

IN FOCUS

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Family Law & Insolvency



The Family Law jurisdiction is often characterised by high emotions and delays inherent in the system.

This article focuses on the interplay between family law and insolvency. It may assist in identifying mechanisms available in the corporate sphere which may have relevance in the settlement of matrimonial property disputes.

Personal Insolvency - Bankruptcy

Is the process whereby an individual cannot pay their debts when they are due and payable. Bankruptcy can be voluntary process (debtors petition – upon application of the individual) or an involuntary process (creditors petition – upon application through the court by a creditor).

In a matrimonial dispute the individual's Trustee in Bankruptcy stands in the shoes of the bankrupt spouse. The Bankruptcy Trustee has the ability to deal with assets that have been vested in the bankrupt estate on behalf of the creditors of the bankrupt estate. The Trustee in Bankruptcy has the ability to be joined to an existing proceeding in the Family Court as he/she is controlling the assets of the bankrupted spouse. The Trustee has no position in relation to child custody and/or child support payments.

Should an agreement by way of binding financial agreement or court order be in place between the parties to the marriage, the Trustee in bankruptcy can review such an agreement to ensure that the interests of creditors of the bankruptcy have been taken into account. This enables a trustee to potentially undo an agreement amongst the parties if it is not just and equitable and the creditors of the bankrupted spouse have been disadvantaged.

The Family Law Amendment Act 2005 was designed to clarify the interaction between the Family Law Act 1975 and the Bankruptcy Act 1966.

Section 35 of the Bankruptcy Act now gives the Family Court and Federal Circuit Court the power to deal with any matters connected to or arising out of bankruptcy in a marriage or de facto relationship in the following proceedings:

- » Property settlement under Section 79 or 90SM;
- » Declaration of interest in property under Section 78 or 90SL;
- » Setting aside property orders under Section 79A or 90SN;
- » Spousal maintenance under Section 74;
- » Maintenance (in relation to a de facto relationship) under Section 90SE.
- » Enforcement of orders made in any of the above proceedings.

One of the effects of the amendments is that a bankruptcy trustee can be ordered to settle or transfer what would otherwise be property forming part of the bankrupt estate to the non bankrupt party or child of a marriage i.e. the non bankrupt party and any dependents can be protected from the effects of the bankruptcy of the bankrupt spouse.

Complications can arise in establishing a just and equitable distribution of property where spouses are not only life partners but partners in business.

Corporate - Informal Settlement

Parties in a spousal business relationship may agree to have the business independently valued with a view to selling to a continuing partner.

If agreement cannot be reached either as to valuation or the party to retain the business – it may be necessary to contemplate formal mechanisms available through the

Corporations Act / The Courts.

Voluntary Appointments

Perhaps not surprisingly separation and/or divorce are often an unfortunate by-product of business financial stress.

Voluntary Administration / Deed of Company Arrangement

Voluntary Administration is the mechanism wherein creditors claims are compromised by way of a Deed of Company Arrangement to enable the company and/its business to continue in existence, rather than proceeding to liquidation.

Prior to considering utilising Voluntary Administration to assist in resolution of spousal business disputes it is a necessary pre-condition that the company be insolvent or likely to become insolvent at some point in the future.

Voluntary Winding Up

Voluntary Winding Up is a terminal administration in the sense that at the end of the process the company itself ceases to be in existence.

It is typically adopted in circumstances where the company itself does not have the resources to contemplate the VA process.

Voluntary Liquidation can be utilised as a mechanism to facilitate a sale of the business as a going concern to a third party or indeed a continuing partner so long as market valuation is achieved for the business / assets of the company.

Voluntary Solvent Appointment

In the case of a solvent company members can resolve to wind the company up voluntarily by way of a Members Voluntary Winding up "(MVL)".

Assets can be realised, creditors discharged and a final distribution made in accordance with members interests.

To initiate a Voluntary Administration / CVL a majority director resolution is required, and in the case of a MVL a special resolution of members (i.e. 75%) is required. This

level of consensus may not be available in the marital dispute setting – so consideration of court intervention may be required.

Court Winding Up

An official liquidation is most often initiated by a creditor of an insolvent company.

Solvent Winding Up

A winding up can be ordered by the court in circumstances where the company is not insolvent.

These remedies can be applicable in matrimonial business disputes where the company itself is not insolvent but the controlling parties of the company are in dispute or there is managerial deadlock.

These remedies may be relevant to facilitate a resolution of matrimonial disputes.

In the context of matrimonial disputes the two most common grounds of solvent winding up are:

- » The affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against a member or members or in a way that is contrary to the interests of the members as a whole;
- » If the court considers that it is just and equitable that the company is wound up.

Court Ordered Receivership

In circumstances where there is a trading business or a non-corporate structure such as a partnership and the business is otherwise solvent a more appropriate relief other than an immediate winding up may be a court ordered receivership.

The power is derived from the inherent jurisdiction of superior courts and orders can be framed to enable:

- » The trading of a solvent business;
- » The sale of the business either to an arms length third party or one of the existing partners;
- » The settling of accounts amongst respective beneficial owners
- » Distributions of surplus funds (if necessary) amongst respective beneficial interests.

Trusts

A number of family businesses are conducted through the mechanism of trading / family trusts.

In the event of managerial deadlock as a result of matrimonial dispute an application to the court can be made pursuant to Section 70 of the Trustee Act 1925 (NSW)¹ for the replacement of trustees to resolve the deadlock.

The intervention of the court and the installation of a third party to run a businesses' affairs can be an expensive exercise which could dissipate some of the assets which might otherwise be available to the matrimonial pool.

Accordingly, the threat of court intervention by way of one of the above remedies can sometimes be sufficient to facilitate a settlement of the relevant property dispute.

However some matrimonial business disputes are by their nature so intractable that court intervention is the only practical measure to facilitate resolution of the dispute.

Statutory Trustee

The court can be approached to appoint a statutory trustee to sell jointly owned property.

In NSW, Section 66G of the Conveyancing Act 1919 provides that a co-owner of property other than goods can apply to the court to appoint trustees to hold the property on a trust for a sale or (on the application of a co-owner with more than a 50% interest in the property) a trust for partition.

This relief enables the sale or partition of the property even if one or more of the remaining owners object to it.

If a statutory trustee is appointed to the real property.

- » The co-owners rights to deal with the property are effectively lost;
- » The property usually has to be vacated before it is sold.

The appointed trustee for sale is under an obligation to use reasonable care to secure market value for the property.

Conclusion

The family law jurisdiction is characterised by inherent delay which inevitably leads to costs diminishing the matrimonial pool ultimately available to the separating spouses.

Appropriate use of some of the mechanisms outlined have the potential to either assist the preservation of the matrimonial pool pending a final ruling by the Court or as a circuit breaker to facilitate the settlement of matrimonial disputes without the ultimate involvement of the court.

¹There are equivalent sections in the respective state Trust legislation.

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