

# irongroup lawyers

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## Estate Planning & Family Law

### Your hard earned assets...

Many clients these days ask whether an inheritance they pass on to their children will be exposed to a future family law dispute. The short answer is yes, it could be. In *Bonnici v Bonnici* [FLC 1992] the court found “a property does not fall into a protected category merely because it is an inheritance” noting however that the decision will always depend on the circumstances.

If, for example, there are **ample other assets** available from the property of the marriage such that a “just result can be achieved” then a **recently acquired inheritance** would normally be treated as an entitlement of the person who received it. Importantly that also assumes no **contribution** by their spouse to the value of those assets up to the date of settlement.

Assessment of each spouse’s contribution includes not only assets brought to the relationship but also financial and non-financial contributions over time eg income and the contribution as homemaker and parent.

Where an inheritance has been acquired late “the other party cannot be regarded as contributing significantly... except in very unusual circumstances.” [*Bonnici v Bonnici*]. In *Verley v Verley* [FamCA 2008], for example, even though the inheritance was received late (in fact after separation) it was not considered protected. Here it was land inherited by the husband that the couple had worked on throughout their marriage, albeit it had remained in the name of the husband’s father.

However even if an inheritance is received late in the relationship and the spouse has contributed very little to its current value, if there are not ample other funds available to achieve a “just result”, the inheritance may be included in the asset pool to be divided.

#### Key elements

Time of receipt of inheritance  
Spouse contributions to value  
Other assets available

#### Issues to consider

Early or late in the marriage?  
Financial & non-financial  
Enough for a “just result”?

### Are trust assets protected?

Assets held in family trusts have long been subject to Family Court orders. In *Ashton v Ashton* [FamCA 1986] the court held the husband’s role as appointor amounted to de facto ownership of the property of the trust and even though the husband was not a direct beneficiary, the court found that he could indirectly benefit through control of a company shareholding or trust which was a beneficiary.

In an extension on considering assets not under direct control as part of a divorce settlement, in *Milankov v Milankov* [Fam CA 2002] 90% of the marriage property was awarded to the wife based on a **potential** inheritance by the husband (the father had even changed his Will to ensure his son was not to be appointor or trustee upon his death). The court acknowledged ‘this leaves the husband without any currently available capital’ however held that “..(his) affairs (have) been so intermeshed with those of his parents for so many years, and his parents (have) previously

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shown generosity towards him, that the husband would be able to restructure his affairs in such a way as to ensure that he might rebuild his life following the breakdown of the marriage.”

### Winding back transactions...

Under S106B of the Family Law Act 1975, the court can set aside a transaction made to defeat a court order regarding settlement. This includes granting, cancelling, transferring or varying rights attaching to a company or trust including a beneficial interest, power of appointment or any power under the trust (whether conditional, contingent or deferred).

In Kennon v Spry [HCA 2009], the husband had set-up a trust prior to the marriage but had made various amendments since including removing himself as beneficiary and trustee (although he still held the power to appoint and remove trustees). He had also removed his wife as beneficiary (without her knowledge) and post-separation, had distributed the trust assets to newly created trusts in favour of his daughters.

Under S106B these amendments were wound back which meant the husband once again had the power to distribute income and capital as trustee and his wife was again a beneficiary. As such the assets became available as part of the divorce settlement.

### Is an inheritance in a testamentary trust vulnerable?

It depends on the circumstances. If, for example, you leave your daughter an inheritance that she receives late in her marriage, her husband did not contribute to the asset value in any way and there are enough other assets for him to be adequately catered for, then the inheritance is more likely to be considered part of her contribution.

### Removing sole control...

You could consider establishing one testamentary trust with all siblings as co-appointors and trustees. If one of them was subject to a family law settlement any income and capital they received from the trust could be taken into account and their spouse could be awarded more

of their combined ‘marriage property’ although the trust assets would be more likely to be protected. Administering the one trust however, could become difficult as the siblings would need to agree on all decisions. If they each had their own testamentary trust (the usual solution), this would not be an issue.

Including a clause that removed the child as appointor or trustee during their divorce settlement could fall under Sec 106B and as such could be wound back.

It is also possible to exclude an in-law as a beneficiary under a testamentary trust however control or ownership by one spouse only does not protect property. In some circumstances this would help your child avoid direct payments from the trust during the course of the marriage however again it is a fairly restrictive approach and means for example, that they can’t distribute income to them and reduce tax.

### Can anything be done?

On a positive note, if the assets are inherited via a testamentary trust it will be much easier to identify the assets contributed by your child as they are less likely to be mixed up in shared funds.

The court can take either a global or an asset by asset approach when assessing assets and whilst the global approach is usually preferred “there are circumstances where (the asset by asset approach) may be appropriate ..., for example an inheritance received post separation.” [Zyk v Zyk FamCA 1995]. Being able to clearly identify the inherited assets via the testamentary trust will certainly assist if this approach is taken.

### Caution

This information is of a general nature. Each client’s individual circumstances must be considered when providing advice. If your clients need advice in planning their estates, we would be pleased to help. Contact us for more information on our fixed fee services.

**Attention Alliance Partners:** Login for more information on Estate Planning and Family Law.

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