



Photo: Jessica Shapiro

Till debt do us part

New rules make it easier for divorced partners of bankrupts to keep their assets, reports **Barbara Drury**.

Revolutionary changes to the interaction of bankruptcy and family law which come into effect next month will result in much better financial outcomes for non-bankrupt spouses and their children.

A lawyer and academic, Dr Tom Altobelli, believes the changes will have profound implications for non-bankrupt spouses. They may also lead to unsecured creditors becoming more savvy and perhaps insisting on more stringent credit requirements.

The Federal Government announced this month that its Bankruptcy and Family Law Legislation Amendment Act will take effect on September 19, in response to longstanding concerns about the uncertainty facing both bankruptcy trustees and non-

bankrupt spouses when these two areas of law operate concurrently.

It is not uncommon for marriages to break down in the lead up to bankruptcy, or after the event. The timing of the bankruptcy and the separation, the nature of the debts and the ownership of assets add up to a legal nightmare for divorcing spouses and creditors.

The new provisions won't make the split simpler, but they will streamline an extremely costly process.

David Bergman, legal policy adviser at the Federal Government's insolvency administrator and regulator, Insolvency and Trustee Service Australia (ITSA), says the changes are not principally aimed at changing the balance (between trustees and non-bankrupt spouses) but delivering greater certainty by

Sweet smell of succession

Continued from page 9
acquisition strategy," says Judy Hartcher, CPA Australia's business policy adviser.

The checklist for sale-ready businesses include ensuring that you have a family constitution, the company has been realistically valued (even if it is just a rough figure), and senior management and key staff are in place.

OPTIONS

Harry Kras, from the Family Business Resource Centre, says businesses have five basic options when the owner wants to retire: hand it on to the next generation, sell

to a third party, arrange a management buyout, liquidation or list on the stock exchange. The last option, he says, is not open to most small businesses due to the sheer size necessary for it to work.

Tim Gullifer, a partner at Deloitte Growth Solutions, offers one more option. He says family business should at least contemplate making use of the hundreds of millions of dollars now in private equity funds and looking for a home.

WITHIN THE FAMILY

Whether the owner is first, second or third generation, it is highly likely that they have poured their heart and

soul into building up the business. In most cases this means that the owner's "retirement savings" are also locked away in the company.

Deloitte's Gullifer says no matter who buys the business, the owners must establish an agreed value. This will protect the parents financially and help instil the child with a sense of the business's intrinsic value.

It will also prevent a feud between siblings who are concerned about their perceived share of the pie.

"If you are selling to family members it is important to get an independent valuation, because if you overvalue it the family member who acquires it pays more than they should," Gullifer says. "Conversely, if you go down the emotional route and undervalue it, it will be to the detriment of the owner and other family members. If you put a figure on the table, a family member can come in and buy it."

The owners will already know if any of their children want to take

over the business, thanks to the family conference/constitution.

Once the "new" generation agrees on the price, parents have a number of payments options, Kras says.

The price can be written off in the will, paid out of future profits, or the child(ren) can simply take out a bank loan.

Dominic Pelligana, a partner at KPMG, says if owners opt for future profits, they must have cash reserves to pay the capital tax liability once the sale is made, not when the purchase price is paid.

The Australian Tax Office also says that in any business sale it requires a letter confirming that the company is an ongoing one.

TRADE SALE

One of the worst exit strategies is simply putting an ad in the paper. Deloitte's Gullifer says this is generally seen as "desperate" and could seriously dilute the firm's goodwill.

A large part of the goodwill that jacks up the final sale price is the company's relationships with its suppliers and customers. Gullifer says if they are not sure if the business will be an ongoing concern, they could look elsewhere — creating risk and uncertainty for any new buyer. A bit of homework could add thousands of dollars, if not hundreds of thousands to the price, he says.

Sellers should quietly compare themselves with others in the sector, value the business, and then compile a list of potential buyers.

"Once they have identified likely acquirers, prepare an information memorandum. This is when the public become aware, so you have to inform your employees," Gullifer says. "The acquirer will also want to talk to your customers and suppliers, so they must be brought in."

But be warned, he says — although suitors may agree to sign a confidentiality agreement, "[these] are not worth the paper they are

"The Kiwis were tough, but getting good returns is even harder. I've been with Equititrust for years and they're great!"

Barry Muir, Former Australian Rugby League skipper.

Earn up to 8.75%*

No entry or management fees • Minimum investment \$10,000
\$300m under management • 22 year record
Minimum 12 month term - 8% • Income monthly or annually

AND NOW... 7 DAY NOTICE - 7%

*Assumes \$150,000 investment for 12 months with income paid at maturity

EQUITITRUST
Merchant Bank
Ph 1800 635 527
www.equititrust.com.au

AFSL 1061 029 854 Equititrust Limited ACN 052 283 844 Investment in the Equititrust Income Fund may only be made by using the application form in the Product Disclosure Statement issued 1 November 2004.

DONOVAN OATES HANNAFORD
MORTGAGE CORPORATION LIMITED

111 William St. Port Macquarie ACN 086 879 307 AFSL 227866

Offers you a 12 Month Debenture Investment 8.35% P.A.

OR FOR A SHORTER TERM 6 Months 5.95%pa 3 Months 5.45%pa

- 20 Years of mortgage management and investment experience
- Debenture interest paid monthly from the day you invest
- No entry, exit or management fees
- Please experience our service for yourself, and join our many other investors who have found our capabilities not only meet but exceed their expectations

For a Prospectus please phone 1300 654 849 or visit our website at www.dohmorcor.com.au

Applications for investment can only proceed on the form contained in the Prospectus dated 11th May 2005 and lodged with ASIC.

20% Fixed Rate
12 - 24 Months
p.a. Strictly Limited Offer

PORT MACQUARIE
property development trust

Invest in NSW fastest growing area
Property Asset Backed
Min 100K* NO Fees
13.75% Paid Monthly

(02) 6583 4000
ah 0414775225

property
port macquarie
prudent property developments

bringing concurrent proceedings together in one court.

Few doubt, however, that a seismic shift will take place.

According to Altobelli, a special counsel at Watts McCray Lawyers: "For the first time the rights of non-bankrupt spouses and their children will be balanced with the rights of unsecured creditors. Now there is a clear message of a level playing field."

Nabil Wahhab of The Argyle Partnership Lawyers says the upshot is that the Family Court will have exclusive jurisdiction in bankruptcy matters where one party in divorce proceedings is insolvent.

Wahhab says the Family Court will be able to equate financial contributions with those of non-financial nature, such as homemaking and child-care by the non-bankrupt spouse, who, more often than not, is the wife.

"The Family Court can look at the contributions made by both partners. In the past, where wives had to seek a claim in the Federal Court, non-financial contributions were not valued," Wahhab says.

On the other side of the bankruptcy and family law divide, bankruptcy trustees also welcome the changes despite some concerns about how the Family Court will view the competing rights of creditors and non-bankrupt spouses and their children. Paul Cook, an insolvency practitioner and deputy president of the Insolvency Practitioners Association of Australia (IPAA),

supports the changes. In the past a husband had property in his name and the bankruptcy trustee would take the property.

Because bankruptcy proceedings took precedence over family law matters, the non-bankrupt spouse had to fight for the right to claim part of the bankrupt spouse's property in the Federal Court, then go to the Family Court to stake a claim for anything left over.

"The law now recognises the wife has contributed and if they separate she has a legal claim to some of that property. It's sensible to have all matters heard in the Family Court. It's a fair balance," Cook says.

'For the first time the rights of non-bankrupt spouses will be balanced with the rights of unsecured creditors.'

TOM ALTABELLI, special counsel

Altobelli cites a case some years ago involving a very long marriage and 12 children.

The husband was the sole breadwinner and conducted the family's financial affairs, while his wife ran the household and cared for the children.

After a series of bad business deals the husband became insolvent and the marriage broke down. The major asset was the family home, which was in the husband's name. When the bankruptcy trustee took everything in his name to satisfy

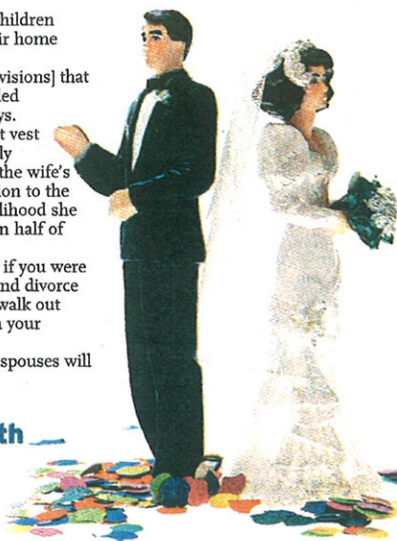
creditors, his wife and children were forced to leave their home with nothing.

"[Under the new provisions] that scenario would be decided differently," Altobelli says.

The house would not vest in the trustee, the Family Court would recognise the wife's non-financial contribution to the marriage and in all likelihood she would receive more than half of available assets.

"Under the old rules if you were married to a bankrupt and divorce then you were lucky to walk out with what you owned in your name," Altobelli says.

Soon, non-bankrupt spouses will



not only have property rights but they can also claim for maintenance against the trustee in bankruptcy of their bankrupt spouse, which was not available under the old rules but will now be paid as a lump sum.

Property such as the family home and business assets vests in the bankruptcy trustee, but other assets commonly involved in family law property settlements do not. The trustee does not have access to property held in trust or to the bankrupt spouse's superannuation up to the pension reasonable

benefit limit, which is currently close to \$1.3 million.

The changes will not affect the rights of secured creditors such as banks with a first mortgage over the family home, but they will have a major impact on unsecured creditors such as the Tax Office, credit card providers and trade debtors and financial institutions that make a business loan to one spouse secured against a second mortgage over the family home.

"It's a new balancing act," says Wahhab, who believes it is likely that the Family Court will also make adjustments to the division of assets to take into account the future needs of dependent children.

Already many family lawyers say one unintended consequence of the new rules is that married couples facing bankruptcy may have a financial incentive to separate even if the separation is a sham. Altobelli believes this is likely to be a major line of inquiry by bankruptcy trustees in the early days of the new regime.

The new legislation dovetails with amendments that came into force in April, which allow the Family Court to set aside binding financial agreements (BFA) if the intention was to defeat or defraud creditors.

This follows the case of a well-known company director who, close to the collapse of his company, used a BFA to sign a significant part of his wealth over to his wife, despite them living together and having no intention of separating.

The Australian Companies and Securities Commission (ASIC) challenged the BFA in the Family Court without success because the law at the time did not allow the BFA to be set aside when neither party challenged it.

All stakeholders say early cases are likely to test the new provisions.

"Bankruptcy trustees and Family Court judges will be on a high learning curve," Wahhab says.

written on". Connolly says the information memorandum should contain the sale procedure, executive summary of the sale, history of the business, products/services overview, details of the market, distribution and supply arrangement, names of key customers, financial projections and future potential.

MANAGEMENT BUYOUT

This is an increasingly popular method of sale as it allows managers and staff to pool their resources to buy the business.

For larger companies, the employees may have to get the backing of the bank and use the business as collateral.

Connolly says as management usually comprises younger people who already have mortgages and insufficient equity, the majority of buyouts do not add up and often fail to attract even the more expensive senior debt and mezzanine funding.

"However, for those who can achieve funding this choice is highly desirable," he says.

Some owners who want a staged retirement may loan the managers money or pay future salaries as equity in the business.

LIQUIDATION

Hopefully a business will never get itself into the situation where they have no option other than to liquidate the company. However, if this is their only choice, they should consult a compliance accountant, Connolly says.

PRIVATE EQUITY

Every month about \$3 million pours into investment houses through super funds. Yet the sharemarket is at a high and other investment classes are at best mediocre.

The extra funds still need to go somewhere, and at the moment they are being held by the likes of Deutsche Bank Private Equity, Investco, and many others.

"It's not a difficult process selling to a private equity player," Gulliver says. "Last year I sold a \$35 million business in the rag trade to

Deutsche Bank. It was funded by two super funds. It [the bank] was looking to cobble three similar businesses together, then exit [through an ASX listing] and make some money on the way" for the super funds.

He says businesses should not be seen desperately knocking on the banks' doors. Instead, the introductions should be made through a corporate finance company, that has a relationship with the private equity fund.

TAX AND DISCOUNTS

For those businesses where the sale and asset mix is below \$5 million, there are a number of discounts available.

These include the small

business 15-year exception offering a total write-off of CGT liabilities; the small business 50 per cent active asset reduction; the small business retirement exception that provides owners with exceptions if they put the money into superannuation; and the small business rollover. For more information go to www.ato.gov.au.

USEFUL WEBSITES

Family Business Australia: www.fambiz.com.au
Family Business Resource Centre: www.fbrcc.com.au
Family and Private Business Adviser Group: www.succession.com.au, www.businessmentoring.com.au.

TIME TO GO

Kevin Chambers was returning to his usual trans-Pacific plane seat - upper deck, exit row 16K - when he asked himself why he was spending up to 10 weeks every year hocking his company's plastic tags around the world.

Soon after touching down in Melbourne, he spoke to his business partner and younger brother, Ron. They decided it was time to plan for a carefully executed retirement, and quietly put the feelers out for a buyer.

Kevin, 57, and Ron, 52, inherited the plastic tag manufacturing business, Kevron Plastics, in 1975 from their father, who founded it in 1952. Determined to make a go of their chance, the brothers transformed the suburban Brunswick operation into an internationally competitive company. It exports more than 30 per cent of production, topping 35,000 tonnes in the last year the brothers owned it.

"These plastic tags have fed three generations of my family and provided me and Ron with a very comfortable retirement," Kevin says. As with most of the family businesses of his father's era, it was expected that the children would end up running the company. "These days people emphasise developing succession plans, and they are right."

When Kevin told Ron of his desire to retire and work on his golf, the brothers already knew that none of their children wanted to take the business over.

Kevin says it took about two years to find the right buyer, Phil Parton, who runs the company with Paul Metz, who remained as general manager after the sale.

"I'm a great believer in networking, in building the brand - 50 per cent of the price was goodwill and that is very high for a small business," he says.

TERM DEPOSIT SALE

5.75% p.a.	5.65% p.a.
12 Month Term Deposit	3 Month Term Deposit

For amounts \$25,000 to \$250,000.
Higher rates may apply for larger amounts.

- Call 13 30 30
- Apply at www.amp.com.au/banking
- Talk to your AMP Financial Planner



Rates current as at 12 June 2005 and subject to change. Interest paid at maturity. You should consider whether this product is appropriate for you. AMP Banking recommends that you read the Product Disclosure Statement which is available by calling 13 30 30 or by visiting www.amp.com.au/banking. AMP Bank Limited, trading as AMP Banking, ABN 15 081 596 009. AMPB1280