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Bankruptcy and Family Law, by Robert A. Klotz Book Review

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transfer is generally made at a time when the debtor is solvent. This being the case, fraudulent intention cannot be presumed; it is an element of the plaintiff's case. Yet, the Supreme Court paid only lip service to this. It concluded that the early failure of the business, even though the failure was due largely to causes beyond the debtor's control, shifted the onus of proof of lack of fraudulent intent to the debtor. The court then appeared to make this a very heavy onus to discharge.²¹

I do not want to leave the impression with the reader that this book is seriously flawed. My complaints are few and some of them are based on a simple difference of opinion. I believe the book is a significant contribution to the development of a very important but largely misunderstood area of Canadian law. The book should provide the basis for the development of a consistent conceptual and policy-based structure for Canadian law of fraudulent conveyance and preferences. Its publication will be welcomed by practitioners, judges and academics alike.

R.C.C. Cuming*

Bankruptcy and Family Law, by Robert A. Klotz (Toronto, Carswell, 1994, xxxiv & 373 pp., \$85)

Robert A. Klotz's thorough and informative new book stands at the intersection of two legal regimes, both of which are forged out of crisis, whether domestic or financial. In this work, Klotz examines what happens when the attempt to divide property in a matrimonial dispute is disrupted by the bankruptcy of one of the spouses. While either bankruptcy or divorce, on its own, can be a trying and difficult experience for the bankrupt or the spouse, when the two regimes collide they present a conflict of social values and legal priorities. As Klotz notes: "While both the bankruptcy and family law frameworks are complete and internally coherent, they do not easily meld."¹ As the economic recession hit in the first half of this decade and debtors and creditors turned more readily to the Bankruptcy and Insolvency

²¹ *Ibid.*, per Anglin and Duff JJ., at p. 54 S.C.R.

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¹ Page v.

Act² to ease their burdens, the intrusion of bankruptcy into matrimonial law has become a familiar event.

The conflict between bankruptcy and family law stems from the competing values served by each regime. Family law takes as its goal the “orderly and equitable settlement of the affairs of the spouses”,³ and thus seeks to vindicate the needs and rights of spouses before those of third parties; moreover, it takes as a cardinal purpose the easing of undue hardships for spouses, particularly custodial parents. But the bankruptcy law regime serves other values. Klotz writes:⁴

Since access to cheap credit is at the cornerstone of our free enterprise economy, Canadian bankruptcy laws are oriented toward providing commercial certainty. Bankruptcy law was not designed to protect spousal claims. Furthermore, sympathy and hardship are endemic in the bankruptcy setting . . . In bankruptcy, almost everyone is a loser to some extent. Few creditors recover what they deserve, despite their extreme hardship in some cases. From the perspective of a bankruptcy trustee, the spouse may be just another claimant looking for a way to improve his or her position at the expense of other deserving creditors.

Bankruptcy law thus favours the balancing of the needs of debtors and *all* creditors, especially secured creditors; except for specific sections, it does not favour the needs of spouses above those of other similarly situated creditors.

Clearly, both sets of values cannot always be served at the same time. Where the courts lean sympathetically in favour of the protection of spousal rights, they may have the subsequent effect of drying up the sources of credit which are necessary to drive the economy — and which help support married couples in the first place. But courts that focus too exclusively on debtor-creditor law may do an injustice to non-bankrupt spouses and provide bankrupt spouses with an improper exemption from future matrimonial claims.

Having framed this conflict, Klotz sets out to provide a simple and useful practitioners’ guide to the intersection of bankruptcy and family law, directed particularly at family lawyers who confront bankruptcy issues in the course of their practice. A brief summary of the book suggests its comprehensiveness. Chapter 1

² R.S.C. 1985, c. B-3 (as amended and renamed by S.C. 1992, c. 27 [hereafter BIA].

³ James C. MacDonald, Ann Wilton, *et al.*, *Law and Practice Under the Family Law Act of Ontario*, rev. ed., vol. 1 (Toronto, Carswell, 1994), p. I-2.

⁴ Pages vii-viii.

offers a simple overview of the principles and procedures found in the Bankruptcy and Insolvency Act. Chapter 2 discusses support orders, which provide for alimony, child support, and other maintenance claims. In this highly detailed chapter, Klotz notes that support payments pose a painful dilemma in bankruptcy. Claims for support are not stayed by bankruptcy and may thus continue without the leave of the creditor or the court. However, the claimant receives no creditors' right in the bankruptcy, and may receive little from his or her claim, as most of the bankrupt's property vests in the trustee. Strategies to maximize the amount recovered in support from the bankrupt source are suggested.

Chapter 3 deals with the enforceability against the bankrupt spouse of debt obligations arising under separation agreements or court orders. Chapter 4 discusses the bankrupt's property, which under the BIA vests in the trustee as part of the bankruptcy estate.⁵ Klotz offers several methods by which the non-bankrupt spouse may gain priority over the trustee in claiming an interest in the bankrupt's property. Chapter 5 enumerates the matrimonial claims against a bankrupt spouse which entitle the creditor to participate in the bankruptcy but which are dissolved by the bankrupt's discharge.

Chapter 6 examines the rights of the trustee in bankruptcy concerning a couple's matrimonial property. Chapter 7 deals with the ability of spouses and trustees to bring claims asserting that the other party is holding property in trust for them. Chapter 8 returns to the subject of the matrimonial home, dealing with possession and alienation of the home and the ability to dispossess an ex-spouse or seek partition and sale. Emotion runs fierce where a wife or husband's dispossession from a home is concerned. For that reason, perhaps, Klotz offers a summation of the issues involved in this chapter that could serve as a summary of the book as a whole:⁶

This [conflict between spousal rights and creditors' rights] brings family law into stark conflict with creditors and trustees and, more broadly, pits the claims of social justice against commercial and economic policy.

Chapter 9 deals with potential attacks by the trustee against transfers of property from the bankrupt to his or her spouse which

⁵ *Supra*, footnote 2, s. 67.

⁶ Page 175.

took place before bankruptcy but during a period of insolvency. Chapter 10 discusses the unfortunate situation regarding pensions, which do not form part of the bankrupt's estate. Klotz cautions that a court-ordered division of pension rights in a matrimonial dispute can, if bankruptcy intervenes, "turn this seeming victory . . . into quite the reverse".⁷ The spouse may act as a creditor in seeking payment of the pension, but since the pension is not part of the bankruptcy estate, the creditor will receive nothing. However, since the claim to the pension moneys comes from the spouse *qua* creditor, her claim will be discharged when the debtor-spouse emerges from bankruptcy.⁸ While the non-bankrupt spouse may preserve her right to the pension moneys, Klotz notes that in the provinces of Ontario and Manitoba, a "cumbersome procedure" is required to do so.⁹

Chapter 11 discusses the effect of bankruptcy on court orders vesting or charging property or requiring that a spouse provide security. Chapter 12 deals with discharge from bankruptcy. Chapter 13 examines ways to foil fraudulent transfers, assignments in bankruptcy, and other actions by "malicious spouses" who wish to thwart matrimonial claims against them. Chapter 14 deals briefly with the issue of recovery of lawyer's fees. Chapter 15 discusses the spouse's limited ability to petition his or her partner into bankruptcy. Chapter 16 deals with the effect of business failures on matrimonial disputes.

As a guide for the perplexed and a practical tool, *Bankruptcy and Family Law* is noteworthy for Klotz's thoughtful efforts to make the book useful to its readers. Most chapters are prefaced by succinct summaries of the material discussed in the following pages; of course, the summaries cannot substitute for the actual text of the chapters, which provide thorough case law and commentary, and note instances in which courts have refused to follow prevailing doctrines. Similarly, Klotz distills his conclusions into a series of suggested strategies which end each chapter, and provide much down-to-earth advice for the practitioner. In addition to the appendices one might expect — forms and precedents, and relevant legislation — Klotz adds a chapter of "case studies", which permit the reader to apply the principles discussed in the rest of the book to a series of hypothetical cases.

⁷ Page 232.

⁸ Pages 232-33.

⁹ Page 225.

Though the book is plainly intended as a practitioner's guide first and foremost, one may wish at times that Klotz had provided a deeper analysis of the policies and theory underpinning the issues he discusses. As he notes, the area of bankruptcy and family law is relatively new and has not yet been thoroughly researched or synthesized, leading him to offer the book as a "foundation on which a more consistent and reasoned jurisprudence can be developed".¹⁰ With his complete research, utilizing legislation and case law from all Canadian provinces, as well as the United Kingdom, Australia, New Zealand, and the United States, Klotz offers an excellent resource for practitioners who wish to understand the *practical* importance of bankruptcy law in their work. But while Klotz does, as I have suggested, very clearly frame the issues that arise when bankruptcy and family law come into conflict, he does not provide a sufficiently clear policy or theoretical position to suggest a way in which bankruptcy and family law can be reconciled — or which regime should take precedence, as a matter of policy,¹¹ if the two cannot be reconciled.

This theoretical underpinning would be particularly useful in evaluating the importance of *Marzetti v. Marzetti*,¹² a 1994 decision of the Supreme Court of Canada which Klotz discusses in a clear and cogent author's note. In a unanimous decision, a seven-member court ruled that a wife's support-based claim to her bankrupt husband's post-bankruptcy income tax refund took priority over the trustee's claim to the refund. Klotz writes:¹³

Marzetti is the first bankruptcy case, which deals with the conflict between support claims and the claims of creditors, to reach the Supreme Court. As such it provides important guidance on the judicial attitude to be adopted in reconciling conflicts between these two interests.

Klotz cites the important policy implications of the court's emphasis on certain social values in reaching its decision. In interpreting the Bankruptcy and Insolvency Act in favour of the non-bankruptcy spouse over the trustee, Iacobucci J. wrote:¹⁴

[W]hen family needs are at issue, I prefer to err on the side of caution. In s. 68 of the *Bankruptcy Act*, Parliament has indicated that, before wages

¹⁰ Page vii.

¹¹ In other words, leaving aside questions of constitutional paramountcy.

¹² (1994), 116 D.L.R. (4th) 577, [1994] 2 S.C.R. 765.

¹³ Page xiii.

¹⁴ *Marzetti*, *supra*, footnote 12, at p. 801 S.C.R.

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.

Klotz also emphasizes Iacobucci J.'s suggestion that statutory interpretation should favour results that would combat the "feminization of poverty" caused by the disproportionate economic impact of divorce upon women.¹⁵

While he properly notes that the decision may not be extended past the realm of support claims,¹⁶ Klotz suggests that the decision may represent a statement by the court that "the social or moral value of mitigating . . . discriminatory consequences [of divorce] is such that, in certain circumstances, third party creditors should pay the social cost".¹⁷ This is a deft distillation of the court's approach in *Marzetti*. Perhaps a clear theoretical discussion throughout the book of the relative importance of the competing values in bankruptcy and family law would better help one to appreciate whether such an approach would be a boon to those caught in matrimonial disputes, or whether it would merely cause lenders to shy away from any loan in which they might lose to a spousal claimant.

Notwithstanding this quibble, this is a highly useful guide to a complex subject, one which attempts to make clear the intersection of two difficult areas of law. Its treatment of the case law in the area is comprehensive, and its practically minded organization should provide any practitioner facing a problem in this area with an excellent road map for planning, research, and action. In addition, the book points out a number of areas which "[call] out for judicial or legislative clarification".¹⁸ Some of Klotz's suggestions have already been adopted in the proposed amendments to the BIA contained in Bill C-109, which had its second reading on November 28, 1995. In particular, his proposals regarding the enforcement of support claims¹⁹ have shaped s. 121(4) of the bill, which makes lump-sum or periodic support arrears accruing in the year before bankruptcy provable claims, and s. 69.41(1), which

¹⁵ *Ibid.*, quoting *Moge v. Moge*, [1992] 3 S.C.R. 813.

¹⁶ Pages xiv-xv.

¹⁷ Page xvi.

¹⁸ Page 27. For examples, see the discussion at p. 27 (dealing with contractual provisions for support); pp. 118-119 (dealing with the provability in bankruptcy of debt claims), and pp. 192-93 (dealing with protection of spousal rights to the matrimonial home).

¹⁹ Pages 45-6.

exempts these limited support claims from a stay, allowing the spouse to seek recovery of the arrears from assets that have not vested in the trustee. Klotz has elsewhere expressed concern over s. 136(1)(d.1), which would give the claimant of these arrears preferred status over most preferred creditors and all unsecured creditors. One hopes that future editions of *Bankruptcy and Family Law* will come along to continue to fulfill the dual functions of serving as a guide to one corner of the law of insolvency — and as a blueprint for reform.

Paul Horwitz*

Fraser & Stewart: Company Law of Canada, 6th ed., by Harry Sutherland (Scarborough, Carswell, 1993, 1200 pp., \$150)

The sixth edition of this well-known work is a quintessential Canadian law book. The structure adheres largely to the structure of the Canada Business Corporation Act. The format parallels Canadian appellate factums, avoiding footnotes, tables and graphics. The style is clear, concise and correct, but largely without colour. And the content is largely Canadian statute law and case law.

To review a 1200 page tome like *Fraser & Stewart* is a formidable challenge, first because of the sheer mass of material, and second because of the intimidating pedigree of the work. The book was first published in 1901 and succeeded by five editions, each updated and substantially rewritten to reflect the evolution of Canadian federal statute law and of the case law interpreting it.

Although *Fraser & Stewart* was used as a working tool by the CBCA drafters, the previous editions were a minor task when compared to the challenge that confronted the authors of the Sixth Edition, who had to adapt the text to a fundamentally new statute that was drafted, in substantial part, to abrogate much of the turgid, complicated and often ineffective legal dogma that has evolved up to 1975. As a result, some of the text seems to have been cut to fit into the Procrustean bed of the CBCA in order to preserve some of the content of preceding editions. Nevertheless it is a useful book, not only because it maintains our collective

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