to avoid, including the following:

(a) substantial documentation is required to comply with *Harris v Caladine*[16];

(b) less ability to restrict future maintenance claims;

(c) less privacy;

(d) less flexibility to have settlements which are not "just and equitable", as per s.79 and s.90SM of the FLA.

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[13] This section of the Bill was cited by his Honour Justice Collier in *Combis, Trustee of the Property of Peter Jensen (Bankrupt) v Jensen* [2009] FCA 778.
[14] *Combis, Trustee of the Property of Peter Jensen (Bankrupt) v Jensen* (supra) at [51]-[54].
[15] *Combis* (supra) at [41].
[16] (1991) ¶FLC 92-217.

31. The Federal Magistrates Court has applied section 120 of the *Bankruptcy Act* to set aside a transfer for "nil" consideration of an equal share in tenancy in common in a former "matrimonial" home, such transfer having been conducted pursuant to a de facto financial agreement under section 90UD of the FLA. The Court found consideration that should have been paid by the transferee was the net value of the bankrupt transferor's tenancy in common equivalent to the gross market value at the time of transfer less costs of sale less discharge of a mortgage and then divided by 50%[17]. In that matter, valuations by real estate agents at the time of the transfer were in evidence, thereby allowing "market value" to be proved. In the absence of such evidence, a bankruptcy trustee would need to obtain evidence such as a retrospective valuation report based on comparable sales.

Setting aside a financial agreement that defrauds or defeats creditors pursuant to sections 90K or 90UM of the FLA

32. A trustee in bankruptcy may also bring an application to set aside a financial agreement under section 90K(1)(aa) (applying to spouses) or section 90UM(1)(b) (applying to de facto couples) of the FLA. These sections apply if a party to the financial agreement entered into the agreement for the purpose or purposes that included the purpose of defrauding or defeating a creditor or creditors of the party or with reckless disregard of the interests of a creditor or creditors of the party. These sections require proof of intent or recklessness. Therefore, the evidence that may be adduced would be similar to that relied on under section 121 of the BA.

33. An application under section 90K or 90UM of the FLA may be made by "any other interested person", apart from a party to the financial agreement provided the applicant can establish as per s.90K(3) and 90UM(6) that it is "just and equitable for the purpose of preserving or adjusting the rights of persons who are parties to that financial agreement and any other interested persons". As per s.90K(1A) and 90UM(2) of the FLA the definition of

[17] *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta, a Bankrupt v Jennifer Ann Byrne-Smith* (supra).

"creditor" for the purposes of section 90K(1)(aa) and 90UM(1)(B) includes in relation to the person who is a party to the agreement a person who "could reasonably have been foreseen by the parties as being reasonably likely to become a creditor of the party". This extended definition of "creditor" means the "interested person" who may bring an application to set aside a financial agreement under sections 90K or 90UM may be a bankruptcy trustee who seeks to recover property for the benefit of creditors of a party to the agreement if those creditors were forseen as reasonably likely to become creditors.

34. Bankruptcy trustees and their advisors who are considering bringing an application to set aside a financial agreement should consider bringing the application both pursuant to sections 120 and/or 121 of the BA as well as sections 90K(1)(aa) or s.90UM(1)(b) of the FLA.

The effect of a successful application under sections 120 or 121 of the BA on the subject property

35. In the event that there has been the successful setting aside of a transfer by a trustee under ss.120 or 121 of the BA, a question mark arises as to the status of the property the subject of the transfer. Two schools of thought have arisen. One school states the property become immediately on avoidance the property of the trustee and has not vested as at the date of bankruptcy. By extension, it is therefore not subject to any action under sections 79(1)(b) or 90SM(1)(b) of the FLA which permit the Court to make orders "altering the interests of the bankruptcy trustee in the vested bankruptcy property". The second school states that the property reverts to its pre-transfer status and then vests in the trustee retrospectively as at the date of bankruptcy. That property may then be the subject of orders under sections 79(1)(b) or 90SM(1)(b) of the FLA.

36. For reasons that shall become apparent I am minded that the second school is to be preferred. It is the most equitable approach as it accords with the

intent of sections 79(1)(b) and 90SM(1)(b) by making property available for claims by non-bankrupt spouses and de facto persons.

37. The second school is also consistent with the decision of his Honour Justice Lindgren in *Anscor Pty Ltd v Clout (Trustee)* (supra) as previously cited in this paper. In that decision, his Honour analysed the operation of earlier versions of sections 120 and 121 within the parameters of the entirety of the BA. His Honour concluded that where the bankruptcy trustee succeeds in an action under section 120 or 121 of the BA, those sections do not have the effect of vesting property in a trustee in bankruptcy. Instead, they make transfers of property void as against the trustee in bankruptcy i.e.: the transfer never occurred. The vesting of property in the trustee in bankruptcy is provided for under ss.58, 115, 116 and 5(1) of the BA[18].

38. His Honour went on to state that where the property the subject of a transfer made void by section 120 or 121 of the BA exists *in specie* as at the date of the commencement of the bankruptcy, the property vests in the trustee forthwith upon the debtor becoming a bankrupt. From the date of the bankruptcy, the transferee as owner will have held the property in trust for the bankruptcy trustee. If the owner sells the property after the date of bankruptcy, the owner will be accountable to the bankruptcy trustee for the proceeds of the sale had and received to the use of the trustee. If the property the subject of a transfer made void by section 120 or 121 of the BA no longer exists *in specie* as at the commencement of the bankruptcy but can be seen to exist as at that date in an identifiable substitute form of property, such as a fund representing the proceeds of sale of the property, that substitute property will vest in the trustee in bankruptcy forthwith upon the debtor's becoming a bankrupt. These statements are subject to protections accorded to third parties under sections 120(6) and 121(8) of the BA which protect successors in title to property where they have acquired the property in good faith and for at least the market value of the property.

[18] *Anscor Pty Ltd v Clout (Trustee)* (supra) at [43](h).

39. The effect of this analysis is that in the event of voiding a transfer under sections 120 or 121 of the BA the property reverts to its status as at the date of transfer. Therefore, for instance in the example of Torrens system land owned by a spouse and a bankrupt as tenants in common in equal shares, the tenancy in common in equal shares as at the date of the transfer is restored. The bankrupt's property, being the 50% share as tenant in common, vests in the bankruptcy trustee as at the date of bankruptcy pursuant to section 58 of the BA. That property then becomes divisible amongst creditors pursuant to s.116(1) of the BA. If the property has been disposed of by the transferee and is no longer available *in specie*, the transferee is liable for the monetary equivalent thereof as moneys had and received to the use of the trustee.

40. Assuming this analysis to be correct, the vested property may then be the subject of a claim by the non-bankrupt spouse under sections 79(1)(b) or 90SM(1)(b) of the FLA or on the basis of equitable principles.

Response by the non-bankrupt spouse or de facto to the setting aside of a transfer of property under sections 120 or 121 of the BA

41. To use the well worn example, pursuant to a financial agreement under the FLA, a spouse or de facto transfers his or her interest as tenant in common in equal shares to a spouse or de facto for "Nil" consideration. The property has a market value of $1,500,000 and there is a loan of $500,000 secured by a mortgage over the land. The nett value of the transferor's property as tenant in common in equal shares in the land is ($1,500,000 – $500,000)/2 = $500,000. The transferor becomes bankrupt 4 years after the transfer pursuant to a debtor's petition. An application under sections 120 of the BA voiding that transfer is successful and the transferee loses her title as owner in fee simple of the land and the property reverts to its status as at the date of transfer as jointly owned by the tenants in common in equal shares. The bankrupt's interest as tenant in common in equal shares vests in the trustee as at the date of bankruptcy pursuant to sections 58 and 116 of the BA. That property is then divisible amongst creditors. The non-bankrupt spouse or de

facto then has the entitlement to make a claim against the vested property pursuant to s.79(1)(b) of the FLA or, where the non-bankrupt transferee is a de facto, pursuant to s.90SM(1)(b) of the FLA.

42. A difficulty will emerge if the transferee and transferor were not married and not in a de facto relationship of at least two years. Pursuant to s.90SB of the FLA the Courts may only make orders in respect of maintenance and property interests in a de facto relationship where the period of the de facto relationship is at least two years or there is a child to that relationship or there is a risk of a serious injustice due to substantial contributions made by a party. In the absence of jurisdiction the transferee will not be able to seek orders under sections 79(1)(b) or 90SM(1)(b) of the FLA. That person may, however, seek general relief pursuant to principles of equity where the application to set aside is determined in a Court with jurisdiction in equity[19].

43. It is beyond the scope of this paper to comprehensively review that entirety of the law with respect to both the resulting and constructive. It is, however, worthwhile noting in shorthand that the resulting trust is a trust that exists as at the date of the acquisition of the property. The circumstances in which such trusts may arise can be grouped under two main headings. The first is where the settlor has transferred property to the trustees but has not disposed of, or has not wholly disposed of, the beneficial interest. The second is where a purchaser of property directs that it be transferred into the name of another person and there is nothing to indicate that the person should take the property beneficially. A resulting trust will be presumed where, on purchase, the legal title to real or personal property is vested in someone other than the person who is proved to have provided the purchase money. Thus, where A purchases land from X and directs X to make a transfer to B, which X does, there is a resulting trust in favour of A.[20] This rule is certainly subject to exceptions, including where the evidence is that it was the intention of the

[19] Such a case was run by the transferee in *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta, a Bankrupt v Jennifer Ann Byrne-Smith* (supra) as the Court found the de facto relationship was of less than 2 years duration.
[20] J D Heydon et al, *Jacobs Law of Trusts in Australia*, Lexis Nexis Butterworth (2006) at [1201] and [1210]

person contributing the purchase price that both parties to the purchase should equally take title, both legally and equitably[21].

44. A further equitable claim is the constructive trust. Summarily put, the constructive trust is applied by equity where one person has contributed to property and it is unconscionable for the legal owner to deny that contribution. Those contributions may be both financial and non-financial, including repayments of a mortgage[22]. To a large extent evidence of both financial and non-financial contributions in the context of establishing a constructive trust is very similar to financial and non-financial contributions in sections 79 and 90SM of the FLA. Any person claiming the benefit of a constructive trust will bear the onus of establishing contributions such that it would be unconscionable to deny those contributions. As such, clear evidence of contributions will be necessary.

45. Raising claims for relief under the FLA or in the alternative in equity presents problems of jurisdiction and the appropriate forum for relief. The Family Court does not have jurisdiction in respect of equitable claims or original jurisdiction to make orders under the BA save for the matters detailed in sections 35 and 35B of the FLA. Those sections provide jurisdiction where a spouse is bankrupt and a trustee is a party to proceedings or a proceeding in the Federal Court of Australia is transferred to the Family Court. Prima facie, the Family Court does not have original jurisdiction to hear an application under section 120 and 121 of the BA. The Federal Court of Australia has jurisdiction in equity and under the BA[23] but does not have jurisdiction in respect of a matrimonial cause[24] and therefore cannot exercise jurisdiction under sections 79 and 90SM of the FLA.

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[21] *Calverley v Green* (1984) 155 CLR 242.
[22] *Baumgartner v Baumgartner* (1997) 164 CLR 137, applied in *Roderick May Sutherland as Trustee of the Property of Barry Paul Pescosta v Jennifer Ann Byrne-Smith* (supra) at [49]-[53] and *Official Trustee in Bankruptcy v Brown and Anor* [2011] FMCA 88.
[23] Section 22 of the *Federal Court of Australia Act 1976* (Cth) gives general jurisdiction in equity while section 27 of the BA names the Federal Court to be a bankruptcy court concurrently with the Federal Magistrates Court. Section 30 of the BA provides a bankruptcy Court jurisdiction to provide equitable relief when applying the BA.
[24] Section 39 of the FLA lists the Courts that have jurisdiction under that Act and does not include the Federal Court of Australia.

46. The only Court that can exercise original jurisdiction under both the BA and the FLA and in equity is the Federal Magistrates Court. Section 14 of the *Federal Magistrates Act* provides that in every matter before the Federal Magistrates Court, that Court must grant all remedies in respect of a legal or equitable claim properly brought forward. Section 27 of the BA provides that the Federal Magistrates Court has jurisdiction in bankruptcy. Section 30 of the BA provides that the Federal Magistrates Court has full power to decide all questions of law or fact in any case of bankruptcy and may take such orders, including equitable remedies, as are necessary for the carrying out or giving effect to the BA. The FLA jurisdiction of the Federal Magistrates Court is contained in s.39(1A) of the FLA which provides that a "matrimonial cause" other than a decree for dissolution of a marriage may be instituted in that Court.

47. If an application under section 120 or 121 of the BA is commenced in the Federal Court, consideration should be given to a transfer of the application to the Federal Magistrates Court to permit concurrent jurisdiction under the FLA and in equity to be exercised. I submit that the Federal Magistrates Court is the preferred jurisdiction for the transferee as that Court has the following:

(a) general equitable jurisdiction pursuant to s.14 of the *Federal Magistrates Act*;

(b) specific equitable jurisdiction and jurisdiction under ss.27 and 30 of the BA;

(c) jurisdiction in respect of a matrimonial cause, including the making of property orders under s.39(1A) of the FLA.

Appeal difficulties from the Federal Magistrates Court

48. An unsatisfactory status of the legislation is that if there is an appeal from a decision of the Federal Magistrate, an appeal from a decision under the general equitable jurisdiction or the BA is to the Full Court of Australia

pursuant to s.24(1)(e) of the *Federal Court of Australia Act*. In contrast, an appeal against a decision in respect of a matrimonial cause is to the Full Court of the Family Court pursuant to s.94AAA(1) of the FLA. The time for an appeal to the Full Court of the Federal Court is 21 days after the date of the order appealed from[25]. The time for an appeal to the Full Court of the Family Court from a decision of a Federal Magistrate is 28 days after the date of the order[26]. Practitioners must therefore be cognisant as to which Court the appeal process is to apply.

Conclusion

49. This is a very complex area of law which will create difficulties for practitioners in advising as to the creation of a financial agreement and then resisting any claim by a bankruptcy trustee to set it aside. Further, consideration must be given to the appropriate jurisdiction to conduct any litigation. Practitioners must be prepared, if the trustee is successful in setting aside a financial agreement, to conduct a cross application to either claim against the vested property pursuant to sections 79(1)(b) or 90SM(1)(b) of the FLA or in the alternative to bring a claim for equitable relief based on a resulting or constructive trust.

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[25] Rule 36.03(1) of the *Federal Court Rules*.
[26] Rule 22.03 of the *Family Law Rules*.