INHERITANCE AND PROSPECTIVE INHERITANCE IN PROPERTY SETTLEMENTS

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In a marriage or a de facto relationship it is not uncommon for one of the spouses to receive an inheritance. If the parties separate, the question often arises as to how the inheritance should be dealt with in the couple's property settlement.

There is also the situation where a parent may have a provision in a Will for their child (the spouse) for a large inheritance. This raises a question of whether a prospective inheritance should be considered when deciding a property settlement. If it is included, what is the outcome?

The extent to which an actual inheritance or a prospective inheritance will impact on a property settlement will depend on the individual case, however previous cases do provide guidance on what can happen.

INHERITANCE RECEIVED DURING THE RELATIONSHIP

When an inheritance is received by a spouse which benefits both spouses of the relationship, often the spouse who is the recipient will argue in the property division that the financial benefit was only intended for them and not the other party.

The starting point, is to determine whether the payment was intended to benefit both of the spouses or, only the child of the parent. This situation arose (in the context of a gift) in the case of *Kessey*, in which the Wife's Mother had contributed large amounts of money to improve the matrimonial home. The Court determined that the contribution by a parent of a spouse to the property of the marriage, will be considered as a contribution on behalf of that spouse unless there is evidence which indicates this was not the parent's intention. The alternative situation would be that the parent intended for both spouses to benefit, not solely the child of the parent.

CAN A PROSPECTIVE INHERITANCE BE TAKEN INTO ACCOUNT?

If the parent of a spouse has a provision for an entitlement in their Will – but they are not deceased then the provision cannot form part of the "property pool" for division, but the "entitlement" is relevant in determining what the percentage apportionment of the existing "property" will be.

The determination of each spouses "percentage entitlement" involves a careful consideration of all of their respective "contributions", as well as their "future needs". It is in the context of "future needs" that any "prospective inheritance" becomes relevant.

In a situation where a spouses parent has made a Will leaving an inheritance to the spouse and they no longer have the testamentary capacity to change their Will the Court has stated that (in such a situation) where the spouses parent is leaving a significant estate, it would be "shutting one's eyes" not to give real consideration to this in the property proceedings, by way of a percentage adjustment.

The consideration and treatment of a “prospective inheritance” has been considered in several cases – here are some showing how the position has changed:

- ***White and Tullock v White*****:** in this case the Wife’s Mother was a widow and aged 81. She was in good health and had two children, one of which was the Wife. The Husband filed a Subpoena which required the Wife’s Mother to produce her Will but not documents detailing her financial situation. The Court identified that the “future needs” consideration in determining any percentage adjustment will depend on the particular facts of each individual case. The Court found that, although it seemed likely that the Wife’s Mother would benefit one, or both, of her children, she had no moral obligation to do so and could choose other persons to benefit. Therefore, the Full Court held that the prospective inheritance was not a financial resource (and was not considered as a “future need” factor) and would not be factored into the property settlement percentages.

- ***Milankov*****:** the Husband’s Father had testamentary capacity. He had set up a Trust with property worth $2.8million! Although the Husband’s Father was 72 years old and the Father had three other children, this “prospective inheritance” of $2.8million was taken into account in the property settlement between the Husband and his former Wife. The Husband tried to appeal this decision, however the appeal was dismissed. Therefore, the Full Court determined that the Wife receive a 40% adjustment increase to her portion of the $800,000 matrimonial pool, as a result of the possibility the Husband would receive $2.8million upon his Father’s death. It should be noted here that the Father still had testamentary capacity which meant he could change his Will at any time until his death, yet the Court still factored this into the property division.

OTHER SITUATIONS

The person leaving an inheritance does not need to be a spouse’s parent for the Court to take it into consideration in a property settlement. In one case, the Husband’s new Wife had a terminal illness and was likely to die within the next two years. The Husband was living in the Wife’s home and it was likely he would continue to do so after the Wife passed away. The Court found that by the Husband having a home to live in indefinitely was a valuable “financial resource” and a percentage adjustment was made in the former Wife’s favour.

SUMMARY

If an inheritance has already been received, this amount will be included in the “property pool” and seen as a percentage contribution by that spouse. In situations where a party is likely to receive a “prospective inheritance” the Court will not make a percentage adjustment for property settlement in all situations, it will depend on the case. The Court has pointed out that a clear connection must exist and the monetary value of the estate needs to be of such significance that it would have an impact on the parties’ financial situation. There must also be more than “mere likely” that the party will receive that inheritance.

It is important that everyone gets Family Law advice on their own specific circumstances.