

**BALFOUR & MANSON ANNUAL FAMILY LAW CONFERENCE**  
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**HELP, MY EX HAS BEEN SEQUESTERED!**

**Introduction**

[1] It was only a matter of time before recession meant that sequestration had an impact on financial provision. There now seem to be a number of cases, and some perplexity about what to do with them. There are few reported authorities, but more judicial decisions may make their appearance before too long. In the meantime this is an attempt to raise some of the issues for discussion. The approach is of necessity tentative as the answers are by no means certain.

**Bankruptcy (Scotland) Act 1985**

[2] The Bankruptcy (Scotland) Act 1985 is 'the other 1985 Act'. As with much modern legislation it has been amended and made more complicated. There is a clear account of the relevant principles in *McBryde on Bankruptcy (2nd Edition)*, but this pre-dates the additional detail added by subsequent legislation. There is therefore no substitute for reading the Act. By way of generalisation (but subject to some specific exceptions) the principles are:

- The estate of the sequestrated debtor vests in the permanent trustee for the benefit of the creditors (section 31(1)). The debtor is divested. His property no longer belongs to him.
- While sequestrated the debtor cannot acquire property. Any estate passing to the debtor between sequestration and discharge vests in his trustee (section 32(6)).
- The debtor retains his income (other than income arising from the estate vested in the trustee) for his own aliment and to meet "relevant obligations" including obligations to pay aliment or periodical allowance and child support (section 32(2) and (6)). The trustee may apply for excess income to be paid to him.
- Pensions are usually protected as the pension fund does not generally vest in the trustee.
- There are some protections for the matrimonial home.
- A debtor is automatically discharged after a year (section 54) but the trustee retains and administers the vested estate. Discharge will not generally result in property returning to the debtor, unless it is not required to meet debts.
- On discharge the debtor will be discharged from the debts and obligations for which he was liable at the date of sequestration, but not obligations of an alimentary nature accruing after that date (section 55).

**Ranking as an ordinary creditor for payment of a capital sum**

[3] If a debtor is ordered to pay a capital sum and is then sequestrated before payment is made, matters are relatively simple. The former spouse or civil partner will have to apply to

the debtor's trustee and will rank alongside other ordinary creditors for payment of a dividend. If the estate is insufficient to pay all the ordinary debts then only part of the capital sum will be paid.

### **Enforcing a transfer of property order granted before sequestration**

[4] An order that requires the debtor to transfer property, which has not been complied with before sequestration, may be a different proposition. On the one hand the trustee takes the debtor's property *tantum et tale*. He has no greater rights than the debtor. That would mean he had no right to retain the property as against the party in whose favour the transfer of property order had been made. On the other hand if there is a question of title, and title has not passed, the debtor can no longer pass title (*Burnett's Tr v Grainger* 2004 SC (HL) 19). This is a grey area where a decision may in the future be required.

### **The trustee's right to ask for recall of orders for financial provision**

[5] Pressing on with a claim against an insolvent party may not however yield any advantage. The trustee can apply for recall of an order for payment of a capital sum, or transfer of property order, or pension-sharing order, if the debtor was absolutely insolvent when the order was made, or the order rendered the debtor absolutely insolvent and within five years the debtor was sequestrated (Bankruptcy (Scotland) Act 1985, section 35). The court must have regard to all the circumstances and may order repayment of money, return of property transferred or, if the property has been sold, payment to the trustee of all or part of the proceeds of sale. Presumably however the trustee will only be interested in recalling a pension-sharing order if he is going to ask for recovery of excessive contributions. These provisions in relation to orders reflect similar provisions applying to agreements which may be challenged as unfair preferences (section 36).

### **Continuing a claim for a capital sum**

[6] If a claim has been made and while the cause is pending one of the parties is sequestrated, what happens? This point was considered by a sheriff and then the sheriff principal of North Strathclyde in *Crichton's Trustee v Crichton* 1999 SLT (Sh Ct) 113. In that case the husband made a claim for a capital sum. Matters did not proceed particularly rapidly and four years into the action the wife was sequestrated. The husband sought to have his claim rank as a debt on the wife's estate. The trustee disputed the claim. Matters were serious enough for the dispute to be litigated before the sheriff principal by senior counsel (Peoples QC for the husband and Drummond Young QC for the trustee).

[7] The case is authority for the proposition that a claim for financial provision on divorce is a contingent debt. The claim is contingent upon decree of divorce being granted and a capital sum being awarded. It is however a debt that is capable of existing at the date of the

sequestration. The creditor may apply to the trustee, or if there is no trustee, to the sheriff for a value to be put on the debt, and that will be the amount that will rank in the sequestration. In *Crighton* the question of financial provision was determined in the course of the divorce proceedings. The sheriff granted decree of divorce and ordered payment of a capital sum of £157,000. The husband was therefore entitled to rank for this sum. The trustee did the other creditors no favours when he decided not to enter an appearance in the divorce proceedings. He failed to take advantage of the opportunity to contest the amount of the capital sum.

[8] So far so good, but if a claim for financial provision is a contingent debt, then it must be pursued. If the claim is not made to the trustee, then it will be lost, because when the debtor is discharged, he or she is discharged from all debts and obligations that exist at the date of the sequestration (Bankruptcy (Scotland) Act 1995, section 55, see also *Mitchell v Scott* (1881) 8 R 875 *per* Lord President Inglis at p 879). The risk of losing any right to claim is a serious consideration.

[9] Section 8(2)(b) of the Family Law (Scotland) Act 1985 requires financial provision to be reasonable having regard to a party's resources. If the potential payer is sequestrated then he or she will have very limited resources. He or she will have been divested of assets on sequestration, but the award will rank with the debts due to other creditors. If the capital sum is limited having regard to resources but has to be claimed in the sequestration, then it may be limited again as the trustee may only be able to pay a dividend. There is much to be said for at least section 9(1)(a) to be given full effect and not limited with reference to resources, so that the payee is not disadvantaged when it comes to ranking his or her claim with other debts.

### **Making a claim for a capital sum**

[10] The loss of the right to claim depends on whether there is a 'debt' at the date of the sequestration. This begs the question of when a claim for financial provision can be said to come into existence. According to *Crighton v Crighton's Trustee* a contingent debt is certainly in existence once divorce proceedings with a claim for financial provision have commenced. There is a suggestion in the case that the claim may arise from separation, as the obligation to share the net value of matrimonial property is usually calculated by reference to the last date of cohabitation. If that were correct then if a spouse or civil partner is sequestrated after separation a claim must be made or it will be lost. This is hardly an auspicious time to make a claim as payment will be limited to what can be secured from the trustee in the course of the sequestration. On the other hand the matrimonial property (other than pension rights) will have disappeared into the hands of the trustee and it may be difficult to maintain a claim at a later date, at least as regards sharing the net value of the matrimonial property, other than value referable to pensions.

[11] A claim for financial provision is not however entirely about sharing the net value of the matrimonial property. That may be the starting point in most cases, but it is not the only basis for a claim. There are claims that are logically capable of being made and met after sequestration, in particular claims that are alimentary in nature (see below). That does not however wholly explain the case of *Shand v Shand* 1994 SLT 387 where Lord Coulsfield awarded a capital sum payable by a sequestrated debtor based on the value of a pension policy that was not included in the estate passing to the trustee, and postponed payment for two years on the basis that this would be after the end of the sequestration. The case report does not indicate there was any discussion of the implications of the sequestration, other than to deprive the defender of resources.

### **Seeking an order for transfer of property**

[12] Matters become more complicated if the claim for financial provision includes a crave or conclusion for a transfer of property order. The spouse or civil partner cannot be ordained to transfer property as he or she has been divested of the property. The property is vested in the trustee. The same applies to any property acquired after the date of sequestration and before discharge. If the debtor were to attempt to deal with his or her estate this would be of no effect in a question with the permanent trustee (section 32(8)). Can the trustee be made to part with the property? The trustee is not a party to the marriage (or civil partnership). It is difficult to see how the Family Law (Scotland) Act 1985 could be interpreted so as to allow a claim to be made to require the permanent trustee to part with property vested in him for the benefit of the creditors as a whole. In any event section 15(1) prevents a transfer or property order being made if the consent of a third party is required. A transfer of property order is likely to be ruled incompetent.

[13] There is in some quarters a view that the position might be saved for a spouse or civil partner by seeking some kind of incidental order requiring the trustee to pass property to the person claiming financial provision. It is difficult to see how the Family Law (Scotland) Act 1985 allows an incidental order to be granted against the interest of a third party, particularly when section 15(3) prevents this happening.

[14] On the other hand, if a debtor has organised his own sequestration in order to defeat the occupancy rights in a matrimonial home of a non-entitled spouse, the non-entitled person may seek recall of the sequestration, or an order to protect his or her occupancy rights (Bankruptcy (Scotland) Act 1985, section 41). The trustee should inform a non-entitled spouse about the sequestration within 14 days of the sequestration so that the spouse may avail himself or herself of this remedy. If a debtor has entered into a protected trust deed that is likely to have the effect of defeating in whole or in part a claim for financial provision, then there may be scope to ask for the trust deed to be set aside under section 18 of the Family Law (Scotland) Act 1985.

[15] Having said that a debtor is divested of his property on sequestration, he may just receive property back. If a surplus remains after the payment of debts, that surplus will be paid to the debtor. The surplus may exist in the form of estate, which will be returned. This is sometimes referred to as the debtor's radical right to the estate. This was reinforced by the Bankruptcy and Diligence (Scotland) Act 2007 as regards the debtor's home. If the trustee has taken no action in relation to the property then at the end of three years from the date of sequestration the debtor is reinvested in the property. This may not assist a party trying to claim a transfer of property order, unless the debtor actually has the property back.

### **Seeking a pension-sharing order**

[16] Sequestration will not generally affect a pension. In the case of occupational pensions the assets of the fund will not vest in the trustee (ie section 31(1) does not apply). Military pensions are expressly excepted from being absorbed into a sequestration (SI 1983/883 para 63A, as amended by SI 1993/598). Tax-approved pensions and potentially some unapproved pensions are excluded by the Welfare Reform and Pensions Act 1999, sections 11 and 12, subject to recovery of excessive contributions under the Bankruptcy (Scotland) Act 1985, section 36A.

[17] A pension-sharing order operates on the fund, not the debtor. In principle it would appear that a pension-sharing order may be made despite the debtor's sequestration. Such a claim could be affected if the pension fund has been swollen by excessive contributions as the trustee could apply for these to be recovered into the debtor's estate. Short of this, if a pension-sharing order can be justified by the principles in section 9, the court should be able to make an order notwithstanding sequestration.

### **Seeking aliment or a payment of an alimentary nature**

[18] Aliment or periodical allowance due on the date of the sequestration may be claimed from the trustee as a debt, provided the amount has been quantified by decree or legally binding obligation. The amount paid out by the trustee will depend on the sum available to distribute between the ordinary creditors. Aliment or periodical allowance due after sequestration cannot be claimed from the trustee (Bankruptcy (Scotland) Act 1985, section 22(9) and sch 1 para 2), but remains payable by the debtor, whose income is available to him to make the necessary payments (section 32(3)). When the debtor is discharged this does not discharge an obligation to pay aliment, or any sum of an alimentary nature or any periodical allowance that could not be claimed from the trustee. Aliment, a payment of an alimentary nature and payments due as periodical allowance remain payable by the debtor.

[19] In *Lessani v Lessani* 2007 Fam LR 81 divorce proceedings were commenced in 1997. The defender was sequestrated in 2003 and decree of divorce granted in 2004. The sheriff awarded a capital sum to the wife pursuer. The defender appealed. The pursuer cross

appealed. The appeal was heard in 2006/2007, by which time the husband had been discharged. The sheriff principal of Glasgow and Strathkelvin accepted that part of the award of a capital sum was an award of an alimentary nature. This part had been made under section 9(1)(c) of the Family Law (Scotland) Act 1985 and was calculated on the basis of the income required by a pursuer until her son attained the age of 16. The defender was not discharged in respect of this part of the award. He also remained liable for interim aliment pending the disposal of the appeal. The wife was able to claim a dividend from the trustee in respect of the major part of the capital sum but the formerly sequestrated husband was left to pay two significant debts (the section 9(1)(c) award and the post-sequestration interim aliment).

[20] A sequestrated debtor retains his income, other than income arising from estate vested in the trustee which the trustee will retain. The debtor may continue to receive the income. "Income" may include a pension lump sum. If a debtor has income that the trustee considers excessive, the trustee may apply to the sheriff for an order that the excess be paid over to the trustee (section 32(2)). The debtor must be allowed enough for his own aliment and to meet his "relevant obligations", which include aliment or periodical allowance for a former wife or civil partner and any obligation to pay child support (section 32(3)). If the debtor saves his income or uses it to acquire assets then *McBryde* suggests that this will remain his property.

### **The matrimonial home**

[21] The Bankruptcy (Scotland) Act 1985 does contain some protection in respect of a family home. Section 40 imposes constraints on a trustee who proposes to sell a family home. The trustee must obtain the consent of the debtor's spouse or civil partner and where this does not apply but the home is occupied by the debtor with a child of the family, then the consent of the debtor. In the absence of consent the trustee must obtain the authority of the sheriff before he can sell the house. The sheriff may refuse the application for authority to sell or may postpone the granting of the application for a period of up to three years. The same considerations apply should the trustee want to commence an action for division and sale or seek vacant possession of the debtor's family home. There is some case law on section 40 (eg *Salmon's Tr v Salmon* 1989 SLT (Sh Ct) 49; *Macleod's Tr v Macleod* 2007 Hous LR 34). In exceptional circumstances authority to see has been refused (*Gourlay's Tr Petr* 1995 SLT (SH Ct) 7. If authority to sell is granted then the trustee may sell. The section cannot be further relied upon to resist ejection (*Blackburn v Cowie* 2008 SC 504). The section only applies to the trustee, not to sale by a secured creditor.

[22] In addition a non-entitled spouse may seek orders under section 41 of the Bankruptcy (Scotland) Act 1985 (see paragraph [14] above).

### **Claim by the debtor**

[23] As a general principal, while sequestrated the debtor cannot acquire property for himself. Any estate, wherever situated, which is acquired by the debtor after sequestration and before discharge vests in the trustee (section 32(6)). The debtor is under a duty to notify the permanent trustee of any substantial change in his or her financial circumstances. Failure to do so is a criminal offence (section 32(7)). If the debtor is awarded financial provision (other than 'income') while sequestrated this will pass to his trustee.

[24] But can the trustee insist that he pursues a claim? If a contingent claim on the estate has to be pursued or is lost, what happens to a claim by the debtor. There is no case law. A non-vested contingent interest vests in the trustee (section 31(5)), but the Bankruptcy and Diligence (Scotland) Act 2007, section 29 inserted section 31(5A) to restore any non-vested contingent interest to the debtor on his discharge. According to the explanatory notes this was to deal with situations where the debtor was a beneficiary under the will of a testator who was still alive at the date of the discharge. Any asset inherited after discharge will now pass to the discharged debtor. It may be that financial provision awarded to a former debtor falls to be treated in the same way. It would mean that a debtor who was able to hang on until after his discharge, before divorce is granted would be entitled to the proceeds of his claim for financial provision.

[25] This could be viewed as somewhat unfair on the other party, whose claim is profoundly affected by the sequestration. He or she will have to make a claim in the sequestration to avoid the right to do so being lost and then may receive only a dividend, while the debtor may be in a position to enjoy the full value of a claim that is concluded after divorce?

### **Conclusion**

[26] It is difficult to resist the conclusion that it is time for a full review of the relationship between sequestration and financial provision on divorce. There is piecemeal provision that is becoming more illogical and incoherent as the law develops and becomes more complex. The issues are too important to be left in the current state of uncertainty.

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