



HIGH COURT OF AUSTRALIA

Public Information Officer

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MICHAEL PELDAN AND MORGAN LANE (as trustees of the bankrupt estate of RAYMOND KENNETH PINNA) v BERNADETTE ANDERSON AND ROBYN MOLLEE (as executors of the estate of the late DOROTHY RUTH PINNA)

The trustees of the bankrupt estate of Mr Pinna are not entitled to the total proceeds of sale of the Pinnas' house for distribution to Mr Pinna's creditors, the High Court of Australia held today.

Mr Pinna's firm, Pinnacle Engineering, was in financial difficulty and by September 2003 his liabilities totalled \$1,474,291.35, including significant tax debts. The Pinnas' home in the Brisbane suburb of Carindale was sold in April 2004 following a bankruptcy petition by the Deputy Tax Commissioner. The elderly Mr and Mrs Pinna had owned the house as joint tenants. Mrs Pinna died in January 2004 and ordinarily her interest in the property would then have passed to Mr Pinna as surviving joint tenant and the whole property would be available to the trustees. However, in November 2003 Mr Pinna unilaterally severed the joint tenancy and the Pinnas became registered as tenants in common. Therefore, when Mrs Pinna died, her interest as tenant in common passed to her deceased estate and did not become part of Mr Pinna's bankrupt estate, so the trustees were entitled to only his half of the proceeds of sale. The trustees argued that the severance of the joint tenancy was in fact void by operation of section 121 of the *Bankruptcy Act*. The Federal Magistrates Court found in the trustees' favour, but Justice Susan Kiefel in the Federal Court allowed an appeal by Mrs Pinna's executors. The trustees then appealed to the High Court.

The trustees argued that the unilateral severance constituted a "transfer of property" for the purposes of section 121(1) of the Act, which provides that transfers of property are void if certain conditions are met, including that the property would probably have become part of the transferor's estate in bankruptcy if the property had not been transferred. However, section 121(9)(b) provides that a person who does something which results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person. The trustees submitted that extinguishment of the joint tenancy and the simultaneous creation of new rights in the Pinnas as tenants in common in equal shares answered the description in section 121(9)(b), and therefore made the "transfer" void under section 121(1)(a).

The High Court unanimously dismissed the appeal. Upon registration of the transfer by Mr Pinna, Mrs Pinna became "the owner of property that did not previously exist", namely an interest as tenant in common in the house in place of an interest as joint tenant. That interest as joint tenant was transformed, or extinguished and replaced, by the interest as tenant in common. Accordingly, the terms of section 121(9)(b) were met. A conundrum arises in applying section 121(9)(b) to section 121(1)(a), namely that if the act which is taken to have transferred the property did not occur, the "property that did not previously exist" would never have come into existence, so could not "probably have become" part of the bankrupt estate. Section 121(1)(a) assumes the transferred property was, before the transfer, capable of becoming part of that estate, while section 121(9)(b) assumes that the property which "did not previously exist" would not have come into existence if the act which is taken to have transferred it had not occurred. The Court held that where section 121(9)(b) is relied upon, the property referred to in section 121(1)(a) should be construed as signifying "the property in the hands of the transferor prior to the act which is taken to be the transfer". This removes from the operation of section 121(1)(a) the assumption that it is existing property which is being transferred. Section 121(1)(a) was not satisfied in the circumstances of the case because Mr Pinna's interest as joint tenant would never become part of his bankrupt estate. The onset of bankruptcy worked as a severance, so that all that would have become part of the bankrupt estate was an interest as tenant in common.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*