

Can I keep my House if I go Bankrupt?

The short answer is possibly.

Equity in real property in which you have a legal or beneficial interest vests in your Trustee in Bankruptcy and your Trustee will look to realise that equity for the benefit of your creditors during the course of your bankruptcy.

Legal Interest

A legal interest in property is typically evidenced by registration on the property title either as sole owner or joint owner with one or more other parties. The nature of the title will impact on the extent of the legal interest and legal advice should be sought to the extent that the legal right is uncertain.

The legal interest in title to real property would typically vest in the Trustee

Beneficial Interest

Even if you are not registered on title you may have an equitable or beneficial interest in real property that can be claimed by your Trustee. This would typically arise if you have contributed to the purchase or improvement of the property despite not being named on title. Examples would include paying part or all of the deposit, contributing toward mortgage repayments or funding improvements to the property.

Once again this can be a complex issue and determining the extent of beneficial or equitable ownership that may be at risk would require a review of all of the facts of any individual situation and legal advice should be sought prior to declaring yourself bankrupt if you think that this may impact you.

Equity

Typically real property in which you have an interest will be subject to some form of mortgage debt. A trustee can sell your property regardless of whether or not it is secured by mortgage, however, the trustee will have to account to the mortgagee for the debt secured by the mortgage. An assessment is typically made of the value that would be in the property after taking into account selling costs and repayment of any mortgage debt. The amount so assessed is typically the equity.

Your share of the equity, if any, would be determined with reference to your legal or equitable interest in the property.

Selling Equity

Once the equity has been determined a Trustee would typically offer to sell the equity to a non-bankrupt relative or spouse. If this were to happen the trustee's interest in the property would come to an end and provided you continued to meet your obligations to the mortgagee, you would be able to retain the house subject to the legal interest of the non-bankrupt party that acquired the equity.

Jointly Owned Property

The trustee would typically offer the joint owner the option to purchase your equity in the jointly owned property. If your co-owner is unable or unwilling to purchase your equity, your trustee will ask the co-owner to join in the sale of the property and the net sale proceeds will be divided in proportion to the ownership interest.

If your co-owner refuses to join in the sale process your trustee may apply to the court for an order of sale.

Can the Trustee Sell my Property After I am Discharged from Bankruptcy?

The equity in real property vests in your trustee for the term of your bankruptcy, typically three years, and if not dealt with at the time of your discharge would re-vest in your trustee. The re-vesting period is normally a further six years from discharge but can be longer in certain circumstances.

The risk to you is that whilst the value of your equity in real property may be minimal at the start of your bankruptcy, ongoing capital appreciation and servicing of the mortgage debt on the property during the term of your bankruptcy, and for up to six years after your discharge from bankruptcy, may create equity in the property that your trustee will look to realise for the benefit of your creditors.

As such it is essential to deal with any interest in real property early in your bankruptcy and to obtain proper advice as to your options.

Disclaimer

Please note that this is by no means to be taken as legal advice but rather our interpretation as registered Bankruptcy Trustees of the relevant legislation and in particular the Bankruptcy Act.

Further Assistance

We are more than happy to discuss any individual situations on a case by case no obligation basis. Should you have any queries please contact James Shaw or Paul Gidley on **1800 376 583** or via the chat line on our website at www.esolvency.com.au.

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