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Bankruptcy Act Injustices Can't be Wished Away: SCC

A discharge under the *Bankruptcy and Insolvency Act* operates to release a bankrupt from all non-exempt claims provable in bankruptcy, including an equalization claim under *The Family Property Act*, according to the Supreme Court of Canada in [Schreyer v. Schreyer](#), 2011 SCC 35. Expressing similar misgivings, the court confirmed the Manitoba Court of Appeal decision denying a Manitoba wife recovery of an equalization claim against her bankrupt husband, who retained ownership of the family farm after his discharge because it was exempt from seizure under *The Judgments Act*. The court rejected the argument that it should treat the wife's equalization as a hybrid claim with a proprietary remedy attached to it, finding that to do so would conflate the division of property and equalization models and interfere with the province's policy choice not to give former spouses a proprietary interest in the family property. Acknowledging the limitations of remedies such as applying to suspend the discharge or addressing the inequity through an enhanced spousal support award, the court urged Parliament to amend the BIA "to ensure that the principles of bankruptcy law and family law are compatible rather than being at cross-purposes." (para.40)

The following articles comment on the decision:

- [SCC: Parliament must revisit bankruptcy rules upon divorce](#), Legal Feeds blog
- [Schreyer Case Comment](#), July 26, 2011

Homestead Rights Cease On Divorce and Don't Affect Bankruptcy Distribution: MBCA

The Court of Appeal has decided another case involving the intersection of bankruptcy and family law. [*Keith G. Collins Ltd. v. Coutu*](#), 2011 MBCA 52 involved a dispute between a trustee in bankruptcy and a now-divorced wife of a bankrupt over the distribution of the proceeds of sale of the one-time marital home. The court confirmed that the bankrupt's agreement to transfer his interest in the marital home to his wife in lieu of paying spousal support was void and unenforceable because it was made after his assignment into bankruptcy. It further found that the judge erred by factoring in homestead rights when distributing the sale proceeds and by crediting the wife for tax and mortgage interest payments when she had not paid occupation rent.

Contempt Motions in Family Matters: MBCA

The Court of Appeal deleted a finding of contempt and an award of solicitor and client costs in the amount of \$5000.00 against the husband in [*Campbell v. Campbell*](#), 2011 MBCA 61. The court found that the motion judge misapprehended material evidence fundamental to the finding of contempt and should have called for *viva voce* evidence to address conflicting affidavit evidence concerning the husband's alleged default. The court cautioned against the unrestrained use of civil contempt orders, likening them to a "sledge hammer" that need not be resorted to where other orders may suffice. (para.48)

Contact With Both Parents Not an Absolute: MBCA

In [*Delichte v. Rogers*](#), 2011 MBCA 50 the Court of Appeal reversed a lower court decision denying a custodial mother's application to allow her to relocate with the children to pursue post-secondary education in California. The court found that by focussing on the *status quo* as being in the best interests of the children the trial judge missed a relevant part of the inquiry, assessing how maximum contact could be achieved in a scenario where the mother was allowed to relocate. In addition,

the trial judge misapprehended the evidence by giving undue negative weight to the mother's current financial situation and not affording her views the respect that they were owed. He also erred in requiring her to satisfy an onus that the move was in the best interests of the children as opposed to conducting an assessment of the relative benefits and detriments of the move in order to reach a determination as to where their best interests lay. (para. 27)

No Unjust Enrichment in Farmland Division: MBQB

The court has made a final order in [*Stanze v. Stanze*](#), 2011 MBQB 185, the case involving a wife's claim for an interest in her husband's half-share of the proceeds from the sale of farmland he owned jointly with his German father. The wife sought relief in equity because the jointly-held land had increased significantly in value in the four years between the couple's separation and the sale of the land. The court found that the husband's half interest in the land clearly constituted an asset within the meaning of *The Family Property Act* and would be included in the family property accounting, but that the wife did not prove unjust enrichment and had therefore failed to establish a right to share in the increased value of that asset subsequent to the parties' separation.

Retroactive Support Adjustment Necessary: MBQB

Close examination of the complicated financial and other circumstances of

the parties in [*J.S.G. v. M.F.G.*](#), 2011 MBQB 177 resulted in a final order requiring the husband to pay considerable arrears despite his compliance with all interim child and spousal support orders. The court rejected the husband's argument that retroactive adjustments prejudice those who comply with interim orders, finding that "...common sense dictates that interim child support payments can and should be adjusted at trial when a paying parent's financial circumstances are made clear" (para 19). The parties shared joint custody of their two children, but the wife had sole custody of the oldest child to whom the husband stood *in loco parentis*. Given the gross disparity in the circumstances of each parent's household, the court declined to take a set off approach to child support. It ordered instead that the husband pay full table support for all three children, both retroactively and prospectively. Spousal support was also adjusted.

Recent Family Division Decisions

[*Thiessen v. Thiessen*](#), 2011 MBQB 167 - in the absence of proper financial disclosure the court orders the father to continue to pay child support above the guideline amount as he had done in the past. The court also took into account that, although the husband's reported earnings from self-employment were below minimum wage, he appeared, given his life style choices, to be able to afford to pay more.

[*Kristjanson v. Kristjanson*](#), 2011 MBQB 178 -the court finds it would not be in the best interests of the children to vary a joint custody agreement to give primary care and control to the mother even though there was clear evidence that the relationship between two daughters and their father had broken down and they were reluctant to spend time with him. The court also declined to vary the parties' child support agreement (which was premised on equal time) and ordered that the father should continue to pay an offset amount.

[*D.S. v. C.S.*](#), 2011 MBQB 184 and [*Drake v Emmerson*](#), 2011 MBQB 118 - both cases deal with change of name applications for children post-divorce where the fathers refuse to consent. In the first case the court denies the mother's application for an order that the director register the change of name; in *Drake* the father's blocking application is dismissed for delay.

Practice Directions and Court Notice: QB

The Court of Queen's Bench has issued Practice Directions providing [Guidelines Regarding Discovery of Electronic Documents](#) and [Guidelines for the Use of Technology in Civil Litigation](#). Both come into effect October 1, 2011. The former is intended to guide lawyers, parties and the judiciary in the e-discovery process and the latter addresses the problems of the exchange of discoverable documents in incompatible electronic formats and establishes default standards for such exchanges.

The court also issued a [Notice re Books of Authority](#) on June 30, 2011, requiring all such books to be indexed, bound, and with the authorities separated by numbered tabs.

Online Resources

The Law Society of British Columbia and the Continuing Education Society of B.C. provide free online access to many of their educational materials, including the Professional Legal Training Course [Practice Materials](#) and selected CLE BC program articles ([Practice Points](#)). Although the [Family Law Practice Materials](#) and the article [Evidentiary Issues in Domestic Violence Trials](#) are both written from a B.C. perspective, they contain a lot of practical information which Manitoba family law lawyers may find useful.

Family Law News

These recent articles deal with family law topics:

- [Family litigants without lawyers](#) - is a *Lawyers Weekly* article from August 5, 2011 reporting the results of a survey concerning the impact of unrepresented litigants in family law matters.

- [Divorce Act reforms could be coming down the pipe](#) - is a July 15, 2011 *Lawyers Weekly* article predicting changes to the *Divorce Act* by the Conservative majority government.
- [Judge orders dad to make support payments directly to child](#) - is a *Law Times* article from July 18, 2011 discussing a "creative and unusual" decision of an Ontario judge designed to reduce family conflict.
- [Family law reforms roll out across Ontario today](#) (Legal Feeds blog) and [Mandatory Family Mediation Information Session](#) (Slaw) both discuss the roll out of family law reforms in Ontario on July 18, 2011.
- [Co-venturer or unpaid employee? The Supreme Court of Canada revisits compensation for unjust enrichment of a common law spouse](#) - is an article from the *CBA National Women Lawyers Forum Newsletter* dealing with the SCC decision in *Kerr v. Baranow*.

Fall CPD Programs: LSM

Be sure to register soon for these upcoming continuing professional development programs offered by the Law Society:

- [Preparation for Big Cases](#) - Mr. Justice Jeffrey Oliphant and Richard Wolson, Q.C. will draw on their experiences with the Mulroney-Shreiber Inquiry to take a close look at the issues specific to preparing for big cases. [Register](#) now for this unique program which will be held September 16, 2011, from 12:00 noon to 2:00 p.m. in the Law Society classroom.
- [Advanced Cross-examination Techniques](#) - all who litigate will benefit from the techniques taught in this full day program by internationally acclaimed presenters Larry Pozner and Roger Dodd. The program will be held October 24, 2011 at the Radisson Hotel. [Register](#) by September 15, 2011 to take advantage of the early bird rate.
- [When the Family Business Fails](#) - this half-day program will explore what happens when a family business fails, including the application of *The Family Property Act* on relationship breakdown and estate freezes and family trusts. It takes place November 2, 2011, from 1:00 - 4:00 p.m. at the Law Society classroom.

Back From the Brink: Insolvency in the New Era - 2011 Isaac Pitblado Lectures

The [2011 Isaac Pitblado Lectures](#) will explore the latest developments in bankruptcy and insolvency law, with a focus on "made in Manitoba" problems and solutions. Keynote speakers include Bob Klotz, author of *Bankruptcy, Insolvency and Family Law*, 2d ed., Professor Janis Sarra, and Frank Bennett. The lectures will be held November 25 and 26 at the Fort Garry Hotel. [Register](#) before October 3 to take advantage of the early bird discount.

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