

# SOLARI & STOCK

LAWYERS



## NEWSLETTER MARCH 2022

We hope you all had a wonderful break over the Christmas and New Year period, and you are enjoying a happy and healthy start to 2022. With the return of schools and business opening back up again after most recent outbreak, we trust that we are starting to see our lives returning to normal.

In keeping with our previous newsletter's, we have selected a number of articles written by our Solari and Stock lawyers. These articles relate to a variety of topics, and we trust that you find these articles informative. Articles include: 'Vaccination, Children and the Court', 'How does the timing of a separation impact on an Inheritance?', 'A Wise Word on Gifts in Wills', and 'The Impact of increasing house prices on Family Law Matters'.

If you require an appointment with one of our Team or would like to discuss any of these articles further, please contact us on 8525 2700 to discuss the options available or send an email to [law@solariandstock.com.au](mailto:law@solariandstock.com.au)

## VACCINATIONS, CHILDREN & THE COURT

Undoubtedly, the COVID-19 world we live in has raised many difficult questions for individuals and families alike. First and foremost, whether or not to get the jab is a hotly debated topic. But what happens if parents disagree about vaccinating their children?

The Federal Circuit and Family Court of Australia ("FCFCOA") are yet to determine a parenting dispute specifically concerning whether a child should receive a COVID-19 vaccine. However, the recent decision of *Covington v Covington* (2021) 63 Fam LR 173 ("Covington") provides a helpful indication of how such a dispute may be determined. In this matter, the Full Court of the Family Court of Australia (now FCFCOA Division 1 - Appellate Division) confirmed

that it does have jurisdiction to order that a child be vaccinated.

In *Covington*, final parenting orders were made by consent following a final hearing in December 2020. The orders provided for, amongst other things, that the child receive a vaccination. However, the mother subsequently withdrew her consent and notified the Court. Thereafter, the mother filed various applications in various courts essentially seeking to set aside the consent orders. She also sought to challenge the constitutional validity of what she termed "compulsory vaccination". That argument, although misconceived, is beyond the scope of this article. Nevertheless, on 13 April 2021, her application came before the Full Court. The Full Court confirmed that it does have jurisdiction to make an order for a child to be vaccinated and emphasised that such an order does not require the parents' consent. Relevantly, section 65 of the Family Law Act 1975 (Cth) provides that a court may make such a parenting order as it thinks proper in proceedings for a parenting order. That order can be validly made even if there is no consent by the parties to the proceedings. Therefore, in *Covington*, the order to vaccinate the child was not invalidated simply by the mother withdrawing consent.

It is important to note that each matter will ultimately turn on its facts and will be determined in accordance with the best interests of the child.



Article written by Kirstin Attard | Photo by CDC on Unsplash

Our team of experienced lawyers can provide you with expert legal advice for all your legal needs including

- Business & Commercial Law
- Leases – Commercial, Industrial
- Sale & Purchase of Businesses
- Litigation
- Franchising
- Environmental & Local Government Law
- Family Law
- Property & Parenting Settlements
- Divorce
- De Facto Relationships
- Spouse Maintenance
- Child Support
- Estate Planning
- Wills, Powers of Attorney & Enduring Guardianships
- Deceased Estates
- Property Law & Conveyancing

## HOW DOES THE TIMING OF A SEPARATION IMPACT ON AN INHERITANCE?

If your marriage or relationship is on the rocks and you are deciding as to whether to separate from your spouse, and are concerned as to the effect on your inheritance, then here is some advice which you ought to consider in making your decision one way or the other.

Under the Family Law Act, a Court is required to take into account all assets, liabilities and financial resources in existence at the time the Court is asked to make a decision, that is, at the time the assets are being divided, not at the time of separation.

When it comes to an inheritance: -

### 1. The parent is alive and well

The fact that your parents have assets, and that upon their eventual death you may stand to inherit a substantial amount, makes no difference to the outcome of your Family Law settlement. A potential future inheritance is not a factor which a Court can take into account, as whilst the inheritance may be a future entitlement, it is by no means a certainty. For example:

- Your parents may change their will and may even exclude you;
- Your parents may have spent all their money;
- You may die before your parents.

### 2. The parent is not well and life expectancy is poor

If you stand to inherit a large sum and you have not separated, then any inheritance you do receive will form part of the pool of assets available for division between you and your spouse in the event of a future separation. Despite the moral beliefs of some people, such an inheritance is not excluded from the family law division.

Whilst one can argue that the other spouse should not receive much of a share of that inheritance, there is no blanket rule of law to cover the situation. A court is required to consider all of the circumstances. Each case is different and must be decided on its own particular facts.

### 3. Is the inheritance given to both parties?

There are some circumstances where the other spouse may be able to argue that the inheritance should rightly be for the benefit of both spouses. For example, if your spouse cared for your incapacitated parent for many years prior to their death, then the Court would consider that this was a substantial contribution towards the inheritance received and that inheritance should just form part of the overall

pool of assets to be divided between spouses in any Family Law Property Settlement.

Therefore, sometimes it may be possible to adopt a strategy to maximise the benefit you stand to gain from an inheritance. For example, if you act quickly and legally formalise a family law property settlement with your spouse before the parent dies, then the inheritance does not form part of the assets to be divided. If your parent dies after the Family Law property settlement is finalised, the subsequent inheritance received is yours.

However, this strategy also works in reverse. For example, if you are not the one receiving the inheritance, then if you continue the marriage/relationship until after the spouse's parent dies, and the inheritance is received, then, subject to arguments as to contribution, the inheritance would need to be considered to form part of the pool of assets to be divided between you. This may mean you receive a greater share of the assets than you would have got had you separated and agreed on a property settlement before the spouse's parent died.

### Husband's inheritance included in asset pool after four years of separation

The case of *Calvin & McTier* [2017] FamCAFC 125 (12 July 2017) involved an appeal from the Magistrates Court of Western Australia to the Full Court of the Family Court on the issue of the treatment of post-separation assets, particularly an inheritance received by the husband four years after separation occurred. At the trial, the husband was unsuccessful in quarantining his inheritance from the assets available for distribution between himself and his wife and the judge adopted a global approach to the assessment of contributions. The inheritance comprised 32 per cent of the asset pool.

The Full Court ruled on appeal that the Court retains the power to decide how to approach the treatment of property acquired after separation and can therefore make orders dealing with a post-separation inheritance.

This principal was recently reaffirmed in the recent case of *Holland and Holland* [2017] FamCAFC 166 where the Full Court granted the wife's appeal on the ground that the original judge had made an error at law by treating a property the husband had inherited post separation as a financial resource rather than including it into the matrimonial asset pool.



Article written by Nikita Ward | Photo by Nathan Damlaou on Unsplash

## A WISE WORD ON GIFTS IN WILLS

For the most part, people make Wills because they want to give someone something on their death, but there are some considerations when deciding who to benefit, and what you intend for them to receive.

During your lifetime, your assets will change as you buy and sell real estate, change vehicles, spend money, get married, get divorced, have children or retire. When you decide that you want to gift a particular item to friend or loved one, you need to consider what happens if that item no longer exists, or if they cannot inherit the gift for whatever reason.

Let's start with the basics of what is a "gift".

A gift in a Will can be a *Specific Gift* such as a property, a piece of jewellery or a car, a *Pecuniary Gift* which is a defined amount of money, or a *Residuary Gift* which is the whole or a share of the balance of your estate after any Specific and Pecuniary Gifts (and any taxes or other liabilities) have been paid.

If you leave any sort of gift in your Will, you should discuss the possibility of it failing, so that an appropriate succession plan can be included. So, what could happen to a gift for it to fail?

There are many reasons a gift may fail, for example:

1. The beneficiary has died before you
2. The description of the gift is unclear
3. The beneficiary of the gift is unclear
4. The Specific Gift is no longer owned by you at the date of your death (also known as Ademption); or
5. The beneficiary disclaims their gift.

To avoid a gift failing because the beneficiary has died before you, you can plan for the gift to pass to their children (if any) if they are alive at your death. This is known as "per stirpes" and means "by branch or roots" and allows the gift to pass to the beneficiary's heirs. If they don't have children, you will need to specify what happens as doing nothing could mean the gift falls into your residuary estate and is redirected elsewhere.

Failing to correctly identify either a gift or a beneficiary can lead to expensive problems and lengthy delays. For example, if the subject of the gift is unclear, it could mean the beneficiary ends up with nothing. If the beneficiary itself is unclear, it could lead to litigation, and this is particularly important if the beneficiary is a charity. The Australian Charities and Not-for-Profits Commission website contains all the necessary details for registered charities to ensure that they are correctly identified, and you should also consider what would happen if the charity ceased to exist or had changed its charitable purpose.

Things get a little more complicated if you leave a

gift, and that gift doesn't exist at the date of your death. In most circumstances, the gift is likely to fail (known as ademption) but it depends on the particular wording of the gift. You will need to consider what you would want to happen if you no longer owned the item.

There are limited circumstances in which a gift will not fail in these circumstances. One of the most important exceptions is Section 22 of the Power of Attorney Act (2003) NSW. A Power of Attorney allows the Attorney to deal with your legal and financial affairs whilst you are alive. If the Attorney sells an asset which was the subject of a gift in a Will, it is possible that the beneficiary can retain an interest in the proceeds of sale of that asset. The law relating to exceptions to ademption is quite complex and it is best for you to try to avoid having to rely on these as much as possible by careful drafting of your will.

What happens if the beneficiary simply doesn't want the gift? Every beneficiary is entitled to say "thanks but no thanks" but depending on the type of gift they were left, this could have significant unintended consequences. For example, if Jane Smith was left a Stamp Collection as a Specific Gift, and she chooses to decline it, the Stamp Collection would likely fall into the residuary estate and pass to the residuary beneficiaries. However, if Jane Smith is a residuary beneficiary (being the person who receives either the whole or a share in the balance of your estate), and she says thanks but no thanks, this could cause a partial intestacy, and the law would then decide in what order people would inherit.

It is best for you to obtain experienced legal advice in the structuring and drafting of your will. Our Lawyers at Solari & Stock can provide advice and guidance in ensuring your will properly reflects your wishes and that who you intend to benefit from your estate does so with a minimum of fuss.



Article written by Rebecca Exley | Photo by Wedding Dreamz on Unsplash

## THE IMPACT OF INCREASING HOUSE PRICES ON FAMILY LAW MATTERS

When parties separate, they will usually commence a property settlement to divide the assets of their relationship. Essentially, a property settlement will put an end to their financial relationship. The first step in the family law property settlement process is to determine the net pool of assets available for distribution between the parties. In most





Article written by Kirstin Attard | Photo by sewcream on Adobe Stock

cases, the family home or other real property will be the parties' most valuable asset available for distribution. If it is agreed between the parties that the property is to be sold, the value of the property will be determined by what the market is willing to pay for it. As is overwhelmingly documented, house prices in Sydney (and elsewhere in Australia) have increased exponentially over the past 12 months. Should the parties choose to sell the former matrimonial home, the increase in value of their property will ultimately result in an inflated asset pool available for division.

However, as is often the case, one party may wish to remain living in the family home. This arrangement would involve one party buying out the other party's interest in the home. If the home, or any real estate, is not going to be sold, the parties can agree to its value. Usually, the value of the real estate requires determination. This is done by obtaining market appraisals or engaging an independent valuer to provide a valuation report. Property will be valued as at the time of the final property settlement or, if the matter proceeds to court, then at the time of the final hearing. Due to the quickly changing property market, it is likely that an updating valuation report will need to be obtained prior to settlement or final hearing, especially if the matter is protracted.

If one party does want to retain the home, it is likely they will need to secure finance in order to buy out the other party's interest. The party retaining

the home must be able to afford the costs of doing so, including taxes, utilities, maintenance and other costs of the property that may previously have been shared.

The fluctuation in house prices can have a significant effect on a family law property division. When the property market is hot and house prices are going up, any delay in a property settlement will adversely impact the party who is seeking to retain the property as their share of the property pool will be tied up in the value of the house. Thus, the party who is to be paid out for his or her share will benefit from the increased value of the property. In the same way, if property prices are going down, a delay in the property settlement will advantage the party who is seeking to retain the property and disadvantage the party who is to be paid out for his or her share.

These issues may need to be taken into account when considering when and how to settle a property matter. Careful consideration must be given to the impact of the fluctuations in values of properties throughout the property settlement process to ensure that a party is not unfairly disadvantaged as a result.

If this article has triggered concerns regarding your own family law matter please contact our office on 8525 2700 to book an appointment with one of our family law team, alternatively click here to request an appointment.



*These articles are for the benefit of our clients and business associates. The document is not intended to be a definitive analysis of legislation or professional advice. You should take advice before any course of action is pursued. Did you find this newsletter useful? If yes, please feel free to forward it onto a business colleague or friend.*

# SOLARI & STOCK

LAWYERS

## CONTACT

Level 2, 12 Central Road  
Miranda NSW  
T: +61 2 8525 2700  
E: law@solariandstock.com.au  
www.solariandstock.com.au

## FAMILY LAW

Riccarda Stock  
Nicole Quirk  
Nikita Ward  
Adrian Stock  
Kirstin Attard

## COMMERCIAL PROPERTY AND WILLS & ESTATES

Michael Solari  
Karina McDougall  
Valentina Abouzeid  
Rebecca Exley  
Vicki De Bonis - Licenced Conveyancer

