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MAINTENANCE

There is always a tension between ordinary execution creditors and an estranged spouse claiming an interest in property. With some trepidation, because we practice no family law, we will discuss two cases that deal with the issues: Flewelling v. Flewelling, a 2007 decision of the Ontario Superior Court of Justice and Shea v. Fraser, a 2007 decision of the Ontario Court of Appeal.

Creditor - Wife

In Flewelling, husband and wife entered into a separation agreement that resulted in a consent order (the "Order") in which the matrimonial home was to be sold and arrears of child and spousal support would be paid to wife from husband's share of the net proceeds.

Before the house sale was completed, husband's lawyer obtained a judgment for his unpaid fees and filed a writ of seizure and sale. The house then sold and the parties disputed how the proceeds were to be paid. The lawyer wanted his writ paid; the Family Responsibility Office, which is charged with the obligation of collecting maintenance arrears, wanted all of the net proceeds directed to it; and the Canada Revenue Agency had a claim for \$54,000, but accepted \$5,000 to withdraw its writ.

Property

The judge first looked at the property aspect of the dispute.

Section 2(11) of the Family Law Act states,

"an order made under this Act that affects real property does not affect the acquisition of an interest in the real property by a person acting in good faith without notice of the order, unless the order is registered in the proper land registry office."

Accordingly, since the lawyer's writ was filed after the Order and since the lawyer negotiated the separation agreement and obviously knew about the order, the order took priority over the writ. When the lawyer filed the writ, the husband had no interest in the matrimonial home to which the writ could attach.

Maintenance

Even if the writ had attached to the matrimonial home before the Order was made, the lawyer still had problems.

Section 4(1) of the Creditors' Relief Act states,

"A support or maintenance order has priority over other judgment debts regardless of when an enforcement process is issued or served,

(a) if the order is for periodic payments, in the amount of the arrears owing under the order at the time of seizure or attachment;

(b) if the order is for a lump sum payment, in the amount of the lump sum."

Since the Order related to a payment for support, it

took priority over the lawyers' writ. However, the CRA writ took priority over the Order because provincial legislation does not bind the federal Crown.

Query

Assume a writ is filed against, say, a husband before an order is taken out and, without notice to the execution creditor, the wife obtains a property order, unrelated to maintenance, that seemingly transfers ownership of the husband's property to the wife. What can the creditor do when it learns of the transfer?

We have had that situation. We attended a hearing – actually, we prepared the documents, but retained a family law lawyer to attend the hearing – under the Family Law Act Rules in which we argued that the first order should be set aside because our creditor client received no notice of it and the parties did not inform the judge of the creditor's writ. The wife ultimately caved and we took the husband's interest in the property.

Bankruptcy

The Shea dispute dealt with a husband's liability to pay his wife even after the husband declared, and received a discharge from, bankruptcy.

The dispute turned on the interpretation and facts surrounding a separation agreement. The agreement stated that the husband had to pay spousal support of \$600/month as long as the wife was not working full time; child support of \$448/month; and a \$36,000 property equalization payment in instalments of \$300/month. The husband still owed \$24,000 of the \$36,000 at the

date of his bankruptcy.

Under section 178 of the Bankruptcy and Insolvency Act

"(1) An order of discharge does not release the bankrupt from (c) any debt or liability ... under an agreement for maintenance and support of a spouse..."

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy."

Accordingly, if the arrears were simply arrears of a debt related to property, then the husband would be successful and the debt would be released. However, if the arrears related to a maintenance or support payment, then the husband's debt to the wife would continue, regardless of his bankruptcy.

Reality

The Court held that there were a number of factors to consider in determining whether a payment was a property payment or a maintenance payment.

1. Would the wife have been entitled to support had the debt not been created? If so, the debt obligation may be a substitute for support.

2. Does the debt reflect the valuation of an asset or does it relate to a property interest in the proceedings. (We are unsure how either of these relates to support).

3. Does the language of the agreement show an intention to differentiate the debt or to integrate it with other parts of the agreement?

- in this regard, the agreement stated that each of the parties were financially independ-

ent. The Court commented as follows: as *"a mother with two young children and a support order of \$600 a month, it is hard to imagine how the wife could agree she was financially independent and not in need of support unless these terms were conditional upon payment of the periodic payments totalling \$30,000 and she was looking to these payments in lieu of support."*

4. The labels used are not determinative (i.e. it matters not that the agreement refers to the payment as equalization if it is really the substitute for a maintenance payment).

5. What are the attributes of the obligation? A debt that bears interest is more likely to be a property debt rather than a support obligation.

6. What is the tax treatment of the debt? How have

the parties been dealing with it?

7. Does the subsequent conduct of the spouses indicate debt or support obligation?

8. When there are two interpretations, use the interpretation that enhances the policy goal not to "feminize" poverty.

Result

The Court set aside a summary judgment in favour of the wife, refused to give the husband a summary judgment in his favour, and ordered a trial as to whether the \$24,000 described in the agreement as an equalization payment was actually maintenance under the meaning of section 178(1) of the BIA.

The Court also stated that the BIA should be amended to reflect the common law (i.e. any payment that fulfills the function of maintenance is maintenance).

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