

When You Inherit: To quarantine or not to quarantine and non beneficiary party rights?

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Introduction

1. Whilst the law in respect of inheritances would appear to be well settled, particularly in respect of an inheritance received following a separation of married or de facto couples, its proximity to separation can bear on the extent to which it is kept out of the pool of assets.
2. The full Court in *Figgins v Figgins (2002) Fam CA 688 (16 August 2002)* held that the receipt of an inheritance could be analogised with that of the receipt of a gift by the parent of a party, that is, the receipt of the inheritance will usually be treated as the financial contribution of the party who received it (para 61).
3. *Bonnici (1992) FLC 92 – 272* is authority for the following propositions:
 - a property is not protected because it is an inheritance
 - if there are ample funds for a settlement, a recently acquired inheritance is ‘normally’ an entitlement of the party who received the inheritance
 - a party cannot be regarded as contributing significantly to an inheritance received late in a relationship, except in very unusual circumstances, for example, the care of a testator prior to death or ‘other particular services to protect a property’
4. The converse of the second proposition above is that if there are not ample funds for a settlement and there is a recently acquired inheritance, a court might include the inheritance as part of the pool of assets and make an adjustment in favour of the non-beneficiary party.
5. The other implication is that the care of a testator by the non beneficiary party appears to be recognized by the Court as a contribution to the inheritance.

6. There is no doubt that the parties are required to ask the question of the extent to which the non-beneficiary party has contributed to the inheritance.
7. The court has stated that isolating or quarantining an inheritance must be done cautiously to ensure that earlier contributions to the family are not ignored (See *Sinclair and Sinclair (2012) FAM CEA 388 (25 May 2012)* at paragraph 23). The court in Sinclair included an analysis of inheritance cases dating back to 1999.¹
8. Most of the reported cases deal with inheritances received by parties late in the relationship, or after separation. The court has adopted a practice of a two pool or one pool approach to inheritances. If the court is inclined to conduct an asset by asset

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16. In *Dickson and Dickson* [1999] FamCA 278; (1999) FLC 92-843 the Full Court noted that the wife had made both greater financial and non-financial contributions than the husband. The Court noted the wife had invested well, raised the family and had a steady income as well as her inherited assets. On the other hand, the husband's income was irregular and modest. Over the 26 year marriage, there was an asset pool of \$6.6 million. The trial judge adjusted matters on a 75 per cent/25 per cent in favour of the wife. The Full Court found reason to criticise the approach taken by the trial judge in respect of s 75(2) factors particularly in relation to the issues of standard of living and made an overall adjustment as to 70 per cent to the wife and 30 per cent to the husband.

17. In *Schirmer and Sharpe* [2005] FamCA 40; (2005) FLC 93-213, the Full Court noted that significant property had been received by one party (the wife) subsequent to separation through inheritance and that up until separation, contributions had otherwise been equal. The assets were all included in "the pool" and the trial judge determined the contributions as to 90 per cent to the wife and 10 per cent to the husband but made a further adjustment of 2.5 per cent in favour of the husband. The Full Court noted the discretionary nature of the assessment and found that it was within the range.

18. In *Mistle & Mistle* [2010] FamCA 29, Le Poer Trench J dealt with a 23 year marriage where both parties brought property into the relationship and both worked as medical practitioners. At the time of separation, the assets totalled \$4.2 million and subsequently, the husband received an inheritance of \$9.5 million. His Honour excluded the inheritance from his calculations and divided the \$4.2 million as to 80 per cent to the wife and 20 per cent to the husband.

19. In *Elgabri & Elgabri* [2009] FamCA 227, Coleman J dealt with a 25 year marriage where the husband inherited \$527,000 late in the marriage. His Honour found that both parties otherwise had made equal contributions of a financial and non-financial nature. His Honour excluded the \$527,000 inheritance. His Honour found the contributions equal and then made an adjustment of 7.5 per cent in favour of the wife because of the benefits that the husband had through the inheritance.

20. Similar cases have been dealt with by the courts and a variety of approaches have arisen which include quarantining the inheritance and dividing the balance making appropriate adjustments (see *Vokic & Vlass* [2012] FamCA 56 and *Froth & Froth* [2007] FamCA 1608).

21. In *Pierce and Pierce* [1998] FamCA 74; 24 Fam LR 377; (1999) FLC 92-844 the Full Court said that initial contributions had to be considered in the light of their impact on the assets of the parties and in light of the erosion by other contributions made by the parties subsequent to that initial contribution. Here, the erosion principle has no significance in my view because the parties started with virtually nothing, were living together for somewhere between 1959 and 1986 and have continued some form of relationship (and not necessarily a marriage relationship) for 25 years thereafter.

22. In *Bremner and Bremner* [1994] FamCA 116; (1995) FLC 92-560 the Full Court noted that an initial substantial contribution may be eroded by later contributions even though those later contributions do not necessarily outstrip those of the other party who has not made a similar contribution. The same could be said for significant non-financial contributions at the start of a relationship at which point in time, there are no assets of substance, but which are later significantly blurred by significant financial contributions received by way of inheritance. As Kay J pointed out in *Aleksovski and Aleksovski* (1996) FLC 92-705 in a long marriage, a variety of factors often assume great significance and "ought not be left almost unseen by eyes dazzled by the magnitude of recent acquired capital".

approach and to separate the inheritance into a separate pool, its practice has been to make a section 75(2) adjustment in favour of the non-beneficiary party, having regard to the disparity of capital between the parties.

Case analysis

Bonnici

9. The total net value of the party's property was \$585,000, which it seems does not include the remains of the husband's inheritance of \$287,000.00.
10. The parties married in 1969 and separated in 1990.
11. Three years prior to separation, the husband inherited \$20,000 in cash from an uncle and a restaurant business which sold for \$750,000, the proceeds which were divided equally between himself and his sister.
12. It was ultimately found that the husband received about \$390,000 in respect of the inheritance.
13. The court excluded the husband's inheritance from the asset pool and the adjustment in favour of the wife was \$277,500.00.

Sinclair and Sinclair

14. This was a decision of Justice Cronin.
15. The parties married in 1959 and separated in 1985.
16. The asset pool was \$7.3 million.
17. The inheritance of the wife was said to represent 75% of the asset pool and was 'unrelated to the direct contributions of the parties themselves'.
18. There is very little detail in the judgement as to when the wife received her inheritance, except that it appears to have been received early in the marriage. There is no reference at all in the judgement as to how much the wife inherited.

19. However, HH found that three quarters of the pool of assets could be seen to be unrelated to the direct contributions of the parties themselves(Para 100). The finding was therefore that the husband and wife had otherwise contributed equally to about the remaining one quarter. His Honour then assessed the husband's contribution to the relationship as reflected in the pool at about half of one quarter or 12.5% or \$912,000.
20. Justice Cronin then made a cash adjustment for S 75(2) factors of a further \$200,000 in the husband's favour, on the basis of the disparity of capital and income earning between the parties, as the wife could command an annual income of \$250,000. The effect was to award the husband 15% of the net value of the party's property.

Dinsmore (2012) Fam CA 798

21. The parties commence cohabitation in 1980 and separated in 2009.
22. In 2007/2008, the husband received an inheritance of \$1.173 million. Further, between 2003 in 2008, the husband received inheritances of \$270,000, which he used predominantly for general living expenses and superannuation.
23. In 2009, the wife received an inheritance of \$72,000.
24. The net property of the parties was \$2.7 million, including the husband's superannuation of \$320,000 and the husband's inheritance which represented 43% of the pool of assets.
25. Justice Watts concluded that contributions were 70/30 in favour of the husband, but adjusted for S 75 (2) factors 7.5% in favour of the wife, resulting in a 62.5/37.5% adjustment in favour of the husband.

Bishop v Bishop(2013) FamCAFC 138

26. Parties married in 1983. There were three children. Parties separated in September 2006.

27. The husband owned farming property 'T' with his mother. In 1988, the parties bought out the mother using the wife's \$25,000 inheritance and borrowed funds of \$100,000.
28. In August 2005, the wife received an inheritance valued at \$227,000 from her aunt in England. The funds were quarantined in a trust fund and never intermingled with joint funds or funds owned by the husband.
29. The total on super pool was 1.134 million, which included the real property 'E' which the parties bought from the husband's parents in 1994, having sold property 'T'.
30. The Federal Circuit Court judge excluded the inherited funds from the pool of assets and assessment of contributions, but did have regard to s75(2) factors and awarded the husband 55/45 snipes at, including section 75(2) factors. These were not upset by the Full Court although the matter was remitted as a consequence of an error in relation to the parties contributions to superannuation.
31. The full court did not disturb the trial judges interpretation of Bonnici and held:
28. *We agree with the assertion in Ground 3 that 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.*
29. *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 in the last three sentences of [41] 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.*

Stone v Stone (2015) Fam CAFC

30. Parties commence cohabitation in 1998 and separated in March 2009.
31. Each party owned real property at the commencement of the marriage.

32. The parties made significant improvements to 'N' property in 2002 of \$1 million, which was owned by the husband's mother. The husband's mother died in 2006, and the husband received 'N' property (valued at \$2.2 million) and an additional \$560,000 by way of inheritance in shares and other assets.
33. The wife had contributed \$150,000 to the improvements of the 'N' street property, which was the subject of a binding financial agreement, which the husband repaid to the wife, with the exception of \$25,000, by the time of trial.
34. The total net assets of the parties was \$5.6 million.
35. The trial judge adjusted contributions 60/40 to the husband and made a s75 (2) adjustment of 8% to the wife, resulting in a 52/48% adjustment in the husband's favour.
36. The husband argued on appeal that the trial judge ought to have adopted an asset by asset approach, rather than a global approach, as the inherited assets represented more than one half of the \$5.6 million net pool (Para 32).
37. In essence, the Court of Appeal considered that the real attack by the Husband was upon the failure of the trial judge to adopt a two pool approach and to attribute proper significance to the value and time of the inheritances introduction to the party's relationship. Further, it was argued that the trial judge failed to consider the contention that the wife made no contribution to the N street property.
38. Lawyers for the wife argued as follows: (see Para 39 – 41)
39. *We agree with counsel for the wife that although the husband's interest in the N Street property did not crystallise in the sense that he did not acquire the right to have the title to it transferred to him until probate over his mother's estate was granted in April 2007, he had before that time acquired an interest in it greater than that described by his counsel. Before his mother's death, both he and the wife moved into the property and made significant renovations to it expending funds accrued during the cohabitation to do so. It was conceded by counsel for the husband during the argument on the appeal that the cost of acquisition of his sister's interest and the \$1 million spent on improving the property amounted to about one half of the value of the N Street property.*
40. *These circumstances would, it seems, give rise to an equitable interest in the husband by way of a constructive trust in the property. In our view there can be no doubt that before his mother's death, the husband had acquired a beneficial interest in the property of at least 50 per cent of its value.*
41. *Viewed in this way, the husband's argument that the whole of the value of the inheritance was received by him late in the relationship, could not be sustained.*

39. The Full Court approved the 8% s 75(2) adjustment on the basis that:

- the wife had the ongoing primary carer of the child of the marriage
- there was a clear disparity in the income earning capacity of the parties
- the resultant division of assets would leave the husband in a stronger position as to capital
- the husband had failed to disclose his proper financial position

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