



# What will happen to the bankrupt's home?

Standard Note: SN/HA/5178  
Last updated: 30 September 2009  
Author: Lorraine Conway  
Section: Home Affairs Section

The treatment of the bankrupt's home and, specifically, whether the trustee in bankruptcy (the 'trustee') has the right to force its sale is determined by the *Insolvency Act 1986*, the *Insolvency Rules 1986* and the *Enterprise Act 2002*.

On bankruptcy, assets that form part of the bankrupt's estate pass to the trustee and, subject to certain exceptions, the trustee may act in relation to them as he thinks necessary for the benefit of the creditors. This means that the trustee may need to sell the bankrupt's home if this is the only way to raise money to repay creditors. However, it may be possible for the sale to be postponed until the end of the first year after the bankruptcy if a spouse or children live with the bankrupt. After that time, the court will only refuse an order for sale in exceptional circumstances, or if the value of the bankrupt's interest in the property is worth less than £1,000. Under the *Enterprise Act 2002*, the trustee has three years in which to deal with the bankrupt's home. If the trustee does nothing (which is unlikely) his interest in the property will revert back to the bankrupt. For all new bankruptcies, the three years period begins to run from the date of the bankruptcy order.

The purpose of this note is to look in detail at what will happen to the bankrupt's home under current insolvency legislation.

## Contents

<b>1</b>	<b>Assets of the bankrupt and the role of the trustee</b>	<b>2</b>
<b>2</b>	<b>Dealing with the bankrupt's home</b>	<b>3</b>
<b>3</b>	<b>Alternatives to an order for sale</b>	<b>4</b>
<b>4</b>	<b>The rights of the bankrupt's partner and children</b>	<b>4</b>
	4.1 Spouse has a proprietary interest in the family home	4
	4.2 The spouse has no proprietary interest in the family home	5
<b>5</b>	<b>A word of warning</b>	<b>5</b>

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to [our general terms and conditions](#) which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

# 1 Assets of the bankrupt and the role of the trustee

Bankruptcy and the sale of property is determined by provisions of the *Insolvency Act 1986* [the IA 1986], the *Insolvency Rules 1986*, and the *Enterprise Act 2002* [EA 2002].

Once a bankruptcy order has been made by the court, the trustee in bankruptcy (either the official receiver or an insolvency practitioner) is legally entitled to seize all assets in the bankrupt's possession at the time of the bankruptcy order.<sup>1</sup> He may also lay claim to 'after-acquired property', that is property acquired after the date of the bankruptcy order but before the date of discharge. In effect, the trustee in bankruptcy is under a legal duty to maximise the potential recovery for the bankrupt's unsecured creditors.

Pursuant to section 283(1) of the IA 1986, the bankrupt's estate essentially consists of all the property which belongs to or is vested in the bankrupt at the commencement of his bankruptcy (i.e. the date on which the bankruptcy order is made).<sup>2</sup> The Act defines the bankrupt's estate as follows:

283.-(a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy; or

(b) any property which is or is treated as being comprised in the estate by virtue of the provisions of the Act which relate to the insolvency of individuals<sup>3</sup>

Under section 436 of the IA 1986, the term 'property' is defined widely. It includes:

...money, goods, things in action, and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.

This means that the trustee may claim property obtained by the bankrupt at any time while he remains bankrupt. (For example, the court may order that part of the bankrupt's income from employment should be paid to the trustee). In addition, it is clear that although the bankrupt's estate is defined by reference to the date of the commencement of the bankruptcy order, the statutory definition of 'property' draws into the estate future and contingent interests, so long as they exist as proprietary interests at that date.

The bankrupt's 'beneficial interest' in a property (either freehold or leasehold) generally falls within his bankrupt estate and can be sold by the trustee in bankruptcy. A distinction is made between legal title and beneficial interest. The legal title to a property is held by the owner, whereas the beneficial interest is the bankrupt's interest in the proceeds of sale of the property. For example, if the bankrupt is the sole owner, the beneficial interest is the whole value of the property. If the bankrupt jointly owns the property (perhaps with a spouse or partner) the beneficial interest is usually an equal share of the value (unless specified otherwise in the deeds). If the property has been mortgaged, the mortgage company has first claim on any proceeds of sale. Therefore, the bankrupt's beneficial interest is calculated after deducting any loans secured against the property. In effect, the property passes to the trustee in bankruptcy subject to the mortgagee's interest and subject to the mortgagee's right to take possession even after the bankruptcy and to exercise all the other rights of a mortgagee (including the right of sale).

---

<sup>1</sup> Insolvency Act 1986, section 283(2)

<sup>2</sup> Insolvency Act 1986, section 278(a)

<sup>3</sup> Insolvency Act 1986, 283(1) The provisions referred to relating to the insolvency of individuals are sections 252-385 of the *Insolvency Act 1986*

On bankruptcy, the bankrupt's beneficial interest in a property will pass to the trustee. If the bankrupt is the sole owner, the legal title to the property will also pass to the trustee. However, if the property is jointly owned, the legal title will remain with the bankrupt and the co-owner, but the trustee may apply to the court for an order for possession or sale or take any other action he thinks appropriate. The primary objective of the trustee is to raise money to pay the bankrupt's creditors.

After discharge (usually after one year) the bankrupt is released from the bankruptcy debts and any property he acquires after his discharge is his; the trustee in bankruptcy cannot lay claim to it. However, the property comprised in his estate at the time of the bankruptcy order remains under the control of his trustee in bankruptcy. Discharge does not return ownership or control of bankruptcy assets to the bankrupt or prevent the bankrupt's trustee from carrying out any of his remaining functions in relation to the bankrupt's estate.<sup>4</sup> This means that if no one buys the bankrupt's beneficial interest in the family home, it remains with the trustee; it does not return to the bankrupt after his/her discharge from bankruptcy. Of course, the value of the beneficial interest may increase over time if the market value of the property increases. In which case, the benefit of any increase in value will go to the trustee to pay the creditors, even if the home is sold some time after the bankrupt has been discharged.

This fact would become apparent if the bankrupt tried to sell his home at any time after his discharge. A bankruptcy restriction notice is an entry at the Land Registry against a property that is solely owned by the bankrupt, it is automatically placed when a bankruptcy order is made. It alerts people to the fact that the bankrupt does not have the ability to sell the property or enter into any other dealings in connection with the property – only the trustee can do this. In practice, no purchaser would be advised to complete a purchase of the property without first ensuring that any restriction is removed.

If the property is jointly owned by the bankrupt (perhaps with a spouse or partner) the trustee may apply to the Land Registry for a Form J restriction to be entered on the Register of Title. Such an entry would mean that the Land Registry must notify the trustee of any dealings in connection with the property.

## **2 Dealing with the bankrupt's home**

Section 283A of the EA 2002 applies only where property comprised in the bankrupt's estate consists of an interest in a dwelling-house which at the date of the bankruptcy was the sole or principal residence of:

- (a) the bankrupt,
- (b) the bankrupt's spouse, or
- (c) a former spouse of the bankrupt

Section 283A limits the time in which the trustee can deal with the bankrupt's home to a period of three years. If the trustee fails to act within this three years period, the property will revert back to the bankrupt (i.e. it will no longer form part of the bankruptcy estate) unless the trustee:

- (a) has realised the interest; or
- (b) has applied for an order of sale or possession in respect of the premises in which the interest subsists; or
- (c) has applied for a charging order over the premises in respect of the value of the interest; or
- (d) has entered into an agreement with the bankrupt regarding the interest.

---

<sup>4</sup> The bankrupt also has a continuing obligation to attend on and provide information to the trustee if required

Section 283(A) of the EA 2002 came into force on 1st April 2004. For all new bankruptcy cases commenced after 1st April 2004, the three years period in which the trustee must deal with the bankrupt's home will begin to run from the date of the bankruptcy order.<sup>5</sup> If, however, the trustee is not aware of the bankrupt's interest in a property, (i.e. it was not disclosed by the bankrupt) the trustee will have three years from the date on which he/she became aware of it to deal with the interest.

For old bankruptcy cases, where the bankrupt has long-since been discharged but their home continues to vest in the trustee (described in the Act as 'pre-commencement bankruptcies'), the three years period ran from the date the provisions come into force (i.e. 1<sup>st</sup> April 2004) to 31 March 2007.

### **3 Alternatives to an order for sale**

As an alternative to obtaining an order for sale, under section 283(A)(3)(e) of the EA 2002, an agreement may be reached whereby the bankrupt's spouse, partner, a relative or a friend buys from the trustee the bankrupt's beneficial interest in the property.<sup>6</sup>

Another alternative would be for the trustee to agree to a charging order on the property; this would enable the bankrupt and his family to continue to live at the property.<sup>7</sup> The maximum duration of a charging order is normally 12 years but it can be renewed. The charging order would be subject to the provisions of the *Charging Orders Act 1979*. Under this Act the court has discretion to impose conditions as to when the charge is to become enforceable. When the property is eventually sold sometime in the future, the trustee would seize his share of the equity.

Any decision regarding the sale of the property rests with the trustee in bankruptcy (and any mortgagee of the property) and not with the bankrupt. It is not unusual for a trustee to opt for a charging order in circumstances where he is not able to dispose of the bankrupt's interest in the family home by the time he has completed the remainder of the administration of the estate.

### **4 The rights of the bankrupt's partner and children**

In most bankruptcies the family home will be the main asset in the bankrupt's estate available for realisation and distribution among creditors. Since selling the home is likely to make the bankrupt and his family homeless, a conflict of interest arises between the needs of the family and the needs of the creditors which has difficult legal and financial implications.

#### **4.1 Spouse has a proprietary interest in the family home**

If the matrimonial home was originally conveyed into joint names of the bankrupt and his wife, only the bankrupt's interest in the property will automatically vest in the trustee in bankruptcy. The wife will retain her own legal interest in the property and will in law be known as 'a trustee for sale of the property'. This means that if she refuses to sell the property, the trustee in bankruptcy must apply to the court for an order of sale under section 30 of the *Law of Property Act 1925*. Until that order is made the wife has a legal right to occupy the

---

<sup>5</sup> Under section 283A(6), the court may substitute for the period of three years a longer period in (a) prescribed circumstances, and (b) in such other circumstances as the court thinks appropriate. Alternatively, under section 283A(7), a shorter period may be specified instead of the normal three years period.

<sup>6</sup> A property conveyancing scheme is run by the Insolvency Service:  
<http://www.insolvency.gov.uk/pdfs/guidanceleafletspdf/home.pdf>

<sup>7</sup> *Insolvency Act 1986, section 313(1)*

property based on the fact that she is a person beneficially interested under a trust for sale which has not yet been determined by the court.

If the property is eventually sold, the trustee in bankruptcy can only take the bankrupt's share of the proceeds of sale. The trustee can only claim the wife's share if he can prove, to the satisfaction of the court, that the original conveyance should be set aside either as a transaction at an undervalue or as a transaction to defraud creditors under sections 339 and 423 of the IA 1986. For example, circumstances where the conveyance might be set aside might include the case of a transfer of the property out of the husband's name into joint names or the wife's name, or the acquisition of the property in joint names or the wife's sole name from funds supplied by the husband in order to defraud creditors.

#### **4.2 The spouse has no proprietary interest in the family home**

Under section 30 of the *Family Law Act 1996*, a spouse who does not have any proprietary (i.e. legal) interest in the family home may be given rights of occupation, known as 'matrimonial home rights'. These rights may be legally protected by registration. In effect, a spouse's matrimonial home rights are a legal charge on the estate which binds the trustee in bankruptcy.

Section 335(A) of the IA 1986 provides that a trustee in bankruptcy can apply to the court for an order for the sale of the bankrupt's family home. Before such an order is made the court will have regard to:

- the interest of the bankrupt's creditors;
- the conduct of the spouse, civil partner, former spouse or former civil partner in contributing to the bankruptcy;
- the needs and financial resources of the spouse, civil partner, former spouse or former civil partner;
- the needs of any children, and
- all the circumstances of the case other than the needs of the bankrupt.<sup>8</sup>

Under section 335A, after one year has passed since the vesting of the bankrupt's estate in the trustee, the court assumes that, unless there are exceptional circumstances, the interest of the bankrupt's creditors outweigh all other considerations. The rights of creditors are also considered paramount to any matrimonial/civil proceedings home rights and to the rights of occupation of the bankrupt after the end of the period of one year from the appointment of the trustee.<sup>9</sup> According to the Insolvency Service, the court has considered certain types of family suffering as exceptional circumstances but generally the trend is to favour creditors' rights without regard to ordinary family suffering.<sup>10</sup>

## **5 A word of warning**

Bankruptcy and property law is complex and detailed legal advice based on the full facts of a case should be sought. The information contained in this note is of a very general nature and should not be taken as a substitute for proper legal advice.

---

<sup>8</sup> *Insolvency Act 1986*, section 336(4)

<sup>9</sup> *Insolvency Act 1986*, sections 336 and 337

<sup>10</sup> [http://www.insolvency.gov.uk/freedomofinformation/technical/TechnicalManual/Ch25-6/Chapter33/part8/part\\_8.htm](http://www.insolvency.gov.uk/freedomofinformation/technical/TechnicalManual/Ch25-6/Chapter33/part8/part_8.htm)