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Mr. BOB KLOTZ:

Bonjour, Mesdames et Messieurs les registraires, Monsieur le Surintendant, Mesdames et Messieurs. C'est un grand plaisir et surtout un grand honneur de vous présenter mon discours aujourd'hui. Je remercie monsieur Mayrand pour m'inviter.

I'm delighted and honoured to be here to speak to you, it's a dream audience for me.

I thought I'd tell you, before starting in, how I got into this area. It started with a memo that I received from a family lawyer in 1990. The memo was simple enough: she had a doctor client who was going bankrupt and had no assets. He had separated from his wife, who owned their million dollar home. The question was, is his trustee going to be able to sue the wife for equalization?

I thought to myself, well, that's a pretty basic question, the answer is either yes or no and it must be in one of the decided cases. So, I looked at

all the reported cases: there was nothing. I said to myself, well, there is no reported case but there must be an article discussing this issue because it's pretty basic. I looked for the article, but there were no articles on the subject area. Well, there was one from 1986 that didn't really answer this question. So I went back to first principles and I answered this question from first principles, which went like this: The right to claim equalization is defined in Ontario legislation as being *personal between the spouses.* We all know what "personal" means in a bankruptcy context. It means that the right doesn't vest in the trustee, so that was my answer: the trustee can't sue.

Then, sometime later, I discovered an unreported case called *Bosveld* which features in this area, that said the opposite. Now, I don't claim to be right — unlike yourselves, when you make your decisions, you are right, at least until overturned — I do not claim to be right. But I do claim to think about these things, and I am stung when I've used my mind to go back to first principles and I turn out to be wrong. Now, that cannot be. So, therefore, the case that I found must be wrong and I, therefore, had to prove why the law should be as I had originally determined. That started me thinking. A while later, I volunteered to speak at the Annual Institute in Ontario and at that time in my career, I was very eager to give talks and this was, to my mind, a prestigious talk to give and so I was searching for a good topic. I thought about this bankruptcy and family law topic, there wasn't anything really written on it and I thought it could be a do-able topic. There were a number of issues, so I could think up all the issues, I could answer

those issues as best as I could, and present a paper that would be a complete treatment. And so, I did that paper and I presented it to the Annual Institute. Well, the bankruptcy lawyers were not very interested. Then I presented that paper to some trustees in bankruptcy and they weren't very interested. And then I presented it to a conference of family lawyers and they went wild. They had been looking for this information for a long time. They had nowhere to turn for this information and finally, they had my paper. And so, I realized there was a need out there.

The paper led to a book and in the course of doing my book proposal, I said, I'm going to cover all provincial laws except Quebec. And that was fine, they were very interested but when I started the writing the book, my wife said: "Bob, we are a federal country, how can you not do Quebec as well?" I said, okay. So I had to learn Quebec law which I knew very little about, and read all the Quebec decisions.

Writing the book was an exercise in archaeology, judicial or jurisprudential archaeology, because cases involving family law and bankruptcy were not properly indexed up to that point. There was no consistent index item in which to look for all of these cases. To be complete, I had to go through all the bankruptcy cases from the beginning of Canadian legal history and look through the indices to find cases that pertained to this, and as well with all of the other reporting series. I had to do the same with all of the family law cases. And I had to do this in both languages. I never knew what I'd find

because I didn't know what the law was on many of these topics. Every so often I'd get a brilliant gem, here was a case from 1976 that had never been applied before or since but it was right on point. It was like archaeology and I made finds. And that's how I got into the subject area. I found, as I explored it and developed some mastery of it, that there was a moral imperative that mastery of this subject created. That is, to some extent it is poverty law, and some of the people that were affected by this law could not speak for themselves — the poor, in large part, and support claimants. And so I felt given this mastery, I had some obligation to try to fix the law where it was broken or to make the law better. I do feel this, and fairly strongly, so I've tried to change the law or fix the law in a number of different areas and that's why sometimes I'm forceful in my views.

Now, let me start with three apologies for you today. First of all, I apologize about the length of the paper, 105 pages. I kept trying to shorten it but every time I tried to shorten it, it got longer. Part of the reason that it's long is because I presumed it would be translated into French and therefore be available to the Quebec registrars. Unfortunately, it got so long that it became prohibitively expensive to translate.

The second apology is that I want to apologize in advance for perhaps being a little too direct when I criticize any of your decisions either today or more likely in my book. I have been admonished for not putting, for example, the words "with respect" before I comment on a completely idiotic decision

and I really should do that more. The problem I have is that cases in this area are sometimes argued by lawyers without a clue. I mean, this is not a criticism of them as lawyers but some of them, they just do not know where to look. The bankruptcy lawyers don't know where to look in terms of family law, the family law lawyers don't necessarily know anything about bankruptcy law and so the cases are argued without the applicable precedents and without the applicable principles. This is a problem that you'll face, I'm sure, constantly, particularly where spouses are not represented. Unless someone criticizes those cases or, I don't know, ensures that the precedents are before you, there's a risk that the laws can go bad or fuzzy because whatever you decide will influence the next case. If you decide a case that's based on wrong precedents or an incomplete argument then it's a problem. So, I do apologize for being overly direct. I definitely know how hard it is to puzzle through some of these issues with a too heavy workload and without perfect argument.

Finally, I want to apologize for speaking so quickly. I'm a fast talking lawyer. I'm not the best kind of lawyer in that way, I always have much more to say than I have time to say it, the court reporters always hate me — for any of my other faults, you can speak to May Sproat after I leave — that's the one I admit to right now.

Now, this paper covers five topics that may be of interest. I believe it was Registrar Alberstat whom I discussed this with, but it may have been

another one of the registrars. These were the topics that were suggested. There are lots of other topics that are interesting. I'll never finish the paper in the time I have. I will just keep talking and eventually someone will cut me off.

Prier de m'interrompre pendant mon discours avec des questions ou vos commentaires. Ça me plaît de partir des sujets dans ce document et de discuter un autre topic en dehors de ce document, alors, please feel free to jump in with your questions, comments or refutations on these topics or any other. I certainly want to take this opportunity to answer your questions or your comments.

Now, I have several objectives in this field. They may seem grandiose but I have them anyway. My first objective is to try to unify the law *federally*. We have ten provinces, three territories. The Quebec decisions should be referred to by the English- speaking common law world, and vice-versa, because there aren't enough of these cases to warrant developing isolated provincial approaches. So, one of my objectives is to bridge the language gap. I try to do that by incorporating Quebec decisions into my discussion of the cases generally.

I'm also trying to integrate the law *internationally* by bringing in the way these issues are treated in the other common law jurisdictions. Often, there is a lot of guidance we can take when the fact situation is identical, the issue

is identical, and the statutory language is similar —not identical, but similar. There is a lot of guidance we can take from Australia which is the closest to us in terms of its federalism, its governments and its bankruptcy and family laws, they are very similar to ours. Also New Zealand is a useful reference point, and the United Kingdom.

Finally, I'm trying to bridge the *topical* gap by closing the chasm in jurisprudence and in policy between the bankruptcy courts and the family courts. One of the issues in this topic is why what's right and what's wrong is so different in those courts. For example, in Family Court, beating the creditors is a noble goal. If the two spouses are going down the tubes and there are three little kids, take all the property from the husband, who's going bankrupt, and give it to the wife. That is a very good thing in family law. That happens every day of the week and it's considered right and just. But that is precisely what bankruptcy law is designed to avoid. So we have this complete conflict in perspective, how do we bridge that gap? I spend a lot of time trying to figure out how — in terms of a frame of reference for looking at these problems — can we bridge the gap and coordinate those frames of reference so that we really have one perspective rather than two conflicting ones. I guess we'll come back to that.

I also try to improve the quality of the law by ensuring that the proper precedents are brought to the court's attention. There is a real problem with what I call rogue cases, which are sometimes well reasoned but based on

inadequate precedents. A rogue case can upset the law unless it's recognized as a rogue. And so my job is to say, wait a second, that case is wrong. You'll see that in the course of this paper and perhaps in my talk. To carry on with my list of grandiose objectives, I do try to fix unjust rules that needlessly violate the relevant policies of law, to identify them and then to fix them by making comments about the case law. I've been somewhat successful in a few specific areas. One is the pension area in Ontario that was sick and had to be revisited, and that has taken place; and a few other areas. Finally, the nature of this topic leads itself to a certain degree of political responsibility and activism and I certainly share that so I've become active in the political process in proposing amendments in this area. I'd much prefer there to be some sort of task force to deal with this. There was the Personal Insolvency Task Force but I mean a specific bankruptcy and family law committee or task force the way they've had in Australia. That has not happened yet so it's a solitary venture for me, but it seems to me that given the expertise that I have, I have some sort of public duty, I do see that.

There are five topics in this paper: The trustee's right to claim equalization or division of property; the *Marzetti* case and what it has done on the question of pre-bankruptcy income and the issue of feminization of poverty. Third, attacking matrimonial court orders in Bankruptcy Court; fourth, constructive trusts; and finally, annulment. I'll probably get through, I don't know, one or two of those topics. Are there any other topics that

anyone would like to hear about that I can somehow slip in? Well, please give me your questions as we go along.

My first topic is the trustee's right to claim equalization or property division. The way I can best deal with this is to break it down into its constituent components, and by looking at those components and answering them, gradually build up the picture to the whole.

The first category is what happens if the spouses are not separated, what rights does the trustee get under matrimonial legislation? The answer there is that most matrimonial statutes give no right to spouses without at minimum a separation. There are a couple of exceptions, one is Newfoundland that gives each spouse a half of the matrimonial home regardless of separation unless there is a domestic contract, and New Brunswick may do the same. But with those two exceptions, separation at minimum is required in order for the trustee to get any rights and there is case law that even if there is separation, a subsequent reconciliation can reverse any kind of vesting operation.

The second category is what if the spouses have separated and no application has been commenced. Does the trustee acquire any rights? Here we get the public policy issues that suggest that only the spouses can commence an application because it's a personal right — this personal word is about to be abused, it hasn't been abused yet in this talk — but commencing

an application is pretty personal, the Quebec cases particularly have said this, matrimonial legislation is not for creditors' benefit, it's for spouses' benefit, it's a personal decision to sue and a trustee cannot commence matrimonial litigation. That seems to be fairly clear.

The third category: If the matrimonial rights have crystallized in a judgement or agreement, what does the trustee get? The answer there is, the trustee gets any property rights that the agreement or judgement gives to the bankrupt spouse except if those rights are exempt. We have cases saying that those kinds of agreements cannot be varied after bankruptcy because that would subtract from the trustee's rights that have been acquired although there are some Australian cases that do permit that.

The next section in the paper is on British Columbia which has very funny rules. I'll tell you briefly what they are for those outside of B.C. The legislation provides for an automatic vesting of half of the family assets in each spouse once a triggering event occurs but they have a very different triggering event. Their triggering event is a declaration by the court of permanent separation. So a court proceeding is necessary to vest. Or the alternative triggering event is the separation agreement itself. So if the spouses enter into a separation agreement, say providing for support payments, automatically on signing that, half of the family assets vest in each spouse and if there is a bankruptcy at that point, bang!

A MASCULINE VOICE:

The trustee gets.

BOB KLOTZ:

There is a lot of confusing case law in B.C. I have some proposals for piercing that thicket of confusing cases. That's in my book and it doesn't really come into play here.

Now we get into some very challenging categories and that is, there has been a separation — this is now the fifth category — there has been a separation but there is not yet a judgement or separation agreement. I look first of all, at what I call "discretionary" jurisdictions. Alberta, Quebec's *prestation compensatoire*, and Yukon's remedy. These are the three provinces who seem to have what I'll call discretionary matrimonial remedies. To analyze these provinces, you start with this case called — I'm now on page 10 — *Deloitte Haskins and Sells v. Graham.* That case said that in the case of provinces with discretionary family law remedies, a discretionary remedy does not vest in the trustee until it has been enshrined in a judgement or separation agreement. The court in that case said, "Well, our remedy here in Alberta is discretionary, the judge can do whatever the judge thinks is fair but look at Ontario's legislation or B.C.'s legislation, they are calculations." For example, in Ontario, each spouse calculates their net family property, one spouse has this net family property, the other spouse has that net family

property, the equalization payment is half of the difference, that is a mathematical calculation, discretion is sharply limited.

The court in this Alberta case said, "In other provinces, the right may well vest in the trustee, but in our province of Alberta, where it's just fairness, too discretionary, the right does not vest in the trustee." That approach has been echoed in Quebec, it has been echoed in the Supreme Court of Canada in *Lacroix v. Valois* where the Supreme Court said Quebec's *prestation compensatoire,* which is a purely discretionary remedy, is not a provable claim until it has been exercised in a judgment because it's too discretionary. It coincides with the case law in Australia, New Zealand and the U.K. and indeed the United States. All of those jurisdictions have discretionary matrimonial remedies, that do not vest in the trustee in any of those jurisdictions.

The law seemed until quite recently to be quite clear at least in Alberta, Quebec's *prestation compensatoire,* and Yukon which has, it seems to me, a similar type of legislation. Except there are a couple of recent cases that start on page 14. The first one is called *Tinant* and I left out a footnote which is a shame, I do love my footnotes, the cite of that *Tinant* case is (2003), 46 CBR 4th, page 150, Alberta Court of Appeal, single judge. *Tinant* is wrong, with respect, and it has been followed by *Lecerf* which is on page 16. I will make one comment about page 16. I strive, as an author, for optimal footnote density. Optimal footnote density is a single line of type,

followed by a complete page of footnotes. Now, this is optimal footnote density on page 16. My next objective is to have a sentence with one footnote per word. I'm not there yet but I'm trying.

These cases, *Tinant* and *Lecerf,* say that even Alberta's discretionary remedy vests in the trustee. They say that in Alberta, the policy is now changed and the trustee will now be suing for equalization. I've given the reasons why I think those cases are badly reasoned, they miss the Supreme Court of Canada case on point and they purport to be interested in creditors' concerns but they really violate applicable policy norms. So, I say the "Alberta rule" is still in place, which is that a discretionary remedy does not vest in the trustee.

That brings us to category six, which is all the other provinces and Quebec's *partition du patrimoine familial* — Quebec has two remedies, the *prestation compensatoire* is an unjust enrichment remedy which is totally discretionary, the *partition* remedy is like an equalization remedy in Ontario, it's a calculation). Here we start with the *Bosveld* decision which is 1986 case, still unreported. Never to be reported because page 111 of the decision is gone, that is to say, the case starts at page 100 and one page is missing so it will probably never be reported. That case said that in certain circumstances, the right to claim equalization vests in the trustee. And one of those circumstances is where there is an application for equalization outstanding on the date of bankruptcy and the spouses were separated,

evidently they must have been, before the date of bankruptcy. If there is an application outstanding on the date of bankruptcy, it becomes the trustee's application. It becomes a property right just like any chose in action. It vests in the trustee who alone has the ability to settle it or litigate it. The bankrupt loses the right to settle, loses the right to sign a separation agreement saying, I release my right to claim equalization. It is not the bankrupt's anymore. It is gone and the trustee now holds it. That's the *Bosveld* case.

Quebec decisions have also reached that conclusion with respect to the *partition* remedy. *Droit de la famille - 1809* is an example of that, and the cases are mentioned there. This case was not referred to, but the point of it was reinforced, in a Court of Appeal decision called *Blowes* in Ontario. *Blowes* was a case where counsel argued my comments in one of my articles but did not present my article to the court, so the court did not appreciate that there was an unreported decision on this point, which is most annoying to me. There have been more recent cases on this point. So, the law in Ontario, Manitoba, Quebec — although Quebec law is unclear, there are cases both ways — and Saskatchewan and I believe the other provinces, if an application is underway at the time of bankruptcy, the trustee becomes entitled to settle that case.

Now, my opinion on this is that there is a serious problem. The reason it's a serious problem is because trustees do not want to appear in matrimonial

court. They prefer to settle the case for a whole host of reasons. They can't rely on the spouses because the other spouse says that this guy is a bastard and they don't have the facts available to refute it. The other thing is the bankrupt is not a reliable witness. The bankrupt makes the following calculation: "If I help the trustee, my wife is going to have to pay a big equalization claim to the trustee. She then won't have enough money, she'll need support, she'll look to me for that support. So I'd have to be insane to help the trustee. I should fight the trustee, acknowledge that I am a bastard, make sure the trustee gets no money and then she will not claim support from me." That's the calculation that the self-interested bankrupt makes. That's one of the reasons that the trustee can't rely on the bankrupt to enforce this type of case.

There is another reason too. If the trustee loses the case, the trustee is now in Family Court litigating an equalization claim against the wife and the little kids. Not a whole lot of sympathy for the trustee in Family Court. If the trustee loses, the cost rules that protect the trustee somewhat in Bankruptcy Court are unavailable outside of Bankruptcy Court, those costs must be paid. And case law demonstrates that those costs are payable in full not just to the limit of the assets in the estate but there are personal cost obligation of the trustee. So the trustee is in an unfriendly court dealing with an uncooperative bankrupt — or one who may become uncooperative as soon as he figures things out — without any protection against personal liability for costs. This is a recipe for a lowball settlement. So the trustee

settles the case for $5,000 to cover his other costs, and the husband — who with the money that he should have gained might have been able to pay his creditors — gets nothing. And there is a lot of bitterness created. So, I don't think it's efficient remedy to have vest in the trustee, for all of these and other reasons.

I made this recommendation to the Senate — if I may back up one step. I was on the Personal Insolvency Task Force along with Dave Stewart and others — although Dave, you weren't formally on the task force, he was just helping out a whole lot. I didn't make recommendations in the bankruptcy/family law area, I didn't think it was my place really. After the Senate hearings where I testified on behalf the Bar Association, I was contacted by the Senate Legal Advisor who said: "Bob, the Senate wants some proposals in the bankruptcy/family law area, will you send in some submissions?" I didn't need to be invited twice on that one. So I prepared five submissions which I thought if the Senate wanted them, these are the five changes that I thought should be made. And they were all adopted by the Senate. One of them is here on page 24, which I've set out in its entirety. I've set it out so that you can read it and decide whether or not you agree with it. It hasn't had much opposition. It should have some opposition. I mean, I would hope there would be some opposition if only to generate discussion and define how far its extent should go. I've proposed that the right to sue for equalization or division of property should never vest in the trustee, only the proceeds. In other words, the bankrupt should

always have the right to say, I will set off support against property so that nothing is owing to me, or I have reconciled with my wife, I do not want to proceed with this claim. I think that's the better policy approach. There will be some, I think, opposition to it but I haven't seen it yet.

A MASCULINE VOICE:

Bob, you said something about bitterness?

BOB KLOTZ:

Yes.

A MASCULINE VOICE:

Who?

BOB KLOTZ:

Who is bitter?

A MASCULINE VOICE:

Yes. I mean it sounded like...

BOB KLOTZ:

The bankrupt. The bankrupt loses the ability to generate a surplus. There are instances where people go bankrupt more because of cash flow reasons or because they can't realize on the equity in the home because of the

matrimonial process. The matrimonial process leads to bankruptcy for a whole number of reasons. Let me give some background to this. Obviously increased expenses and so on, failure to pay support so the people can't handle their debts but there are also some systemic reasons why people go bankrupt where they have creditor proofed themselves. That is because the family court will not force the spouse in the house to mortgage the home to pay off the other spouse's creditors. All you have to do is make a reasonable claim for lump sum support or for possessory rights, and the family court will defer possession proceedings.

The flip side of that is that the existence of a debt burden on, let's say, the husband, will not trouble the family court in setting support, the quantum of support obligations, under the principle that you can deal with your creditors by going bankrupt, we won't worry about your payment of your debts, payment of support is more important than payment of debts. The family court sets the payment obligation at a high level resulting in a credit squeeze. The family court refuses to allow the home to be sold or encumbered to alleviate that credit squeeze and so the spouse out of the house is forced into bankruptcy even though there is equity there that would pay off the creditors and leave a surplus. The effect of the vesting of the equalization remedy is to stop that from happening. The $100,000 that comes from that claim against the house turns into $5,000, that's the bitterness that I referred to. It's one kind of bitterness, there are many

other kinds of bitterness that this process generates but that's one that's generated by the rules, this particular rule, the *Bosveld* rule.

DAVE STEWART:

Bob, on that point, that's where you would also suggest that the trustee in that situation would still have the right to oppose the bankrupt's discharge?

BOB KLOTZ:

Absolutely, the way to deal with that is to oppose the bankrupt's discharge. Say the bankrupt has the right to get a whole lot of money, let's postpone the discharge until that litigation is concluded or let's direct that 50% of the net proceeds go to the creditors. The court can still do justice in that setting. I'm not saying that the money should go to the bankrupt to the exclusion of all the creditors, but justice can be done in that setting for all the parties in the system, not just for some. I don't expect unanimity on this proposal. I expect some opposition to it. I haven't seen it yet though.

Alright, let me move on to *Marzetti* — this is now at page 27, and I'm leaving out a whole lot. *Marzetti v. Marzetti* ruined my summer in 1994, as I mentioned in this paper, because the case was a key case pitting support claims against the creditors and bankruptcy — it's absolutely a fundamental topic of my book — and it came out just after my book was set in galley print. I had to make a huge number of changes, but I was told by my publisher that I could not alter the length of any paragraph and I could not add or delete

any footnotes. So I had to both write a commentary, and fit it together like a jigsaw puzzle into this book. That was a real challenge that took a lot of time.

Marzetti is probably well known to you. The husband, who was bankrupt, was entitled to his post-bankruptcy income tax rebate and the federal government was about to pay it. However, he was in arrears on his support payments. The Support Enforcement Agency garnisheed the federal Crown in some manner and the question was who got the money: the trustee or the wife and kids? At the time, there was a clear bankruptcy rule that the trustee was entitled to any post-bankruptcy tax rebate. In fact, many trustees funded the bankruptcy through those rebates at the time. And *Marzetti* shook up the law because the Supreme Court of Canada said a tax rebate is derived from income; income falls under section 68 of the Bankruptcy and Insolvency Act; therefore, we treat this as a s. 68 problem; and you only grant a s. 68 order subject to family needs. Clearly, this family needed the money, therefore, the money should go to the wife and kids. It wasn't the trustee's money yet, no s. 68 order had been obtained, therefore the wife's garnishment caught the money. That was the actual result. The court's policy statements were notable and that I'll get back to — the policy statements are on page 28. The first one was,

"Where family needs are at issue, I prefer to err on the side of caution."

That's a general rule of statutory interpretation: be cautious when there is family need. And much more provocatively,

"There is no doubt that divorce and its economic effects are playing a role in the feminization of poverty. A statutory interpretation which might help defeat this role is to be preferred over one which does not."

Marzetti changed the rules of pre-bankruptcy income. It started a process which is still carrying on to this day. That's the first section I'll talk about, it starts at page 28. In 1994 I sent out an alert to trustees, suggesting that because of *Marzetti,* pre-bankruptcy wages may not accrue to the trustee. Because the *Marzetti* court said that anything derived from wages falls under s. 68. They didn't say anything about pre-bankruptcy wages not falling within this rule. So I sent out an alert saying anything deriving from wages vests in the trustee. I actually recall a discussion with you, Dave, where Dave Stewart pointed out to me that the court didn't say anything about pre-bankruptcy income and there were all sorts of cases that said pre-bankruptcy income vests in the trustee automatically. There is no doubt that that was true at the time. And so I said, oops! I hadn't thought of that, I guess I went too far.

But then *Wallace v. United Grain Growers* came along in 1997. It was in-bankruptcy income that we were dealing with there, it was a severance claim by Mr. Wallace who was bankrupt when he was fired. The Supreme Court of Canada said that that is a s. 68 problem; that the severance claim derives from income; and that it is the character of the asset — income — not the time in which it came into existence, which determines whether it's s. 68

money or not. So, here is *Wallace* saying that timing is irrelevant when determining if an asset falls under s. 68. Based on *Wallace*, it seems that the writing was on the wall that pre-bankruptcy income would not accrue to the trustee without a s. 68 order. And what is pre bankruptcy income? A severance claim, a pre-bankruptcy tax rebate, a disability claim for the pre-bankruptcy period, a motor vehicle claim for lost income in the pre-bankruptcy period, all of these things, historically, have been treated as accruing automatically to the trustee.

The cases since *Wallace* have in large part adopted the *Wallace* perspective and said that anything relating to pre bankruptcy income falls under s. 68. This point of view was adopted explicitly in *Landry* which is an Ontario Court of Appeal decision from 2000. In the two footnotes on page 30, I have set up all the cases since *Wallace* in the first footnote that have said that pre-bankruptcy income vests automatically in the trustee, there are still a lot of cases that say that. In the main, these are cases that failed to consider *Wallace* and *Landry*, they are not in my submission well reasoned or perhaps not well argued by the lawyers. The cases in the second footnote — there are more of them, there are 11 in the second footnote and only 8 in the first — are cases that explicitly follow *Landry* and *Wallace*, overturn all the black letter law that existed up to 1997, and say that pre-bankruptcy wages, just like post-bankruptcy wages, just like all wages, vest in the trustee only if there is a s. 68 order, subject to family need.

At page 30, I talk about the next stage in the development which I think is inevitable. That is, what about pre-bankruptcy accounts receivable, say of an accountant or a self employed professional? What happens to those? The way trustees deal with those now, is that those are deemed to be the trustee's property. And at the time of the discharge, the trustee has to be bought out of those assets. I think that is now unsupportable. Pre-bankruptcy accounts receivable clearly are income, clearly they fall under s. 68, there is nothing to be bought out. Case law hasn't gone there yet but I think it will. The first step is this *Lintott* case of Justice Menzies, you'll see it at page 31, the bank claimed priority over money deposited after bankruptcy by the bankrupt, who was a crop adjuster, that he had received as reimbursement for pre-bankruptcy employment expenses. The bank had security over accounts receivable and over everything, these were pre-bankruptcy receivables, the bankrupt put them in a bank account and the court said that's s. 68 money. This was, in effect, an account receivable covered by the bank security, and the court said no, it's income, it doesn't matter that it's pre-bankruptcy income. The bankrupt gets to keep it if he or his family needs it. So, I think it's quite straightforward to move from there to pre-bankruptcy receivables that could be worth $100,000 or $150,000, that is income, that is subject to family need. I think that's where we're going.

Section 68 is not well designed to deal with lump sums. In my view, there is some guidance in the case law. We have Registrar Hill's decision in *Laybolt*

which is quoted here at page 31 that suggests a way of looking at that problem. I've set out at note 113 what the Personal Insolvency Task Force has proposed for a revision of s. 68. I think that's going to happen because the courts have detached timing from s. 68. The definition of income has to follow that, so we should be bringing into income, income earned at any time during the bankruptcy period even if it's only received after the discharge. That's what this new definition will do and it will have some teeth to it as well.

The second impact in *Marzetti,* which starts at page 33, is the feminization of poverty. This I find interesting from an academic perspective because it's completely new. Not just that it's completely repugnant to most insolvency lawyers I know, the idea that feminism is being brought into bankruptcy law, it makes people sick. It's considered politically correct, it's considered, you know, tyranny of the conscience by the judiciary. There is a lot of resistance to it. I've tried to explain in this paper and elsewhere what it's about. There are a couple of aspects to it. Where there is an ambiguity, the Supreme Court is saying we can put the burden on creditors to help alleviate the problem of impoverishment of support claimants. There was a crisis in the country and the crisis was that the rules for collection of support, and actually for establishing the quantum of support, were not working. There was a tremendous rate of non-payment. The consequences of non-payment were not serious enough, we were developing an underclass of single women raising their children in poverty

with the consequent social problems that that creates and so on. It was considered to some extent a scandal and the judiciary took the lead, the academics as well and ultimately the politicians, they completely reworked support enforcement. They amended the Bankruptcy Act to correspond to that and the Supreme Court of Canada played their part by saying, this is a battle, it has to be fought for the benefit of us all, so where the ambiguity exists, let's help fight that battle by helping support claimants. I don't see anything wrong with that.

The *Marzetti* case, in this formalism, invites us to look at bankruptcy rules generally to see if they meet this policy goal which is alleviating suffering, or the undue suffering, of separated spouses, particularly women, or do those rules disproportionately harm women or support claimants. I see the case law since then to some extent as a laboratory where we can examine a completely new ground of public policy and see what the courts make of it: do they abuse it, do they discard it, do they treat it as a useful tool? That's what I've done in this section: I have presented every single case where this public policy of defeating feminization of poverty has been raised in a debtor/creditor setting to see how it has been applied, and I've given my comments fairly freely. *Marzetti* now is a wild card. It allows courts to reconsider established debtor-creditor rules in the support setting to see if they reflect the applicable public policies.

I've set out some considerations for looking at these cases on page 34. Can the decision that's being advocated also be justified on conventional jurisprudential grounds or can it solely be justified under the policy ground? We'll see that play out in some of these cases. Should a general insolvency rule be applied to support claims, or are such claims by their nature different? This is an argument I have with people all the time. Is support different or is it the same? Should we treat it like we treat everything else or do we have to reorient ourselves because it's a support claim? The Supreme Court of Canada suggests the latter. How far should this new policy ground apply? Should it be just worth a little bit in the weight or should it be a lot? Another important question: has the public policy ground been spent through the 1997 amendments — the support amendments to the BIA or the support enforcement amendments to family law generally — how would we know when a sufficient degree of equality has been reached? This public policy ground is a type of affirmative action. It says, these people have been historically disadvantaged, let's fix it at the expense of others. But how do we know when it's been fixed? How do we know when we should stop discriminating in favour of a disadvantaged group and start not discriminating? Some of the cases suggest that we're there already. This is a real criticism of affirmative action generally in all sorts of areas, because affirmative action never seems to be spent, and that creates some resentment so I think it's important to face that issue.

Is this policy ground driven by sympathy or by entitlement? I've been criticized in my writing when I've said compassion is what is being generated by *Marzetti.* Some commentators have said that this is obviously a chauvinistic view because this is not compassion, this is entitlement. Women are entitled to this preferential treatment because of their role in the childcare area and it has nothing to do with sympathy, this is hard law. I think that's a bit too harsh but it's important to bear in mind that it's not just compassion but a legal right to preferential treatment that may be appropriate, that's something for argument and consideration.

Finally, do women's comparative lack of commercial familiarity bias the system against them in bankruptcy? This is issue is grist for all sorts of academic articles particularly in the United States. Let me give an example of that. In the United States, if there is an obligation under a separation agreement or court order and it's unclear whether it's support or not, the support claimant has a certain limited period of time following the filing, I think it's 30 or 60 days. If she doesn't make application to the bankruptcy court within that time, the claim is deemed to be wiped out even if it's in the nature of support. That short time frame has been challenged as being a systemic bias against women because they don't necessarily have access to the bankruptcy advice in time that they can catch this 30 to 60 day rule. It helps the man beat what may be a proper support claim. It's not really tailored to the situation of many of these poor women who desperately need

the support. That's a kind of systemic bias that has been, I think, justifiably criticized in the U.S. We don't have any kind of time limit for that inquiry.

With that background, let me run quickly through the case law. *Hogan* is the first case that considered *Marzetti*. The wife asked the Discharge Court to order at the husband's hearing that he pay all the support arrears in priority to payments to the trustee, that's just the support amendments and the court said, no, public policy is an unruly horse, it can't give us that remedy, that would contradict the statute, public policy cannot contradict the statute. That's fine, I agree. The *Burrows* decision is one that refers to things I wrote so, I guess, I have a bias but in this case, a gentleman filed a proposal and then said that support was provable and therefore, his wife could not enforce support claims during the bankruptcy proposal. If that was true the wife had to wait for five years until the proposal played out to enforce support arrears. The court, therefore, had to decide, well, is support provable? If it is provable, she's got to wait five years or else apply for leave in every case where there is bankruptcy proposal. The court said that doesn't make sense, support is not provable and applied *Marzetti*, it would be inappropriate and would discriminate against women and perpetuate poverty to require women in every case of a proposal to bring an application to Bankruptcy Court to enforce her support, it doesn't make sense.

The court also concluded — this is Justice Feldman who is now in the Court of Appeal — that the payment of support is a more fundamental policy goal

than debtor rehabilitation. This will come up in the case law particularly when we get to onus in just a few minutes. Bankruptcy Courts have always said the onus on the section 178 claimant to prove that he or she falls within s. 178 because debtor rehabilitation is more important than s. 178. There are number of cases here with which I agree, with some reservation, that say, no, support enforcement is more fundamental to the policy of the court than debtor rehabilitation. That would require us to revisit the onus in what I call the quasi-support cases, is it support or isn't it? Does it fall within s. 178 or not? This case is the first example of that new attitude.

Next case is *Jenanji*. Some money had been garnisheed from the husband's bank account, the money was still in court, he went bankrupt and the court was asked to give the money to the wife. Now, this is straight out of s. 70 and s. 71 of the Act. The automatic statutory vesting, vested the money in the trustee, there is no discretion. But the court used *Marzetti's* public policy to say, no, it should go to the wife. Now that's clearly wrong. One can understand the sympathy factor but that's clearly wrong. It's a classic example of the danger of public policy arguments, if it's taken too far, it's an unruly horse. You can see that in the next case, *Renda,* where the wife garnisheed the mortgage debt due to the husband. The garnishee sent $3,000 to the notary, who issued a cheque to the wife's lawyer. The wife lawyer's never cashed the cheque, she just kept it in her file and the husband later declared bankruptcy. The lawyer didn't inform the trustee about the money, applied it against her outstanding fees, a noble purpose.

The trustee learned about the cheque and sought the money and the court said, *Marzetti* is inapplicable, the garnishment was over a mortgage debt, not salary or wages, it's not whether support is the issue but it's the nature of the debt, the mortgage is a receivable. And that's, I think, a correct result. Public policy does not overcome the statute.

The next case is *Mattes.* This case took another step in expanding the scope of this public policy of defeating feminization of poverty. There was a very nasty husband, often a feature of these cases, and the wife had obtained a court order. The court order just before bankruptcy said that the parties would cooperate in selling the home, the net proceeds would be paid into court and $12,000 would paid and in the event it wasn't paid, it should be secured and paid out of the husband's share of the sale proceeds. The husband went bankrupt after this order was made but before the house was sold and the question was, does this order give security over the proceeds of matrimonial home or not? It was a priority question. Dealing with interpretation of a court order, not a statute but a court order, the court said after going through the paces, the wife was a secured creditor. The court explicitly recognized the public policy goals, saying that although *Marzetti* dealt with statutory interpretation, its policy goals were relevant in interpreting the judge's order. So, the court chose an the interpretation of the order, as long as it was reasonable, that facilitated support collection. So *Marzetti* is now being applied to interpretation of court orders, not just statutes, which I agree with.

The next one is *Cowger* where on the slenderest of facts, the Northwest Territories Court, Justice Vertes, granted the wife a constructive trust where basically the facts did not entitled her to one, and used the *Marzetti* public policy as a way of saying, well, let's give it to her because after all, the creditors are banks and she needs the money more and where family needs are in issue, I prefer to err on the side of caution. So, here the court is using *Marzetti* to influence the exercise of discretion. We're moving from interpretation of legislation to court orders to now influencing how discretion is to be exercised, and I as well agree with that although here, you know, the facts just weren't there.

The next one is *Backman*, we're now in 1998 so the new support amendments are starting to kick in. Mr. Backman was a bad man. He fled to Costa Rica to avoid paying his support. Might have been doctor Backman actually, doctor Backman, the urologist, I think, was it? My father and my brother are urologists, so I've asked them about doctor Backman but I don't have any good information. So, the court ordered him, so he fled off to Costa Rica and then he applied to vary the support and the court said that despite the fact that he is bankrupt now, he declared bankruptcy on the same day he fled. He has to pay security for costs, the outstanding support arrears of $58,000 and $19,000 of cost arrears before pursuing his motion to vary support and the result, he's bankrupt, he has to pay something like $90,000 or $100,000 into court if he wants the court to consider his motion. The court, once again, used *Marzetti* as a factor to influence the exercise of

discretion, yes, he was bankrupt, yes, by definition, he had no assets although he probably had them squirreled away but the importance of support enforcement was more important than the bankruptcy objectives or the bankruptcy policies involving rehabilitation. Once again, the court is saying, support enforcement ranks ahead of, or at least, on the same level as debtor rehabilitation.

We're getting to the end of this list and we're also getting to the good stuff, I think. *Rathbone-Herman* is the next one, an Ontario case. The facts were terrible. There were all sorts of judgments registered against the home and if the family support enforcement office had done its job, they would have registered the wife's support arrears and she would have received all the money when the house was sold. The wife kept asking the support enforcement people to register the writ, she would send letters, she made phone calls, she kept getting the recording.

I don't know if you've heard these complaints but it's impossible to get in touch with the support enforcement people, they have recordings that overburdened — in Ontario, and I know some of the other provinces, the provinces have taken over the role of support enforcement so it's now a bureaucratic matter and they can't keep up. All of the workers get harassed, they quickly reach their limit of compassion which then turns to resentment toward their clients. You can't get off the answering machine, you press the 1 and you go to a different answering machine. In this particular case, this

woman pleaded for the support enforcement people to put the writ on the home because "It's going to be sold by power sale, you have to get in there so I can get priority," but they didn't. It came up to court and the court essentially let the wife weasel through, contradicting express legislation, despite clear statutory language but using the *Marzetti* principle of feminization of poverty to give the deserving wife, the sympathetic wife, a remedy. Very compelling facts, not really a precedent because of those unusual facts.

Cherkowich was one of two decisions of Justice Veit. Justice Veit is not fond of the *Marzetti* decision. In this case, *Cherkowich*, the husband was awarded $3,000 in costs after the trial. The wife argued that he shouldn't be permitted to set off those costs against child support. In other words, she was entitled to child support every month and she said to the court, he shouldn't allow to reduce the child support presumably down to zero for two or three months to set off the costs award. And there is a lot of cases where the judge has refused to allow that set off to take place against support for obvious reasons. If you set off that support money then what does the family do for the three months when they don't have any money to buy, you know, food and pay the rent and so on, supports typically our concern about that set off issue and *Marzetti* was argued, Justice Veit said:

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

So, she restricts *Marzetti* to its very precise ambit in that case rather than the interpretation of other things and the exercise of discretion and in my view, she was wrong in doing so. *Marzetti* sets out a fundamental policy rule of the court, you can't treat it like a statute and say it only applies on the facts and that *Marzetti* case, it's clearly something greater.

Next is *Beattie v. Ladouceur*, once again a familiarly malicious husband. When I discussed this topic, by the way, I use stereotypes, all husbands are malevolent rats. They all go bankrupt. Wives are virtuous saints. There are always eleven children. Needless to say that isn't always the case but you can see how sometimes these stereotypes do recur. *Beattie v. Ladouceur*, the husband was a rat. He refused to pay support despite serving jail time for contempt and twenty years of litigation. He declared bankruptcy and moved to stay all contempt proceedings against him until his bankruptcy obligations were determined and that was thrown out. The court applied existing case law and then confirmed it by having reference to the public policies of the court. That's precisely the kind of restrained methodological approach that *Marzetti* used.

Taylor v. Taylor is the next one, we've got three or four to go and I'm going through these to illustrate some of the other points that come up in different areas. I hope this is of some interest to you. *Taylor*, is a Court of Appeal case in Ontario and this one is problematic. The wife had a lawyer and this lawyer did his job in the best traditions of the profession. The wife was

impecunious, she had no money. Her lawyer worked on spec without payment, did a marvellous job for this client, got a huge equalization order, got a huge support order, managed to trap $69,000 from the husband in lump sum support arrears and get it into his bank account. He had not been paid a penny up to that point. The lawyer had done a marvellous job and then he called up the wife or wrote to the wife and said, look, I just got $69,000, please arrange to meet with me so we can discuss how much of this money I should keep toward my current fees of $112,000, and how much I should give to you? The response: a letter from her new lawyer saying, "I have now been retained by Mrs. Taylor, please forward the entire support monies forthwith, failing which, we'll report you to the Law Society."

The lawyer was not pleased and he brought a motion for a charging order. I'm not sure if this remedy is available in Quebec, an order that the lawyer's fees are a secured claim against the monies that the lawyer's work has created, but in the common law world that is a secured claim. It's up to the discretion of the court. In this case, the lower court granted the order but the Court of Appeal said no: Even though the lawyer's efforts created this money, even though the lawyer had done a brilliant job and was obviously a generous guy, support is too important; even if it is a lump sum award of $69,000, we will not grant a charging order against it; we should not make an order that dramatically contradicts express public policies. The court said, you can have your charging order against equalization, even though it hasn't been collected yet; but the wife gets $69,000 and you, lawyer, get nothing.

That was public policy, in my respectful submission, that has run wild. What is support money for if not to pay your expenses? If you're hiring a lawyer to pursue your husband, aren't you going to pay that lawyer? Certainly, some of that money that has been collected would have gone to pay the lawyer. Why should the wife needs be $69,000 at this time? Somehow she's gotten through this process, does she need all this money now? Shouldn't there be a balancing? I see this case as being, in a sense, politics run wild. It's doctrinaire, it doesn't balance the competing interests.

The next one is *Watson v. Schellenberger.* I really like this case. It's an Alberta case. It was a claim for essentially child support and I have to explain this case to you because it's a product of our times where it has become difficult to define what the family is. This case was a claim by a woman called "Auntie" against the father of a little boy. Auntie had cared for this little boy. The agreement was that father would pay Auntie $700 a month for this. But he didn't pay for ten months so she sued him and got a judgement at small claims court. Then he went bankrupt and she sought an order that that $7,000 was a support entitlement that survived his bankruptcy.

Now, Auntie had never slept with this guy. He had had a child with the boy's mother who lived out of the country then he split up with her and he took up with another woman. That woman had a half sister, Auntie. Then, he broke up with that second woman. So Auntie was the half sister of his

former cohabitant, pretty distant. The court said that that is child support even though there is no connection between Auntie and the father and no connection between Auntie and the kid except that she is in effect doing him a favour. The father argued that she was merely a babysitter and the court said, no. The intent of Parliament in its last round of amendments as interpreted and as assisted through the *Marzetti* policy is to ensure that child maintenance and support orders and agreements will survive bankruptcy, efforts to enforce them would be given a special status and the court says that policy on child maintenance and support should trump bankruptcy protection as a public policy if there is any conflict between the two.

My comment on this case is, clearly without *Marzetti*, this wouldn't have gone as far as it did. There was no written agreement, Saskatchewan legislation required separation agreements to be in writing so the court had to make all sorts of leaps to get to this result. She was not entitled to claim support under matrimonial legislation, she had no relationship to the child, no relationship to the father. The court had to jump over hoops and I think it was only the *Marzetti* public policy that allowed the court, or gave the court a justification for doing so. Here I think a real difference was made by this public policy, this one, the first, I think, contrasts with that in *Taylor v. Taylor*. But *Taylor v. Taylor* was wrong, and this case I think was right.

Next was *Kingston v. Ackerson*. I'm just going to pass over that one to *Cameron* which is so much more challenging a case. I don't know if you're familiar with *Cameron*. *Cameron* was a case out of Alberta that basically said that if the wife gets money out of the bankruptcy, she has to pay the 5% — approximately — Superintendent's levy, as do all creditors. But when she tries to enforce the remaining 5% of her support claim, she can't, it's deemed to having paid even though she never receives it. Let me supply the facts in *Cameron* to make sense of that. In *Cameron*, the wife was owed about $30,000. Mr. Cameron filed for bankruptcy and then, fortunately, one of his parent died and his inheritance money poured in, enough to pay off the creditors. The trustee had to pay off the debts. The wife was owed support arrears of about $30,000, they were provable. So, the trustee paid her a cheque, and what's the cheque for? It's not for $30,000. Because of the Superintendent's levy, it's for $30,000 less 5% which in this case was about $883.00. So, the trustee sends her a cheque for all her support arrears, less $883.00. Actually, he sent it to the support enforcement branch. Then the support enforcement branch, after this guy's discharge, says okay, husband, you still owe $883.00, please pay. He says, forget it. They say, alright, may we have your driver's licence, please? He goes to the trustee. The trustee says, I don't know what to do with this.

Now I have some inside dope on this one. The trustee said, I don't know what to do with this. He consulted with the Official Receiver in Alberta. The O.R. says, "No, no, no, trustee, you should apply to the court." This is not

really a trustee matter, the guy's discharged, it's between husband and wife. But the trustee applied to the court and the court, at the registrar level said, "No, even though she has only received 95% of her support, she received a 100% dividend, that 5% is to her account not to his. You can never collect the remaining 5% of the support, it is deemed to have been paid." I got involved at that point, because that wasn't right. I wrote about this case. Unfortunately, my comments were rejected when the case went up to appeal before Justice Veit. She essentially took the position that the public policy in *Marzetti* was expressed, or perhaps exhausted, by the 1997 amendments, that support claimants got so much out of those amendments that we shouldn't give them any more than they got, and that the wife in this case should bear that 5% tax.

The case then went up to the Court of Appeal, which affirmed the decision and in addition made a wacky comment about infinitely regressing levy deductions which I can discuss with anyone mathematically inclined. The court said, if she only received 95% and 5% is still owing, she should be able to file a new claim for the 5% and receive 95% of that, then file a new claim for 5% of the 5% and get another dividend for that and keep going on and on. The court said that there may be a mathematical formula for that. Of course, I worked out the mathematical formula, I used to be a mathematician. The math says that if you add all that up, it's precisely 100% of the claim. That's high school math, not university. But that's besides the point. So the Court of Appeal got totally sidetracked and in my submission —

I believe I've set this out at length some pages, 39, 40, 41 — this is all wrong. It's really a question between husband and wife, and as between the two, the wife is entitled to her support. The husband is also getting the extinction of all his other debts. The wife is getting nothing more than what she's entitled to, but the husband is getting more. As between the two, there is no question that she should be able to recover 100% of her support.

The interesting thing is that the effect of this decision, as I have been told by the Alberta support enforcement people, is quite serious because under the new scheme of Superintendent's levy, it's not 5% anymore. In summary administration cases, it's the first amount that's available after trustee's fees up to the limit of $200.00. So if the support claimant has a claim of $200.00 for support arrears, the first $200.00 that's available, that she should get, goes to the Superintendent but she is deemed by this *Cameron* case, to have received that $200.00. Her claim can be wiped out. Whether or not that's the case, the support enforcement people tell me that it has seriously inhibited their desire and ability to file bankruptcy claims for people. This has be fixed in my submission. This is one of the recommendations that the Senate adopted. Hopefully, it will be fixed although I'm sure there are discussions going on with the Superintendent of Bankruptcy's office as to how exactly to fix it.

The final case in this recitation is *Lecerf,* on which I've spent a lengthy one page footnote discussing, in my submission, how horrible a decision it is.

The next question is where else should *Marzetti* apply? Where are we going to bring this lens of feminization of poverty to bear in bankruptcy law? I have one suggestion and that is this quasi-support issue where the case law outside the family setting places the onus on the claimant, the s. 178 claimant, to prove that the claim falls within s. 178 so is not extinguished by the bankruptcy. There are a number of cases that apply that in the family law setting although they're challenging because, for example, in *Jerrard v. Peacock*, the court said:

"Any benefit of doubt within this section should go to the bankrupt."

But that statement was made just after the court commented on the overriding social policy reflected by the new amendments, and on society's vested interest in ensuring support of the bankrupt's dependants. We have this very strong policy favouring support payments and this strong policy favouring debtor rehabilitation; and the bankruptcy courts have always said, rehabilitation is up here, support enforcement is down there. But I don't see that anymore. I don't think that's right. I think it should be levelled and if some of these decision are followed, it should be tilted the other way.

How does this work out and how does this create injustice? There are two examples that I've given in this paper. The first one is *Peterson vs Peterson*. The facts are lousy. The wife got an order for the husband to pay $52,000 in annual instalments. He paid $5,000 and then he went bankrupt. Ten years later, after the wife had remarried and split up with husband number two,

she sought an order that his obligation from ten years before was a support debt. No-one was going to have sympathy for the wife in that situation. She remarried and now she's coming back to get more money from the previous husband. And so, the court threw it out. But the Court of Appeal went much further and said, where you have a payment obligation that is not characterized in the agreement — that is to say, there is simply an agreement that he pay $52,000, it doesn't say whether it's support or whether it's property, it's probably a combination of both and in this case, it was clear that it was a combination of both — the court says, we cannot, as a court, divide between the two aspects, support and non-support, to say that this portion, $25,000, or $2,000, survives and this portion doesn't. The court says, we cannot do that, the court cannot do it, the judicial process is not designed for that purpose.

Now, this ensures, in my opinion, that injustice will be done because in actual matrimonial litigation, sometimes, all the recipient of this money wants is the money. The recipient is not the one who's deciding in the back of his or her mind, oh, maybe I'll go bankrupt and not pay; only the payer sometimes thinks that way. If in matrimonial litigation, one side, say the husband, says, "I will pay you this money" and the wife says, "Well, what if you go bankrupt?" He says, "Don't worry, I won't, do you want the money or not? If you start imposing conditions, the offer is off the table." These types of things do happen. The result is going to be this kind of agreement. If that agreement can't be reviewed by the court and these components examined

and perhaps differentiated, then a wife in that situation is going to lose both her support and her equalization. That's an example, I think, of a system that isn't well designed.

This reasoning was applied in *Lees*, we're now on page 44, where there was a cost order. There are all sorts of cases that say where there is a cost order in family litigation, after bankruptcy, a judge can look at the cost order and say, well, most of trial was on support, about 80%, so 80% of that order will be support and will survive bankruptcy, and 20% won't. But this court said, where there is a cost order, after bankruptcy the court is *functus officio*, the court cannot examine that cost order and say, this proportion is for support and survives, this proportion isn't. And that's another example that frustrates the policy of differentiating between support and non-support to ensure that the support component is paid. The decision completely flouts that policy goal which is fundamental. So, that's another rule that is, in my submission, a systemic rule that's discriminatory.

Ladies and Gentlemen, *Messieurs et Mesdames les registraires*, I've outrun my time. I'm only, I think, two fifths done. I'd be delighted to keep speaking outside, but unfortunately, you're staying in here. If any of you have any questions or comments or sharp criticism, I'd be delighted to receive it. I do not claim to be right in this area, I'm interested in this area and I have a certain desire to further it but I do not claim to be right. I'd

be delighted to engage in any debate or discussion if you're interested.

Thank you very much.