JAMES MCCONVILL & ASSOCIATES

The Law on Prospective Inheritances in Family Law Property Matters

How to deal with the prospect of a party's potential future inheritance is a vexed issue in Australian family law

BACKGROUND

When dividing assets after separation, it may become relevant to consider the prospective (or "future") inheritances of the parties involved. Issues arise where one partner is nominated in a will to receive an inheritance from a member of their family. The Court is then tasked with determining whether the other partner is entitled to a proportion of this future inheritance.

THE CURRENT APPROACH

Whether a prospective inheritance warrants an adjustment in the property settlement is dependent on the particular circumstances of each case. In *White & Tulloch v White* (1995) 127 FLR 105, the Court affirmed that there is no 'any absolute rule' in this area. Instead, they held that:

"The ultimate criterion is whether the evidence is, or may be, relevant to the just and equitable process... In the end, relevance must depend upon the nature of the claims being put forward and the facts of the particular case."

As such, the Court is primarily required to have regard to what is 'just and equitable' in the circumstances, consistent with Section 79(2) of the *Family Law Act 1975* (Cth).

When making orders as to the division of property, the court is permitted to consider a range of factors under Section 75(2) of the *Family Law Act*. In particular, they may consider the financial resources of the parties (Section 75(2)(b)) and 'any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account' (Section 75(2)(o)) (so called "future needs")'"

While in the matter of *Sapir v Sapir (No. 2) (1989)* FLC 92-047, an anticipated inheritance was considered as a "financial resource" within Section 75(2)(b), the Court in *White & Tulloch v White* 1995 (1995) 127 FLR 105 held that the prospect of inheritance was not a financial resource. Instead, the Court considers prospective inheritances under Section 75(2)(o).

In determining whether it is just to make an order which takes into account the prospective inheritance of one party, the Court has particular regard to the likelihood that the inheritance will be received and the size of the inheritance.

LIKELIHOOD OF INHERITANCE BEING RECEIVED

Significant consideration is given as to whether it is likely that the party will actually receive the inheritance in question. In doing so, the Court takes into account the health and capacity of the testator. As such, if the testator has deteriorating health, and limited capacity to change their will, the Court will be more likely to make an order which takes into account the prospective inheritance.

In *White & Tulloch v White,* it was noted that this 'is ultimately a question of fact and degree.' The Court provided two scenarios to give clarity on this issue:

"In a case where the testator had already made a will favourable to the party but no longer had testamentary capacity and there was evidence of his or her likely impending death in circumstances where there may be a significant estate, and where there was a connection to s 75(2) factors, it would be shutting one's eyes to realities to treat that as irrelevant.

On the other hand, the bald assertion that one of the parties has an elderly relative who has property and is or is likely to benefit that party is so speculative that it would be inappropriate to contemplate it as relevant in an s 79 determination, it being too remote to affect the justice and equity of the case in any worthwhile way."

In this case, the wife was nominated in her mother's will to receive an inheritance when her mother passed. Her ex-husband argued that he should be entitled to a share of her future inheritance. However, the court noted that the wife's mother was in her early 80's and in good or reasonable health. Hence, it was possible that she could later choose to benefit other people or institutions in her will.

The Court essentially explained that such a benefit to any beneficiaries would erode over time as the mother is still alive, and hence it was difficult to know what, if any, assets would still exist when the will would come into effect. Therefore, the Court rejected the husband's claim for his ex-wife's future inheritance.

In contrast, in the matter of *De Angelis and De Angelis [2003] FLC 93-133, the Court made an adjustment to the property pool based on the likely inheritance of a large amount of money from the wife's aunt. This was justified on the basis that the aunt was 90, suffered from dementia and likely lacked capacity to change her existing will. Furthermore, the husband had* conducted substantial maintenance work on both properties which significantly improved their value, thereby benefiting the wife. Hence, it was held to be unjust in the circumstances to deny the husband a proportion of the inheritance.

A similar decision was reached in *Webster v Webster* [2007] FamCA 1652. In this case, a husband claimed an adjustment to the property settlement on the basis that his wife would inherit 70% of a sizable estate from her aunt in the reasonably foreseeable future. The court granted an adjustment as it was unlikely that the aunt's will would be changed as she was 92 years of age and in reasonably poor and deteriorating health.

SIZE OF INHERITANCE

Additionally, the size of the prospective inheritance is a major factor in determining whether it should be considered in a property settlement. Where the monetary value of the inheritance is of such significance that it impacts on the financial situation of the parties, it justifies consideration by the Court.

For instance, in the case of *Webster v Webster*, it was held that it was likely that the wife would soon receive about 70% of her aunt's estate which was valued at $2.8-3 million. This was considered a significant inheritance, which would secure the wife's financial future much more considerably than her husband's. As such, it was held unjust to ignore the prospective inheritance in the circumstances.

ADJOURNMENT IN CERTAIN CIRCUMSTANCES

Where a testator's health is rapidly deteriorating or they are near death, the Court may adjourn the matter until their death, so that the actual inheritance may be identified.

This was affirmed in the case of *Rogan v Rogan* [2007] FMCAfam 1044. The Court noted that an 'adjournment would probably crystallise the prospective inheritance and arguably make quantification of the 75(2) factors easier.'

CONCLUSION

The prospective inheritance of one party may be considered in a property settlement. This will depend on the unique circumstances of the case, considering factors such as the likelihood the inheritance will be received and the size of the inheritance.