FAMILY LAW PROPERTY DIVISIONS

THE TREATMENT OF INHERITANCES

SUMMARY

For the purpose of understanding how the courts treat inheritances, there are three relevant classes of case:

1. Inheritances received during the relationship
2. Inheritances received late in the relationship or following separation
3. Where a party is likely to receive a substantial inheritance in the future from a testator who is still alive.

The principles may be stated as follows:

1. Ordinarily, when a party receives an inheritance during a marriage it is treated the same as any other contribution. A financial contribution does not fall into a protected category simply because it is an inheritance.
2. When an inheritance is received late in the marriage or post separation, the Court has a discretion to:
   a) exclude it from the main asset pool when assessing contributions, but
   b) have regard to it when deciding whether any adjustment is required under section 75(2).

   Whether the court will choose to take this two-pool approach will depend principally upon whether there are sufficient assets in the main asset pool to do justice to the other party, having regard to all the facts of the case.
3. The likelihood that one of the parties will receive an inheritance sometime in the future is generally irrelevant. The exception is where it can be shown that the testator no longer has testamentary capacity such that the testator's will can no longer be changed. In that case, the Court can have regard to the future expectancy as a factor relevant under section 75(2).

INHERITANCES RECEIVED DURING THE RELATIONSHIP

There is nothing special about an inheritance

The starting point is that no item of property falls into a special protected category simply because it is an inheritance, or the proceeds of inheritance.

In most cases, the inheritance will be included in the asset pool like any other legal or equitable interest in property. The inheritance is taken to be a contribution made by the party who received it, and what weight the Court gives it will depend on all the other contributions made by the parties across the entirety of the relationship.

All contributions, including inheritances, must be assessed holistically

The leading Full Court authority to this effect was the 2012 case of *Dickons*[1]. The relevant passage in *Dickons* was repeated twice by the Full Court in 2014 in *Bolger v Headon*[2] and *Singerson v Joans*.[3] It was repeated again in 2017 in the case of *Wallis v Manning*.[4]

For the purpose of making some sense of what it means to assess contributions holistically, two particularly helpful judicial statements are Kay J's gold bar analogy in *Aleksovski*[5] and Watts J's chemistry lab analogy in *Froth*.[6]

In *Aleksovski,* Kay J said:

> *What his Honour had to assess by way of contribution was 18 years where each party provided their labours towards the acquisition, conservation and improvement of assets, and towards the welfare of the marriage generally. Additionally, late in the marriage, the wife received a large capital sum arising out of a motor car accident. In my view whether the capital sum was acquired early in the marriage, in the midst of the marriage or late in the marriage, the same principles apply to it. The Judge must weigh up various*

1 (2012) FamCAFC 154 (19 September 2012)
2 [2014] FamCAFC 27 (27 February 2014)
3 [2014] FamCAFC 238 (10 December 2014)
4 [2017] FamCAFC 14 (10 February 2017)
5 *Aleksovski v Aleksovski* (1996) FLC 92-705 @ 83,443
6 *Froth v Froth* [2007] FamCA 1608 (21 December 2007)

> *areas of contribution. In a short marriage, significant weight might be given to a large capital contribution. In a long marriage, other factors often assume great significance and ought not be left almost unseen by eyes dazzled by the magnitude of recently acquired capital. A party may enter a marriage with a gold bar which sits in a bank vault for the entirety of the marriage. For 20 years the parties each strive for their mutual support and at the end of the 20 year marriage, they have the gold bar. In another scenario they enter the marriage with nothing, they strive for 20 years and on the last day the wife inherits a gold bar. In my view it matters little when the gold bar entered the relationship. What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship. Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight because of those other elements.*

Kay J's gold bar analogy was cited with approval by a unanimous Full Court as recently as 2012 in *Dickons*.[7]

In *Froth v Froth* , Watts J put forward a similarly useful illustration:[8]

> *Without attempting to compete with Kay J's gold bar passage and without wanting to turn "the erosion principle" into "the evaporation principle", let me illustrate the legal principals referred to above by using a metaphor. There is a beaker on a flame. One spouse, at the beginning of the marriage, pours an amount of water into the beaker. Over a long time both spouses each pour water into that beaker. The water is of different colours, representing personal exertion, introduced assets and the growth of assets from market forces, dividends and interest. The water bubbles away. Towards the end one spouse adds an inherited amount of water to the beaker. Throughout there is a distillation coil catching the steam. The condensed vapour is collected in a second beaker. At the end of this long marriage the parties have available to them the water left in the beaker on the flame. There is also an amount of water in the second beaker. That water represents the income, the capital and effort spent by the parties during the marriage, to which they no longer have access.*
>
> *To do justice between the parties what is left in the beaker on the flame needs to be distributed between the parties in a way that acknowledges the water in both beakers.*
>
> *In shorter marriages there usually won't be as much water in the second beaker.*

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[7] *Dickons v Dickons* [2012] FamCAFC 145 (19 September 2012) @ paragraph 20 per Bryant CJ, Faulks DCJ & Murphy J

[8] [2007] FamCA 1608 (21 December 2007) @ paragraphs 157 - 159

Such is the process that must be applied in considering what weight the Court will give to any inheritance received during the marriage. It is essentially the same process which the Court applies in weighing up initial contributions, gifts and any other material capital contribution which is made by one party only.

There is no requirement that the inheritance or its proceeds still be present in the asset pool, or traceable to the asset pool at trial. That approach was firmly rejected by the Full Court in *Dickons*:

> *… her Honour's reasons might be seen as suggesting a necessary causal relationship between contributions and what they are asserted to have produced in terms of the available property of the parties.*
> …
> *The corollary would appear to be that, if moneys were contributed to the relationship, but could not be tied to specific assets, or to the available property in its totality, they ought not be considered as contributions within the meaning of s 79.*
>
> *As is plain from earlier decisions of this Court, regard must be had to the use made of contributions of various types so as to compare the contributions made by each of the parties during the course of, and over the length of, their relationship (see, for example, In the Marriage of Pierce). But that is an entirely different proposition to, as it were, causally linking contributions with their asserted financial "product" or "value". The former recognises that the nature, form and extent of contributions made by each of the parties might differ; the latter suggests that the absence of a causal link counts as no contribution at all.*
> …
> *… it is self-evident that financial contributions (whether direct or indirect) can be made to a relationship that have an effect on the property of the parties without those financial contributions finding their way directly into, or being directly linked to, specific property or, indeed, directly to the totality of the property available for distribution at the time of trial. … A financial contribution can be made indirectly by, for example, the use by parties of income or assets for purpose A freeing up the use of other income or assets for purpose B. Moreover, a particular financial contribution might have been used wholly in discretionary expenditure which, but for that contribution, would not have been available to the parties or would have required borrowings or a diminution of capital. …*
>
> *Any and all such contributions, whether or not they sound in, or are directly linked to, the property available for distribution, should be considered and assessed together with the nature, form and extent of all other contributions of all types contemplated otherwise by s 79(4).*

INHERITANCES RECEIVED LATE, OR POST SEPARATION

Separate treatment using a two-pool approach

The separate treatment of inheritances received late in a marriage or post separation was first endorsed by the Full Court in 1991 in *Bonnici's case*.[9] In 2013, the principle was repeated, and essentially re-affirmed by the Full Court in *Bishop v Bishop*.[10]

Bonnici was a case where the husband received - late in the marriage - an inheritance of approximately $430,000 in circumstances where the value of the parties' other assets was approximately $585,000, accumulated over a 21 year relationship. The trial judge found that the parties' contributions were equal. The Full Court said:

> *The problem that presently faces the Court is as to whether a finding that the parties had contributed equally can be justified given the very substantial assets that came into the husband's hands shortly prior to the end of the marriage.*
>
> *We have no doubt that his Honour was correct in rejecting the submission that these assets were a "resource" and not property…*
>
> *The more difficult issue in this case is as to whether the same should be treated differently from other types of property in which the parties clearly have an interest.*
>
> *The answer, we consider, must depend upon the circumstances of individual cases. If, for example, in the present case, there had been no other assets than the husband's inheritance, but the wife had, as his Honour found, clearly carried the main financial burden in the support of a family and also performed a more substantial role as a homemaker and parent than the husband, then it would clearly be open and indeed incumbent upon a Court to make a property settlement in her favour from such an inheritance.*
>
> *A property does not fall into a protected category merely because it is an inheritance. On the other hand, if there are ample funds from which an appropriate property settlement can be made and a just result arrived at, then the fact of a recently acquired inheritance would normally be treated as an entitlement of the party in question.*
>
> *The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances. Such circumstances might include the care of the testator prior to death by the husband or wife as the case may be or other*

[9] *In the marriage of Bonnici* [1991] FamCA 86 (6 December 1991)
[10] *Bishop v Bishop* [2013] FamCAFC 138 (6 September 2013)

> *particular services to protect a property. But there was no evidence of this in the present case.*

The authority of this passage arose again for consideration by the Full Court in *Bishop's case*. *Bishop* concerned an inheritance received by the Wife late in the marriage, in circumstances where.

- Both the parties were aged in their mid fifties.
- The Husband was a farmer and the Wife was a teacher.
- Their cohabitation period was about 25 years.
- They had three children together.
- Apart from the inheritance, the parties' net assets at the time of trial totalled $1.134mil, of which $900,000 was referrable to the farm which the Husband worked.
- About two years prior to separation, the Wife received an inheritance worth about $252,000, of which $207,000 still remained in a bank account at the time of trial.

In weighing up contributions, the presiding Federal Magistrate determined to exclude the inheritance from the joint asset pool, and treat it as a separate asset which was to be retained by the Wife as her own property, but to which he would have to have regard in considering any section 75(2) adjustment. In doing so, his Honour followed the authority of *Bonnici's case* which, as his Honour understood it, compelled the Court to exclude from the asset pool any inheritance received late in the marriage or post separation.

As to His Honour's determination that he was bound to follow *Bonnici*, the Full Court said (per Finn, May & Strickland JJ):

> *We agree … his Honour was not constrained by what the Full Court said in Bonnici about the treatment of inheritances.*
>
> *As the Full Court emphasised in that decision, and as we cannot emphasise too strongly, each case in this jurisdiction will depend on its own facts or circumstances.*
>
> *However, we would not interfere with his Honour's decision because of his view that he was bound by authority to exclude the inheritance from the calculation of "the asset pool". This is because his findings or conclusions … would support the approach which he took of excluding the wife's inheritance from the "asset pool" and regarding the husband's contributions to it as "nil". His Honour did, however, have regard to the inheritance in the context of his consideration as to whether any adjustment was required to be made to the division of the property to which the*

> *parties had contributed, on account of the matters contained of s 75(2) of the Act. This, in our view, was an approach open to him.*

Bishop's case provides a clear, modern, Full Court authority in support of the two-pool approach where there are sufficient other assets to provide fairly for the other party.

In each case it will be a question of fact and degree as to whether the Court will be persuaded that the two pool approach is appropriate.

Practical illustrations

A convenient practical illustration of the two pool approach came only eleven months after *Bishop's case* when the Full Court (Thackray, Strickland & Ryan JJ) handed down its decision in the case of *Bevis*.[11]

Bevis presented a very different fact situation:

- The cohabitation period was one of 27 years.
- The parties had four children together, the youngest of whom was only 15, still at school and living with the Wife.
- Both the Husband and Wife were employed, although there was apparently a significant disparity in their earning capacities.
- The Husband had been a full time breadwinner throughout.
- The Wife had spent the entirety of the relationship juggling part time work and home maker duties.
- Apart from the inheritance, the parties' net non-superannuation assets at the time of trial totalled only $6,000, once the estimated cost of selling the matrimonial home was factored in.
- About a year after separation, the Husband received an inheritance worth around $278,000, $220,000 of which he had applied to purchase a house to live in. The balance of it he applied to meeting ongoing mortgage payments on the matrimonial home.
- The Husband had superannuation totalling about $727,000, after it had increased by $261,000 post separation (and where roughly $80,000 of that increase was referrable to

[11] *Bevis v Bevis* [2014] FamCAFC 147 (14 August 2014)

post separation salary sacrifices by the Husband). The Wife's superannuation was worth only $23,000

- The parties' ages were not specified in the judgment, but there was nothing to suggest that either of them was at or near an age where they could access their superannuation entitlements.

The trial judge was persuaded to adopt a three pool approach: non-superannuation assets, superannuation and the Husband's home which represented the remaining proceeds of the inheritance. In substance her Honour determined to:

1. Have the Husband pay the Wife a cash sum of $19,000 (effectively indemnifying the Wife for the agent's fees she would incur on the sale of the matrimonial home).
2. Divide the Husband's superannuation equally.
3. Allow the Wife to retain her own superannuation.
4. Allow the Husband to retain his home without further adjustment.

The Full Court dismissed the appeal, with reasoning which included four important observations:

1. They described the three pool approach as a "perfectly sensible approach to adopt" on the facts.
2. They agreed with the trial judge that the Husband's post separation contributions (significant as they were) could not be considered in isolation to all the other contributions and, specifically, the Wife's greater parenting contribution.
3. They reaffirmed the authority of *Bonnici* that an item of property does not fall into a protected category merely because it is an inheritance.
4. The outcome was not outside the range of discretion, although the Court recognized there were "other outcomes available."

By way of contrast, the 2014 case of *Miller v Miller*[12] (a first instance judgment of Foster J) provides an example of a case where the Court did not hesitate to include a husband's inheritance in the asset pool and assess the entire pool in the usual way, in circumstances where:

- The Husband and Wife were aged 43 and 37 respectively

[12] [2014] FamCA 591 (30 July 2014)

- There was only a small asset pool ($196,000 in non-superannuation assets plus $189,000 in superannuation).
- Both parties were earning only modest incomes.
- There were two young children of the marriage who were living with the Wife and spending alternate weekends with the Husband.
- Husband paid only nominal child support ($40 per week per child)

FUTURE INHERITANCES

Three basic propositions

The rules concerning future inheritances can be stated in three basic propositions:

1. As a general rule, the likelihood that a party will receive an inheritance at some point in the future is irrelevant if the testator is alive and still has testamentary capacity. That is the case irrespective of the size of the inheritance or the age of the testator.
2. The general rule does not apply if the testator has lost testamentary capacity, such that the testator's will cannot be changed and there is a high probability that the party will shortly receive the inheritance in accordance with the terms of the will.
3. It is not beyond the realms of possibility that the Court will consider the likelihood of a party receiving a future inheritance from a testator who still has testamentary capacity because – and as the Full Court has emphasised[13] - every case turns on its own facts. But that's the way to bet.

The leading Full Court authority is the case of *De Angelis v De Angelis,*[14] where the Court considered and applied the principles set out in the earlier Full Court decision of *White & Tulloch v White.*[15]

Three relatively recent decisions at first instance suggest that the court will not entertain any inquiry into a testator's affairs in circumstances where the testator has capacity and is still in charge of his/her affairs.[16]

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[13] *White & Tulloch v White* (1995) FLC 92-640
[14] [1999] FamCA 1609
[15] (1995) FLC 92-640

Proximity of the inheritance

Even if the testator has lost testamentary capacity, the Court must also consider how far away the inheritance might be temporally if it is to give the inheritance any weight in the section 75(2) exercise. If is not clear whether the testator will survive six days, six weeks six months or six years, the inheritance is likely to count for nought.[17]

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[16] *MacDowell v Williams* [2012] FamCA 479 (22 June 2012) per Kent J; *Kavan v Mallery* [2013] FCCA 210 (10 May 2010) per Judge Altobelli; *Parkes v Parkes* [2016] FamCA 44 (5 February 2016) per Thornton J
[17] *Idelsohn v Idelsohn* [2017] FamCA 488 (11 May 2017) per Benjamin J