

Family law and bankruptcy

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 seek 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 a party to a marriage or de facto relationship in proceedings for:

- property settlement under Section 79 or 90SM of the *Family Law Act 1975*, and/or
- declaration of interest in property under Section 78 or 90SL of the *Family Law Act*, and/or
- setting aside property orders under Section 79A or 90SN of the *Family Law Act*, and/or
- spouse maintenance under Section 74 of the *Family Law Act*,
- maintenance (in relation to a de facto relationship) under Section 90SE, and/or
- enforcement of any of the above orders.

What is the effect of bankruptcy on the bankrupt?

Once a party to a marriage or de facto relationship 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 party to the marriage or de facto relationship is bankrupt.

Can (or must) the trustee become a party to family law proceedings?

The trustee may apply to become a party to family law proceedings. 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 party to the marriage or de facto relationship have priority over the creditors?

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

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

Yes, the Court can order the trustee to transfer vested property to the non-bankrupt.

What if either party to a marriage or de facto relationship is a debtor subject to a personal insolvency agreement?

If a party to a marriage or de facto relationship, who is a party to property settlement or maintenance proceedings, is or becomes, a debtor subject to a personal insolvency agreement then:

- the above information relating to bankrupt parties, applies to the debtor party
- the above information relating to trustees in bankruptcy applies to the trustee of the debtor party's property.

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*.

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 family law financial proceedings

Who can apply to set aside or vary orders made in property settlement proceedings?

Any person affected by an order made in property settlement proceedings can apply to have such order set aside or varied.

A creditor of a party to the property settlement proceedings is able to make an application to have an order that prevents them from being able to recover a debt owing to them set aside or varied.

In cases where a party to the marriage or de facto relationship is a bankrupt or debtor subject to a personal insolvency agreement when a property settlement order is made, or becomes so after the order is made, the trustee is able to have the order set aside or varied. (see Sections 79A and 90SN of the *Family Law Act 1975*).

Can the non-bankrupt party to a marriage or de facto relationship apply to restrain the trustee?

Yes, the non-bankrupt party to a marriage or de facto relationship 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 party to their marriage or de facto relationship.

When do I need to give notice to the Court?

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

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.