

9 Treatment of Family Homes in Bankruptcy

9.1 Background

1. Secured creditor options in bankruptcy

In bankruptcy, a secured creditor has three options:

- Confirm whether they wish to rely on its security and remain outside the bankruptcy, or
- Abandon their security and claim in the bankruptcy for full debt (rarely occurs), or
- Realise the asset or value the security they hold and then claim in the bankruptcy for any balance owed in excess of the net proceeds received or the valuation (rarely occurs)

2. Official Assignee in Bankruptcy

The functions of the Official Assignee in Bankruptcy are set out in *section 61 of the Bankruptcy Act 1988* (the Act) and are essentially to validate ownership of the assets, to realise them and to distribute the proceeds thereof to creditors. In discharging these functions, the Official Assignee will sell or surrender *buy to let* properties, depending on whether or not there is equity in these properties. In relation to the family home, the Official Assignee is precluded from selling the interest that has vested in him, without first obtaining the permission of the High Court under *section 61(4)* of the Act. The Court may, on application under *section 61(4)*, stay the order for sale for such period as the Court deems fit, having regard to the needs of the bankrupt and their dependents.

3. How family homes are dealt with in bankruptcy

The policy of the Official Assignee in applying the legislation in relation to the family home is best explained by way of the various scenarios that may arise, some of which are detailed below.

Scenario 1 - Family home in positive equity

The Official Assignee will seek to realise the interest in the family home. He will always seek to sell the half interest in the family home to the spouse and will accept staged payments, to allow the spouse to purchase the property. In the event that the spouse is not in a position to buy out the interest of the bankrupt, the Official Assignee is obliged to put the family home up for sale, having first applied for permission of the High Court as outlined above.

Scenario 2 – Family home in negative equity

Scenario 2a - Debtor loses family home - hands back the keys

If the bankrupt does not want to stay in the family home, because they cannot afford the repayments, or cannot for whatever reason, enter into an arrangement with the mortgage holder/lending institution, they will surrender the family home for sale by the mortgage holder/lending institution. The sale would crystallise the negative equity in the property for the mortgage holder/lending institution, with the negative equity being written-off in bankruptcy.

Scenario 2b - Debtor loses family home – against their will

If the bankrupt wishes to stay in the family home, they will first have to agree mortgage repayments that are acceptable to the mortgage holder/lending institution. Where the bankrupt has agreed such payments, they must then submit those payments to the Official Assignee for approval – having regard to the Reasonable Living Expenses (RLEs) issued by the ISI. If no agreement can be reached, the bankrupt will be required to leave the family home and seek alternate accommodation, which will again crystallise the negative equity in the family home.

Scenario 2c - Debtor remains in family home

If the bankrupt wishes to stay in the family home and can agree terms that are acceptable to the mortgage holder/lending institution and the Official Assignee, the family home may be retained. In bankruptcy, with commitments to pay unsecured debts (e.g. bank personal loan, credit card, Credit Union loan) ceasing, the bankrupt's capacity to pay the mortgage may significantly increase. Furthermore, the Official Assignee will sell the interest that vested in him for €5,000 to the bankrupt or their spouse, and will allow them to pay by staged payments over 12 months.

9.2 Survey

The table on the following page sets out the details of a survey undertaken by the Bankruptcy Division of the ISI in March 2015. It looks at debtors who were declared bankrupt in 2014 and sets out what has happened, or is likely to happen to the family home of the bankrupt. The analysis shows that approximately 70% of bankrupts lose their homes in bankruptcy. The majority surrendered the family home prior to bankruptcy, such that bankruptcy in itself is not an intervening event that causes them to lose their family homes.

2014 Bankruptcies - Family Home Analysis

Total 2014 bankruptcies	448		
Less subsequent annulments	-2		
Less those who never owned a home (renting)	-47		
Less those who didn't respond to survey	-16		
Effective sample	383	100.0%	
Family Home lost / Surrendered			
Bankrupts who have surrendered property	143	37.3%	
Bankrupts who have not yet lost their family home, but aren't paying mortgage and are likely to lose family their home in the future	112	29.3%	
Bankrupts whose family home has been repossessed	16	4.2%	70.8%
Family Home retained / sold to connected party			
Bankrupts who have reached deal with bank to stay in home or are servicing mortgage in full	89	23.2%	
OA sold/selling interest to spouse (bankrupt remains in family home)	15	3.9%	
Bankrupts who have equity in the family home which the OA will realise (possibly to spouse, in which case bankrupt will remain in family home)	8	2.1%	29.2%