FEMINIZATION OF POVERTY IN DEBTOR-CREDITOR LAW

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1. Introduction

Marzetti v. Marzetti[1] was released by the Supreme Court of Canada in 1994, two years after the court's seminal decision in *Moge v. Moge.*[2] *Marzetti* introduced into debtor-creditor law the concept of feminization of poverty that the Supreme Court had developed in *Moge.* This article traces the evolution of this concept in subsequent Canadian debtor-creditor law, and identifies issues that could benefit from the application of this new policy ground.

2. The Decision in *Marzetti*

Marzetti arose before the 1997 amendments to the Bankruptcy and Insolvency Act ("BIA"), at a time when support claims were excluded from the benefits of any property accruing to the trustee. The facts are brief. The husband declared personal bankruptcy. As was then customary, he assigned to his bankruptcy trustee any post-bankruptcy income tax refund that might become available once the trustee filed his post-bankruptcy tax return. At the time, the

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[1] [1994] 2 S.C.R. 765, 5 R.F.L. (4th) 1, 26 C.B.R. (3d) 161, 169 N.R. 161, 20 Alta. L.R. (3d) 1, [1994] 7 W.W.R. 623

[2] [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345, [1993] 1 W.W.R. 481, 145 N.R. 1, 81 Man. R. (2d) 161, 99 D.L.R. (4th) 456

husband was in arrears under an order for spousal and child support. Before the refund was paid out to the trustee, the Alberta Director of Maintenance Enforcement garnisheed the Federal Crown. The issue was who had priority to the tax refund: the trustee, or the wife and children.

The Supreme Court of Canada ruled unanimously that the wife's support claim had priority over the trustee. In arriving at this result, the court determined that an income tax refund, which represents a return of employer withholdings, retains its character as wages. Thus priority over the refund fell to be determined in the same way as priority over the bankrupt husband's post-bankruptcy wages. Under the then-existing language of the BIA, wages could only be accessed by the trustee through a s. 68 order, which section specifically required that the court have regard to the family responsibilities and personal situation of the bankrupt. This section ensured that support claims come first as against the bankrupt spouse's wages or earnings. Justice Iacobucci said this for a unanimous court:

> *My opinion [that the income tax rebate retains its character as wages] is, furthermore, fortified by public policy considerations ... [W]hen family needs are at issue, I prefer to err on the side of caution.* In s. 68 of the Bankruptcy Act [now the BIA], 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.
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> Moreover, there are related public policy goals to consider. As recently recognized by L'Heureux-Dubé in *Moge v. Moge*, *"there is no doubt that divorce and its economic effects" (p. 854 S.C.R.) are playing a role in the "feminization*

of poverty" (p. 853 S.C.R.). A statutory interpretation which might help defeat this role is to be preferred over one which does not. [emphasis added]

3. Feminization of Poverty in Debtor-Creditor Law

The impact of need and poverty has always been an implicit, albeit often unspoken, factor in judicial analysis. But the Supreme Court brought this factor into overt respectability by explicitly authorizing the court to utilize family need as a factor in statutory interpretation. Moreover, and more controversially, the constitutional policy goal of equality now authorizes, or indeed mandates, the court to try to redress the unequal burden of divorce impoverishment, as between husbands and wives, even at the expense of other actors in the credit system.

The harm that this policy addresses is not that of poverty directly, but rather the existence of jurisprudential rules which have the overall effect of disproportionately or unfairly prejudicing women. The fact that a given jurisprudential rule is applied in a gender-neutral manner is presumed, but irrelevant. What is important is the discriminatory *effect* of the rule. Previous Supreme Court decisions[3] ensured that the rules for quantum and duration of support, as between husband and wife, should work against the discriminatory impoverishment of divorced women. *Marzetti* extended this analysis one theoretical step further: the social or moral value of mitigating such discrimina-

[3] *Moge v. Moge, ibid.*

tory consequences is such that, in certain circumstances, third party creditors should pay the social cost.

Because this explicit policy ground was completely new in bankruptcy law, we can trace its evolution in the 11 years since *Marzetti* to see how it has been utilized in the debtor-creditor/family law decisions that have been rendered. The following considerations come to mind in this connection:

❑ Can the decision that is being advocated also be justified on conventional jurisprudential grounds, or solely on this new public policy ground?

❑ Should a general insolvency rule be applied to support claims, or are such claims, by their nature and special function, "different"?

❑ How far does this new policy ground apply?

❑ Has this public policy ground been 'spent' through the 1997 support amendments to the BIA, or the 2000 support enforcement amendments to family law legislation? How will we know when a sufficient degree of equality has been reached?

❑ Is this policy ground driven by sympathy, or by entitlement?

❑ Do women's comparative lack of commercial familiarity bias the system against them in bankruptcy?

The next section reviews the cases since 1994 that have referenced or applied the policy grounds articulated in *Marzetti*. My comments or brief analysis[4] appear in brackets.

4. Case law considering the *Marzetti* public policy in the debtor-creditor setting

1. ***Hogan, Re***, [1994] B.C.J. No. 2449 (B.C.S.C., Drake J.): The bankruptcy court refused to apply the *Marzetti* public policy to grant the wife an order, at the husband's discharge hearing, that he pay all support arrears in priority to any payment to the trustee:

> Public policy, that high and unruly horse, which might favour a certain mode of statutory interpretation in certain situations can have no bearing on this question ...

[Comment: The court correctly rejected an invitation to contravene the clear statutory distribution scheme on the grounds of public policy.]

2. ***Burrows, Re*** (1996), 42 C.B.R. (3d) 89 (Ont. Gen. Div., Feldman J.): In this decision, made before the 1997 support amendments to the BIA, the court concluded that a support provision in a separation agreement is not provable, therefore is not stayed by the husband's bankruptcy proposal. The contrary

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[4] Or intemperate fulminations, as the case may be.

result would have been inconsistent with the public policy consideration articulated in *Marzetti* that there is an overriding concern for the support of families:

> The policy of the BIA is to protect the ability of the family to be supported by the bankrupt to the extent possible, even over the policy of giving the bankrupt an opportunity for a fresh start ..., and over the rights of creditors to share in the bankrupt's income and assets before discharge.

This result was driven not merely by public policy, but by the practicalities of support enforcement and the desire to avoid unnecessary leave applications in bankruptcy court. [Comment: The court concluded that payment of support is a more fundamental policy goal than the bankruptcy policy favouring debtor rehabilitation.]

3. ***Jenanji (Syndic de)***, [1997] R.D.F. 748, J.E. 97-1916 (29 avril 1997, C.S. Qué., Greenberg J.): The wife's support claims were granted priority over monies garnisheed from the husband's bank account when the husband declared bankruptcy while the garnisheed funds were still in court, on the basis that it was the nature of the debt - nonprovable support - rather than the nature of the asset i.e. bank deposit, which mattered. [Comment: This conclusion, apart from ignoring BIA ss. 70 and 71, is utterly inconsistent with the technical reasoning in *Marzetti*, but demonstrates the attractiveness of public policy reasoning over legal analysis. *Marzetti* was applied in this case to overcome unambiguous statutory language.]

4. ***Renda (Syndic de)***, J.E. 98-37, *sub nom. T.R. (Syndic de) c. L.H.*, [1997] J.Q. 5360 (C.S.Qué., 27 novembre 1997, Tremblay J.): The wife garnisheed, for support arrears, a mortgage debt due to the husband. The garnishee sent $3,000 to the notary, who issued a cheque payable to the wife's lawyer, who kept the cheque in her file. When the husband declared bankruptcy, the wife's lawyer did not inform his trustee about the cheque, and applied it against her outstanding fees with the wife's consent. The Trustee learned of the cheque at the discharge hearing, and sought priority. Held: The *Marzetti* policy was inapplicable because the garnishment was not in relation to salary or wages, but rather a mortgage receivable. [Comment: Correct result; compare to the previous case, *Jenanji*.]

5. ***Mattes, Re*** (1998), 5 C.B.R. (4th) 212 (N.S. S.C., Registrar Hill): The irresponsible husband dissipated his assets, failed to pay child support, and threatened to become bankrupt in the course of the divorce trial. The trial judge directed the wife's counsel to prepare an order which would secure the wife's claims against their real estate. The husband declared bankruptcy two weeks later, and the following week the order was issued. The order required the parties to cooperate in selling the matrimonial home, with the net proceeds to be paid into court. It provided for $12,000 in lump sum support to be paid forthwith, "and in the event such payment is not paid, such payment shall be secured and paid out of the [husband]'s share, if any, of the sale proceeds of the matrimonial property held in trust by the court as specified herein"; the balance of the proceeds "shall be secured and frozen ... and held as security to pay child support." The bankruptcy court concluded that the wife was a secured creditor, even though the property had not been sold, and the monies not paid into court, until after bankruptcy. The trial judge's intention, as derived from her reasons,

was to secure the wife's entitlement and freeze the proceeds toward the payment of child support. The court explicitly recognized the role of public policy in reaching its decision, noting that although *Marzetti* dealt with principles of statutory interpretation, its public policy goals were relevant in interpreting the trial judge's order. Thus the court chose to prefer an interpretation - so long as it was a reasonable one - that facilitated the objective of support of families. This preferred interpretation supported the conclusion that the wife was a secured creditor. [Comment: *Marzetti* applies not only to statutory interpretation, but also to the interpretation of wording in a court order.]

6. ***Cowger v. Cowger***, [1998] N.W.T.R. 275, [1998] N.W.T.J. 20 (N.W.T. S.C., April 3 1998, Vertes J.): At the time of the husband's bankruptcy, $10,000 was held in a solicitor's trust account on account of the husband's portion of the sale proceeds of the joint matrimonial home. The husband had, before bankruptcy, offered to pay this amount to the wife as her equalization entitlement in exchange for a full release of all claims, and had designated it as such in a Direction to Pay. His Statement of Affairs in the bankruptcy showed a $10,000 debt to the wife, and did not disclose any claimed interest in his half share of this money. The court held the fund was directly linked to the wife's contributions to the accumulation of family assets. They were ear-marked by the husband for the payment of her property claims and were thus impressed with a constructive trust. As to the competing equities,

> The trustee's counsel referred to the unfairness of disentitling all of the [husband]'s creditors from sharing in these proceeds through the bankruptcy. I note that, except for the [wife] and the [husband]'s former lawyers, the only

> creditors listed on the Statement of Affairs are banks ... [*Marzetti* quoted]... These comments were made in the context of the wage seizure provisions of the statute but the public policy goals are applicable generally. It seems to me that the funds in trust could be far more appropriately used by the [husband]'s ex-spouse and children than in the partial satisfaction of credit card debts and vehicle loans. To repeat something Iacobucci J. also said in *Marzetti*, when family needs are at issue, I prefer to err on the side of caution. [¶53]

[Comment: The court utilized public policy arguments to inform the exercise of judicial discretion, which is wholly appropriate. It is difficult, however, to justify the recognition of such a weak constructive trust claim.]

7. ***Backman v. Backman*** (1998), 7 C.B.R. (4th) 55 (Ont. Gen. Div., Beaulieu J.): The husband owed the wife $58,000 in support arrears, and $3,000,000 in damages and costs. He fled to Costa Rica, despite outstanding arrest warrants, on the same day that he declared bankruptcy. When he later applied to rescind the support arrears and reduce support, the court ordered him, despite his bankruptcy, to pay security for costs, the outstanding support arrears, and $19,000 of cost arrears, before pursuing his motion.

> Together, the Bill C-5 amendments and the *Marzetti* case evidence the court's growing concern with bankruptcy issues in the area of family law. This concern must be factored into the court's assessment of justice particularly in the case at bar." (¶14) ...
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> "Any order for security for costs or immediate payment of arrears could be construed as being unfair or unjust. However, equally, if not more, important is making certain that children are supported after divorce, irrespective of bankruptcy. [¶39]

[Comment: According to this decision, the *Marzetti* concern over the feminization of poverty places the importance of support enforcement against the bankrupt on at least the same level as the traditional bankruptcy policy goal of debtor rehabilitation. *Marzetti* is correctly utilized as a factor in the exercise of discretion.]

8. ***Rathbone Herman v. Rathbone*** (2000), 46 O.R. (3d) 678 (S.C.J., Beckett J.), also cited as *Herman v. Rathbone*: The husband's property was sold under power of sale, generating a surplus. At the time of sale, no valid writ execution for the wife's support arrears had been filed with the Sheriff (the provincial support enforcement agency had been astoundingly delinquent in filing a writ despite the wife's repeated entreaties). Had her writ been filed in time, the wife would have had priority over all the other execution creditors. The court nonetheless granted her priority. The existence of the support order, and the mortgagee's notice of it, created the priority under s. 4(1) of the Ontario Creditors' Relief Act; the public policy in *Marzetti* compelled this result. [Comment: The decision utilized *Marzetti* to contradict clear statutory language; there was little statutory ambiguity, but very compelling and, one hopes, unique facts.]

9. ***Cherkewich v. Cherkewich,*** [2001] A.J. No. 846 (Alta. Q.B., Veit J., June 25 2001): The husband was awarded $3,000 in costs against the wife after he won their matrimonial trial. The wife argued that he should not be permitted to set off the costs against arrears of child support owing to her. The court disagreed:

> The *Marzetti* decision has no application in this case; it reminds us that the public policy against the feminization of poverty should inform the interpretation of statutes.

[Comment: Public policy, unlike a statute, reflects important underlying values. Clearly the court ought to take into account, when exercising discretion, all applicable policy norms. It is far too restrictive an interpretation to limit *Marzetti*, as if it were a statute, only to questions of statutory interpretation.]

10. ***Beattie v. Ladouceur*** (2001), 23 R.F.L. (5th) 33 (Ont. S.C.J., Polowin J., October 22 2001): The malicious husband refused to pay support despite contempt citations, jail time and twenty years of litigation. He declared bankruptcy and moved to stay all contempt proceedings, all support enforcement proceedings for costs or interest, and a general stay until his bankruptcy obligations were determined. Held: Bankruptcy does not stay contempt proceedings. Support claims are not stayed by bankruptcy. Costs and interest on support claims are part of support, and not stayed or discharged. [Comment: The court applied existing case law to reach this result, and confirmed the result by reference to public policy. This is the same methodological approach as was utilized in *Marzetti* itself.]

11. ***Taylor v. Taylor*** (2002), 60 O.R. (3d) 138, 26 R.F.L. (5th) 208, 21 C.P.C. (5th) 205 (Ont. C.A.): The wife's solicitor sought a charging order against $69,000 in lump sum support monies he held in his trust account, having acted for the wife in creating the support entitlement and collecting it. While the Court of Appeal recognized his superb efforts, having pursued his client's interests nobly and

professionally, it refused to grant him a solicitor's lien against the support arrears. The wife was held to be entitled to all of the money from his trust account even though he was owed $112,000. Spousal support is not "property" recovered or preserved within the meaning of the Solicitors Act. Moreover, by virtue of the public policy importance of support articulated in *Marzetti*, the court ought not to grant charging orders against support. At ¶40:

> I cannot see how, given this legislative and jurisprudential recognition of the need to insulate support orders, a court can justify exercising its discretion in a way which so dramatically contradicts express public policy.

The court excluded support, including arrears, from the scope of the charging order (upholding the charging order in regard to equalization). [Comment: This decision was perhaps partly motivated by fact that the solicitor could likely recover his account from the equalization amounts already paid to the wife ($150,000) and perhaps to be further recovered after disposition of the husband's appeal of the equalization judgment. The court ignored the fact that support can be compensatory, not needs-based; and that $69,000 was presumably more than enough to cover the wife's needs. The court could have balanced her need against the lawyer's right to justice. The likely chilling effect of this ruling on future representation of poor people was not even considered. And surely one of the purposes of support is to pay for necessities such as, in this instance, hiring a lawyer to collect her entitlements; why should the court not insist that some of it be used for that purpose?[5] With respect, this decision is a doctrinaire one that

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[5] See, for example, *Gomez c. Bell Rudick Edelstein*, [2004] J.Q. no 9704 (C.S. Qué., Delorme J., 16 septembre 2004): 3 months before his bankruptcy, the husband consented to an order

fails to perform a necessary balancing function.[6] Presumably the case applies to the bankruptcy setting: if the lawyer whose efforts created the fund is not allowed to share in it, the wife's trustee in bankruptcy, who is in this sense a volunteer, would likely have no greater right. On the other hand, both the vesting effect of bankruptcy, and the rights deriving from a writ of execution, do not depend on judicial *discretion*, but on a statutory entitlement. While one could perhaps limit the application of *Taylor* to cases of judicial discretion, the policy-driven nature of the decision renders such a limitation unlikely, at least in Ontario.

12. ***Watson v. Schellenberger*** (2002), 38 C.B.R. (4th) 130, [2003] 3 W.W.R. 75, 9 Alta. L.R. (4th) 192, 321 A.R. 371 (Q.B., Watson J.): This was a claim against the father of a little boy, for payment of an alleged debt for child support after the father's bankruptcy. The father had orally agreed to pay $700 monthly to a woman, known to his son as "Auntie", to care for the boy, in effect as a substitute step-mother, while the boy resided with her. The father never resided with or nor had any intimate relationship with Auntie. She was a half-sister to the father's former common law wife, i.e. she was a half-sister to the son's former step-mother. The birth mother lived in another country. After 10 months of arrears had accrued, Auntie obtained a default judgment for $7,000, whereupon the father declared bankruptcy. Held: the debt survives as child support. An oral agreement for support is sufficient under s. 178. The court noted that the 1997

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requiring him to pay the wife's lawyers $15,000 as a "provision for costs". Such a provision is alimentary in nature and is granted to enable a litigant to pay her lawyers to litigate the case. Held: the debt survives his bankruptcy. It does not matter that it is payable to the lawyers; the purpose is to relieve her of the burden of paying costs that she cannot afford.

[6] See James McLeod's annotation to this case at 26 R.F.L. (5th) 208 for further critical comment.

BIA support amendments were enacted at about the same time as the Federal Child Support Guidelines and the changes to the Divorce Act regarding the precedence of child support. The court stated that Parliament was sending a strong message in more than one piece of legislation about the importance of child support:

> The intent of Parliament was to ensure that child maintenance support orders and agreements would survive bankruptcy and that the effort to enforce them would be given a special status. (¶31) ...

Provincial legislation also shows a clear legislative intention that child support be paid and enforced. Furthermore,

> It is my conclusion that the policy as to child maintenance and support as reflected in legislation would trump the policy as to bankruptcy protection for debtors to the extent that there might be any conflict or ambiguity as between the policies when it came down to application of s. 178(1)(c) of the [BIA] to a particular situation. (¶38)

[Comment: It is difficult to imagine a court reaching this decision without the approbation provided by the *Marzetti* decision. Alberta legislation required support agreements to be written, and while the statutory language was not totally unambiguous in this respect, significant stretching had to be done given that Auntie was not even entitled to sue for support under any applicable legislation. Thus in this case, the *Marzetti* policy was arguably crucial to the result. Note the court's decision that child support enforcement trumps bankruptcy rehabilitation as a policy goal.]

13. ***Kingston v. Ackerson*** (2002), 22 C.P.C. (5th) 31, 252 N.B.R. (2d) 209 (Q.B., Smith C.J.): The efforts of the father's solicitor in wrongful dismissal litigation resulted in the father becoming entitled to a severance payment of $7,400. The Family Court had previously ordered that any severance should be held as security for the father's child support obligations, which were $5,000 in arrears. The solicitor, whose fees for the wrongful dismissal litigation exceeded the settlement amount, sought a solicitor's lien. Held: while the solicitor performed a service, the child would encounter hardship if support arrears were not paid. In view of the *Marzetti* policy of favouring family support, the court exercised its discretion in favour of the child. The solicitor was ordered to pay the support arrears to the wife and $300 costs; he could retain the $2,100 balance. [Comment: While this case reached essentially the same result as *Taylor*, it is less rigid in its evaluation of the competing interests. It treats *Marzetti* - correctly in my view - as a strong policy argument, rather than, in effect, a rule of law as in *Taylor*.]

14. ***Cameron, Re*** (2002), 31 C.B.R. (4th) 204 (Alta. Registrar Funduk, January 28 2002), confirming (2001), 29 C.B.R. (4th) 206 (Alta. Registrar Funduk, October 29 2001): The husband declared bankruptcy after allowing spousal support arrears to accrue. The wife received a 100% dividend from the trustee for her roughly $18,000 of support arrears, less the Superintendent's levy (akin to a 5% bankruptcy tax) of $883.83. The Director of Maintenance Enforcement refused to reinstate the husband's drivers licence until he paid the outstanding balance of $883.83. The trustee sought advice and directions. Held: The support claimant is obliged to give the bankrupt spouse credit for the Superintendent's levy - the 5% deduction - on any support monies received from the trustee. The support recipient cannot recoup this deduction after bankruptcy. In other words,

if the support claimant receives $95 from the trustee, he or she must give $100 credit to the bankrupt support payor. The basis for this conclusion was that all creditors should share the burden of the levy; it would be unreasonable for creditors whose claims survive, to be able to shift that burden back onto the bankrupt. [Comment: With respect, this reasoning seems faulty. Why should the support claimant suffer from the bankrupt's choice to declare bankruptcy? It runs contrary to current social and judicial policy to give the bankrupt more credit than the monies actually received by the claimant. The fundamental premise of the 1997 provability amendment to the BIA was not to prejudice the collection of support in any manner. The courts have consistently held that s. 178 creditors are a protected and vulnerable class; this should be sufficient to allow for the discrimination which the court ought to make in connection with the levy. Support claimants in particular deserve the benefit of the doubt; this is an appropriate point to which the *Marzetti* doctrine should apply.]

On appeal: *Cameron, Re*, [2002] 6 W.W.R. 687, 32 C.B.R. (4th) 176, 25 R.F.L. (5th) 252, 301 A.R. 228, 2 Alta. L.R. (4th) 86 (Q.B., Veit J.): The court rejected both my comments above, and the *Marzetti* benefit of the doubt analysis. The 1997 BIA support amendments benefit support claimants by giving them provability and priority in bankruptcy . The payment of a 5% levy is a small price to pay for access to this system. Not every law of general application needs to be re-interpreted to give special status to women. There is no discernible policy reason for relieving support creditors from the general obligation of bankruptcy creditors to help support the public service provided by the Superintendent. If there is any ambiguity, the new support priority is "a more than fair trade-off" for the levy, by adding an enormous benefit to the pre-existing situation of support

creditors. That advantage is clearly worth payment of the 5% levy. The reasoning suggests that the public policy expressed by *Marzetti* has been expressed, indeed exhausted, by the 1997 BIA support amendments. [Comment: With respect, this misses the point: no-one doubts that the levy should be paid. But here, where there was a surplus (though this is somewhat unclear), why should the recipient (ie the child or spousal support claimant) bear the tax? This has nothing to do with the superintendent, because clearly the trustee must deduct and pay the levy. The real question is, who should bear the loss (the levy) as between the bankrupt and the claimant? There is no policy reason to ignore the special vulnerability of s. 178 creditors, especially support creditors. With respect, what Veit J. fails to note is that the priority remedy is in fact also an enormous benefit to the bankrupt, whose support obligations are reduced by the preferred and provable support claims paid. So just because both the bankrupt and the claimant get an enormous benefit, why should the claimant alone pay the levy, as between the two? More fundamentally, Justice Veit presumes the existence of a general policy that other s. 178 creditors also give the 5% credit to the bankrupt. This is absolutely incorrect. I have not found a single case where a s. 178 creditor (normally a fraud creditor) is obliged, in the lawsuit following the bankrupt's discharge, to credit the bankrupt with more than the monies actually received from the bankruptcy. No-one forces the plaintiff to go back to the trustee's distribution sheet and give credit for a paper amount; rather, it is simply a credit for the dividend received. After all, the bankrupt is getting the benefit of extinguishing all his other debts, and a stay period. The creditors get no benefit whatever out of the bankruptcy beyond that to which they are already entitled. As between the two (protected s. 178 claimant versus debtor who has voluntarily declared bankruptcy), clearly the bankrupt should pay the 5%.]

On further appeal to the Alberta Court of Appeal: decision affirmed, *Cameron, Re*, [2003] 6 W.W.R. 211, 42 C.B.R. (4th) 1, 38 R.F.L. (5th) 261, 12 Alta. L.R. (4th) 203, 327 A.R. 278 (Alta C.A., May 8 2003):

> "¶23 What, then, is the nature of the levy? With the one exception just mentioned, s. 147(1) makes it 'payable .. on all payments .. made by the trustee .. on account of the claims of creditors, whether unsecured, preferred or secured ..'. This language suggests that the levy is to be shared by all creditors who benefit from the proceedings. Under the Director's interpretation, the levy would be borne only by creditors whose debts do not survive a discharge. In regard to debts surviving a discharge, the burden of the levy would be effectively transferred from the creditor to the bankrupt. Nothing in the language of s. 147(1) suggests such an outcome."
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> .. ¶27 Since s. 147(1) is not ambiguous, I need not address the social policy elements of statutory interpretation mentioned in *Marzetti*, supra."

The court wanders off onto a bizarre tangent involving infinitely regressing levy deductions to suggest the absurdity of the Director's approach.[7] [Comment: This decision has already had an adverse effect on support enforcement, according to the Alberta Support Enforcement office. The 2003 Senate Review has adopted this author's proposal to legislatively reverse this decision.[8]]

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[7] The sum of the infinitely regressing series of payments hypothesized by the court, using high school math, is simply 100% of the maintenance debt.

[8] See Robert Klotz, *Submission to the Senate Standing Committee on Banking, Trade and Commerce*, August 13, 2003, www.klotzassociates.com/sensub3.813.htm.

5. Evaluating the case law

Judicial attitudes toward public policy arguments reflect the personality, and the underlying belief systems, of the judge hearing the case. The two poles are illustrated, first, by the traditional aphorism discouraging resort to public policy:[9]

> "Public policy .. is very unruly horse, and when once you get astride it you never know where it will carry you."

and by Lord Denning's retort:[10]

> "I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice."

Of the 14 cases that have considered the *Marzetti* public policy, four of them reject the relief requested by the support claimant. Two of those, *Hogan* and *Renda*, refuse to allow public policy arguments to bend what appears to be clear statutory language. The other two, *Cherkewich* and *Cameron,* both of them Alberta decisions, appear to be more inhospitable to the new policy ground. *Cherkewich* would limit the applicability of the *Marzetti* doctrine to the narrow priority context of the *Marzetti* case itself. *Cameron* refuses to recognize an obvious ambiguity in the BIA (the BIA is utterly silent on who, as between the

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[9] *Richardson v. Mellish* (1824), 2 Bing. 229 at p. 252, 130 E.R. 294, per Burrough J.

[10] *Enderby Town Football Club Ltd. v. The Football Association Ltd.,* [1971] Ch. 591 at p. 606 per Lord Denning, M.R.

bankrupt and his s. 178 creditors, is to bear the levy), and rejects the idea that support claimants should be treated with any special degree of judicial consideration.

Ten of the 14 cases, however, apply the *Marzetti* public policy approach. Three of these, *Jenanji*, *Rathbone* and *Watson v. Schellenberg*, utilize public policy to override fairly clear statutory language. *Jenanji* uses public policy to overcome the clear meaning of BIA s. 70(1) without any demonstration of ambiguity; *Rathbone* allows the support claimant to assert priority despite not having complied with the statutory condition; *Watson v. Schellenberg* enforces an oral separation agreement where the applicable matrimonial statute appears to require a written agreement. However, one would be hard pressed to consider the last two of these cases wrong; both of them present facts which justify a compelling application of public policy. In *Rathbone*, the support enforcement authorities had prejudiced the needy wife's support entitlement through appallingly dilatory conduct; in *Watson v. Schellenberg*, a father took advantage of his child's benefactor who had acted in loco parentis. All of these cases might well have been decided differently without the new policy grounds that were explicitly commended in *Marzetti.*

Another three of these ten cases apply *Marzetti* in an appropriate and unexceptional manner. In *Burrows* the BIA was silent on the provability of support (before 1997), and the court used the *Marzetti* analysis to confirm a result reached on practical and purposive grounds. Likewise *Beattie v. Ladouceur* was decided through the application of decided precedents, with *Marzetti* being utilized as a judicial safety check to confirm that this result conformed with

public policy. *Mattes* applied *Marzetti* to the interpretation of an ambiguous court order. These cases might well have reached the same result without the assistance of *Marzetti.*

The last four of these ten cases use *Marzetti* to inform the exercise of judicial discretion, outside the context of any ambiguity. This is eminently appropriate, although one may argue in some of these cases that the court has gone too far. *Backman* resorted to public policy in determining what conditions to impose upon a malicious bankrupt who was in serious arrears of support. *Kingston v. Ackerson* applied public policy to deny a discretionary solicitor's lien where this would oust the payment of child support. In *Taylor*, the solicitor's lien was refused against any part of the wife's large lump sum spousal support recovery – arguably the court ignored other persuasive policy arguments in so doing. *Cowger* used public policy to justify granting the wife a modest constructive trust under extraordinarily weak facts where no-one else (ie. the trustee) was actively pursuing the asset in question. Of these four cases, *Taylor* is the only one that would likely have been decided differently had the case been adjudicated before *Marzetti*; one might well argue that public policy was an unruly horse in this case.

The trend in a number of these cases is to re-evaluate, or re-balance, the tension between social policy favouring payment of support and bankruptcy policy favouring debtor rehabilitation. Historically, s. 178 has been narrowly construed, in favour of rehabilitation and to the prejudice of support claims and the other listed exceptions, such as fraud, to the general discharge of debts. But several of these cases - *Backman* and *Watson v. Schellenberg* in connection with child support, *Burrows* and *Taylor* in connection with support generally - suggest the

reverse, namely that support enforcement should trump debtor rehabilitation. At very least, these decisions compel us to weigh older precedents in this area against contemporary public policy favouring support enforcement, to determine whether the precedents still reflect the appropriate balance between the competing policies.

6. Where else should *Marzetti* apply?

The case law on what I term "quasi-support" is perhaps due for reconsideration in light of public policy. A quasi-support obligation is a debt obligation, payable under a separation agreement or court order, that does not clearly specify whether the debt is or is not a support debt. The court must determine whether the debt is in the nature of support, in which case it survives bankruptcy, or not, in which case it is extinguished. This subject pits the bankruptcy goal of rehabilitation, through s. 178 of the BIA, against the 'matrimonial' policies of family support and defeating the feminization of poverty. Arguably the rules applied by the court in some of these cases, particularly on the question of onus, do not fully consider the matrimonial policies.

It has been stated that the claimant bears the onus to establish that a given debt falls within BIA s. 178. This section lists the kinds of debts, including support and alimony, that survive bankruptcy. The Registrar in *Jerrard v. Peacock*,[11] noted that creditors whose claims survived the bankruptcy under s. 178

[11] (1985), 61 A.R. 161, 37 Alta. L.R. (2d) 197, 57 C.B.R. (N.S.) 54 (Alta. Registrar)

stand on a higher plane than the general body of unsecured creditors and therefore, if there is doubt whether they fall within the section, the benefit of the doubt should go to the bankrupt. Oddly, this conclusion immediately followed his reflection on the "overriding social policy" reflected by these provisions, and society's "vested interest" in ensuring the support of the bankrupt's dependents. No reason is articulated for preferring the public policy favouring the bankrupt's rehabilitation, over the overriding social policy favouring family support.

The Registrar's comments in *Jerrard v. Peacock* were approved by the Alberta Court of Appeal in *Peterson v. Peterson*[12] without, however, any reference to *Marzetti*.

With respect, there appears to be no good reason to place the onus against the support claimant in favour of the bankrupt. There are two competing policies at play here. Surely one could equally argue that in view of the importance that the law places on the support obligation, the support claimant ought to have the benefit of the doubt. Indeed, a number of the cases discussed above — *Burrows, Backman* and *Watson v. Schellenberger* — suggest that the policy favouring payment of support trumps the bankruptcy policy favouring debtor rehabilitation.

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[12] (1995), 37 C.B.R. (3d) 76, 132 D.L.R. (4th) 329, 18 R.F.L. (4th) 207 (Alta. C.A.): "I agree with Master Funduk, that, in application of the general principle that one who propounds must prove, [the support claimant] must establish the facts essential to trigger the statutory exception: *Jerrard v. Peacock* (1985)." (p. 83)

Let us examine two cases that illustrate the problem. *Peterson v. Peterson*[13] involved a nine-year childless marriage. The separation agreement and divorce decree required the husband to pay the wife $52,000 over five years in annual instalments, without interest, commencing after the sale of the matrimonial home. The obligation was in satisfaction of both property and support claims, but did not apportion as between them. The husband paid $5,000 but declared bankruptcy after the real estate market collapsed and he lost all of his equity through foreclosure. Ten years later, after the wife's second marriage collapsed, she applied to enforce the obligation as support despite having taken virtually no steps to enforce it since the husband's bankruptcy. On the facts, the wife's claim was undeserving of sympathy. The lower court reviewed the circumstances leading up to the separation agreement and concluded that, by virtue of the wife's employability and health at the time of the agreement, no portion of the debt pertained to support. The Alberta Court of Appeal affirmed this ruling on much broader and more problematic grounds, namely that an agreement which provides for both property and support, but which is not amenable to allocation as between them, does not survive the bankruptcy under s. 178, to any extent. The onus lay on the wife to establish that there was an agreement between her and her husband regarding what portion of the payment related to support. Where the spouses never agreed on apportionment, the court should not do so:[14]

> "In answering the question, a judge should apply the usual rules for the interpretation of agreements, but should not trespass on those rules by asking what a court might have ordered if support had been sought or by asking what

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[13] *Ibid.*

[14] *Ibid.*, ¶19-23

> the parties might have agreed to in a case where they did not agree ... A judge in a case like this should not be seduced into a hearing on issues that should have been resolved long since ... [I]t is clear that there never was any agreement about apportionment of the consideration, as both parties freely acknowledge. Presumably each had his or her own private intentions, into which we should not inquire, but they never agreed on an apportionment."

[Comment: With respect, this decision leads to injustice and obscures the reality of matrimonial negotiation and litigation. The wife in these negotiations does not care how the monies are allocated - she just wants to get paid, and is unlikely to waste time or money negotiating over an allocation issue that may never arise. On the other hand, if the husband contemplates declaring bankruptcy in the future, it is in his interest in the negotiations to keep the allocation ambiguous. The court's reasoning rewards the husband's strategic negotiation, and penalizes the wife's good faith. This reasoning is even more unjust if the payment obligation derives from a court order, as seen in the next case discussed: the support recipient loses if the judge failed to allocate. Given the finding in this case that some unallocated portion of the obligation relates to support, the court's reasoning results in the defeat of the fundamental policies underlying both bankruptcy and matrimonial legislation. This approach — though not the result in this case — is inconsistent with the key importance paid to support in legal theory and jurisprudence at the highest levels, including *Marzetti*. The decision should therefore be restricted to its unusual facts. The court ought not to shirk from its duty to allocate as best it can.]

A more recent B.C. case, *Lees, Re*,[15] applies a procedural rule, *functus officio*, to embed gender bias into bankruptcy law. After the wife died, her parents were appointed guardians of the two children. They brought a successful motion against the husband for monies to be paid into court to secure child support. When the husband then declared bankruptcy, the bankruptcy court confirmed that costs incurred in creating and enhancing a fund for the security for payment of support are non-dischargeable. However, the court determined that it had no jurisdiction to determine what portion of a mixed cost order was attributable to support so as to survive discharge and obtain priority in the bankruptcy. It is unclear from the decision whether any court could do so, because the decision was based on the grounds that the cost order had been entered and there was no power to "amend" it in these circumstances after entry. [Comment: With respect, the Court paid lip service to the overriding social policy favouring payment of support, but adopted a procedural rule which guaranteed the frustration of that policy. The court did not advert to the numerous cases[16] that perform this allocation after the order is entered. This decision was followed in *Manolescu v. Manolescu*,[17] holding that where bankruptcy occurs after the matrimonial judgment is entered, the court has no jurisdiction to apportion a mixed cost order as between support and property. Once again, this decision allowed a procedural rule to defeat a fundamental public policy.]

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[15] (2002), 35 C.B.R. (4th) 150 (B.C.S.C., Wilson J.)

[16] See R. Klotz, *Bankruptcy, Insolvency and Family Law, 2nd Ed* (2001, Carswell, supplemented), §2.11

[17] *Manolescu v. Manolescu* (2003), 47 C.B.R. (4th) 77, 42 R.F.L. (5th) 407 (B.C.S.C., Groberman J., July 15 2003, wife unrepresented)

In my view, procedural rules of onus and *functus officio* should not be employed to frustrate the importance of family welfare and to unfairly prejudice the support claimant. Such procedural rules can be criticized under the epithet of 'systemic bias'. They have been built into the system. It is only when the effect of these rules on support claimants - primarily women - is examined, in view of the reality of matrimonial negotiation and litigation, that their unfairness in this context is revealed. This is, perhaps, classic feminization of poverty that should be 'defeated'.

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