

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY
OF DUANE ROBERT RAMSAY

MEMORANDUM OF JUDGMENT

A) BACKGROUND OF APPLICATION

[1] Duane and Ivy Ramsay separated in December of 2000 and are involved in matrimonial litigation that is ongoing. At the time of their separation, the Ramsays owned a condominium located in Yellowknife. They are listed as joint tenants on the title of the property. After the separation Ivy Ramsay continued to live in the condominium with the couple's three children. Duane Ramsay never lived in the condo again.

[2] On September 10th, 2001 Duane Ramsay filed an assignment in bankruptcy and Exelby and Partners Ltd. were appointed as trustees in the bankruptcy.

[3] The Trustee filed a Notice of Motion on July 14th, 2006, seeking an order confirming the sale of the condominium, as well as declarations about the parties' respective equities in the property. At the time the Notice of Motion was filed, an Offer to Purchase had been made on the property, agreed to by Ivy Ramsay and the Trustee, with a closing date that was imminent.

[4] The Trustee's Application was first spoken to in this Court on August 8th, 2006. It was adjourned for a number of reasons, including the fact that counsel wanted more time to review the briefs and Affidavit material filed by the other parties. In addition, Duane Ramsay, who was unrepresented at the beginning of the proceedings, retained counsel during an adjournment. Understandably, that counsel wanted some time to

review the materials filed to date, and an opportunity to submit materials. At the time the proceedings were adjourned on August 8th, the positions of the parties were:

1. The Trustee wanted the sale of the condo to proceed; his position was that 50% of the net proceeds from the sale should be paid to Ivy Ramsay and the other 50% should go to the Trustee; he opposed Ivy Ramsay's claim to anything more than 50% of the sales proceeds. He took the position that Duane Ramsay, as an undischarged bankrupt, had no standing to oppose the sale of the condo or to engage in the argument in this Court about how the sales proceeds should be divided.
2. Ivy Ramsay agreed with the proposed sale of the condo, but on the condition that she would receive 50% of the sales proceeds immediately after the transaction closed. If that portion of the sales proceeds was not to be distributed to her, she was not consenting to the sale of the condo. Her position was that she was in fact entitled to more than 50% of the sales proceeds, based on various things she has paid for since the parties separated. Finally, she too took the position that Duane Ramsay did not have any standing in these proceedings.
3. Duane Ramsay agreed with the proposed sale of the condo but took the position that all the sales proceeds should be held in trust pending adjudication of the issue of division of property between the spouses. He disagreed with the other two parties about Ivy Ramsay's immediate entitlement to 50% of the sales proceeds.

[5] The matter was scheduled to continue on August 22nd. Unfortunately, for logistical reasons, the matter could not proceed that day. However, the parties did come to an agreement on the question of whether the proposed sale should proceed. An Order confirming the sale of the condo was issued on consent of all parties, on August 24th. That Order provided that the sales proceeds would be allocated towards the payment of outstanding property taxes and mortgages, and that the net proceeds would be held in trust by the Trustee until further order of this Court. The date for continuation was then scheduled to be August 30th.

[6] On August 30th, I asked counsel to outline their positions on the issue of Duane Ramsay's standing in these proceedings, which had been raised in the written submissions. I also asked counsel to outline their positions on the question of whether this Court was the proper forum for the issue of division of the sales proceeds to be decided. I heard submissions on these issues and reserved my decision.

B) POSITIONS OF THE PARTIES

[7] On the standing issue, the Trustee and Ivy Ramsay both take the position that Duane Ramsay, as an undischarged bankrupt, is only an observer in the proceedings before this Court. On the issue of forum, they are in agreement that this Court is the proper forum to deal with the distribution of the proceeds from the sale of the condo. In effect, their position is that Mr. Ramsay's assignment in bankruptcy has taken away the relevance of the matrimonial proceedings, insofar as division of property between the spouses is concerned.

[8] Duane Ramsay concedes that he does not have standing, in this Court, to engage in the substantive argument about the division of the proceeds of the sale of the condo, as his rights in that property vested in the Trustee by operation of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("*BIA*"). He argues however that he does have standing to present submissions on the question of whether this Court is the proper forum to have these decisions made. On that issue, his position is that this Court is not the proper forum to have the issue of distribution of the sales proceeds adjudicated upon. He argues that issues related to the division of property between the parties should be dealt with in the matrimonial proceedings, on the basis of the principles set out in the *Family Law Act*, S.N.W.T. 1997, c. 18 ("*FLA*"); that the determination of property issues between former spouses requires an evidentiary basis that is much broader than what would be adduced in bankruptcy proceedings; that he has the right to defend against the claim for unequal division of property that was pleaded by Ivy Ramsay in the matrimonial proceedings, and that there is some fundamental unfairness in preventing him from doing so in having the issue decided in proceedings where he has no standing beyond that of an observer.

C) ANALYSIS

[9] The complexity in this matter arises from the fact an important asset jointly owned by Duane Ramsay and Ivy Ramsay, and how the proceeds from its sale should be divided, finds itself at issue in two different sets of proceedings, in different Courts.

Depending on which Court deals with the issue, different factors will be considered and different consequences may follow.

[10] In the bankruptcy proceedings, the issue would be focused on evidence related to this particular asset. The effect of Duane Ramsay's assignment in bankruptcy with respect to that asset was to sever the joint tenancy that previously existed, and to create a tenancy in common between Ivy Ramsay and the Trustee. *Bennett v. Bennett* [1981] M.J. No.211. The only issue is whether Ivy Ramsay is entitled to more than the 50% the Trustee concedes is hers as a joint owner.

[11] By contrast, in matrimonial proceedings, while the spouses' respective equities in this asset would be important, it would only be part of the evidence adduced, and the ultimate result would not strictly depend on findings made about proprietary rights. Under the equalization scheme created by the *FLA*, the question would be whether either spouse is entitled to an equalization payment from the other. To answer this question, the Court would consider the spouses' assets and liabilities at the "commencement date" and on the "valuation date". The Court would then calculate each spouse's "net family property". Because in this case one of the spouses has made a claim for unequal division, the Court would examine the factors set out in Subsection 36(6) of the *FLA* to assess the merits of that claim. In the end, the family Court would conclude one of three things: (a) Duane Ramsay owes some money to Ivy Ramsay; (b) Ivy Ramsay owes some money to Duane Ramsay; or (c) neither of them owes the other any money. Presumably, the proceeds from the sale of the condo could be used to satisfy the debt arising from the equalization payment. It is important to note that because Duane Ramsay is an undischarged bankrupt, money owed to him would go to the Trustee.

[12] When a bankruptcy occurs in the context of ongoing matrimonial proceedings, it significantly changes the legal landscape within which property issues are to be addressed. The extent and manner to which it does, of course, depend on the circumstances of each case.

[13] Subsection 69.3(1) of the *BIA* operates to stay actions or claims against a bankrupt for the recovery of a claim provable in bankruptcy. Section 121 of the *BIA*

sets out what a “claim provable in bankruptcy” is. The question of whether a matrimonial claim that has not yet been adjudicated upon is a “claim provable in bankruptcy” has been discussed in several cases, including some of the ones filed by counsel in this case, and does not appear to have always led to the same answer. *Bellamy v. Hill* [2005] S.J. No.512; *Baylyk v. Baylyk* [1994] O.J. No.764; *Burson v. Burson* [1990] O.J. No.2035; *Malboeuf v. Malboeuf* [1994] O.J. No.1046; *Cowger v. Cowger* [1998] N.W.T.J. No.20.

[14] On this issue, in his text, *Bankruptcy, Insolvency and Family Law*, Carswell, 2nd ed., R.A. Klotz writes, at p.5-4:

“(...) this issue depends on the degree of judicial discretion inherent in the matrimonial property claim. Where the claim is by its nature wholly or substantially discretionary, the claim ought to be provable only if it has been quantified, by a court or agreement before the date of the bankruptcy, or perhaps before the bankrupt’s discharge. Where the claim is based on a formula such as equal division, where judicial discretion has been significantly circumscribed, the claim ought to be provable so long as the “triggering event” has occurred before the bankruptcy.”

[15] The regime created in the Northwest Territories by the *FLA* is as a regime where judicial discretion is circumscribed. Equality of division is presumed. A person claiming unequal division must meet a significant onus, and the factors to be considered in the decision are set out in the statute. In this case, as the Ramsays had separated by the time Duane Ramsay made his assignment in bankruptcy, the “triggering event” giving rise to an equalization claim had occurred. For this reason, I conclude that Ivy Ramsay’s claim in the matrimonial proceedings is in fact a claim provable in bankruptcy and that it was stayed when Duane Ramsay filed his assignment in bankruptcy in 2001.

[16] The next issue is whether the stay of proceedings on that claim should be lifted by this Court. It is important to note that in this case, the non-bankrupt spouse, Ivy Ramsay, is not asking that the stay on her claim be lifted. Similarly, the Trustee, who was the party who initiated the proceedings in this Court, seeks to have the matter disposed of here. It is Duane Ramsay who is asking this Court lift the stay of proceedings and allow the claim against him to be dealt with within the matrimonial proceedings.

[17] The power to lift the stay of proceedings of a claim is set out in section 69.4 of the *BIA*, which reads as follows:

69.4 A creditor who is affected by the operation of sections 69 to 69.31, or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration subject to any qualifications that the court considers proper, if it is satisfied

- (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration.

[18] I am not aware of a case where s.69.4 was applied at the request of a bankrupt. From my reading of section 69.4, a bankrupt is not someone who can apply to lift the stay. Save in circumstances where s. 69.31 is engaged (which is not the case here), the power to apply for a stay is available to a bankrupt's creditors.

[19] Even assuming, without deciding, that this Court can lift the stay on its own motion, I do not find that a case has been made out to do so. As I understood the submissions, the main reasons that were advanced as to why the stay should be lifted are, first, that Duane Ramsay has the right to defend against the claim for unequal division of property, and this is something he can only do within the matrimonial proceedings; secondly, the family Court is the better forum to dispose of these issues because in that Court, the decision will be made on the basis of a much more complete record of how property matters were dealt with by these parties.

[20] I am not unsympathetic to these arguments, but I do not think they can succeed in the circumstances of this case, largely because of Duane Ramsay's status as an undischarged bankrupt. One incontrovertible consequence of Duane Ramsay's assignment in bankruptcy is that he ceased to have any capacity to deal with his property. His rights vested in the Trustee. Paragraph 71(2) of the *BIA* is unequivocal on that point:

71(2). On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose 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 (...)

The definition of “property” in the *BIA* is very broad:

s.2 (...)

“property” means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property

[21] A bankrupt’s own claim in matrimonial proceedings falls within this broad definition, and the rights to pursue such a claim vests with the Trustee. *Blowes v. Blowes* [1993] O.J. No.2022.

[22] Similarly, in my view, the defence of such a claim against a bankrupt is in the hands of the Trustee, even if the matter were to proceed in the context of matrimonial proceedings.

[23] Therefore, whether one considers the issue from the perspective of Duane Ramsay’s proprietary interests in the condo as a joint owner, or his personal interest as those of someone who could be found to be either a debtor or a creditor as a result of a judgment rendered pursuant to the *FLA*, the result is the same: his property interests and rights have vested in the Trustee, and Duane Ramsay no longer has the right to exercise them. If Ivy Ramsay’s claim in the matrimonial proceedings were allowed to proceed, Duane Ramsay would not truly be in control of his interests in these proceedings. Similarly, he could not now amend his pleadings and claim unequal division of property against Ivy Ramsay. The Trustee might consult or confer with Duane Ramsay and his counsel, but ultimately, decisions on how the claim would be defended would be the responsibility of the Trustee.

[24] I am not overlooking the hypothesis that the Trustee’s counsel alluded to in his submissions, namely, the possibility of the Trustee assigning carriage of this matter back to Duane Ramsay if this Court decided to lift the stay and refer the matter back to

the family Court. However, this was clearly articulated as an alternative position designed to control the Trustee's costs, and the Trustee's counsel reiterated a number of times during the hearing that the Trustee's primary position is that this Court is the proper forum to deal with this issue. I assume that this is an informed decision that the Trustee has made, that consideration has been given to the possibility of having the property issues litigated in the matrimonial proceedings, and the Trustee has concluded that this is not the best course of action for the protection of Duane Ramsay's estate, and ultimately, the interests of the creditors. As already mentioned, I accept the proposition that the issues of property between the parties, if dealt with in the matrimonial proceedings, would be examined with much more evidence in a much fuller context. I do not know whether this fuller context would work to the advantage of one party or the other, or how it may affect the outcome. But I do know that the Trustee, who is in charge of Duane Ramsay's estate and his property for the time being, wants the issue dealt with in this Court. Duane Ramsay disagrees with this decision, but that, in and of itself, is not sufficient reason for this Court to second-guess it.

[25] Another relevant factor is that Ivy Ramsay is not asking for a lift on the stay of proceedings on her claim in the matrimonial proceedings. Often, where attempts are made to seek relief in matrimonial proceedings notwithstanding a bankruptcy, the non-bankrupt spouse is the party urging the Bankruptcy Court to lift the stay of proceedings. That is the not case here.

D) DISPOSITION

[26] For these reasons, I decline to lift the stay of proceedings that applies to the claim for unequal division of property that has been pleaded, but not yet argued or adjudicated upon, in the matrimonial proceedings between Ivy Ramsay and Duane Ramsay. The hearing into how the net proceeds from the sale of the condo ought to be distributed will continue in this Court.

[27] On the issue of standing, I find that Duane Ramsay does not have standing to engage in the substantive issue of how the monies currently held in trust by the Trustee should be distributed.

[28] I also grant the Trustee's Application to adduce *viva voce* evidence by telephone, pursuant to Rule 352 of the *Rules of Court*.

[29] Within seven days of the filing of this Memorandum, counsel are directed to provide to the Clerk of the Court their available dates over the next six weeks for the continuation of this hearing.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
18th day of September 2006

Counsel for the Trustee:	Douglas G. McNiven
Counsel for Ivy Ann Ramsay:	Donald Large, Q.C.
Counsel for Duane Robert Ramsay:	Katherine Peterson, Q.C.

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