A Tale of Two Statutes: Balancing the Interests of Spouses and other Creditors at the Crossroads of the Family Law Act and the Bankruptcy and Insolvency Act – A Zero Sum Game?

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I. INTRODUCTION

Social upheaval was percolating in Canada in 1968. Power to the people was an anthem of the baby-boomer protesters seeking change. Anti-war sentiments ran high. Women's and other civil rights were demanded. It was the spring of hope. It was the winter of despair.[1]

1968 was the year during which no fault divorce became the law of the land,[2] finally unshackling divorce from the constraints of western religion. This opened a world of possibilities to unhappily married Canadians, affecting nearly one-half of all marriages in Canada. What followed, however, was not nearly as liberating.

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1 Excerpted from Charles Dickens' 1859 novel *A Tale of Two Cities*, with the extended quotation reading: "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair...".

2 *Divorce Act*, SC 1968, c 24.

Men and women alike were able to escape from their marriages after a short stint of living separate and apart, but many, especially women, found themselves with no social net available for support. Canadian women, significantly more than their male counterparts, fell into the abyss of poverty. Single parenthood and scarce child care options limited the access of many women to the employment market and even upon employment, unequal pay for work of equal value was the norm for so many. All of these factors contributed to the feminization of poverty in Canada, which was first recognized by the Supreme Court of Canada in 1992 in *Moge v Moge* as an entrenched social phenomenon that saw women's rate of poverty increasing far greater than their male counterparts, especially after divorce.[3] In Ontario, family law legislation in the 1970s and 1980s was the Legislature's attempts to deal with and to alleviate the feminization of poverty in the province. However, at least historically, bankruptcy law and family law have been seen to be at odds with one another, with bankruptcy law often aggravating, rather than ameliorating, the feminization of poverty, particularly in cases involving marital dissolution.

For example, the *Bankruptcy and Insolvency Act* ("*BIA*")[4] gives an ex-spouse's claim for support and child support priority in the bankruptcy of the former spouse. And neither of these claims are released under section 178 of the *BIA* upon discharge of the bankrupt. However, in provinces in which the family law regime calls for the equalization of net family assets accumulated during the marriage – as opposed to property division – an ex-spouse's equalization claim receives no such priority and only shares rateably with other unsecured creditors in a bankruptcy of the other spouse. This perceived unfairness has given rise to much criticism and calls for reform. In 2003, the Standing Senate Committee called for the "prompt resolution"

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3 *Moge v Moge*, [1992] 3 SCR 813, 1992 CarswellMan 143 (SCC) at para 56 [*Moge*].

4 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

of this perceived inequity.[5] In the 2011 Supreme Court of Canada case of *Schreyer v Schreyer*, LeBel J echoed the concern about the apparent injustice, renewing the call for reform and holding that "this matter is ripe for legislative attention so as to ensure that the principles of bankruptcy law and family law are compatible rather than being at cross-purposes."[6] To date, Parliament has failed to act.

In 2009, section 96 of the *BIA* was enacted, which prohibits transfers at undervalue.[7] This new provision is a modernization of provincial fraudulent conveyance legislation. Of note is that section 96 affords the court judicial discretion, in that the court "may" declare the impugned transaction void in the prescribed circumstances described later in this paper.[8]

What few trustees and practitioners appear to have come across in their day-to-day practice is that section 96 may also become an instrument promoting the feminization of poverty in the circumstances outlined in the case of *Mercado Capital Corporation v Qureshi* ("*Qureshi*"), which decision was the genesis for this paper.[9] In *Qureshi*, the court of first instance used its equitable jurisdiction under section 96 of the *BIA* to allow an economically disadvantaged spouse to retain what had all the indicia of being a classic transfer at undervalue of a 50 percent interest in the matrimonial home owned by her ex-spouse. On appeal, Ontario's Court of Appeal referenced the feminization of poverty conflict inherent in some *BIA* sections, but decided the matter on legal rather than equitable grounds

5 Standing Committee on Banking, Trade and Commerce, "Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*" (November 2003), online (pdf): *Senate of Canada* <http://www.parl.gc.ca/Content/SEN/Committee/372/bank/rep/bankruptcy-e.pdf> at 85 ["Senate Report"].

6 *Schreyer v Schreyer*, 2011 SCC 35 (SCC) at para 40 [*Schreyer*].

7 *BIA*, *supra* note 4, s 96.

8 *Ibid*, s 96(1).

9 *Mercado Capital Corporation v Qureshi*, 2017 ONSC 5572 (Ont SCJ [Commercial List]) [*Qureshi* ONSC], affirmed 2018 ONCA 711 (Ont CA) [*Qureshi* CA].

and completely missed a rare opportunity – in the authors' opinion – to use judicial discretion as a tool to avoid or minimize the feminization of poverty, choosing instead to assist the spouse in need of economic assistance, by interpreting in a novel way the word "disposition" that is used in the definition of "transfer at undervalue".

In this paper, the authors endeavour to present an approach to the principled exercise of discretion in a section 96 impugned transfer at undervalue of an interest in a matrimonial home between ex-spouses. Specifically, the authors submit that, in cases of an otherwise financially vulnerable ex-spouse who receives such a transfer, a court ought to consider whether the feminization of poverty can be used as a catalyst for the exercise of its discretion under section 96 of the *BIA* in a manner that allows the recipient spouse to retain up to a 50 percent interest in the home – which transfer otherwise would have been a void transfer at undervalue under section 96 of the *BIA*. In the authors' view, this approach mitigates, rather than magnifies, the feminization of poverty, and works together with the goals of family law, rather than at cross-purposes.

II. OVERVIEW

This paper will begin by canvassing the notion of the feminization of poverty, followed by a background on the interplay between the family law and bankruptcy regimes. The authors will then continue with an overview of section 96 of the *BIA* and a principled approach to the exercise of judicial discretion under section 96. This will be followed by an analysis of the reasonable expectations of spouses regarding the ownership of the matrimonial home when registered in the name of one spouse only and the sometimes competing interests of commercial creditors who voluntarily provide unsecured credit to the owner spouse, without taking security in the matrimonial home from that spouse. Then, the authors will propose an expansion of the principled exercise of section 96 judicial discretion as it relates to transfers of interests in

matrimonial homes between spouses in circumstances of financial hardship.

This paper will then review and analyze the decisions in *Qureshi* below and at the Court of Appeal and assess the nature of the discretionary principles that might have applied had the Court of Appeal taken up the opportunity to address the extent and scope of judicial discretion in the interpretation and application of section 96 of the *BIA*, particularly at the intersection of the feminization of poverty and competing bankruptcy and insolvency policy. The paper will then conclude with an alternative proposal to the resolution of this issue in family law courts rather than within the context of a bankruptcy proceeding.

The authors of this paper take more than simply an academic interest in the subject matter, as they acted as counsel for Mercado Capital in the *Qureshi* case discussed herein, both at first instance and on appeal. The authors note that this paper is not national in scope, but rather focuses on Ontario's jurisprudence and family law legislation, as it relates to the *BIA*. Like Ontario, the provinces and territories of Manitoba, Prince Edward Island, Northwest Territories, and Nunavut all have family law equalization regimes, and this paper will therefore bear some relevance to those jurisdictions.[10]

III. FEMINIZATION OF POVERTY AT THE CONVERGENCE OF FAMILY LAW AND BANKRUPTY LAW REGIMES

1. Feminization of Poverty

In the 1992 case of *Moge*, the Supreme Court of Canada recognized the feminization of poverty as being an entrenched social phenomenon, and referenced that the percentage of poor Canadian women found among all women in Canada doubled

10 *Family Property Act*, CCSM c F25; *Family Law Act*, RSPEI 1988, c F-2.1; *Family Law Act*, SNWT 1997, c 18; and *Family Law Act*, SNWT (Nu) 1997, c 18.

between 1971 and 1986, while in the same period, the percentage of poor men increased just 24%.[11] While acknowledging that the feminization of poverty was not caused solely by the financial burden associated with marital breakdown, the Court recognized that "there is no doubt that divorce and its economic effects are playing a role."[12]

As noted by Michael J. Bray in his 2008 article, "To Whom the Swords, for Whom the Shields", the feminization of poverty is a constantly evolving phenomenon.[13] The need to continue the process of reversing this trend can be met by finding instances of gender inequality and "apply[ing] the counteractive measures, be they social programs, legislative enactments or judicial remedies."[14]

2. The *BIA*'s Contribution to the Feminization of Poverty

The *BIA* has always lagged far behind family law legislation in terms of social conscience and awareness. The primary reason being that the first versions of the *BIA* did not have universal application, but rather, it was initially a statute that only applied to those seeking to gain a living by trading.[15] It was not until 1919 that the *BIA*'s purview expanded to cover all insolvent individuals and corporations.[16] Of course, the traditional role of women in Canadian society was quite different in 1919 than it is now. For example, women only obtained the right to vote in Ontario in 1917. This 1919 version of the *BIA* was very much a typical example of legislation written by men for men.

After no fault divorce was introduced, the short-lived 1978

11 *Moge, supra* note 3 at para 56.
12 *Ibid* at para 56.
13 Michael J Bray, "To Whom the Swords, for Whom the Shields?– The Feminization of Poverty in Canadian Insolvency Practice", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) at 456.
14 *Ibid*.
15 *The Insolvent Act of 1869*, SC 1869, c 16 [*Insolvent Act of 1869*].
16 *The Bankruptcy Act of 1919*, SC 1919, c 36.

The Family Law Reform Act ("*FLRA*")[17] and its replacement, the 1986 *Family Law Act* ("*FLA*"),[18] were the Ontario Legislature's answer to the plight of separated and divorced individuals who were able to take advantage of no fault divorce, but would otherwise have been left impoverished by that decision. Former spouses were required to pay child support, spousal support and divide family assets. First, under the *FLRA*, by a division of the actual family assets and then, and now, under the *FLA*, by the equalization of the net family assets accumulated during the marriage.

But with family law reform in the 1970s came new challenges. Although the *FLA* was intended to reverse the feminization of poverty in Ontario, former spouses soon discovered that the *BIA* was still mired in the 19th century. As an example, even after the enactment of the 1986 *FLA*, spouses were not even considered to be creditors of their bankrupt spouses for the purpose of proving claims for alimony, spousal support and child support in bankruptcy proceedings. In fact, it took another decade after the 1986 *FLA* was enacted for the *BIA* to be amended to allow these debts for alimony payments or for spousal or child support to be claims provable in bankruptcy.[19] These 1997 amendments to the *BIA* also saw claims for alimony, spousal and child support that accrued during the year before a bankruptcy as well as any lump sum payable, ranked, for the first time, as preferred claims for the purposes of payment under the *BIA*. Clearly both of these amendments were important steps aimed at preventing the *BIA* from being used as a shield by a bankrupt, usually husband, to avoid paying family debts to an ex-spouse and children.

However, while these amendments brought improvements to the economic circumstances of women in marital breakdowns, it was not the panacea that the legislature was

17 *The Family Law Reform Act*, SO 1978, c 2 [*FLRA*].

18 *Family Law Act*, RSO 1990, c F.3 [*FLA*].

19 *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, SC 1997, c 12 [*1997 BIA Amendments*].

seeking. These improvements did not have the desired effect of eliminating the *BIA*'s perhaps unwitting, but nonetheless real, contribution to the feminization of poverty in Canada. Undoubtedly long overdue improvements, the 1997 amendments have been the subject of much subsequent criticism.[20] One glaring omission of the *BIA* – that continues to this day – is that awards for equalization payments under Ontario's *FLA* are treated as unsecured debts owing by the bankrupt spouse to his or her former spouse. As a result, an ex-spouse with a court order for an equalization payment cannot enforce or collect that equalization payment if the payor spouse files for bankruptcy protection. Since 1997, the wealthier of the two ex-spouses, often being the husband, has been able to turn to the *BIA* and use this "loophole" as a shield to protect against making equalization payments to this statutorily created class of creditor, the ex-spouse. A wife with an equalization award had no choice but to share rateably with all of her ex-spouse's unsecured creditors. And these equalization awards are then released under section 178 of the *BIA* upon the ex-spouse's discharge from bankruptcy.

This anomaly was identified more than fifteen years ago, in 2003, by the Standing Senate Committee.[21] In its report released in November 2003, entitled *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, the Senate Committee stated that "[w]e must ensure that the devastating effects of marital breakdown and its aftermath are, to the extent possible, minimized – financial and otherwise – for all parties concerned..." and that inequities like the one perceived to exist with equalization payments required "prompt resolution".[22]

20 Bray, *supra* note 13 at 459; see also Janis Sarra & Susan B Boyd, "Competing Notions of Fairness: a Principled Approach to the Intersection of Insolvency Law and Family Property Law in Canada", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2011* (Toronto: Carswell, 2012) at 213-214.

21 Senate Report, *supra* note 5.

22 *Ibid* at 85.

The Senate Committee recommended that the *BIA* be amended to provide that "bankruptcy does not stay or release any claim for equalization or division against exempt assets under provincial/territorial legislation regarding equalization and/or the division of marital property".[23] This recommendation was adopted and repeated in the 2011 Supreme Court of Canada decision in *Schreyer*[24] where LeBel J noted that:

> More than seven years have elapsed since the [Senate] Committee issued its report. It seems to me that this matter is ripe for legislative attention so as to ensure that the principles of bankruptcy law and family law are compatible rather than being at cross-purposes. However, until such legislative changes are made, creditor spouses should be alive not only to the pitfalls of the *BIA*, but also to the importance of the remedies available under it in such situations.[25]

Five months prior to the release of the Supreme Court of Canada's decision in *Schreyer*, the Ontario Court of Appeal released its decision in *Thibodeau v Thibodeau*. The judgment of the court was delivered by Blair JA, who wrote:

> Accordingly, in my view, an order providing that an equalization payment to one spouse is to be made out of the payor spouse's share of the proceeds of the sale of the matrimonial home, without more, does not create "property rights" in the payee spouse – equitable, securitized, or otherwise. Absent clear language pointing to the trier of fact's intention to order the transfer or vesting of a payor spouse's assets, or the creation of security, or the imposition of a trust-like obligation, in satisfaction of the equalization payment, courts should be wary of giving effect to a proprietary right form of disposition, lest (a) what the legislature has clearly decided is to be an equalization regime is inadvertently transformed into a division of property regime under the guise of protecting a payee spouse's right to receive the equalization payment awarded, and (b) otherwise legitimate claims of third parties be subverted and bankruptcy priorities reversed.[26]

As in *Schreyer*, Blair JA also expressed lament as to the "difficult policy choices" at play, but that, ultimately, any

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23 *Ibid* at 86.
24 *Schreyer*, *supra* note 6 at para 39.
25 *Ibid* at paras 40-41.
26 *Thibodeau v Thibodeau*, 2011 ONCA 110 (Ont CA) para 43 [*Thibodeau*].

change would have to be effected by Parliament.[27] In *Schreyer*, the Supreme Court of Canada approvingly cited the Ontario Court of Appeal's decision in *Thibodeau*.

Section 96 of the *BIA*, discussed below, is a relatively recent section of the *BIA* which can – depending on its application – contribute to, or ameliorate the feminization of poverty.

IV. SECTION 96 OF THE *BIA* AND TRANSFERS AT UNDERVALUE – IN GENERAL

1. Purpose of the Prohibition

The law has long recognized the need to protect creditors from insolvent debtors who give away assets to third parties, rather than using those assets to repay their debts. In fact, legislation prohibiting debtors from fraudulently dissipating their assets when heavily indebted was first enacted in England during the reign of Queen Elizabeth I in the 1500s and has been the law of Ontario for more than a century.[28] Ontario has continued this statutory prohibition in its *Fraudulent Conveyances Act*.[29]

The rationale for this prohibition is that by giving away assets when insolvent, the transferor prejudices her or his unsecured creditors by reducing the value of the assets that are exigible by those creditors. As a necessary consequence, when the transferor becomes bankrupt, the prior gift of assets reduces the value of the bankrupt estate distributable by the trustee to the unsecured creditors of that estate. Correspondingly, each recipient of the gifted assets is bestowed an unjust benefit equal to the value of the asset received in excess of the amount, if any, paid by the recipient for such asset. This benefit gives the recipient priority to the transferred asset over the other unsecured creditors of the insolvent transferor and runs afoul

27 *Ibid* at para 45.
28 *Insolvent Act of 1869*, *supra* note 15.
29 *Fraudulent Conveyances Act*, RSO 1990, c F.29.

of one of the *BIA*'s primary goals, which is to ensure that all unsecured creditors share their losses rateably.

2. Transfer at undervalue – Defined

Section 96 – entitled "transfer at undervalue" – has been included in the *BIA* since 2009. It impugns a transfer of property or the provision of services by an insolvent person to third parties within a legislated time period prior to the bankruptcy, but only in circumstances where the insolvent transferor receives no consideration or inadequate consideration for the services or property transferred. These transfers of property or provisions of services are defined in section 2 of the *BIA* as "transfer at undervalue" which, for most estates, will be either a bankrupt's gift of an asset, or a sale of an asset for less than its fair market value. More technically, the definition of transfer at undervalue in section 2 of the *BIA* is "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor".[30]

This definition is drafted in an intricate and compound manner. It includes two words – "debtor" and "property" – that are themselves defined in the *BIA*.[31] It also deals with two separate types of transactions that may be undertaken by a debtor, one being a "disposition of property" and the other being the "provision of services". And finally, at the same time, it also sets out two different measures of consideration that may be received by the debtor on account of the "disposition of property" or the "provision of services", the first being "no consideration" and the second being consideration that is "conspicuously less than the fair market value of the consideration given by the debtor".

30 *BIA*, *supra* note 4, s 2.
31 *Ibid*.

3. Impugned Transfers at Undervalue under Section 96 of the *BIA*

In spite of the rather broad definition of transfer at undervalue, only three types of transfer at undervalue transactions are impugned by section 96. A court may void, or alternatively, grant monetary judgment against a recipient of a transfer at undervalue, in each of the following three scenarios depending upon the relationship of the parties to the transfer and depending on the timing of the transfer:

- Arm's length parties – within one year prior to bankruptcy: if the transfer at undervalue was between parties dealing with each other at arm's length within one year before the bankruptcy and if the trustee (or creditor) can prove both**:**

    i. the debtor was insolvent at the time of the transfer, or was rendered insolvent by it; and

    ii. the debtor intended to defraud, defeat or delay a creditor.

- Non-arm's length parties – between one and five years prior to bankruptcy: if the transfer at undervalue was between parties not dealing with each other at arm's length – for instance, if they are related to each other – more than one but not more than five years before the bankruptcy and if the trustee (or creditor) can prove either**:**

    i. the debtor was insolvent at the time of the transfer, or was rendered insolvent by it; or alternatively

    ii. the debtor intended to defraud, defeat or delay a creditor.

- Non-arm's length parties – within one year prior to bankruptcy: if the transfer at undervalue was between parties not dealing with each other at arm's length within one year before the bankruptcy. In this scenario, no "insolvency test" and no "intention test" is required. This is an "effects-based test", meaning that the transfer at undervalue, in and of itself – between non-arm's length parties within one year of the bankruptcy – ought to be impugned because of its negative impact on the creditors of the bankrupt estate.[32]

These three distinct classes of impugned Transfers at Undervalue have been summarized as follows by Professor Roderick J. Wood:[33]

Transaction	Transfer at Undervalue		
Relationship	Arm's Length	Non-Arm's Length	
Timing	Within one year	Within one year	Outside one year but within five years
Additional Elements	Insolvency **and** Intention to Defeat Creditors	None	Insolvency **or** Intention to Defeat Creditors

The test for attacking a transfer at undervalue between spouses and other parties who are not dealing with each other at arm's length is easier to establish than a transfer at undervalue between arm's length parties. With the former, the trustee or creditor can look back at transactions occurring within five years of the bankruptcy. When the transfer at undervalue took

32 Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, *The 2018 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2018) at 588.

33 Roderick J Wood, "Transfers at Undervalue: New Wine in Old Wineskins?", in Janis P Sarra and the Honourable Barbara Romaine, eds, *Annual Review of Insolvency Law 2017* (Toronto: Carswell 2018) at 4.

place more than one year and less than five years before the bankruptcy, the trustee or creditor must prove either the debtor's insolvency or the debtor's intention to defraud, defeat or delay a creditor. There is no need to prove both of these pre-conditions. And when the transfer at undervalue took place less than one year before the bankruptcy, there is nothing more to prove – other than the disposition of property or provision of services itself, for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

Section 4 of the *BIA* provides that persons who are related to one another, which includes married and common law spouses, are deemed not to be acting at arm's length for the purposes of section 96(1)(b) of the *BIA*.[34] However, spouses may adduce evidence to the contrary if, in fact, they were acting at arm's length at the relevant time.

Consequently, transfers of property for no consideration or for consideration conspicuously less than the property's fair market value, within one year prior to bankruptcy, by a debtor to her or to his spouse, is a transfer at undervalue which falls squarely into the class of impugned transaction described above and particularized in subsection 96(1)(b)(i) of the *BIA*.[35] Voiding this class of impugned transfers at undervalue does not require proof of insolvency and does not require proof of intent on the debtor's part. As a result, a court generally should have no difficulty finding that a debtor's transfer at undervalue to a spouse or other non-arm's length person within one year of the bankruptcy is void. And the court also has the power under section 96 of the *BIA* to order that the recipient of such a transfer pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor.

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34 *BIA*, *supra* note 4, s 4.

35 *Ibid*, s 96(1)(b)(i).

V. A PRINCIPLED APPROACH TO THE EXERCISE OF DISCRETION UNDER SECTION 96 OF THE *BIA*

The preamble of section 96 of the *BIA* provides that "on application by the trustee, a court may declare that a transfer at undervalue is void...".[36] The inclusion of the word "may" affords the court judicial discretion in the determination of a section 96 application.

1. The Modern Principle to Interpreting "may" in Section 96

In interpreting statutes, courts are guided by the modern principle of statutory interpretation, which provides that: "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[37]

The modern principle mandates a complex and multi-dimensional approach to statutory interpretation. A court must examine words in their total context, and must take into account the purpose of the legislation. Interpretations that are consistent with or promote legislative intent should be adopted, while those that defeat or frustrate legislative intent should be rejected. The court should consider both the purpose of the statute as a whole, and the purpose of the specific provision at issue.[38] Most recently, in 2017, the Ontario Court of Appeal held in *R v Del Mastro* that the proper exercise of statutory interpretation should also "produce a result that is reasonable and just, in compliance with accepted legal norms."[39]

In *R v Johnson*[40] and in *R c Lavigne*,[41] the Supreme Court of

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36 *Ibid*, s 96(1).

37 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 7; see also Re Rizzo & Rizzo Shoes Ltd, [1998] 1 SCR 27 (SCC) at para 21.

38 Sullivan, *supra* note 37 at 7-8.

39 *R v Del Mastro*, 2017 ONCA 711 (Ont CA) at para 61, citing Sullivan, *supra* note 37 at 7–10 [*Del Mastro*].

Canada applied the modern principle and held that the conditional use of the word "may" in a statute – much like in section 96 of the *BIA* – does not give the court a broad unfettered discretion. Rather, the use of the word "may" in a statute gives the judge a limited discretion when enforcing that provision. That limited discretion is to be guided by equitable principles, sometimes referred to as a "principled exercise of discretion", and the scope of the limited discretion can be inferred from the purpose and scheme of the act or from other contextual factors. [42]

The Supreme Court of Canada has held that the purpose of the *BIA* is to provide for the orderly and fair distribution of the bankrupt's property among his or her creditors on a *pari passu* basis. The *BIA* is intended to place all unsecured creditors upon an equal footing.[43]

Regarding section 96 specifically, in *Pitblado LLP v Houde*, the court held that: "[t]he legislative purpose of section 96 of the *BIA* is to ensure fair treatment of unsecured creditors following bankruptcy... The goal is to protect creditors against the debtor's improper efforts to prefer one or more creditors over others or to remove assets from his or her estate." [44] Similarly, in her article entitled "Fraudulent Preferences and Transfers at Undervalue: A Review of the Legal Developments under the Bankruptcy and Insolvency Act", Robyn Gurofsky described the purpose of section 96 as being "intended to create a framework for challenging transactions that have the effect of diminishing the value of the bankrupt's estate and limiting the ability of creditors to recover all or a portion of their debt from the estate."[45]

40 *R v Johnson*, 2003 SCC 46 (SCC).
41 *R c Lavigne*, 2006 SCC 10 (SCC).
42 *Re People's Department Stores Ltd (1992) Inc*, 2004 SCC 68 (SCC) at para 81 [*Peoples*].
43 *R v Fitzgibbon*, [1990] 1 SCR 1005 (SCC) at 1015; Hudson v Benallack, [1976] 2 SCR 168 (SCC) at 175-176.
44 *Pitblado LLP v Houde*, 2015 MBQB 85 (Man QB) at para 35.
45 Robyn Gurofsky, "Fraudulent Preferences and Transfers at Under-

2. The Principled "No Harm/No Benefit" Test

In "Transfers at Undervalue: New Wine in Old Wineskins", Professor Wood described an approach in which the discretion conferred in section 96 ought to be limited to circumstances in which (i) the creditors are not prejudiced or (ii) the recipient has not benefited; (the "no harm/no benefit" test).[46] As an approach to section 96 jurisprudence, the authors endorse and adopt the no harm/no benefit test and are indebted to Professor Wood for its articulation. In the authors' view, this approach gives effect to the modern principle of statutory interpretation of the use of the word "may" in section 96, and strikes an appropriate balance. It exemplifies a principled approach to the exercise of judicial discretion under section 96, and is consistent with the Ontario Court of Appeal's test in *Del Mastro*.[47] In the authors' view, this ought to be the guiding principle for section 96 cases.

Notably, the court already appears to be in some cases – at least implicitly – following the approach set out in the no harm/no benefit test. In *Royal Bank of Canada v Racher*, the Court applied the "no harm to creditors" approach, in holding that a transfer of exempt property – farm land in Alberta – could not be impeached under section 96 because the bankrupt estate would not benefit at all from the voiding of the transfer and returning property that is an exempt asset into the estate.[48] In the case of *Re WF Canada*, the Court applied the "no benefit to recipient" approach in deciding not to impeach a transaction in which a wife received no benefit from funds deposited into a joint bank account used solely by the other joint owner of the account, her husband.[49] The court did not impeach the

value: A Review of the Legal Developments under the Bankruptcy and Insolvency Act", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2011* (Toronto: Carswell, 2012) at 584-585.

46 Wood, *supra*, note 33 at 30-32.

47 *Del Mastro*, *supra* note 39.

48 *Royal Bank of Canada v Racher*, 2017 ABQB 181 (Alta QB) at paras 70-76 [*Racher*].

49 *Re WF Canada*, 2017 ONSC 3074 (Ont SCJ) at paras 43 and 47.

transaction as against the wife and cited with approval the "no benefit to recipient" principle set out in the earlier case of *Re Anderson*.[50]

VI. THE REASONABLE EXPECTATIONS OF SPOUSES AND VOLUNTARY COMMERCIAL CREDITORS REGARDING MATRIMONIAL HOMES

In *Qureshi*, counsel for Ms Qureshi framed the dispute between Ms Qureshi and Mercado as a "David versus Goliath" contest. On one side was Ms Qureshi, a spouse and mother without any meaningful income and whose one-half interest in the home was her sole asset. Opposite Ms Qureshi was Mercado, a large commercial financing institution.

The biblical allegory was fitting, admittedly so, by the authors who were Mercado's counsel. The same optics are equally applicable to other similar cases where financially vulnerable spouses, unfortunately, most often women, are pitted against commercial creditors of a bankrupt spouse. As noted by Janis Sarra and Susan B Boyd in "Competing Notions of Fairness: A Principled Approach to the Intersection of Insolvency Law and Family Property Law in Canada", most commercial creditors of individual bankrupts will be large financial institutions, credit card companies, and others.[51] These commercial creditors only become creditors on a voluntary basis, and extend credit on risk-adjusted terms acceptable to the creditor. Simply, voluntary commercial creditors already factor in and hedge against the risk of default and non-payment through various mechanisms, including credit assessment, charging interest – including charging higher interest in cases of greater default risk – and requiring guarantees.

Perhaps the greatest protection a voluntary commercial creditor can afford itself is taking security from the debtor

50 *Re Anderson*, 2012 BCSC 956 (BCSC [In Chambers]) at para 13.
51 Sarra & Boyd, *supra* note 20 at 209.

encumbering the debtor's asset, which would prioritize the loan over any unsecured claims. By way of example, a voluntary commercial creditor is free to require that their credit facility be secured against the matrimonial home of the borrower. However, in many circumstances, including in *Qureshi*, the lender elected not to do so. The decision not to require security is an evaluated business decision of the creditor, and factors in notions of market positioning and competitive advantage over other lenders. Of course, if a loan is to be secured against a matrimonial home, the non-borrower spouse would have to provide consent, and therefore be aware of the possible erosion of equity in the home and the creditor would be outside of the bankruptcy claim process.

It is in this context that the reasonable expectations of both commercial creditors and spouses in a bankruptcy are to be assessed. The authors posit that – in the absence of requiring security in a matrimonial home or conducting a title search – voluntary commercial creditors operate, or ought to operate, under the reasonable expectation that the matrimonial home of the borrower is likely, or at least possibly, jointly owned with the borrower's spouse. In fact, in many circumstances and as an asset-protection strategy, the matrimonial home will be solely owned by the non-borrower spouse – who generally is less exposed to business risk. In the case of 50/50 joint ownership, only half of the home's equity will enter into the estate of a bankrupt borrower. In the case of the matrimonial home being owned solely by the non-borrower spouse, the commercial creditor will have no recourse to any equity in the matrimonial home.

From the perspective of the non-borrower spouse, there appears to be a widely held, although incorrect, view that upon marital dissolution, the spouses will each get, in colloquial terms, "half the house". While this is not reflective of the operation of Ontario's equalization regime where, in general terms, each spouse is only entitled to half the increase in net family property, it does appear to be a widely held belief. In

fairness, it is most likely outside the reasonable expectations of a spouse that, regardless of actual titled ownership interest, the spouse may be disentitled to any equity in the home because of the existence of a non-secured creditor of the other spouse.

In fact, both the application judge and the Ontario Court of Appeal put stock into Ms Qureshi's mistaken belief that she jointly owned her family's first matrimonial home which we will discuss in detail in sections IX and X below. At first instance, Hainey J references the Qureshis' belief that she jointly owned the family's first matrimonial home, which "was registered in [Mr Qureshi's] name although both [Mr Qureshi] and [Ms Qureshi] believed that they each owned an equal share."[52]

The Court of Appeal upheld the application decision on other grounds, and while not as explicit on the issue of Ms Qureshi's belief about ownership of the first home, the appeal decision does refer to Hainey J's acceptance of Ms Qureshi's evidence that the Qureshis believed that they had an equal interest in their matrimonial homes.[53]

Therefore, the reasonable expectations of commercial voluntary lenders and non-borrower spouses have a convergence point – namely, that the entirety of the equity in a matrimonial home will not always be available to satisfy a judgment on an unsecured loan of the borrower spouse. The authors wish to be clear that the reasonable expectations of the parties would not, by itself, be persuasive to mandate a specific legal outcome. However, it is in the context of the discretion afforded under section 96, where the reasonable expectations of the parties gain significance.

52 *Qureshi* ONSC, *supra* note 9 at para 4.
53 *Qureshi* CA, *supra* note 9 at paras 7 and 24.

VII. PROPOSED EXPANSION REGARDING A TRANSFER OF AN INTEREST IN A MATRIMONIAL HOME TO A FINANCIALLY VULNERABLE SPOUSE

The authors propose that the no harm/no benefit test should be expanded to allow the court to refuse to impugn a transfer of an interest in a matrimonial home when the transferee spouse is otherwise financially vulnerable (the "*Qureshi* exemption"). The *Qureshi* exemption should, in the view of the authors, allow for a carve-out of up to half of the equity in the home, which effectively condones an impugned transfer at undervalue to the extent of a 50 percent interest to the recipient spouse. Within such a carve-out, a balance would be struck between, on the one hand, completing stripping all equity from a financially vulnerable spouse, weighed against a borrower, who has become insolvent, being able to put the entirety of the matrimonial home's equity outside the reach of creditors, as was attempted in *Re Lee*.[54] While a 50 percent carve out is, admittedly, not a scientific metric, it does represent a fair compromise and balanced approach. The balance being struck is two-fold: the balance between (1) family law and bankruptcy law regimes; and (2) voluntary commercial creditors and financially vulnerable spouses.

The proposed *Qureshi* exemption would give effect to the reasonable expectations of both the commercial voluntary creditor and the recipient spouse, given the preponderance of matrimonial homes being jointly owned. Critically, it would help alleviate and counter the feminization of poverty, without creating undue burdens on commercial creditors, who could simply require that credit facilities be secured against the matrimonial home or, in failing to do so, recognize that they may not have recourse to the entire equity in a matrimonial home. This is fitting, as commercial creditors, who are more sophisticated and, critically, voluntary creditors, can require security in instances deemed appropriate, at the lender's

54 *Re Paul W Lee, a Bankrupt*, 2017 ONSC 388 (Ont SCJ) [*Re Lee*].

discretion and as part of their business decision on whether and on what terms to extend credit. By contrast, impoverished spouses, who involuntarily become creditors of bankrupt spouses, do not have the same protectionary measures available.

Further weighing in favour of such a carve-out is the disproportionate impact that the absence of such a carve-out would have on the transferee spouse and the commercial creditors. For the impecunious transferee spouse, being deprived of half the equity in the home is financially devastating. On the other hand, commercial creditors have expertise in spreading risk, and importantly, most loans do not go into default, and of those that do, creditors are often able to enforce and collect upon the loan. In reality, the possibility of some loans not being repaid in full is an expected, and hedged, part of doing business.

Of course, not all transferee spouses would be suitable candidates for the *Qureshi* exemption, and the courts would need to assess on a case-by-case basis. Prime candidates would have some or all of the following characteristics: (a) dependent children; (b) no other assets, or no other significant assets outside the matrimonial home; (c) no or little income; and (d) a limited ability to earn income.

The authors note that while Hainey J did not make explicit reference to such a carve-out in *Qureshi* ONSC, a similar motivation appears to have influenced his decision. One of the factors cited by Hainey J in ruling in Ms Qureshi's favour was "[t]he fact that Hafsa and her children have no other guaranteed form of financial support and that [the second home] was her only asset which she needs to carry on an independent life with her children".[55]

On this point, the authors are reminded of the obiter of Iacobucci J in the Supreme Court of Canada case of *Marzetti v Marzetti*, in which he approvingly cited the earlier Supreme

55 *Qureshi* ONSC, *supra* note 9 at para 29.

Court of Canada case of *Moge*, for the statement that: "...there is no doubt that divorce and its economic effects are playing a role in the feminization of poverty... A statutory explanation which might help defeat this role is to be preferred over one which does not."[56] The proposed *Qureshi* exemption does, in the author's view, "help defeat" the role that marital dissolution plays in the feminization of poverty.

VIII. SECTION 96 JURISPRUDENCE PRIOR TO *QURESHI*

Prior to the *Qureshi* case, there were a number of judicial decisions in which the court voided a transfer at undervalue of a matrimonial home, or alternatively ordered a recipient to pay funds to the estate.[57]

In the Ontario case of *Re Lee*, Mr Lee transferred his 50 percent interest in his family's matrimonial home to his wife, Ms Lee, for nominal consideration less than one year before making a consumer proposal.[58] This transfer at undervalue gave Ms Lee full ownership of their entire home. Justice Myers of the Ontario Superior Court held that the relief sought on a section 96 application should be granted "in all but the most exceptional of circumstances".[59] Further, when the transfer at undervalue involves a spouse within one year of bankruptcy, "judgment should be nearly automatic".[60] On this issue, Myers J held:

> The ultimate purpose of the section [96 of the *BIA*] is to ensure that the property of a bankrupt is treated fairly and justly balancing the rights of all stakeholders...Section 96 imposes a strict test to remedy non-arm's length transfers among family members... on proof of the requisite facts, relief should be granted at the amount calculated in accordance with [the] statute, in all but the most exceptional circumstances. This is

56 *Marzetti v Marzetti*, [1994] 2 SCR 765, 1994 CarswellAlta 346 (SCC) at 801, and *Moge*, *supra* note 3 at 853-854.

57 *Racher*, *supra* note 48; *Re Rehman*, 2015 ONSC 188 (Ont SCJ [Commercial List]); *Re Lee*, supra note 54.

58 *Supra* note 54.

59 *Re Lee, supra* note 54 at para 16.

60 *Ibid*.

> especially so in the case of a non-arm's length transaction that is attacked within one year. Section 96 sets out different rules for different types of transactions. For a non-arm's length transaction that is attacked within one year, the transaction may be avoided without any consideration or proof of an intention to defraud, to prefer, or any other fact other than the simple existence of the transaction at an undervalue. In my view, judgment should be nearly automatic in such cases.[61]

In the authors' review of the section 96 jurisprudence prior to *Qureshi*, the courts did not consider the financial position of the recipient spouse, often the wife, who is separated from the transferor husband, nor the economic impact that a section 96 order might have on the recipient's financial position personally or as head of a single parent household. Historically, bankruptcy and family law regimes have served different purposes. The *BIA* has always been intended to balance the rights of all unsecured creditors, including a separated spouse, while it has traditionally been family law legislation that is aimed at the sharing of financial responsibilities and family wealth between former spouses upon the breakdown of the marriage. As stated by Ann Poirier in her 2008 article entitled "The Feminization of Poverty, A Question of Balance", "[i]nsolvency legislation should not be used to equalize the financial position of spouses resulting from separation. This is the role of matrimonial legislation."[62] As earlier discussed, section 96 of the *BIA* – which was enacted after Ms Poirier's article – just might be an exception, in appropriate circumstances.

IX. THE QURESHI APPLICATION JUDGE'S HOLDING AND INTERPRETATION OF THE EXERCISE OF DISCRETION

The facts in the *Qureshi* case are straightforward and relatively non-controversial, with an agreed statement of

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61 *Re Lee*, *supra* note 54 at para 16.

62 Ann Poirier, "The Feminization of Poverty, A Question of Balance" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) at 469.

facts being filed at the application. Mr Qureshi alone owned a home, which was registered solely in his name, but was used by Mr and Ms Qureshi as their matrimonial home. Mr Qureshi sold this home, with Ms Qureshi's consent, and the closing of this sale transaction was 30 June 2015.

Some four months earlier, in February of 2015, Ms Qureshi signed an agreement of purchase and sale ("property acquisition agreement") to acquire a new family home on Davina Circle on her and her husband's behalf. The closings of the sale of Mr Qureshi's home and the purchase of Mr and Ms Qureshi's Davina property under the property acquisition agreement took place on the same day, being 30 June 2015, when title to the Davina property was transferred from the seller to Mr and Ms Qureshi as joint tenants.

Ms Qureshi did not directly contribute any funds towards the purchase price of the Davina property – while there was some controversy about an $89,000 contribution to the purchase price by Ms Qureshi's parents, nothing turns on this issue. The entire purchase price was paid for by Mr Qureshi, who was petitioned into bankruptcy less than one year later. Mercado, a creditor of Mr Qureshi, obtained leave pursuant to section 38 of the *BIA* to bring a section 96 application.

Mercado alleged that Mr Qureshi effected a transfer at undervalue less than twelve months before his bankruptcy when he used his own funds to pay for Ms Qureshi's purchase of her 50 percent interest in the Davina property which had the effect of depleting his bankrupt estate of approximately $360,000.

Justice Hainey of the Ontario Superior Court dismissed the transfer at undervalue application by exercising the judicial discretion afforded to him by the use of the word *may* in section 96(1) of the *BIA* transfer at undervalue. In doing so he relied on equitable findings of good faith of Mr and Ms Qureshi, no intention to defeat creditors, and non-monetary contributions to the family unit by Ms Qureshi, who appeared to be an

innocent spouse. Justice Hainey based the exercise of this discretion on case law interpreting the now repealed section 100 of the *BIA*.[63] In the authors' respectful view, while Hainey J may have ultimately arrived at the correct result, the underlying analysis was flawed.

X. THE COURT OF APPEAL'S HOLDING IN QURESHI – A MISSED OPPORTUNITY TO ANALYZE SECTION 96 DISCRETION

Mercado appealed the application decision to the Ontario Court of Appeal on various grounds.[64] One of the core grounds of appeal was that the cases decided before the enactment of section 96 were inapplicable to the interpretation of section 96, as those prior cases examined the extent of judicial discretion afforded to a judge by the use of the word "may" in the now repealed section 100 of the *BIA*. Counsel for Mercado, being the authors herein, submitted that this is not only because the comparatively recent section 96 is contextually different from the repealed section 100, but also that section 96 incorporates the very concepts of intention and fair value into certain subsections of its text, but not others, which makes those equitable factors statutory imperatives in some circumstances, but precluded as relevant factors in others. As a result, it was argued that the court ought not use intention and fair value as equitable factors in interpreting subsection 96(1)(b) where such concepts were specifically omitted by Parliament.

Additionally, Mercado's counsel submitted that the discretion given to a judge under section 96 of the *BIA*, by the use of the word "may", is not a broad and expansive discretion but rather, is a limited discretion that must be exercised in a principled manner, and in compliance with the legislative text in

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63 *Standard Trust Co Ltd v Standard Trust Co*, 1995 CanLII 3508 (Ont CA) at 31; see also *Peoples*, *supra* note 42 at paras 81-82.

64 The authors note that there were various appeal grounds raised in the appellant's factum which are not referenced in *Qureshi* CA.

order to promote the legislative objects of section 96 and of the *BIA* generally.

The Court of Appeal dismissed the appeal on other grounds, as described below, and in doing so failed to provide any guidance on the extent of discretion afforded to a judge under section 96. The question of whether a judge hearing a section 96 transfer at undervalue matter has as a broad and expansive discretion or alternatively, is limited to the exercise of her or his discretion in a principled manner, will have to be addressed by other courts in future cases, either in accordance with the no harm/no benefit test the *Qureshi* exemption, or otherwise. The authors suggest that this sidestepping of any meaningful section 96 analysis was a missed opportunity for the Court of Appeal to provide much-needed clarity and direction.

The reader will recall that the timing of a transfer of undervalue relates to the date of "disposition" of the asset between the transferor and transferee of the asset, and further, that a transfer at undervalue between non-arm's length's parties within one year of bankruptcy has no "intention test". The Court of Appeal held that the date of the impugned disposition was, in fact, the date that the property acquisition agreement for the second home was executed, rather than the closing date of the transaction, being the date that the closing funds were paid, and title transferred jointly to the Qureshis from the vendor. Parenthetically, the authors note that Ms Qureshi's counsel never submitted, either at application or on appeal, that the disposition date was the date of entering into the property acquisition agreement, rather than the closing date nor, for that matter, did the Court of Appeal panel itself raise the issue during the hearing of the appeal.

While Mercado elected not to seek leave to appeal to the Supreme Court of Canada, it was, in the authors' respectful view, incorrectly held that the date of disposition of the transfer at undervalue from Mr Qureshi to Ms Qureshi was the date on which they entered into the property acquisition agreement

because no asset was disposed of by Mr Qureshi on that date. The authors find it difficult to comprehend the judicial stretch required to find that the date of the acquisition of an asset was in fact the date on which that asset was disposed of from the bankrupt, Mr Qureshi, to his spouse. From the authors' review of the case law at the time of writing this paper, there has been only one subsequent decision citing the Court of Appeal's decision in *Qureshi* CA. In *1085372 Ontario Limited v Kulawick*, the plaintiff sought to set aside a transfer of shares in a company, and, as in *Qureshi*, the timing of the transfer of shares was critical. On the issue of the timing of the impugned disposition, Penny J held:

> [63] The relevant date is the date the loan agreement, promissory note and share pledge agreement were executed; that is, the end of March 2011. At the end of March, the contract was made: the obligation to advance funds became operative, as did the obligation to repay or, upon failure of repayment, to forfeit Mr. Shumak's Linus shares. The "date of transfer" is the date on which the agreement entitling Mr. Kulawick to the transfer was signed, i.e., the date of the Transaction. The completion, in law, relates back to the date of the contract, *Mercado Capital Corporation v. Qureshi*, 2018 ONCA 711, at paras 29-33.
>
> [64] Even if I am wrong in this conclusion, the only other relevant date is clearly December 20, 2011. This the date upon which the shares were actually transferred by right of forfeiture upon non-payment of the loan.
>
> [65] Either of these dates, March 30, 2011 or December 20, 2011, occurred more than one year before Mr. Shumak's assignment in bankruptcy. Accordingly, the Transaction is, in either case, outside the reach of s. 96(1) and cannot, therefore, be set aside under the *BIA*.[65]

Although it may be wishful thinking on behalf of the authors, it does appear to the authors that there is a tone of incredulity and questioning about the correctness of the Court of Appeal's holding regarding the timing of the disposition, when Penny J writes "even if I am wrong in this conclusion [by following the Court of Appeal's ratio in *Qureshi* CA], the only other relevant date is clearly the [date of the shares were transferred]".[66]

65 *1085372 Ontario Limited v Kulawick*, 2019 ONSC 2344 (Ont SCJ [Commercial List]) at paras 63-65.

XI. POTENTIAL RESOLUTION IN FAMILY LAW RATHER THAN INSOLVENCY LAW

While section 96 of the *BIA* certainly grants the court discretion in circumstances of a transfer of an interest in a matrimonial home, there is an alternative avenue which may be pursued in family law court for, effectively, the same relief. Specifically, section 9 of Ontario's *FLA*, provides the court with the ability to transfer or vest property of one spouse in the other.[67] This is an additional and distinct remedy from the usual equalization regime, which does not transfer ownership in assets, but rather makes one spouse an unsecured creditor of the other.

This concept was canvassed at some length in *Thibodeau*, where Blair JA described the role and effect of section 9(1) of the *FLA*:

> Given its powers under s. 9(1) of the *Family Law Act*, the court *can* impose a legal relationship between the spouses other than a debtor-creditor relationship pursuant to the equalization process, if the record justifies such exceptional and intrusive action. The court can order the transfer to or vesting of property in one of the spouses. It can order the creation of trusts of property or a charge against property in favour of one spouse with respect to the other spouse's property.[68]

In *Thibodeau*, Blair JA specifically cautioned that the granting of proprietary rights under section 9(1) should only be done in limited circumstances:

> It bears highlighting here that the enhanced remedies available under s. 9(1) of the *Family Law Act* give rise to *proprietary* rights in the spouse benefitting from the order. They are therefore exceptions in an equalization *payment* regime and give rights that may affect third parties of whom the trier may be unaware and who are not represented in the proceedings. It follows, in my view, that these remedies should not be imposed indiscriminately or routinely, and only if there is a real need and there are sound reasons on the record for doing so.[69]

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66 *Ibid* at para 64.
67 *FLA*, *supra* note 18, s 9(1)(d)(i).
68 *Thibodeau, supra* note 26 at para 39.
69 *Ibid* at para 40.

The authors posit that the circumstances of a financially vulnerable spouse, who would otherwise be deprived of all equity in the matrimonial home, is just such a case that would warrant relief under section 9(1) of the *FLA*. These would constitute circumstances in which "there is a real need and...sound reasons" for granting a proprietary interest to the financially vulnerable spouse.[70]

Importantly, family law judges are undoubtedly better positioned and have developed a more specialized expertise in the subject area than judges hearing insolvency cases, and would therefore be the preferable decisionmaker.

However, as this family law remedy is available only in cases of marital dissolution, it will not be applicable to all transfers of an interest in a matrimonial home being judicially scrutinized under section 96 of the *BIA*. In cases where the questioned transfer is between spouses who are not separated or divorced, the court's analysis and jurisdiction will continue to remain under section 96.

Additionally, the authors recognize that the mechanics and practicalities of such an approach need to be finessed and more fulsomely articulated, which is beyond the scope of this paper. For instance, this approach would require the staying of the bankruptcy proceeding to allow for the family law proceeding to be adjudicated and would require coordination between family law and bankruptcy law courts in jurisdictions in which they are distinct. Issues of notice and standing of non-spousal creditors in the *FLA* proceeding would also need to be addressed.

XII. CONCLUSION

Bankruptcy and family law regimes have historically been viewed as having separate – and even antagonistic – objectives. The social phenomenon of the feminization of poverty has been aggravated by marital dissolution, and the *BIA* has been used as

70 *Ibid.*

a shield by ex-spouses, predominantly male, to the detriment of their predominantly female financially vulnerable ex-spouses. However, the principled judicial application of the discretion inherent in section 96 of the *BIA* can – in appropriate circumstances – operate to ameliorate, rather than aggravate, feminization of poverty upon marital dissolution. This desirable outcome can be effected by the court's exercise of judicial discretion in adopting and applying the *Qureshi* exemption, to allow for otherwise financially vulnerable ex-spouses to retain a 50 percent interest in a matrimonial home.