Chapter 6: The consequences of bankruptcy: Part 7

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Summary

There are many different consequences of bankruptcy. Some of the concepts are quite complicated. It is important to have a broad understanding of the principles and to be familiar with problems that might arise so that you know what questions to ask the client and when to seek more advice on their behalf.

This section is broken up into segments. Parts 1 – 5 covers:

1. What happens to debts?
2. What property is protected?
3. What property will be taken by the Trustee?
4. Whether the client has to pay income contributions and how much.
5. What other consequences there might be.

Financial counsellors should be aware of the content of all these parts at least in broad terms as they are relevant to all clients.

Parts 6 – 9 need only be referred to if they are relevant to your client's individual circumstances. They cover in order:

6. Small Business
7. Family Law
8. Gambling and hazardous speculation
9. Death

Introduction

Your client must understand the following potential impacts of bankruptcy before making an informed decision whether to go bankrupt:

- **Debts** – will they go away?
- **Assets** (past, present and future) – will the trustee in bankruptcy ('the Trustee') take them? Can the Trustee undo past transactions and get at assets now owned by others? What about assets your client may acquire in the future?
- **Income** – will the client have to pay a portion of their income towards their debts ('income contributions') and if so, approximately how much?
- What other limitations might there be on the client's life as a result of the bankruptcy?

These are all covered in this Chapter.

> **Note:** The same consequences apply when the client has been made bankrupt on a Creditor's Petition, although in that case there is no decision for the client to make. You can refer to this Chapter to advise your client about what to expect during bankruptcy. You should also refer to the bankrupt's obligations in **Chapter 8**. If your client has very recently been made bankrupt and does not think this should have happened, refer to **Chapter 10** – A sequestration order has been made against my client – Is there anything he or she can do? Advise your client to seek urgent legal advice.

Part 7: Family law and bankruptcy

Summary

The Federal Court of Australia, Federal Circuit and Family Court of Australia (Division 1) (formerly the Family Court of Australia where the provisions of ss 35 or 35A of the *Bankruptcy Act* operate) and Federal Circuit and Family Court of Australia (Division 2) (formerly being the Federal Circuit Court of Australia) have the power to alter the property interests between the parties to a marriage or de facto relationship at the end of a relationship. In doing so they have regard to the contributions of the parties to the relationship, financial and otherwise before, during and after the relationship and their future needs (including their age, health, earning capacity and the need to maintain children of the relationship). Financial contribution considerations include the assets and debts each party had at the start of the relationship, any inheritances, payouts and windfalls they received

during the relationship, along with their earnings. The Court can also order spousal maintenance be paid by one party of the relationship to the other by way of periodic payments, lump sum payment or transfer of property. This is separate to any child support or child maintenance obligations.

If one of the parties to a relationship is bankrupt, or becomes bankrupt during the Court proceedings, the Trustee can apply to be joined to the proceedings (usually instead of the bankrupt party). Any property that would have been allocated to the bankrupt party by the Court passes to the bankrupt estate instead. Any property that is allocated to the non-bankrupt party is no longer available to the bankrupt estate (even if it would otherwise have vested in the Trustee). It does not matter whether the bankruptcy or the family law application occurred first.

If the parties to a relationship enter into a Binding Financial Agreement under the *Family Law Act*, the Trustee may challenge the agreement under the *Bankruptcy Act* as an undervalue transaction or transfer to defeat creditors where appropriate. The Trustee can also apply to set aside the agreement under the *Family Law Act* in some circumstances. If the Trustee challenges a Binding Financial Agreement in the bankruptcy jurisdiction, the other party to the agreement may seek family law orders instead. This way, even if the agreement is set aside, the usual property settlement arguments can be made about the division of ownership of the property.

In very limited circumstances the Trustee can apply to have Court orders set aside.

Where there are no Court proceedings on foot the Trustee must either accept the legal interests of the parties (as noted on the title of any property, for example) or rely on equitable common law principles to assert a different ownership arrangement. The Trustee will only do this where there is compelling evidence and a significant sum involved.

Background

Clients need to get specific family law advice where applicable. The information in this toolkit is very general.

> **Important Note:**
>
> Western Australia was the only Australian State to establish its own Family Law Courts and did not refer its powers to the Commonwealth for parenting proceedings and de facto property. The Western Australian Family Courts jurisdiction is with the Federal Court and Federal Circuit and Family Court of Australia to deal with matrimonial property, child support and divorce orders.
>
> Western Australia has not referred its powers relating to de facto relationships to the Commonwealth as had occurred in other States. The law of Western Australia is therefore different in some respects to that described below. If you

are in Western Australia and your client is not married, he or she will need local family law advice.

The following section applies primarily to separating or separated couples. The general purpose of the financial provisions of the *Family Law Act 1975* (FLA) is to finalise matters between the parties and prevent further proceedings as far as is practicable (s 81, FLA).

The Federal Circuit and Family Court of Australia (Division 1 and 2) can make under both maintenance and/or property settlement applications now include transferring vested bankruptcy property back to a non-bankrupt ex-spouse or de facto spouse.

However, to balance this, the Trustee also has standing under the FLA, and can apply to be heard or joined in relevant proceedings in certain circumstances and to have orders of the Court or Binding Financial Agreements set aside. This is covered in more detail below.

Powers of the Federal Circuit and Family Court to divide up property and debts

Summary

The court has the power to alter the legal property interests of separating couples, and/or order payment of spousal maintenance of one member of the couple by the other (by way of regular payments, a one-off lump sum or a transfer of property)

The court will take into account the:

- financial contributions by the parties, including before, during and after the relationship
- non-financial contributions by the parties including contributions as a homemaker or carer
- future needs of the parties.

The FLA provides for the division of property (and debts) at the conclusion of a relationship. It also provides for orders to be made for the maintenance of one spouse by another in certain circumstances. Applications in relation to marriages are dealt with under Part VIII of the FLA and de facto relationships are dealt with in Part VIIIAB.

A de facto relationship is defined as persons who are not legally married to each other, not related by family and having a relationship as a couple living together on a genuine domestic basis (s 4AA, FLA). A de facto relationship can exist between two people of the same or opposite gender and can also exist despite the fact that one or both members of the couple is/are still married to another person. In determining whether there is a de facto relationship,

the court will consider all the circumstances of the case including, for example, the length of the relationship; whether they share a residence; whether there is a sexual relationship; their financial arrangements; their ownership, use and purchase of property; their degree of mutual commitment to a shared life, their care and support of children; and their public image (are they known as 'a couple').

There is no particular timeframe required to establish the existence of a de facto relationship, but there are time frames for applying to the Court for a property settlement. To access the financial provisions of the FLA, such as applying for maintenance orders or a property settlement:

- there must have been a relationship of at least two years' duration; or
- there must be a child of the relationship (as opposed to a child of another relationship that the couple have cared for); or
- the court must be satisfied that the party seeking the order has made substantial relevant contributions and the failure to make the order would result in serious injustice; or
- the relationship is registered under a prescribed law of a State or Territory (s 90SB).

A maintenance order can take the form of regular payments or a lump sum payment and/or the transfer of property (ss 72, 74 & 75 for marriages and ss 90SE & 90SF for de facto relationships, FLA). When assessing spousal maintenance applications the Court will consider:

1. whether the applicant is unable to support himself or herself adequately; and
2. whether the respondent has the ability to pay the spousal maintenance for the applicant.

The applicant has to establish their inability to maintain themselves adequately arises from one of the following:

- caring for a child under 18; or
- as a result of age or physical or mental incapacity for gainful employment; or
- another adequate reason.

A spousal **maintenance order** can consist (wholly or partly) of a one-off transfer of vested bankruptcy property (that is property that has already vested in the Trustee as a result of one partner to a relationship being bankrupt) or an ongoing payment.

There is a list of matters the court needs to consider before making a spousal maintenance order including, for example (this is not an exhaustive list):

- the age and state of health of the parties
- their income, property, financial resources, physical and mental capacity for earning an income
- whether a party has the care or control of a child of the relationship who is under 18

- their commitments to support any other person
- their eligibility for pensions, benefits, etc
- their eligibility to access their superannuation entitlements
- the effect of any proposed order on the ability of a creditor to recover a debt
- the duration of the relationship and the extent to which it has affected the earning capacity of either party
- what is a reasonable standard of living in the circumstances
- any financial agreement that is binding on the parties
- any order that may be made for the division of property
- any assessment likely to be made under the *Child Support (Assessment) Act 1989*
- any other fact or circumstance the court considers relevant to doing justice.

A **property settlement** which divides up the assets and debts of a relationship can be applied for in either marriages or de facto relationships meeting the criteria above (s 79, FLA for marriages and s 90SM, FLA for de facto relationships). In dividing up property the court takes the following four step approach:

1. It determines what makes up the pool of assets available for distribution. This is done by identifying and valuing the assets and liabilities of the relationship;
2. It looks at both the financial and non-financial contributions made by the parties. This includes wages earned, payouts, windfalls, inheritances and gifts received, plus direct contributions to the acquisition, conservation or improvement of the property of the relationship. Non-financial contributions include to the welfare of the family, including such things as maintaining property with physical labour, carrying out housework and caring for children). The court will consider contributions made before the relationship, ie the assets and liabilities each party had when the relationship commenced, contributions during the relationship and contributions made following separation;
3. The future needs of the parties, set out in s 75(2) FLA for marriages and s 90SF(3) FLA for de facto relationships;
4. It considers what orders would be just and equitable to make, taking into account the above assessment.

Usually, a creditor is able to become a party to the property settlement proceedings if an order is sought that would mean that the creditor would not be able to recover his or her debt (s 79(10), FLA) – that is, where the liability of the particular spouse to the creditor would be ‘extinguished’ if the orders were made. However, where the debtor is a bankrupt (or in a Personal Insolvency Agreement (PIA)) this no longer applies to creditors with provable debts and instead it is the Trustee who has the right to appear (s 79(10A), FLA).

The court has to take into account the impact of any orders on the ability of a creditor to recover a debt but does not have to give that consideration greater priority than any other. In dividing up the assets and liabilities the court has the power to bind third party creditors. In most cases the pool of assets is considered after deducting any debts, meaning that the FLA orders should not generally interfere with the ability of creditors to collect their debts (although they may be restricted from pursuing both spouses/partners for some joint debts).

However, where one party is insolvent and the other party has a reasonable claim to a significant portion of a substantial asset (usually the family home) the competing rights of creditors and the solvent spouse will often need to be weighed by the Court. Generally, if there are children of the union, their financial needs will rank above the needs of the creditor(s).

In the case of marriages, a property settlement or maintenance order can be applied for at any time after separation and up to 12 months after a divorce. With de facto relationships an application must be made within 2 years after the end of the relationship. The court can also give leave for an application to be brought after the expiry of these periods in cases of hardship. This may be crucial in cases where the parties have not sought a property settlement within the relevant time period (possibly because there was no dispute or they were not in contact with one another) and one party goes bankrupt. A party must seek leave of the Court to apply outside these time periods. In determining if leave is to be granted to permit a party to commence property proceedings out of time, the court must be satisfied that hardship would be caused to a party or child of the relationship, if leave was not granted.

Summary – 3rd party creditors and family law

- The court must take into account the interests of creditors, but this must be weighed against other competing considerations (such as the needs of children)
- The court can alter the obligations of the parties to the relationship to 3rd party creditors – this would usually mean severing a joint loan obligation in certain circumstances
- Occasionally the court will allocate property to one party and liability for a debt to another (knowing the creditor will be unlikely to be paid as a result)

What if one of the parties is, or becomes bankrupt during the family law proceedings?

Summary

The Trustee can:

- Appear in family law proceedings in the shoes of the creditors
- Apply to set aside past orders (including consent orders) and Binding Financial Agreements

The court can also allocate vested bankruptcy property to the non-bankrupt partner in a relationship (even though the bankruptcy occurred first).

The Federal Circuit and Family Court of Australia (Division 1) has jurisdiction under the *Bankruptcy Act* where necessary because of the bankrupt status of one of the parties to the relationship. All family law matters begin in Division 2, after filing the application a Registrar will consider the issues in dispute and then determine if the application should proceed to Division 1 or 2.

If a party to family law proceedings is a bankrupt, or becomes a bankrupt while the proceedings are being dealt with, then the Trustee must be notified of any of the following applications (ss 79G and 90SP, FLA):

- Maintenance (ss 74 or 90SE, FLA)
- Declaration of property interests (ss 78 or 90SL FLA)
- Alteration of property interests – property settlement – (ss 79 or 90SM, FLA)
- Setting aside orders altering property interests (ss 79A or 90SN, FLA)

The same applies if a party enters a PIA under the *Bankruptcy Act*.

The Trustee can be joined (upon application) if the court is satisfied that the interests of the bankrupt's creditors may be affected. Once the Trustee is permitted to join the proceedings, then the bankrupt can only appear with the leave of the court in exceptional circumstances. Because the interests of the creditors are only one of a long list of factors that the court needs to take into account, the Trustee will usually be arguing the case of the bankrupt person under the

Family Law provisions more generally – that is, that it will be up to the Trustee to establish the bankrupt's entitlements in the light of his or her contributions, needs, etc as much as to make the case for payment of the creditors.

Example: *Witt v Witt and Another – (2007) 38 Fam LR 431*

In the case of Mr and Mrs Witt the wife applied for a property settlement after the husband went bankrupt (in 2006). The Trustee was notified and appeared in the

proceedings. The Trustee sought the sale of the matrimonial home and an equal split of the proceeds between the Trustee and Mrs Witt. The house had been owned by Mr and Mrs Witt as joint tenants, but the joint tenancy was severed by the bankruptcy with a 50% interest vesting in the Trustee.

In addition to the home, there were a number of debts, and superannuation in each of the spouse's names. There were also seven children of the marriage (although four had left home by the time of the proceedings) who were largely cared for by Mrs Witt, in addition to some paid work being done by Mrs Witt.

The Federal Magistrate made the decision to allow Mrs Witt and the children to remain in the home, in return for retaining responsibility for some associated debts and that Mr Witt's superannuation be split 95/5 in Mrs Witt's favour. This deprived the trustee of almost $50,000 in remuneration and legal fees (including legal fees of the Petitioning Creditor).

As part of the Federal Magistrate's reasoning, he noted that Mr Witt had done nothing about paying the judgment debt. Further, he had received the Bankruptcy Notice after separation and had not either paid, come to any arrangement or appeared in any of the proceedings. Mrs Witt had no knowledge of the Bankruptcy Notice, or the subsequent Creditor's Petition until she was contacted by the Trustee after these events had taken place. He considered that it was unfair in the circumstances to deprive the wife and children of their home, especially as the original creditor (the lender in relation to a car loan) would be unlikely to be paid from the sale proceeds in any event as a result of the Trustee's fees being deducted first. He was also influenced by the fact that the wife, a co-debtor under the original car loan but not a judgment debtor, had offered to seek early access to some of her superannuation to pay the original creditor. Also, Mrs Witt had already used a large portion of a personal injury compensation payment she had received to maintain mortgage payments and for the payment of household debts.

Example: *Official Trustee in Bankruptcy v Brown and Anor [2011] FMCA 88 (20 May 2011).*

Ms Brown and Mr Daevys were married for over 10 years. Prior to their marriage they had lived together for almost 1 year. In that period, Ms Brown, had purchased a house with funds of her own and obtained a mortgage in her own name. The couple lived in the house while they were married and both made payments at various times towards the mortgage. Mr Daevys made some improvements to the property and appeared on a development application as an 'owner' with Ms Brown. Mr Deavys went bankrupt in 2004. He was discharged in

2007. While bankrupt he received an inheritance that was not disclosed to the Trustee. He separated from Ms Brown in 2007 and they were divorced in 2009.

In 2009 he applied for a property settlement in the family court seeking half the property in Ms Brown's name (believing that as a discharged bankrupt he could now own property). The Trustee of his *bankrupt estate* intervened and argued that 50% of the property had already vested in the trustee in 2004. As the bankruptcy occurred prior to the Family Law Act amendments in 2005, the Trustee argued that the property was not available for division in the property settlement. The Trustee based his claim on the *Cummins case* (See **Resulting Trusts** in **Chapter 6 Part 3**), arguing that as a married couple who purchased a home intended as a matrimonial home, and in the absence of any evidence as to intention, Ms Brown held 50% of the property in trust for Mr Daevys.

The court agreed that the Trustee was entitled to a share under the law of bankruptcy and that a property settlement was not available (because vested bankruptcy property was not available for division under the *FLA* in 2004). However, the Federal Magistrate distinguished the case from *Cummins* on the basis that the property was purchased by Ms Brown prior to the marriage and in her own name. The Federal Magistrate preferred to view the case as a 'thwarted joint venture' (see **Constructive Trusts** in **Chapter 6 Part 3**) than a 'traditional matrimonial relationship' and divided up the house between Ms Brown and the Trustee on the basis of the differing contributions of the parties (in this case 67% to Ms Brown & 33% to the Trustee). The Federal Magistrate also noted that there was no evidence that Ms Brown had any intention to thwart Mr Daevys' creditors when she placed the house she purchased in her own name back in the nineties.

What if the bankruptcy occurs after the Family Court orders have already been made?

Once the court has ordered that property be transferred to, or retained by, a party who is not bankrupt, it is no longer divisible amongst the creditors (ss 116(q) & (r) of the Bankruptcy Act) unless the orders are appealed (by the original parties) or set aside.

Final property orders can be set aside, varied or substituted orders made (s 79A, 90SN FLA) on the application of a person affected by an order made by the Court or by consent of the parties where:

- There has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or
- In the circumstances that have arisen since the order was made it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or
- A person has defaulted in carrying out an obligation imposed on the person by the order leading to circumstances where it would be just and equitable to set aside or vary the orders; or

- Circumstances that have arisen since the making of the order of an exceptional nature relating to the care, welfare and development of a relevant child where the applicant has caring responsibility for the child and will suffer hardship if the court does not vary or set aside the order; or
- A relevant proceeds of crime order has been made.

A trustee in bankruptcy will be considered an interested party in many circumstances. Similar rules apply for trustees of PIAs.

A transfer of property cannot be set aside pursuant to s 120 (undervalue transactions) or s 121 (transfers to defeat creditors) of the *Bankruptcy Act* where the transfer was made pursuant to Federal Circuit and Family Court orders (or any other court exercising jurisdiction under the FLA). This is not a 'transfer of property by a person who later becomes a bankrupt….' within the meaning of s 121(1) of the *Bankruptcy Act* – it is a transfer ordered by the court. The trustee would instead need to make an application to set aside the Court orders under the provisions above.

The same rules apply for orders made by consent – that is, the orders would stand against the Trustee unless the Trustee successfully applied to set the orders aside for one of the reasons set out above. When parties apply to the Court for consent orders, they must complete an Application for Consent orders setting out their current assets, their contributions and the proposed property settlement. The court must conclude that the orders sought are just and equitable in the circumstances before orders are made by consent.

Generally speaking, the court should only divide up such property as is available for division after taking into account the liabilities of the parties (property minus debts). There are exceptions, for example, where one party has incurred liabilities with deliberate or reckless disregard for the rights of the other party and the Court feels that the 'innocent' party should not be called upon to contribute to the liability from their portion of the property. This does not mean the liability is disregarded, but that it has been appropriately weighed against the other competing factors.

A creditor or the Trustee could challenge such orders (apply to set them aside) if a particular liability had not been considered at all (as opposed to being considered and disregarded by the court as outweighed by other factors). Further, a failure to include details of significant creditors in the material supporting an application for consent orders could also constitute grounds for setting aside the consent orders under ss 79A and 90SN (sub-paragraph (1)(a)).

> **Note:** Generally, a Trustee will be very reluctant to apply to court to set aside orders made in the family court jurisdiction (including consent orders). Usually, they will only do so where the creditors have either advanced funds to meet the legal costs or have authorised the Trustee to use funds in the estate and at least one creditor has given the Trustee an unlimited indemnity as to costs should the Trustee be ordered to pay the other person's costs.

If your client is the bankrupt (as opposed to the non-bankrupt member of a couple) and has previously had a property settlement, the Trustee will want to know how the proceeds of the property settlement have been spent. The usual rules in relation to undervalue transactions and transfers to defeat creditors will apply. Any remaining funds, or funds recovered through challenging such transactions, will vest in the Trustee.

In considering whether to challenge Federal Circuit and Family Court orders, including consent orders, the Trustee is also likely to have regard to whether or not the separation of the couple appears to be genuine or a sham to defeat the creditors. The Trustee will also consider whether the percentage split appears to be fair and reasonable having regard to the circumstances of the parties.

What if the parties have made a Binding Financial Agreement under the Family Law Act?

Parties can enter into Binding Financial Agreements under the FLA whether they are married, contemplating marriage (that is, the Australian version of a pre-nuptial agreement), ending a marriage or in, or contemplating, a de facto relationship or ending a de facto relationship. There are a number of technical requirements to ensure that a financial agreement is binding and enforceable (s 90G for marriages, s 90UJ for de facto relationships, FLA), and the court will only declare it binding on the parties if it would be unjust and inequitable not to do so.

If one party would be dependent on social security payments to support him or herself, then a maintenance application can be made despite a Binding Financial Agreement (Section 90F for marriages, s 90UI for de facto relationships, FLA).

Financial agreements can be terminated by the parties by agreement (s 90J for marriages, s 90UL for de facto relationships, FLA) or set aside by the Court (s 90K for marriages, s 90UM for de facto relationships, FLA). Agreements can be set aside by the Court where (among other things):

- the agreement was obtained by fraud (including non-disclosure of a material matter); or
- a party to the agreement entered into the agreement:
    - for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or

- with reckless disregard of the interests of a creditor or creditors of the party.

The Trustee can apply as an interested person for orders setting aside a financial agreement and requesting the court to make alternative orders (ss 90K(3) and 90UM(6), FLA). It should be noted that this provision is expressed more broadly than s 121 of the *Bankruptcy Act* which requires the main purpose of the transfer to be to defeat or delay creditors; in this case this need only be one of the purposes of the agreement.

Where a Trustee applies to have a Binding Financial Agreement set aside, the non-bankrupt former spouse or de facto spouse is able to argue both for the agreement to be upheld and, in the alternative, for a division of property in the form of a property settlement. The court's decision would then require weighing up the interests of the creditors (as represented by the Trustee) and the interests of the non-bankrupt spouse (and possibly dependent children).

Unlike property settlement orders, a Binding Financial Agreement can be declared void against the Trustee under s 120 (undervalue transactions) and s 121 (transfers to defeat creditors) of the *Bankruptcy Act*. If proceedings are commenced under these sections of the *Bankruptcy Act*, the non-bankrupt spouse or de facto spouse can seek orders under the property division provisions of the FLA as an alternative in the event that the Binding Financial Agreement is set aside (provided they otherwise qualify to apply under these sections).

Example: *Sutherland v Byrne-Smith [2011] FCMA 632 (22 December 2011)*

A de facto couple purchased an investment property hoping to renovate and make a profit.

They separated before the project was complete. The woman asked the man to enter a Binding Financial Agreement ostensibly under the FLA signing the property over to her and he later went bankrupt. The Trustee challenged the Binding Financial Agreement under ss 120 and 121 of the Bankruptcy Act.

The court found that the binding financial agreement should not be upheld because the couple had not cohabited for a period of at least two years and there was no child of the relationship. The court refused to set aside the transfer under 121 because the woman's purpose had not been to defeat the man's creditors, but instead to secure a loan from her father to finish the renovations (her father would not lend the money unless the property was in her name only). The court did, however, set aside the transaction under Section 120 (undervalue transactions) because the man received no consideration for the transfer. The court then ordered that the proceeds of the sale of the house after payment of debts be divided between the woman and the trustee 60/40 in recognition of her greater contribution to the purchase and improvement of the property (this was still not enough to cover her original substantial deposit on the property).

Summary – Binding Financial Agreements under the Family Law Act

Binding Financial Agreements can be set aside as undervalue transactions or transfers to defeat creditors under the Bankruptcy Act. They can also be set aside under the Family Law Act if one or both of the parties entered the agreement to defeat creditors, or with a reckless disregard for the interests of creditors.

Where a Trustee applies to the Federal Circuit and Family Court to set aside a Binding Financial Agreement, the non-bankrupt spouse can argue for a property settlement instead.

Dividing up property where the spouse/defacto may become bankrupt

If you have a client who is contemplating a Binding Financial Agreement under the FLA in circumstances where they are aware that their ex-partner is insolvent or likely to become so, you should advise the client to get family law advice which takes this fact into account (that is they should make sure that the family law solicitor is informed about the possibility of bankruptcy and considers what it may mean for the validity of any Binding Financial Agreement). It may be that the client should consider applying for consent orders instead, ensuring he or she provides full disclosure to the court of all the relevant financial circumstances (and creditors).

Likewise, if you have a client who is insolvent or on the verge of becoming insolvent and they are contemplating a Binding Financial Agreement under the FLA, you will need to point out, in addition to the above information, that if by transferring property under a Binding Financial Agreement they become insolvent, that is an 'act of bankruptcy' which might have relevance if the person becomes bankrupt in the near future (in other words the Binding Financial Agreement may be found to be ineffective against the claims of the Trustee).

It also interesting to note that a spousal maintenance agreement registered in a court cannot be void against the Trustee for lack of consideration (undervalue transactions – s 120, *Bankruptcy Act*) but can be challenged as a transfer to defeat creditors (s 121, *Bankruptcy Act*).

Again, when considering whether to challenge court orders, including consent orders, the Trustee is also likely to have regard to whether or not the separation of the couple appears to be genuine or a sham to defeat the creditors. The Trustee will also consider whether the split appears to be fair and reasonable having regard to the circumstances of the parties.

What if the Trustee makes a claim on property of a previous relationship after the relationship has ended?

The Trustee may claim property from a non-bankrupt ex-spouse or de facto spouse in a number of circumstances:

- the ex-partner is inhabiting property in the name of the bankrupt, or owns property jointly with the bankrupt, which has now vested in the Trustee (or at least the bankrupt's share has vested in the Trustee); or
- the trustee believes the bankrupt has a claim in equity (see **Chapter 6 Part 3** for an explanation of the possible equitable arguments) or under the Bankruptcy Act against property in the name of the non-bankrupt spouse or ex-spouse (for example, because the bankrupt provided the purchase money or a significant proportion of it, or made substantial improvements to the property); or
- there has been a transfer that the Trustee argues is void against the Trustee (as an undervalue transaction or transfer to defeat creditors).

It may be possible to argue against the Trustee's claims in bankruptcy law, and/or to make a family law claim. If the time limits for applying for a property settlement or maintenance order have expired, the affected person may be able to seek leave to apply out of time, depending on the circumstances.

If you have a client who receives a letter or notice to this effect, they will need immediate legal advice from a solicitor with appropriate expertise in bankruptcy and family law. If your client is the bankrupt, you cannot assist the ex-spouse or de facto spouse – they will need to get independent legal advice (and independent financial counselling if required).

What if there are no Family Law proceedings?

If there are no family Court proceedings on foot (commenced by one of the parties to the relationship), then the Trustee cannot commence Family Law proceedings. In those circumstances the Trustee will refer to the current legal ownership of the parties unless there are strong grounds to assert a different equitable interest by the bankrupt.

A house which is registered in the name of the non-bankrupt spouse (or de facto spouse), will therefore be relatively safe from claims by the trustee unless:

- there has been a transfer from the bankrupt spouse to the non-bankrupt spouse at some point in time or
- the bankrupt has made substantial and traceable contributions to the property or its improvement.

Contributions by the bankrupt spouse as a homemaker are unlikely to have an impactexcept in Family Law proceedings.

Equitable ownership and antecedent transactions which may be void against the trustee are covered in **Chapter 6 Part 3.**