

## **BANKRUPTCY: WHAT HAPPENS TO THE FAMILY HOME?**



Separation from your spouse or partner can be a stressful and difficult time without the added stress of either you or your partner being declared bankrupt. As family lawyers, since the global financial crisis, we have seen an increase in the number of matters before the Family Law Courts in which a trustee in bankruptcy is either appointed or involved as a party to property proceedings.

The Family Law Courts have the jurisdiction to hear family law and bankruptcy proceedings concurrently to ensure that all relevant issues affecting the interests of the competing parties are determined at the same time. How bankruptcy is treated in the family law arena will depend on the circumstances of the bankruptcy, the level of financial intertwining between the bankrupt and non-bankrupt spouse and the contributions of the parties to the assets.

The Family Law Courts will apply the four-step process in assessing the parties' entitlements to the property pool, including the trustee in bankruptcy's entitlement. These steps are:

1. Identifying all of the assets, liabilities and financial resources available for distribution;
2. Assessing the financial contributions, non-financial contributions and the contributions to the care and welfare of the family made by each party at the commencement of the relationship, during the relationship and since separation;
3. Assessing the future needs of each party. This includes a consideration of a number of factors such as the age and health of the parties, the income earning capacity of the parties, the care of dependent children and the financial position of each party; and
4. Making an Order that is just and fair in the circumstances.

The continued application of the four-step process in family law matters involving bankruptcy is beneficial to a non-bankrupt spouse, particularly one who has made financial contributions to a jointly owned property.

In the absence of family law proceedings, the jointly owned family home can be sold by the trustee in bankruptcy in order to pay the creditors of the bankrupt spouse. Generally, a trustee in bankruptcy will sever the joint tenancy and will seek the sale of the property. Upon the settlement, a portion of the net proceeds of sale will be paid to the non-bankrupt spouse and the remaining net proceeds will be paid to the trustee in bankruptcy. In this circumstance, the financial contributions of the non-bankrupt spouse have no bearing. This can give rise to an inequitable and unjust outcome, particularly if the non-bankrupt spouse has made significant financial contributions either during the marriage or since separation. For example, continuing to pay the mortgage after separation or contributing the deposit to assist with the purchase of the property.

A non-bankrupt spouse can apply to the Family Law Courts for an injunction to prevent the trustee in bankruptcy from selling jointly owned property as well as preventing the trustee in bankruptcy from distributing any monies realised to the creditors of a bankrupt spouse until a final hearing before the Court as to their equitable entitlement.

### **Case Study**

In the matter of *W & W & Anor (2007)*, the parties had been separated for approximately ten years before the husband was declared bankrupt. The wife and the children had continued to live in the jointly owned family home since the separation, with the wife solely paying the mortgage repayments during that time.

Immediately prior to separation, the parties obtained a \$9,000.00 loan to purchase a car for the husband. The wife was not involved in the decision to purchase the car and at the time of signing the loan agreement, she had minimal reading and writing comprehension. Consequently, the wife was not able to read the loan document and trusted the husband's explanation to her. The husband was declared bankrupt as a result of his default on the car loan, his non-participation in debt recovery proceedings by the lender and his non-payment of the debt after service of the bankruptcy notice. The husband defaulted on the loan and failed to pay the debt despite having a full time job and earning an income of \$50,000.00 per annum.

Since the separation, the wife had not had access to or use of the car, was unaware that the husband had defaulted on the loan and was further unaware of the husband's bankruptcy until she was notified by the trustee in bankruptcy of their intention to sell the jointly owned family home and to distribute the net proceeds between the wife and the trustee. The trustee in bankruptcy offered to transfer their interest in the property to the wife if she refinanced the mortgage and paid them one half of the equity.

The wife did not have the capacity to refinance the mortgage and had limited means to obtain alternative accommodation for her and the children in the event of a sale of the property. The wife subsequently applied to the Federal Magistrates Court of Australia under section 79(4) of the *Family Law Act 1975* for a property settlement in which she received a share greater than one half of the equity of the jointly owned family home.

The trustee in bankruptcy made submissions that the contribution by the wife to the mortgage since separation and the future needs factors outlined in section 75(2) of the *Family Law Act 1975* should not apply as the vested property of the husband ought not be available for distribution in a family law matter.

The Court held that it would not be just and equitable to make orders that would result in the Wife and the children being removed from the family home, particularly given the reckless, negligent and wanton conduct of the husband in relation to the default on the car loan and the subsequent appointment of a trustee in bankruptcy. The Court ordered the trustee in bankruptcy to transfer their interest in the family home to the wife, with the wife to refinance the jointly held mortgage into her name alone.

### **Orders may be Set Aside**

In the event that you have Final Orders from the Court detailing the terms of a property settlement and your spouse is declared bankrupt after the issuing of those Final Orders, it is important to note that a trustee in bankruptcy can apply to the Family Law Courts to have the Final Order set aside in order to seek a division of the property pool to pay the creditors of the bankrupt spouse.

### **Contact Us**

If you have an issue involving family law and bankruptcy or you are concerned that your spouse may be declared bankrupt and want to know how it will affect you, please contact the **msl | michael sing lawyers** family law team in Brisbane on (07) 3229 6099 or the Gold Coast on (07) 5597 8888 to arrange a consultation.



**Amy Sanders-Robbins** holds degrees in Law and Behaviour Science and is a staunch advocate for her clients. Amy has a diligent and relentless approach to fight exceptionally hard to achieve client goals. Amy's approach echoes the culture of the **msl** family law team, who have demonstrated their abilities as formidable litigators with strong trial capacity, and ability to obtain exceptional results. With expertise in child protection, domestic violence, parenting matters, family law property disputes and de facto property matters, Amy has a meticulous approach to all of her cases.



**Carriae Dawson-Wheeler** is a passionate advocate for the rights of children and families. With demonstrated experience and an impressive trial record, Carriae is a family lawyer who strives to drive all her cases to conclusion as quickly and cost-effectively as possible. Carriae's commitment and expertise ensures all her clients receive exceptional legal advice, and with it the confidence that they will achieve the best outcome possible



For more information on family law, email us at [info@msslayers.com.au](mailto:info@msslayers.com.au) or visit our dedicated family law website [www.familylawyersqld.com.au](http://www.familylawyersqld.com.au). Alternatively, contact our professional team at our Gold Coast or Brisbane office.

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