

Code of Banking Practice

Guidelines for parties involved in Family Law property proceedings.

These guidelines are for the assistance of parties, their legal practitioners and representatives involved with family law property proceedings including: agreements for division of matrimonial property, the division of joint property that is subject to a mortgage to us, and division of other joint and several liabilities owed to us. They are intended to be for general information and guidance, and are not a substitute for legal or financial advice. If you are contemplating or are involved in family law proceedings or a family law agreement you should seek specialist legal and financial advice.

A person's liability to us can be either as a borrower or as a guarantor of another person's borrowing from us. In these guidelines, a reference to a liability to us includes both borrowing and guarantee liabilities.

Under the Family Law Amendment Act 2003 the Family Court can make orders and issue injunctions that affect the rights, liabilities or property interests of third parties who are not parties to the marriage. The court has a wide discretion but can only make orders that are reasonably 'necessary or appropriate' to result in a division of property between the parties to the marriage and it must not be foreseeable that a debt will not be fully repaid. The orders must be 'just and equitable' or 'proper' and take into account taxation and social security effects, the third party's administrative costs, the capacity to repay without undue hardship and anything else the court considers relevant.

Where the bankruptcy of a party to a marriage occurs *after* separation, that person's trustee in bankruptcy may apply, under the Bankruptcy and Family Law Legislation Amendment Act 2005, to become a party to the Family Law proceedings, even if final property orders under the Family Law Act have been made. If those orders have been made, but not *fully* implemented, the trustee can still apply to have the Family Law proceedings reheard. The trustee's involvement would be 'for the benefit of creditors generally'. On the other hand, a non-bankrupt party may, in the Family Court proceedings, claim a share (for his or her own benefit) in the bankrupt's *undistributed* property.

Guidelines

- 1) We are not bound by Family Court orders or injunctions directed to individuals, or by privately negotiated agreements, and cannot be compelled to permit the transfer of property that is mortgaged to us or the re-allocation between the parties of debts owed to us (either secured or unsecured) unless:
 - expressly ordered by the Family Court; or
 - we are parties to the privately negotiated agreement; or
 - we consent to the privately negotiated agreement.
- 2) Where we are satisfied about the ability of the transferee of property or the party who has assumed liability for joint debts owed to us to fulfill the financial commitment to us by himself or herself without undue hardship, we will try to accommodate the new arrangements.
- 3) We might either agree to the transfer of the property and the mortgage and release the other party from further liability or retain our rights under the personal covenants in the mortgage against that other party.
- 4) In the majority of cases we would be reluctant to release joint debtors from their joint obligation to us where the debt is an unsecured liability.
- 5) Where a transfer of property subject to a mortgage to us is contemplated, applicants need to keep in mind the following points:
 - a) Allow sufficient time for us to make an assessment of the proposal; it is advisable to get in touch with us as soon as the likelihood of a settlement or court order altering the interests of the parties in mortgaged property arises.
 - b) Don't enter into the agreement or seek the court order until you know that we will agree to the transfer.
 - c) We need to make a fresh assessment of the transferee's capacity to service the mortgage debt as this, in effect, is a new loan application.
 - d) Where the court intends making an order requiring one of the parties ("A") to pay a lump sum or an amount by instalments in settlement of the other party's ("B") interest in property, if A is to borrow that amount we will take that amount into account when assessing A's ability to service the existing loan facility. Depending on A's financial circumstances, we might not be satisfied that the existing facility together with the new obligation to B can be serviced by A without undue hardship.
 - e) Full financial particulars including the terms of the proposed agreement need to be provided to us.
 - f) If there are continuing credit facilities such as overdrafts on joint (and several) accounts that are secured by the mortgage, we may have to stop further drawings on the accounts until the matter is resolved or unless both parties expressly agree to further drawings.
 - g) We are not able to divulge information about one of the parties to the other party or to their practitioners or representatives without that party's consent.
 - h) If there are other co-owners their consent will be required to any dealing with the property.
 - i) If other persons have guaranteed the parties' obligations to us, the consent of those guarantors might be needed before any re-arrangement of the facility.
 - j) There may be bank and other fees and costs payable for obtaining our consent to a dealing and in connection with the dealing itself.
 - k) Each application for our consent will be assessed on a case-by-case basis.
- 6) Where unsecured joint and several liabilities of the parties or a liability of one of the parties is proposed to be assumed by one of the parties, either in whole or part, an application for consent to recognise the change in liability should be made. The points in 5 a) to k) above should be observed. Contact should be made with us, to ascertain our likely attitude to releasing one of the parties, as soon as possible after it becomes apparent that an agreement or court order is likely to provide for a re-allocation of liabilities.
- 7) If the court grants one party the sole right to reside in a property, to the exclusion of the other party, our consent should be sought beforehand. Our rights against the other party under the mortgage over the property would be preserved unless we agree to release the other party from the mortgage.
- 8) If we decline a transfer or to release a party from further liability we will, unless prevented by a court order or injunction, be entitled to enforce any existing liability, if that becomes necessary.

