

Bankruptcy & Insolvency Issues in Family Law

Presented to the CBA Family Law subsection by,

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Terminology

BIA or the Act – Bankruptcy and Insolvency Act, RSC, 1985, c B-3

Bankruptcy – the state of being bankrupt or the fact of becoming bankrupt.

Insolvency or insolvent person – the stage before bankruptcy where, generally, a person:

- a) is unable to meet obligations as they become due;
- b) has ceased paying current obligations as they become due; or
- c) has greater liabilities than assets.

Process of Assignment & Timing Issues

Acts of Bankruptcy – Examples:

- debtor makes an assignment
- debtor makes a fraudulent gift, delivery, or transfer of the debtor's property
- debtor leaves Canada or their home with the intent to defeat or delay creditors
- debtor gives notice to any of their creditors that payment of debt is suspended or about to be suspended
- defaults on a proposal made under the *BIA*

See *BIA* s 42 (1) for the full list.

Process of Assignment & Timing Issues (cont.)

Voluntary Assignment – BIA s 49 (1)

Insolvent person may make an assignment of all the person's property for the general benefit of the person's creditors.

Notice of Intention to Make a Proposal – BIA s 50.4 (8)

Insolvent person may be deemed to have made an assignment if they:

- fail to file with the official receiver documents prescribed at *BIA s 50.4 (8)*;
- fail to file a proposal within the prescribed time (as may be extended); or
- if they file a proposal not accepted by their creditors *BIA s 57*.

Petition into Bankruptcy – BIA s 43 (1)

One or more creditors may file an application for a bankruptcy order against a debtor if:

- debt(s) owing to the applicant creditor(s) amount to no less than \$1000; and
- debtor has committed an act of bankruptcy within the preceding six (6) months.

Process of Assignment & Timing Issues (cont.)

Bankruptcy prior to separation:

All of the insolvent spouse's assets will automatically vest in the bankruptcy trustee for the benefit of creditors.

Bankruptcy after separation:

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

(a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

s. 81 FLA (emphasis added)

Where assignment occurs post-separation and there is "crystallization" of the undivided half interest, only the bankrupt spouse's half-interest vests in the trustee for the benefit of creditors

Stay of Proceedings

Stay of proceedings commences on bankruptcy [*BIA* s 69.3 (1)] or on filing a notice of intention [*BIA* s 69 (1)].

The stay does not apply to child and spousal support claims made before the date of the initial bankruptcy event [*BIA* ss 69.41 (1) & 121 (4)].

Note that the stay would preclude claims for property division without an application to lift the stay (hence the importance of timing) *S.J.D. v S.A.G.*, 2015 BCPC 370 at para 122.

Issues Facing Trustees

Restraining Orders which prohibit dealing with assets or making an assignment;

Lack of recognition of the Stay of Proceedings for property issues;

Spouses separated but living under the same roof;

Spouses separated but no agreement in place;

Family unit size and calculation of “surplus income”.

Joint Property

Can include all property but vesting occurs upon assignment into bankruptcy;

Trustee required to deal with property.

Joint Debt

All family debt, both legal and non-legal;

Can Trustee pursue non-bankrupt spouse for 50% of “family debt”;

One spouse agreeing to be responsible for “debt” – cannot control third parties – CRA.

Debt that Survives

Examples:

- any award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted, or sexual assault, or wrongful death resulting therefrom
- any debt or liability for alimony or alimentary pension
- student loans from the government

See *BIA s 178 (1)* for the full list.

An order of discharge does not release the bankrupt from, among other things, any debt or liability arising under judicial decisions or agreements respecting child and spousal support claims [*BIA s 178 (1) (c)*].

Debt that Survives (cont.)

Costs orders related to claims for maintenance and support survive bankruptcy: *Dorey v Havens*, 2019 BCCA 47 at para 16.

Also note the application of *BIA* s 178 (1) (d) [fraud, embezzlement, or misappropriation while acting in a fiduciary capacity] to the family law context: *Lehman (Re)*, 2016 BCCA 514.

The determination as to whether a judgment is the type that survives does not have to be made at the time the judgment is made; the determination can occur after the bankruptcy: *Dorey v Havens*; *Lehman (Re)*.

The Trustee is your Friend



The Trustee is your Friend (cont.)

The Trustee is in a position to come to an agreement relating to assets and debts of a bankrupt.

Document Requests



Document Requests (cont.)

Trustee has information relating to income and debts of the bankrupt spouse;

Can request a “claims register”.

Presenters



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