



Bankruptcy and Inheritance – Who gets the \$\$\$?

Receipt of an inheritance usually has mixed emotions for recipients. On the one hand, there is sadness because usually a family member or close friend has died, precipitating the administration of their estate. On the other hand, there is gladness on receipt of a financial resource not necessarily planned on and received almost as a windfall. But, for beneficiaries who are bankrupt there can be other more unfortunate emotions.

After acquired property

If a person becomes bankrupt, their divisible property, which includes but is not limited to their home, shares, bank accounts and motor vehicle (if valued over a certain amount), vests in the Trustee appointed to manage their estate for the benefit of the bankrupt person's creditors.

What is perhaps not as well known is that Section 58 of the Bankruptcy Act 1966 allows a bankruptcy Trustee to also collect and sell assets which are acquired by a person during the period of their bankruptcy. This is normally three years, but can be extended up to eight years if a bankruptcy Trustee lodges an objection because the bankrupt fails to provide information or disclose all income to the Trustee, does not make compulsory payments, explain how money was spent or reveal all assets and debts to the Trustee. The assets acquired in the period of bankruptcy are referred to as "after acquired property" and the two most common examples of which are:

- An inheritance in a deceased estate, and
- Lotto / Gambling wins

After acquired property vests in a bankruptcy Trustee as soon as it is acquired by or devolves on the bankrupt. If a bankrupt becomes entitled to an inheritance whilst bankrupt, the inheritance must be paid to their bankruptcy Trustee.

Becoming entitled to an inheritance does not mean receiving it and often a bankrupt will become entitled to an inheritance on the date someone dies. A bankrupt or the executor of the Will under which the bankrupt is a beneficiary must notify the bankrupt's Trustee of the inheritance within 14 days of becoming aware of the entitlement. Non-disclosure and concealment are an offence and the penalty ranges from a fine to imprisonment.

Pre-emptive measures

From an estate planning perspective a willmaker who is aware that a person they wish to nominate as a beneficiary in their Will is bankrupt or may potentially be made bankrupt due to their financial circumstances, may choose instead to leave the intended gift to the person's spouse, child or other close family member.

Alternatively, the willmaker may choose to include a general clause in their Will that provides that if any beneficiary is bankrupt at the date of the willmaker's death, the bankrupt person is deemed for the purposes of the Will to be



treated as if they had died before the willmaker. Consequently, any entitlement the bankrupt may have had under the Will would pass to another beneficiary who had been nominated to receive it in the event the bankrupt had actually predeceased the willmaker.

Another measure is to consider establishing as a discretionary Testamentary Trust. This is like a discretionary Family Trust except that the trust is set up in the Will of the deceased person at the time the Will is made and the Trust does not come into effect until they die.

A beneficiary of a Testamentary Trust usually has a mere expectancy rather than an interest in the assets and income of the Trust and the trustee of the Testamentary Trust has a discretion to whom they will distribute assets and/or income of the trust. In these circumstances it is generally considered that a Trustee in bankruptcy cannot claim the assets of the Testamentary Trust as after acquired property and make them available for distribution to the creditors of the bankrupt.

If you would like further information about estate planning measures and bankruptcy or want to discuss making a Will or having your current Will reviewed, please contact [Lisa Delalis](mailto:Lisa.Delalis@batemanbattersby.com.au) or [John Bateman](mailto:John.Bateman@batemanbattersby.com.au) of our office 02 4731 5899 or email willsestates@batemanbattersby.com.au.