Prospective Inheritances in Family Law Property Proceedings
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This article deals with how the Court considers prospective inheritances when determining what adjustment to make to the legal and beneficial interest of the property of the parties to the relationship ("the parties' property"). The article concentrates on prospective inheritances following the breakup of a marriage. The same principles apply when considering the adjustment to make after the breakup of a de facto relationship.

The Court’s approach in determining any adjustment to the parties’ property is first to identify and value the existing legal and equitable interests in the property of the parties ("the property pool") and then to evaluate whether it is just and equitable to make any order adjusting those interests. In determining what order is to be made, the Court must consider all of the factors set out in Section 79(4) including what are referred to as the Section 75(2) factors.

Factors the Court Considers
Section 79(4) deals with what is described as the ‘contribution entitlement’. That is the financial, non-financial, parenting and homemaking contributions each party makes to the marriage. Once that assessment is made, the Court then turns to the range of factors under Section 75(2) which includes:

- Health;
- the caring responsibility of children;
- income earning capacity;
- age;
- financial resources;
- superannuation;
- general provision under Section 75(2)(o) which allows the Court to consider any other matter that is relevant.

This last provision has significance in determining how to deal with a prospective inheritance.

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1 Family Law Act 1975 (Cth) s 79(2) ("FLA").
What is a Prospective Inheritance?

In Family Law property proceedings, there is an important distinction to be drawn where inheritances are concerned. The first kind is where the inheritance has already been received by one of the parties, and usually before the breakdown of the relationship. The Courts have little trouble in dealing with such inheritances. The other kind is a prospective inheritance, being an inheritance which a party may receive sometime in the future, but has not yet been received as the testator who has made provisions for that party in their will is still alive. Dealing with those prospective inheritances presents a more problematic exercise for the Courts.

Issues with Prospective Inheritance

A prospective inheritance may be no more than an expectation as there can be no assurance that the testator will not change his or her will.\(^3\) In light of this, the Courts do not include a prospective inheritance as part of the property pool, but may consider it either as a financial resource under Section 75(2)(b) or generally under Section 75(2)(o).

While there is no absolute rule as to how the Courts ought to treat prospective inheritances,\(^4\) the Courts have approached the issue by taking into account:

- the size of the inheritance;
- the likelihood of the inheritance being received; and
- the time at which the inheritance is likely to be received.

Size of the Inheritance

The key issue surrounding a prospective inheritance is whether it should be considered in making property adjustments. However, the size of the inheritance can largely determine whether the Court ought to consider it. For example, if the property pool is valued at $5 million, and one of the parties is expected to inherit an item of jewellery valued at $1,000, it is unlikely the Court would encounter any great difficulty in dealing with this inheritance, and it is unlikely the Court will make any kind of percentage adjustment as a result. On the other hand, where the size of a prospective inheritance is significantly comparable to the size of property pool, its treatment is somewhat more problematic, as was the case in \textit{In the Marriage of De Angelis}.\(^5\)

In \textit{De Angelis}, the matrimonial property was valued at roughly $560,000,\(^6\) however, the wife in the matter was expected to receive, by way of inheritances from her mother and her aunt, two properties with a total value of $500,000.\(^7\) Faced with this sizable prospective inheritance, Lindenmayer and Finn JJ noted that it would be unjust to ignore the inheritance.\(^8\)

Likelihood of Inheritance

In the case of \textit{White & Tulloch v White},\(^9\) the Full Court of the Family Court noted that in determining the likelihood of an inheritance coming to fruition, two factors may be of assistance:\(^10\)

- the testator’s testamentary capacity; and
- the testator’s health.

\(^{3}\) White & Tulloch v White (1995) 19 Fam LR 696, 702 (Fogarty, Kay and Hilton JJ).
\(^{4}\) In the Marriage of De Angelis [1999] FamCA 1609, [95] (Lindenmayer and Finn JJ) ("De Angelis").
\(^{5}\) [1999] FamCA 1609.
\(^{6}\) Ibid [36] (Lindenmayer and Finn JJ).
\(^{7}\) Ibid [55] (Lindenmayer and Finn JJ).
\(^{8}\) Ibid [96] (Lindenmayer and Finn JJ).
\(^{9}\) (1995) 19 Fam LR 696.
\(^{10}\) Ibid 707 (Fogarty, Kay and Hilton JJ).
Again, in the case of De Angelis, the wife’s aunt was 90 and had suffered from dementia and therefore lacked the capacity to alter or revoke her existing will. The aunt had made a will, with the wife being a beneficiary under the will. The Court in the process of determining what adjustment to make to the property pool took into consideration that, as the aunt lacked capacity, it was very unlikely she was going to change or revoke her will and therefore the wife was likely to receive the inheritance under her aunt’s will.

The Court then went on to make an adjustment of the overall property pool by taking into account the likely inheritance of the wife from her aunt, as well as the inheritance from the wife’s mother.

**Timing of Inheritance**

Where the Court is satisfied that an inheritance is likely to be received, and that the size of the inheritance would warrant an adjustment of property interests, the Court may also wish to consider when the inheritance would be received. If, for example, the testator who has made provisions for one of the parties is faced with imminent death or is in a state of rapidly deteriorating health, the Court may adjourn the matter until the testator has died, and the actual inheritance can be identified. The Full Court in Grace, noted that a prospective inheritance might present sufficient grounds to grant an adjournment. In the matter of Rogan, Altobelli FM noted that an ‘adjournment would probably crystallise the prospective inheritance and arguably make quantification of the 75(2) factors easier.

**Other Considerations**

In De Angelis, additional factors were considered by the Court in its treatment of the wife’s inheritance, including the contributions made by the husband to the wife’s mother’s property, and the potential challenge against the aunt’s will by her son.

Lindenmayer and Finn JJ, quoting the trial Judge, stated that:

“[t]he husband has contributed to a very substantial extent to the expectation of the inheritance of the wife’s mother’s home, both as to its value by his labours and contribution to the cost of renovations and maintenance and because of his contribution to which allowed the wife to care for her mother … these contributions ought to be taken into account in adjusting the parties’ division of property.”

The wife in De Angelis contended that the inheritance she was expected to receive from her aunt should not be considered as a relevant factor for the reason that her aunt’s son had intentions of challenging his mother’s will. While this issue was not explored at any great length, either at first instance or on appeal, it still nonetheless illustrates the broad nature of the factors the Court may consider under Section 75(2)(o).

Ultimately, in De Angelis the Court deemed the wife’s inheritance, from her mother and aunt, to be relevant in its consideration under Section 75(2)(o). Accordingly, as the wife was likely to receive two properties with a value of $500,000, the Court made a percentage adjustment to the property pool of 63.8% to the husband and 36.2% to the wife.

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11 FLA s 79(5)(a).
12 In the Marriage Grace (1997) 22 Fam LR 442.
14 Rogan v Rogan [2007] FMCA fam 1044.
Conclusion

Issues surrounding prospective inheritances in property proceedings can be difficult, especially given that the legislative regime is silent on how inheritances are to be approached. Given this, the Courts will not immediately consider prospective inheritances as relevant factors in making property adjustments; instead the Court will examine the facts of each individual case and determine whether or not the inheritance presents sufficient grounds to make property adjustment orders.

At Diamond Conway, our Family Lawyers are always conscious of addressing the factors that will ensure the best results for our clients in property matters, including issues in relation to inheritances. Having acted on a variety of property matters, our Lawyers are highly experienced, and boast an impressive track record in delivering outcomes favourable to our clients. If you require any advice in relation to the fair and reasonable division of property following separation, our Lawyers are happy to discuss the options open to you.