INHERITANCE AND FAMILY LAW PROPERTY SETTLEMENT INFORMATION BOOKLET

Abstract

Property settlement proceedings are expensive. Generally, inheritance is considered to be an asset of the marriage. Like other assets of the marriage, it is subject to property settlement claims from the other party.

Matthews Lawyers encourages parties to finalise property issues between them by negotiation and seek consent orders, in terms of their negotiation from the Family Court. This is the simplest and most cost-effective way to finalise financial issues between parties. The parties have control over how the matrimonial or De Facto property will be divided.

If you cannot agree, the Family Court will make orders, which one or both parties – usually both parties – will not be happy with. Legal proceedings are costly. Don't waste your time and money. Negotiate a property if you can.

Disclaimer: The information contained herein is of a general nature only. It is not a substitute for legal advice and should not be relied upon.

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INHERITANCE AND PROPERTY SETTLEMENT IN FAMILY LAW

Introduction:

It is an established principle in property settlement proceedings, where inheritance is a factor that it will be considered 'property' and will be available to be included in the asset pool of the parties for distribution. It is also established that inheritances do not fall into any special category or property that is immune from a claim by one of the parties. Bonnnici and Bonnici (1992) FLC 92-272 (hereinafter 'Bonnici') is the primary authority for this principle

Each case will be determined on its own facts, but in general the following factors will be considered:

1. Which party received the inheritance?
2. When was the inheritance received – prior to the relationship, during the relationship or post-separation?
3. Is the inheritance considered to be protected or special property?
4. How was the inheritance treated by the parties?

As cases come before the Family Court and determined, new legal principles are established to ensure that there is a just and equitable division of the matrimonial or De Facto assets. There may be a finding that the inheritance had a 'springboard' effect to the accrued relationship assets. The longer the length of the marriage or De Facto relationship, the more likely it will be that the inheritance will be treated as an asset available for equal division between the parties**.**

Is an inheritance a matrimonial asset?

Generally, inheritance is considered to be an asset of the marriage. Like other assets of the marriage, it is subject to property settlement claims from the other party.

An inheritance received by one party prior to the relationship or around the time the relationship commenced, is more likely to be treated as an initial financial contribution, to the relationship or marriage.

Where the inheritance was received close to the end of the relationship or after the relationship has ended, **it is likely the** Federal Circuit and Family Court of Australia (hereinafter for simplicity will be referred to as the 'Family Court), **will quarantine some or all of the inheritance**. It will be difficult for the non-inheriting spouse to claim or assert a contribution towards the inheritance.

How does the Federal Circuit & Family Court of Australia (hereinafter for simplicity will be referred to as the 'Family Court') treat an inheritance?

How the Family Court will treat a claim by the former spouse or De Facto partner, for part of the inheritance, depends upon when the inheritance was received. An inheritance will only be considered by the Family Court when it has already been received by one of the parties. In addition, an inheritance will be considered to be part of the matrimonial asset pool where it will be received in the near future (i.e., when a parent of one of the parties is ill, and or has lost the capacity to change their Will). The mere expectation of a future inheritance will not impact of the division of the matrimonial assets.

What Factors will the Family Court consider regarding an inheritance?

1. The timing of the inheritance

If an inheritance is received by one of the parties to the marriage or De Facto relationship, shortly prior to separation, or after separation and it has been quarantined from other matrimonial or relationship property, constituting the asset pool, accumulated during the relationship, an argument exists, for the inheritance to be excluded from the asset pool.

If the inheritance is received by one party to the marriage or De Facto relationship, around the time of the commencement of the relationship or during the relationship and that inheritance has been applied towards the accumulation of matrimonial or relationship assets, that exist at the time of separation or for the benefit of the family, Family Court will not or is not likely to separate the assets acquired with the inheritance from the matrimonial or relationship property pool. This does not mean that the inheritance is not considered by the Family Court when dividing the asset pool between the parties. The inheritance would be deemed a financial contribution by the party who received it, and considered along with any other financial and non-financial contributions made by the parties to the care, welfare and development of the family

2. Did the other party contribute to the inheritance during the relationship?

If inheritance has been left to one party, but the other party, can be regarded as having contributed to the; for example, by providing care and support to the deceased or financially assisting the deceased, there is an argument for the inheritance to be included in the asset pool. Another relevant consideration for family law purposes, is if one party receives an inheritance during the relationship, which was applied by the couple, during their marriage or De Facto relationship, to accumulate assets or for the benefit of the family, which shortly prior to separation the other party receives an inheritance but is of the view their inheritance should be excluded. The Family Court will consider the facts of the situation between the parties to determine whether the inheritance will or will not become part of the matrimonial or relationship asset pool, available for division as part of property settlement.

3. The size of the inheritance compared to the value of the overall property pool

If the inheritance is modest, there may be no utility for separating parties, to argue over whether it should, or should not be included in the asset pool. Where the relationship between separating parties, has been of long duration and both contributed during their

relationship and where the inheritance was received late in the relationship, the inheritance is likely to be included in the asset pool. This will be especially so if there is no other matrimonial or relationship property that forms the asset pool available for division in property settlement proceedings.

4. The inheritance has been mixed with joint matrimonial or De Facto assets

If the inheritance received by one of the parties to the marriage or De Facto relationship, was received prior to separation and has been intermingled with other assets owned by the parties before their separation the inheritance will ordinarily be included in the asset pool. An example of this is where cash has been applied to reduce a mortgage or renovate a jointly owned property.

5. What were the intentions of the Deceased Benefactor?

When looking at inheritance during a divorce settlement, the Family Court will also look at the intention set out by the benefactor in his or her Will, if there is one.

Did the benefactor intend for the inheritance to benefit the entire family? If this question is answered "yes", the inheritance, will most likely be regarded, as part of the joint asset pool. If the intention of the benefactor, was to benefit only one party and if that party kept it separate from other assets, then it would be treated as separated from the joint asset pool. The Family Court will consider the evidence produced to it, for guidance regarding the intentions of the amount before deciding on how it will be distributed. Also, the Family Court will look at the relationship between both parties to the marriage or both parties of the De Facto relationship and the benefactor. An example here, is if the benefactor either lived or had been cared for by both parties, the inheritance will most likely be considered part of the joint asset pool. If the benefactor was cared for by one party, the inheritance is likely to not be considered part of the asset pool available for division as part of property settlement.

The Family Court will consider what weight, if any, should be given to the inheritance and assess it along with the other contributions made by each of the parties.

Time Limits for Property Settlement Proceedings:

There are time limits for property settlement proceedings after separation. A **married** couple must apply for a property settlement **within 12 months of a divorce finalisation**, whereas a **De-Facto couple** must apply within **2 years of separation**.

If a party wishes to commence property settlement proceedings outside of these time limits, they lose the ability to apply to the Family Court. However, it is possible to seek the court's permission to apply for a property settlement "out of time". This is not guaranteed and can be quite costly.

Binding Financial Agreement ('BFA') and Inheritance:

If you have a BFA that was prepared prior to you living together and there is a child of your relationship, the BFA is likely to be set aside. The Family Law Act 1975 (Cth) states that the paramount consideration for the Court, is the welfare of the child/ren of the relationship. The interests of the child/ren take precedence over any property settlement orders the Family Court will make or confirm as a result of a negotiated agreement between the parties. For this reason, Matthews Lawyers cautions that BFA are not likely to assist you in property settlement proceedings, when there is a child or children involved.

Inheritances received early in a relationship - Cases

H v H (1981) FLC 91 083

In this matter, the husband inherited the sum of $6,000.00. The money was used to purchase the matrimonial home (that could not have otherwise been purchased). Renovations and extensions were made to the home, from the inheritance. The remainder of the inheritance was used for living expenses. There were numerous other contributions made by each of the parties to the marriage and to the matrimonial property. His Honour, Smithers J, gave the husband's inheritance considerable weight due to the *springboard factor*. That is, His Honour took the view that the inheritance of the husband was significant and without it, the matrimonial home could not have been purchased.

Sinclair v Sinclair [2012]FamCA 388

This dispute was about what was a just and equitable division of the matrimonial property. The parties married in 1959. Their union produced three children, the first of whom died just after birth. The other children at the time of the proceedings were adults. The parties disputed the date of separation. On one view it was in 1970. The other view was 1985/1986. Between them, the parties had over $7 million in assets most, if not all, were controlled by the wife, who had received it from her father many years ago. The husband sought assets in the vicinity of $1.8 million, including a house worth $800,000 and $1 million in cash. It was also common ground that the wife had about $7.1 million represented by real estate (including the house that the husband seeks) cash in the bank, chattels and shares. The court held at paragraphs 95 to 96:

"The inherited wealth in this case must reflect two things. First, the inheritance was received a long time ago and therefore the current wealth ***is a reflection of the springboard effect of the various contributions early in the marriage****. Secondly, having regard to the clear donor intention reflected in how and through whom the wealth was received, the contribution was by or on behalf of the wife. But contributions come in many forms and it is inappropriate to simply look at the monetary contributions.*

The longer the relationship, the greater the importance of the early non-financial contributions ***because like an initial financial contribution from which more wealth grows, they form the foundation of the relationship****. They set up needs and obligations of the parties about support for one another and children. They set up assets that require ongoing maintenance and preservation. Thus, what happened from 1959 to*

1985 in this case is important. The inherited wealth had not significantly materialised until towards the end of that period and it has the tendency to distract attention from the importance of the early period of this relationship when both parties worked extremely hard at whatever commitments they had made to each other to fulfil. True it is also that some of those contributions are offset by the benefits received but all this shows the inability of the law to simply process the outcome by some mathematical formula."

Here, the Family Court found the inheritance received by the wife, not only formed the *springboard for their financial growth*, but also that there was a foundation of the relationship, which emanated from the contributions early in their relationship, required consideration. The significant wealth that accrued as a result of the inheritance, in this matter was a significant factor in the orders made.

Inheritances received during the relationship – Cases

Similar to inheritances received prior to a relationship, inheritances received *during* the relationship are generally considered contributions by the party upon whom the inheritance was conferred. Once again, the erosion principle applies, and if the parties are in a long relationship and making otherwise equal contributions, the Court may give no particular weight to the inheriting party's contribution.

Elgin & Elgin [2014] FamCA 10

The relevant facts:

The parties in this matter met in the mid-1950s. They married in 1960. At that time, the Husband was aged 20 years. The Wife was aged 19 years. After almost 49 years of being married, they separated on a final basis in June 2009. Their marriage produced three children, born 1961, 1964 and 1970. At the time of the proceedings, the children had reached adulthood.

Just after they married, the Husband started to manufacture and install EF Products. The Wife was employed when they married, but she, like many Australian women of that time, took on the primary caregiving role with respect to the family, staying home and raising the children, whilst the was gainfully employed outside of the home. When the children were a little older, the Wife also owned and ran a small retail business in suburban Melbourne where the family lived.

Towards the end of the 1970s, the family moved to the Gold Coast. The EF Products business had grown into a national business and in the early 1990's it was sold off, piece by piece. Around that time, and using the capital acquired from the sale of the EF Products business, the couple undertook their first property development project on the Gold Coast. It was successful and the Husband, now 74 years old, has been developing property ever since with a great deal of apparent financial success. A large amount of wealth has been

generated over the years. It was also added to by an inheritance of $1.3 million received by the Wife in 2003. Even after having gifted each of their children at least $6,000,000 over the years, the couple's wealth is now in excess of $40,000,000.

The Court held that the $1.3m inheritance, received 10 years prior to separation should be given no special weight. The parties were married for 40 years and had assets totalling $44m. The Court divided the property equally.

Roverati & Roverati [2021] FamCAFC 89

Here the parties were married for 33 years. Both received inheritances throughout the marriage. The Wife's inheritance was valued at approximately $50,000. The Husband's inheritance was valued at over $400,000. He derived income from the inheritance property over time, which he used to reinvest, and for the household expenses of the parties.

The primary Judge assessed the parties' contributions as equal. The Husband challenged the primary Judge's treatment of the inheritances. He asserted that the primary Judge had failed to consider and give weight to the inheritance received by the Husband, comprising his contribution to the matrimonial assets and the extent to which this inheritance was put to the benefit of the household. The appeal was allowed. The Court reassessed the contributions at 55/45 in favour of the Husband.

The judgment states that inheritances will not be excluded from the matrimonial asset pool available for division in property settlement proceedings.

Inheritances received post-separation – Cases

Historically, inheritance received after separation, were quarantined from the asset pool, or simply weighted as a contribution made by the party who received it. Recent case law suggests that the Courts are taking a more holistic and less mathematical approach to the assessment of post-separation inheritances, when making property settlement orders. The Family Court appears to instead of isolating post separation inheritances to evaluating all the contributions of parties to a marriage, particularly contributions by one of the parties to the welfare of the family. Contributions made prior to the receipt of an inheritance are in some instances weighted equally, than the timing of an inheritance or upon whom it was bequeathed.

Calvin v McTier [2017] FamCAFC 125

Mr Calvin ("the husband") appealed against orders made by Magistrate Calverley on 17 November 2016, in property proceedings between him and Ms McTier ("the wife").

Original Orders

Central to the proceedings before the trial magistrate and to the appeal, was the approach that should be taken to a substantial inheritance received by the husband well after the parties separated. The issue his Honour had to determine was whether or not that inheritance should be included amongst the property of the parties that was to be divided by the court. That issue was decided against the husband and the trial magistrate made orders dividing all of the property of the parties, including the inheritance, so that the husband was to receive 65 per cent of the property and the wife 35 per cent.

Husband's Grounds of Appeal

Ground 1 – Should the inheritance have been available for division between the parties?

Ground 2 – Was the only way to make an appropriate assessment of the s 79(4) factors to include the inheritance in the net assets and resources to be divided?

Ground 3 – Did the trial magistrate err in requiring the husband to comply with the orders within 28 days?

The Full Court stated at paragraphs 51 to 52:

"In short, we consider that the court retains a discretion as to how to approach the treatment of after-acquired property. The trial magistrate could have included the inheritance amongst the property to be divided or dealt with it separately. The trial magistrate was not obliged to follow one course or the other. The submissions of the husband are no more than an invitation to "pok[e] around in the entrails of discretion" (to adopt the remarks of French CJ, which his Honour made during the unsuccessful application for special leave in Singerson & Jones [2015] HCATrans 195).

It is worth repeating that it was not submitted that any error said to have arisen from the inclusion of the inheritance for division led to a result which, after consideration of the contributions and the s 75(2) factors, was inappropriate."

The Full Court held that:

1. It had the power to include the inheritance in the asset pool. It did not matter if the inheritance was acquired a significant period of time after separation.
2. The High Court of Australia decision of *Stanford v Stanford* (2012) 247 CLR 108 where it was held that it may not always be just and equitable to alter ownership of property of parties to a relationship, did not require property acquired post separation to be dealt with any differently to property acquired during a relationship. Further, nor did it require the Court to have a specific reason to interfere with any particular asset, such as the inheritance here, of the parties.
3. There was no requirement, that there be a nexus between any specific asset owned by one of the parties and the marriage.

Mantel & Mantel [2020] FamCA 157

The parties married in 1983. Two adult children were produced from their relationship.

At the time of the proceedings, the Husband was aged 58 years. He was retired, having joined a public service in January 1978 at the age of 16. The husband suffered from anxiety, depression, and post-traumatic stress disorder, acquired during the course of his employment. He retired in September 2017 due to ill health and was in receipt of alifetime permanent disability pension. He had not worked since. The wife was aged 59 years. She worked on a part time basis, at 0.8 FTE as an administrative assistant. She enjoyed good health.

In 1982, prior to their marriage, the parties purchased a property in H Town for something in the region of $32,000 from their joint savings. In 1984 their first child was born, and at about that time the H Town property was sold for approximately $40,000. In 1986 the parties had a second child, and a property in Suburb C was purchased for $160,000 ("the former matrimonial home"). The former matrimonial home, at the time of the proceedings was valued at $1,415,000.

On 20 September 2002 the husband's father, Mr G Mantel, created the Mr G Mantel Family Trust. On 28 April 2006 the husband's father made his last Will.

On or about 12 March 2017 the parties separated and the husband left the former matrimonial home. The wife remained living in the former matrimonial home since that date.

On 13 March 2017, the day after the husband left the former matrimonial home, the husband's father passed away. Upon the death of the husband's father, the husband inherited absolutely a substantial F Investment bond and the modest proceeds of a bank account, together with a substantial parcel of shares purchased by the husband's father during his life and registered either jointly with the husband or in the husband's sole name.

In May 2018 the husband commenced and his new partner commenced living together at her home in J Town. In the period since the parties separated until May 2018, he had lived at various locations. In September 2018 the husband purchased a property in country Victoria ("the country property") for $1,250,000 plus stamp duty and other expenses. The husband and his new partner commenced living at that property in November 2018 and apparently continue to do so.

The Family Court held at paragraph 133:

" that insofar as the assets accumulated by the parties themselves during the marriage – (excluding the husband's inheritance) are concerned, it is appropriate to proceed on the basis that the parties have made equal contributions. Insofar as the husband's inheritance from his father is concerned, I accept that it is appropriate to view these assets as not having been the subject of any contribution by the wife, but that it is appropriate to regard them as highly relevant on the assessment of the adjustment to be made in the wife's favour against the assets accumulated by the parties during the marriage."

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Prospective inheritances – Cases

Recent case law suggests that prospective inheritances can be considered in the determination of property settlement proceedings between the parties to a marriage or a De Facto relationship. The potential future receipt of an inheritance by one of the parties, allows the property settlement proceedings to be adjourned, pursuant to sections 79(5) and 90SM(6) of the Family Law Act 1975 (Cth), if there is likely to be a significant alteration of the financial circumstances of the parties to the marriage or either of them. Each case will be determined on its own facts.

MacDowell & Williams & Others [2012' FamCA 479

By application filed on 1 December 2012, the Wife (MacDowell) sought final property Orders relating to her former marriage with the Husband (Williams). The Wife was born in 1964. At the time of the proceedings, she was aged 47 years. The Husband was born in 1947. He was aged 64 years, at the time of the proceedings. The parties commenced cohabitation in about 2003, married in April 2004 and then separated on a final basis on 12 July 2010. There were no children of the relationship.

By way of subpoena filed on 4 October 2011 ("the subpoena"), the Husband sought certain documents from the parents of the Wife, in both their personal capacity and their capacity as directors of A Pty Ltd, B Pty Ltd and C Pty Ltd. The subpoena sought both the Wife's parents' current and any revoked wills and any relevant testamentary documents as well as a range of financial documents from entities of which the Wife's parents were directors or shareholders.

On 17 October 2011, the Wife's parents filed a Notice of Objection to the subpoena and sought that the subpoena be set aside pursuant to r 15.26 of the Family Law Rules 2004 (Cth) on two main grounds. Firstly, they stated that the documents sought from them in their personal capacity were not relevant, given that both of them still retained testamentary capacity. Secondly, the documents sought from them in their capacity as directors of the entities mentioned above were not relevant because neither the Husband nor the Wife, had any proprietary interest in the entities (with respect to C Pty Ltd and B Pty Ltd) and because the Wife's only link to these companies was as a beneficiary of the F G MacDowell Discretionary Trust, of which B Pty Ltd was the corporate trustee and the financial statements and trust deed of the F G MacDowell Discretionary Trust had already been disclosed.

The parties' submissions regarding the subpoena can be conveniently divided into two categories:

Category 1: Those concerning the financial documents relating to the corporate entities of which the Wife's parents are directors or shareholders; and

Category 2: Those relating to the testamentary wishes of the Wife's parents.

The application of the Husband was refused. It was held at paragraph 22 that:

In such circumstances, it appears that there is no reason to suppose that the Wife is likely to receive any inheritance in the near future, or that any present testamentary directions made by the Wife's parents will not change prior to their death. In those circumstances, I find that there is no justifiable reason why the Wife's parents should be required to produce such documents to the Court.

Conclusion:

Each case is determined on its own facts, but in general the following factors will be considered:

5. Which party received the inheritance?
6. When was the inheritance received – prior to the relationship, during the relationship or post-separation?
7. Is the inheritance considered to be protected or special property?
8. How was the inheritance treated by the parties?

As cases come before the Family Court and determined, new legal principles are established to ensure that there is a just and equitable division of the matrimonial or De Facto assets. There may be a finding that the inheritance had a 'springboard' effect to the accrued relationship assets. The longer the length of the marriage or De Facto relationship, the more likely it will be that the inheritance will be treated as an asset available for equal division between the parties.

Caution:

Property settlement proceedings are expensive. Matthews Lawyers encourages parties to finalise property issues between them by negotiation and seek consent orders, in terms of their negotiation from the Family Court. This is the simplest and most cost-effective way to finalise financial issues between parties. The parties have control over how the matrimonial or De Facto property will be divided.

If you cannot agree, the Family Court will make orders, which one or both parties – usually both parties – will not be happy with. Legal proceedings are costly. Don't waste your time and money. Negotiate a property settlement if you can.

Legal Advice is prudent:

Property settlement proceedings are stressful and difficult enough as it is. When an inheritance is involved, often makes it even more complicated and difficult. Navigating property settlement negotiations when inheritance is not a factor becomes even more difficult.

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Matthews Lawyers is able to assist you, in property settlement matters. We have experienced Solicitors to guide you through the process. If you have, or you anticipate receiving, an inheritance, initial prudent advice can alleviate some of the stress involved in property settlement proceedings.

You will be part of the team. Your views will be heard. Your instructions will be carried out.

Call our office on **0401 269 091**, to speak with one of our experienced family law Solicitors.

Disclaimer: The information contained herein is of a general nature only. It is not a substitute for legal advice and should not be relied upon.

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APPENDIX A: SECTION 79 Family Law Act 1975 (Cth)

Alteration of Property Interests:

Alteration of property interests

(1) In property settlement proceedings, the court may make such order as it considers appropriate:

(a) in the case of proceedings with respect to the property of the parties to the marriage or either of them--altering the interests of the parties to the marriage in the property; or

(b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage--altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

(c) an order for a settlement of property in substitution for any interest in the property; and

(d) an order requiring:

(i) either or both of the parties to the marriage; or

(ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

(1A) An order made under subsection (1) in property settlement proceedings may, after the death of a party to the marriage, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(1B) The court may adjourn property settlement proceedings, except where the parties to the marriage are:

(a) parties to concurrent, pending or completed divorce or validity of marriage proceedings; or

(ba) parties to a marriage who have divorced under the law of an overseas country, where that divorce is recognised as valid in Australia under section 104; or

(bb) parties to a marriage that has been annulled under the law of an overseas country, where that annulment is recognised as valid in Australia under section 104; or

(c) parties to a marriage who have been granted a legal separation under the law of an overseas country, where that legal separation is recognised as valid in Australia under section 104;

on such terms and conditions as it considers appropriate, for such period as it considers necessary to enable the parties to the marriage to consider the likely effects (if any) of an order under this section on the marriage or the children of the marriage, but nothing in this subsection shall be taken to limit any other power of the court to adjourn such proceedings.

(1C) Where the period for which a court has adjourned property settlement proceedings as provided by subsection (1B) has not expired and:

(a) divorce or validity of marriage proceedings are instituted by one or both of the parties to the marriage; or

(ba) the parties to the marriage have divorced under the law of an overseas country and the divorce is recognised as valid in Australia under section 104; or

(bb) the marriage is annulled under the law of an overseas country and the annulment is recognised as valid in Australia under section 104; or

(c) the parties to the marriage are granted a legal separation under the law of an overseas country and the legal separation is recognised as valid in Australia under section 104;

a party to the first-mentioned proceedings may apply to the court for the hearing of those proceedings to be continued.

(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-

mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and

(d) the effect of any proposed order upon the earning capacity of either party to the marriage; and

(e) the matters referred to in subsection 75(2) so far as they are relevant; and

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

(5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, where, in property settlement proceedings, a court is of the opinion:

(a) that there is likely to be a significant change in the financial circumstances of the parties to the marriage or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and

(b) that an order that the court could make with respect to:

(i) the property of the parties to the marriage or either of them; or

(ii) the vested bankruptcy property in relation to a bankrupt party to the marriage;

if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the marriage than an order that the court could make immediately with respect to:

(iii) the property of the parties to the marriage or either of them; or

(iv) the vested bankruptcy property in relation to a bankrupt party to the marriage;

the court may, if so requested by either party to the marriage or the relevant bankruptcy trustee (if any), adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the marriage or the relevant bankruptcy trustee, as the case may be, applies for the proceedings to be determined, but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.

(6) Where a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:

(a) any of the property of the parties to the marriage or of either of them; or

(b) any of the vested bankruptcy property in relation to a bankrupt party to the marriage.

(7) The court may, in forming an opinion for the purposes of subsection (5) as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the marriage, have regard to any change in the financial circumstances of a party to the marriage that may occur by reason that the party to the marriage:

(a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or

(b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust property;

but nothing in this subsection shall be taken to limit the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of a party to the marriage.

(8) Where, before property settlement proceedings are completed, a party to the marriage dies:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;

(b) if the court is of the opinion:

(i) that it would have made an order with respect to property if the deceased party had not died; and

(ii) that it is still appropriate to make an order with respect to property;

the court may make such order as it considers appropriate with respect to:

(iii) any of the property of the parties to the marriage or either of them; or

(iv) any of the vested bankruptcy property in relation to a bankrupt party to the marriage; and

(c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(9) The Federal Circuit and Family Court of Australia (Division 1), or a Family Court of a State, shall not make an order under this section in property settlement proceedings (other than an order until further order or an order made with the consent of all the parties to the proceedings) unless:

(a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate:

(i) in the case of the Federal Circuit and Family Court of Australia (Division 1)--with the Chief Executive Officer, or a Senior Registrar or Registrar of the Court; or

(ii) in the case of the Family Court of that State--with a Senior Registrar or Registrar of that Family Court; or

(b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or

(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

(10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage (the ***subject marriage***):

(a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;

(aa) a person:

(i) who is a party to a de facto relationship with a party to the subject marriage; and

(ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship;

(ab) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;

(b) any other person whose interests would be affected by the making of the order.

(10A) Subsection (10) does not apply to a creditor of a party to the proceedings:

(a) if the party is a bankrupt--to the extent to which the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966*); or

(b) if the party is a debtor subject to a personal insolvency agreement--to the extent to which the debt is covered by the personal insolvency agreement.

(10B) If a person becomes a party to proceedings under this section because of paragraph (10)(aa), the person may, in the proceedings, apply for:

(a) an order under section 90SM; or

(b) a declaration under section 90SL;

in relation to the de facto relationship described in that paragraph.

(11) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage:

(i) when the application was made, the party was a bankrupt;

(ii) after the application was made but before it is finally determined, the party became a bankrupt; and

(c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the bankruptcy trustee as a party to the proceedings.

(12) If a bankruptcy trustee is a party to property settlement proceedings, then, except with the leave of the court, the bankrupt party to the marriage is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

(13) The court must not grant leave under subsection (12) unless the court is satisfied that there are exceptional circumstances.

(14) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage (the ***debtor party***):

(i) when the application was made, the party was a debtor subject to a personal insolvency agreement; or

(ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and

(c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the trustee of the agreement as a party to the proceedings.

(15) If the trustee of a personal insolvency agreement is a party to property settlement proceedings, then, except with the leave of the court, the party to the marriage who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any property subject to the agreement.

(16) The court must not grant leave under subsection (15) unless the court is satisfied that there are exceptional circumstances.

(17) For the purposes of subsections (11) and (14), an application for an order under this section is taken to be finally determined when:

(a) the application is withdrawn or dismissed; or

(b) an order (other than an interim order) is made as a result of the application.

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APPENDIX B: SECTION 90SM Family Law Act 1975 (Cth)

Alteration of Property Interests:

(1) In property settlement proceedings after the breakdown of a de facto relationship, the court may make such order as it considers appropriate:

(a) in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them--altering the interests of the parties to the de facto relationship in the property; or

(b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the de facto relationship--altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

(c) an order for a settlement of property in substitution for any interest in the property; and

(d) an order requiring:

(i) either or both of the parties to the de facto relationship; or

(ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the de facto relationship or a child of the de facto relationship, such settlement or transfer of property as the court determines.

Note 1: The geographical requirement in section 90SK must be satisfied.

Note 2: The court must be satisfied of at least one of the matters in section 90SB.

Note 3: For ***child of a de facto relationship***, see section 90RB.

(2) If a party to the de facto relationship dies after the breakdown of the de facto relationship, an order made under subsection (1) in property settlement proceedings may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(3) The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(4) In considering what order (if any) should be made under this section in property settlement proceedings, the court must take into account:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:

(i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or

(ii) otherwise in relation to any of that last-mentioned property;

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:

(i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or

(ii) otherwise in relation to any of that last-mentioned property;

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and

(c) the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the de facto relationship and any children of the de facto relationship, including any contribution made in the capacity of homemaker or parent; and

(d) the effect of any proposed order upon the earning capacity of either party to the de facto relationship; and

(e) the matters referred to in subsection 90SF(3) so far as they are relevant; and

(f) any other order made under this Act affecting a party to the de facto relationship or a child of the de facto relationship; and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship.

(5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, if, in property settlement proceedings in relation to the parties to a de facto relationship, a court is of the opinion:

(a) that there is likely to be a significant change in the financial circumstances of the parties to the de facto relationship or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and

(b) that an order that the court could make with respect to:

(i) the property of the parties to the de facto relationship or either of them; or

(ii) the vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship;

if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the de facto relationship than an order that the court could make immediately with respect to:

(iii) the property of the parties to the de facto relationship or either of them; or

(iv) the vested bankruptcy property in relation to a bankrupt party to the de facto relationship;

the court may, if so requested by either party to the de facto relationship or the relevant bankruptcy trustee (if any), adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the de facto relationship or the relevant bankruptcy trustee, as the case may be, applies for the proceedings to be determined, but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.

(6) If a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:

(a) any of the property of the parties to the de facto relationship or of either of them; or

(b) any of the vested bankruptcy property in relation to a bankrupt party to the de facto relationship.

(7) The court may, in forming an opinion for the purposes of subsection (5) as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the de facto relationship, have regard to any change in the financial circumstances of a party to the de facto relationship that may occur by reason that the party to the de facto relationship:

(a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or

(b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust property;

but nothing in this subsection limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of a party to the de facto relationship.

(8) If a party to the de facto relationship dies after the breakdown of the de facto relationship, but before property settlement proceedings are completed:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and

(b) if the court is of the opinion:

(i) that it would have made an order with respect to property if the deceased party had not died; and

(ii) that it is still appropriate to make an order with respect to property;

the court may make such order as it considers appropriate with respect to:

(iii) any of the property of the parties to the de facto relationship or either of them; or

(iv) any of the vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship; and

(c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(9) The Federal Circuit and Family Court of Australia (Division 1) must not make an order under this section in property settlement proceedings (other than an order until further order or an order made with the consent of all the parties to the proceedings) unless:

(a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with the Chief Executive Officer, or a Senior Registrar or Registrar of the Federal Circuit and Family Court of Australia (Division 1); or

(b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or

(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

(10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a de facto relationship (the ***subject de facto relationship***):

(a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;

(b) a person:

(i) who is a party to a de facto relationship (the ***other de facto relationship***) with a party to the subject de facto relationship; and

(ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the other de facto relationship;

(c) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject de facto relationship;

(d) a person:

(i) who is a party to a marriage with a party to the subject de facto relationship; and

(ii) who could apply, or has an application pending, for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage);

(e) a person who is a party to a financial agreement (that is binding on the person) with a party to the subject de facto relationship;

(f) any other person whose interests would be affected by the making of the order.

(11) Subsection (10) does not apply to a creditor of a party to the proceedings:

(a) if the party is a bankrupt--to the extent to which the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966*); or

(b) if the party is a debtor subject to a personal insolvency agreement--to the extent to which the debt is covered by the personal insolvency agreement.

(12) If a person becomes a party to proceedings under this section because of paragraph (10)(b), the person may, in the proceedings, apply for:

(a) an order under section 90SM; or

(b) a declaration under section 90SL;

in relation to the other de facto relationship described in that paragraph.

(13) If a person becomes a party to proceedings under this section because of paragraph (10)(d), the person may, in the proceedings, apply for:

(a) an order under section 79; or

(b) a declaration under section 78;

in relation to the marriage (or void marriage) described in that paragraph.

(14) If:

(a) an application is made for an order under this section in proceedings between the parties to a de facto relationship with respect to the property of the parties to the de facto relationship or either of them; and

(b) either of the following subparagraphs apply to a party to the de facto relationship:

(i) when the application was made, the party was a bankrupt;

(ii) after the application was made but before it is finally determined, the party became a bankrupt; and

(c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the bankruptcy trustee as a party to the proceedings.

(15) If a bankruptcy trustee is a party to property settlement proceedings in relation to the parties to a de facto relationship, then, except with the leave of the court, the bankrupt party to the de facto relationship is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

(16) The court must not grant leave under subsection (15) unless the court is satisfied that there are exceptional circumstances.

(17) If:

(a) an application is made for an order under this section in proceedings between the parties to a de facto relationship with respect to the property of the parties to the de facto relationship or either of them; and

(b) either of the following subparagraphs apply to a party to the de facto relationship (the ***debtor party***):

(i) when the application was made, the party was a debtor subject to a personal insolvency agreement;

(ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and

(c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the trustee of the agreement as a party to the proceedings.

(18) If the trustee of a personal insolvency agreement is a party to property settlement proceedings in relation to the parties to a de facto relationship, then, except with the leave of the court, the party to the de facto relationship who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any property subject to the agreement.

(19) The court must not grant leave under subsection (18) unless the court is satisfied that there are exceptional circumstances.

(20) For the purposes of subsections (14) and (17), an application for an order under this section is taken to be finally determined when:

(a) the application is withdrawn or dismissed; or

(b) an order (other than an interim order) is made as a result of the application.