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## **REAL ESTATE PROPERTY OWNED BY A BANKRUPT**

### **DISCLAIMER:**

*This memo represents our firm's opinion only. It should not be considered as legal advice and should only be used as an informative guideline. We advise that anyone who is involved with real estate, consult with a lawyer and obtain an independent legal opinion as to the effects bankruptcy may have on their property themselves and their family.*

This memo is to provide information to bankrupts, and their families, who own real property (real estate), in order that they understand the Trustee's responsibilities and position, and the effect this will have on the bankrupt.

1. All property owned by a bankrupt at the date of bankruptcy, or that they acquire prior to their discharge, is automatically vested in their Trustee, who becomes the "legal owner" of the property. This vesting is by law and does not require any action by the bankrupt or Trustee.
2. As the new owner of the property, the Trustee will usually register its interest on title but this is not required, as the property passes by law and vests in the Trustee. The bankruptcy is recorded with the government which will be notice to all in the future that the bankrupt's interest in the property passed to the Trustee on his/her bankruptcy.
3. It is important to note that even if a bankrupt does not disclose property to the Trustee, the Trustee still becomes the legal owner of the property. The bankrupt will not have capacity to deal with the property in the future, **EVEN** if they receive their discharge from the bankruptcy. **The property does not automatically "return" to the bankrupt when they receive their discharge.**
4. If the property was owned by the bankrupt as a "joint tenant", this joint tenancy is severed on bankruptcy. Any previous joint owners will then become "tenants-in-common" with the Trustee.
5. If the property is a matrimonial home and the other joint owner is the spouse of the bankrupt, and/or there are also children residing at the property, other considerations may come into play. We refer you to the case of *Yale vs McMaster*, 18 CBR (N.S.) 225
6. The trustee must then determine whether any equity exists in the property. Equity is usually defined as the value of the property after payment of all mortgages, liens and charges on the property, that rank in priority to that of the Trustee.

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- 7.. If the property has no equity, the Trustee will usually de-register its interest from title for a nominal sum. The Trustee will require a fee to execute any document related to this de-registration, sale or transfer of its interest. The purchaser or transferee will also have to pay any related legal fees to this transaction.
- 8.. If the property has equity, the Trustee must attempt to realize on this equity for the bankrupt's creditors. We refer you to Le Page (Re) [2016] O.J. 2859, Ontario Court of Appeal
- 9.. If the bankrupt wishes to "keep" the property, it may be in the bankrupt's best interest to arrange for a third party to purchase the property as soon as possible from the Trustee - especially in a rising market, as any increase in value will be for the benefit of the bankrupt's creditors via the Trustee, and not the bankrupt. Once a bankrupt is discharged from bankruptcy, they are free to "purchase" the equity from the Trustee themselves.
10. If arrangements are not made to purchase the equity from the Trustee, the Trustee remains the legal owner of the property. Therefore, if the bankrupt wishes to "keep" the property, it is very important that they make arrangements as soon as possible to deal with the matter.
11. If, at the date of bankruptcy, the bankrupt "walks away" from the property, any amounts owing to the mortgagee after disposition of the property will be a claim provable in bankruptcy and is not the responsibility of the bankrupt. If there is equity in the property, the bankrupt's share of the equity will be forwarded to the Trustee for the benefit of the creditors.
12. If a bankrupt remains in the property, they are free to make arrangements with the mortgagee for the continuation of regular mortgage payments or otherwise. It should be noted that the Trustee has little control over the mortgage company's decisions with respect to accepting new arrangements.
13. Any continuation of regular mortgage payments may be considered as "re-affirming" the mortgage and any future deficiency suffered by the mortgagee may become the responsibility of the bankrupt.
14. As noted in the disclaimer, bankrupts and their families should consult with, and obtain independent legal advice on this matter.