



How does bankruptcy affect Family Law Property Disputes?

If a person is declared bankrupt during the course of a marriage or during the course of a Family Law property dispute, it can have a significant impact on both parties involved. However, the Family Court can intervene to protect the non-bankrupt party's rights under the Family Law Act.

When a person is declared bankrupt under the Bankruptcy Act, a Trustee (Bankruptcy Trustee) is appointed to take control of their assets and income so that their debts can be paid from them. The bankrupt's assets vest in (go into control of) the Bankruptcy Trustee immediately they are declared bankrupt. The bankrupt then cannot deal with or transfer their assets. This can lead to frustration for both parties involved in the marriage or the family law property dispute, particularly the non-bankrupt spouse, as their ability to further negotiate directly with their bankrupt spouse is very limited.

Bankruptcy and Family Law

As a result of the Bankruptcy and Family Law Amendment Act (2005), the bankruptcy of a spouse does not prevent the non-bankrupt spouse from pursuing an adjustment to the parties' property interests under the Family Law Act. Whilst we normally expect property proceedings to occur when spouses separate, it is not a prerequisite that the spouses be separated before the non-bankrupt spouse can take proceedings.

The Family Court has comprehensive powers to deal with proceedings for property settlement in circumstances where a Bankruptcy Trustee has been appointed and property belonging to the bankrupt spouse has vested in the Trustee. In determining the property dispute, the Court will apply the same process required under the Family Law Act regardless that one spouse is bankrupt.

The Family Court

The Court will likely deal with three types of property of the marriage: -

- the bankrupt spouse's property that has vested in the Bankruptcy Trustee;
- the bankrupt spouse's property that has not vested in the Bankruptcy Trustee being exempt assets under the Bankruptcy Act, such as superannuation; and
- the non-bankrupt spouse's assets

The Court must then determine, whether it is just and equitable to make an order altering the parties existing interests, taking into account the financial and non-financial contributions of the parties during their relationship and considering the specific needs and characteristics of the parties. What is different is that the Court must determine the competing rights of the Bankruptcy Trustee on behalf of the bankrupt spouse's creditors, and those of the nonbankrupt spouse, but neither has priority.



If necessary, the Court can interfere with the rights and interest of the Bankruptcy Trustee and creditors of the bankrupt spouse so as to give the nonbankrupt spouse a share in the bankrupt spouse's assets that have vested in the Bankruptcy Trustee.

The Bankruptcy Trustee cannot itself commence the Family Law property proceedings on behalf of the bankrupt spouse. However, if the proceedings had been commenced before the bankruptcy, or once the proceedings are commenced by the non-bankrupt spouse after the bankruptcy occurs, then the Bankruptcy Trustee can join in those proceedings.

A spouse who is bankrupt, or becomes bankrupt, must notify the Court at the start of the proceedings, or if the proceedings have already started, as soon as they become bankrupt. Unless the Family Court gives permission, a bankrupt spouse is not entitled to make submissions to the Court in relation to the division of his or her property that has already vested in the Bankruptcy Trustee. This right then belongs to the Bankruptcy Trustee. However, the bankrupt spouse can make submissions about property that has not vested in the Trustee, such as the bankrupt spouse's superannuation.

Once the Court makes a property settlement order in favour of the non-bankrupt spouse, the Bankruptcy Trustee can on very limited grounds apply to set aside the order. Sometimes spouses may obtain property settlement orders from the Family Court on a consent basis before the bankruptcy arises. For the Bankruptcy Trustee to succeed, the Trustee needs to establish that the order was obtained by reason of a failure to disclose relevant information (such as the imminent bankruptcy of one of the spouses), fraud, duress or false evidence.

At Bateman Battersby we have a number of experienced Lawyers that specialise in Family Law Property Settlement matters. If you need help sorting out who gets what when a marriage or relationship breaks down, please call [Oliver Hagen](tel:0247315899) or [Ken Gray](tel:0247315899) on (02) 4731 5899 or email us at familylaw@batemanbattersby.com.au if you require further information or assistance.