

Family law and bankruptcy

FACT SHEET

This fact sheet answers frequently asked questions about the bankruptcy jurisdiction (in family law cases) of the Family Court and the Federal Magistrates Court. Bankruptcy is a complex area of law. You should get legal advice.

Note – the Federal Magistrates Court’s bankruptcy jurisdiction extends beyond family law cases. For more information, go to www.fmc.gov.au

Legal terms

Bankrupt – (see Section 5 of the Bankruptcy Act 1966) - a person:

- (a) against whose estate a sequestration order has been made, or
- (b) who has become a bankrupt because of a debtor’s petition.

Creditor – a person to whom money is owed.

Debtor – a person who owes money to another.

Injunction - a court order requiring a person to do, or to refrain from doing, a specified action.

Personal Insolvency Agreement (see Part X of the Bankruptcy Act) – a deed between a debtor and creditor(s), aimed at avoiding bankruptcy of the debtor. The deed identifies the property and income available to pay creditors’ claims and how it is to be distributed amongst the creditors.

Trustee in bankruptcy – the trustee is the person who administers the estate of the bankrupt. The bankrupt’s property vests in the trustee. The trustee must sell all of the vested property and distribute the proceeds amongst the creditors, or sell sufficient property to pay the creditors and return any remaining money or property to the bankrupt. The trustee can be either a private individual (a registered trustee) or the Official Trustee.

Vest – a person in whom property is vested has the right to possess and control the property, including the right to sell it.

Vested property – all of the property of the bankrupt that belonged to him/her at the start of the bankruptcy or is acquired during the bankruptcy vests in the trustee, except for exempt property. Section 116 of the Bankruptcy Act defines exempt property. It includes property held by the bankrupt in trust, some household property, some personal property, property (to a certain value) used in earning income, a vehicle (to a certain value) used by the bankrupt, life assurance policies, some superannuation interests, rights to recover compensation for injury and any compensation recovered.

When can the Family Law Courts deal with bankruptcy?

The Family Court and the Federal Magistrates Court can deal with any matter connected with or arising out of the bankruptcy of either spouse in a case involving:

- property settlement under Section 79 of the Family Law Act 1975, and/or
- declaration of interest in property under Section 78 of the Family Law Act, and/or
- setting aside property orders under Section 79A of the Family Law Act, and/or
- spouse maintenance under Section 72 of the Family Law Act, and/or
- enforcement of any of the above orders.

This fact sheet provides general information only and is not provided as legal advice. If you have a legal issue, you should contact a lawyer before making a decision about what to do or applying to the Court. The Family Law Courts cannot provide legal advice.

What is the effect of bankruptcy on the bankrupt?

Once a spouse becomes bankrupt, his or her property immediately vests in the trustee. This excludes some categories of assets such as most household goods, superannuation, some tools of trade and a motor vehicle up to a certain value.

Do Family Court pre-action procedures apply?

No, the pre-action procedures required by Family Law Rules 2004 do not apply to cases in the Family Court where a spouse is bankrupt.

Can (or must) the trustee of a bankrupt become a party in a family law case?

The trustee of the bankrupt spouse may apply to become a party to the case. If the trustee does become a party, the bankrupt cannot make any submissions to the Court about property already vested in the trustee, except with permission of the Court.

Does the non-bankrupt spouse have priority over the creditors?

The Court must determine the competing rights of the creditors and the non-bankrupt spouse, neither has priority.

Can the Court order the transfer of property vested in the trustee?

Yes, the Court can order the trustee of the bankrupt spouse to transfer vested property to the nonbankrupt spouse.

What if either spouse is a party to a personal insolvency agreement?

If a spouse, who is a party to property or spouse maintenance case, is or becomes a debtor subject to a personal insolvency agreement then:

- the above comments, relating to a bankrupt spouse, apply to the debtor spouse
- the above comments, relating to the trustee of the bankrupt spouse, apply to the trustee of the debtor spouse.

When do I need to give notice to the Court?

Parties to a financial case, including enforcement, must notify the Court at the start of (or during the case) if they are (or become) a bankrupt or a party to a personal insolvency agreement.

When do I need to give notice to my trustee?

A bankrupt or a debtor subject to a personal insolvency agreement must notify his or her trustee if he or she becomes a party to a financial case in court.

Can a non-spouse apply to set aside orders for property settlement?

If a party is a bankrupt or is a debtor subject to a personal insolvency agreement when a property settlement order is made, or becomes bankrupt or enters into a personal insolvency agreement after the order is made, then a creditor, the trustee of the bankrupt spouse or the insolvency trustee of the debtor spouse subject to a personal insolvency agreement can apply to set the order aside where a debt due may not be recoverable because the order was made (see Section 79A of the Family Law Act).

Can the non-bankrupt spouse apply to restrain the trustee?

Yes, the non-bankrupt spouse can apply to the Court for an injunction to restrain the trustee from declaring or distributing dividends amongst the creditors of the bankrupt or debtor spouse.

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What if costs are ordered?

Unless the Court orders otherwise, a person entitled to costs in a case to which the Bankruptcy Act applies is entitled to costs in accordance with Order 62 of the Federal Court Rules 1979.

What forms do I need to use?

You should use the form that is relevant to the Court handling your matter. You can get the forms from www.familylawcourts.gov.au, by calling 1300 352 000 or at your nearest family law registry.

www.familylawcourts.gov.au 1300 352 000

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