FOLEY'S LIST

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FOLEY'S LIST

VICTORIAN BAR

WHAT EVER HAPPENED TO THE GOLD BAR
INHERITANCES AND HOW THEY ARE TREATED

Emphasis are the author's save where otherwise stated

INTRODUCTION

Back in the year 1996 Kay J made a famous quote in the case of ALEKSOVSKI v ALEKSOVSKI (1996) FLC 92-705

> "*...A party may enter a marriage with a gold bar which sits in a bank vault for the entirety of the marriage. For 20 years the parties each strive for their mutual support and at the end of the 20-year marriage, they have the gold bar. In another scenario they enter the marriage with nothing, they strive for 20 years and on the last day the wife* ***inherits a gold bar***. ***In my view it matters little when the gold bar entered the relationship****....*"

One might take the view reading the above that an inheritance has some higher place in Family Law matters.

However the "quote" above is not the full story

What his Honour said back in 1996 is repeated below, in its entirety.

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> ***In my view whether the capital sum was acquired early in the marriage, in the midst of the marriage or late in the marriage, the same principles apply to it.*** *The Judge* ***must weigh up various areas of contribution. In a short marriage, significant weight might be given to a large capital contribution. In a long marriage, other factors often assume great significance and ought not be left almost unseen by eyes dazzled by the magnitude of recently acquired capital.*** *A party may enter a marriage with a gold bar which sits in a bank vault for the entirety of the marriage. For 20 years the parties each strive for their mutual support and at the end of the 20 year marriage, they have the gold bar. In another scenario they enter the marriage with nothing, they strive for 20 years and on the last day the wife inherits a gold bar. In my view it matters little when the gold bar entered the relationship.* ***What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship. Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight because of those other elements …"***

It is the view of this author that His Honour was completely right in his analysis and that if one takes the full paragraph as a guide one should not go too far astray when advising ones clients. His Honour does what we all forget to do. That is consider and weigh ALL factors as set out in the LEGISLATION

I shall expand upon this in this paper using examples on the oft vexed question how to deal with inheritances

A LOOK AT ALEXSOVSKI

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This case was actually not about an inheritance! Rather the wife, late in the 18 year marriage, received a large sum of money after a car accident. There were three children aged 19, 15 and 11 at the time of the trial, all living with the Wife, The Aleksovskis were not wealthy, and both had worked in similar paid jobs although the Husband was retrenched and received a small payment for that late in the marriage. The parties renovated their home in the latter half of the marriage with the husband doing a large amount of the labour. The wife's compensation for her car accident (for pain and suffering) was used in part to purchase a unit a year before separation.

At trial the judge found the Wife to have been principally if not exclusively responsible for the care of the children with assistance from her mother following the accident. At trial the Husband was unemployed and had broken English and more limited prospects for employment than the Wife (her prospects were not great either)

The Wife's employer had gone into liquidation with a small payment to her but she had better hope of getting a new job,

At trial the Wife got the FMH and half the unit.

As Baker and Rowlands J described it, *"the lions share*". (In fact 77.28 % to the Wife and 22.72% to the Husband)

At trial the Judge did not set out an asset list and their honours felt had he done so and stood back and looked at the overall effect on each of the parties he would have realised the orders could not be just or equitable

I quote their honours from page 83,435

> *The manner in which his Honour structured his orders was to quarantine the Thomastown unit as a contribution made solely by the wife because of her compensation award and then provide for the wife a further 15 per cent of the parties' interest in the former matrimonial home (which he quantified at 60 per cent in her favour) because of s 75(2) factors which again favoured her. Such an order left the wife with the lion's share of the parties' property in a case where she was to receive approximately $13,000 by way of a retrenchment package and, at the same time, had some earning capacity.*

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> ***Unfortunately, the trial Judge did not set out a list of the assets and the liabilities of the parties, which, in our view, is essential in property cases, where s 79(4) contributions have to be weighed and assessed and s 75(2) factors considered. Had that been done, it must have become apparent to his Honour, before making his final orders, that the result which he achieved was plainly wrong. In other words, he did not stand back and consider the overall effect on each of the parties of the orders which he was proposing, or consider whether or not such order was just and equitable.***

We can see a lot in that highlighted passage on the theme of section 79(2) of the act being the **overarching consideration**.

Their Honours also said this … (at p 83,437):

> "*It is therefore necessary that trial Judges* ***weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation and then translate such assessment into a percentage of the overall property of the parties or provide for a transfer of property in specie in accordance with that assessment.***
>
> ***It really comes down to questions of weight. Whilst weight would and must be given to a contribution which a party makes shortly before the separation, less weight may be given to a contribution made by one of the parties to a marriage early in the cohabitation period of a long marriage, particularly in circumstances where the contribution has gone into the parties' assets or been used up in the payment of family expenses****."*

Their Honours then determined the matter on a 62%/38% basis in favour of the Wife

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Justice Kay, in a separate judgment agreed with the majority that the appeal should be allowed but for different reasons, and the oft quoted passage comes from his separate judgement

The passage is often said to be a point of difference on the basis that that the TIME of the contribution was made did not necessarily affect the outcome. However, I note that his Honour also said that **all** contributions need to be weighed)[1]
However when one looks at what his Honour said in its entirety the last part of the para quoted above is quite clear;

> ***Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight because of those other elements.***

And remember his Honour said this

> ***What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship***

WHY is ALEKSOVSKI so important?

If one reads both judgements one realises that this case is almost a "back to the future" experience

FOR INSTANCE

Kay J gives some CLEAR guidance on the difference between "windfalls" and inheritances AND pre-empts what the High Court told us in STANFORD V STANFORD (2012) FLC 93-518, (2012) HCA 52 all those years later

[1] See CCH authours at part 37-025 timing of contributions

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His Honour talked about the trial judge giving more significance to the lateness of the Wife receiving the payment then the ***nature*** of the payment at page 83,444. The trial judge had also made an *analogy* between and inheritance late in the marriage and a " windfall" or " lottery win"

Kay J said this in relation to the NATURE of the payment

> *It was submitted by counsel for the wife and conceded by counsel for the husband that there was a peculiarly personal element to the wife's contribution because much of her money was compensation for her pain and suffering. This was an important matter for his Honour to consider but it had to be properly weighed together with the other significant factors in this case and ought not have been overwhelmingly decisive. As the High Court said in Williams v Williams (1985) FLC ¶91-628 at 80,093*
>
> *``... when the property available for division between the parties represents an award of damages for pain, suffering and loss of amenity, it may be relevant in some situations, to have regard to the circumstances relating to that award, but there is no general presumption that the award should be left out of account in determining what orders should be made under s 79 of the Family Law Act 1975 (Cth)."*

Kay J said this in relation to the ANALOGY

> *I am not entirely convinced that the analogies used by his Honour are all apposite. **The moneys are peculiarly personal to the recipient**. **This is almost always true of inheritances although often the parties both change their spending and saving habits in anticipation of an inheritance. The parties may both work a farm property or in a business owned by the parent of one spouse in anticipation of eventually inheriting it and in so doing may forgo entitlements such as wages (see James and James (1978)***

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> ***FLC ¶90-487****). A* ***lottery win is of a different dimension****. Its acquisition may have involved risking the assets of both parties or it may be as a result of a birthday gift or other fortuitous circumstance. With a lottery windfall, the issue of other contributions is easier to emphasise.* ***With damages for pain and suffering or with an inheritance, the other 79 considerations required to alter the ownership of that fund need to be all the more powerful before it could be said to be just and equitable and proper to make such an order.***

So here we get a hint that the COURT can and WILL in some instances "**quarantine**" an inheritance.

MORE ANALOGY

Another way to describe what Kay J said in ALEKSOVSKI

FROTH V FROTH (2007) Fam CA 1608

In this case Watts J gave another analogy. Perhaps not as catching as the "gold bar" His Honour said this in FROTH (at 157 -159)

> *Without attempting to compete with Kay J's gold bar passage and without wanting to turn "the erosion principle" into "the evaporation principle", let me illustrate the legal principals referred to above by using a metaphor. There is a beaker on a flame. One spouse, at the beginning of the marriage, pours an amount of water into the beaker. Over a long time both spouses each pour water into that beaker. The water is of different colours, representing personal exertion, introduced assets and the growth of assets from market forces, dividends and interest. The water bubbles away. Towards the end one spouse adds an inherited amount of water to the beaker. Throughout there is a distillation coil catching the steam. The condensed vapour is collected in a*

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second beaker. At the end of this long marriage the parties have available to them the water left in the beaker on the flame. There is also an amount of water in the second beaker. That water represents the income, the capital and effort spent by the parties during the marriage, to which they no longer have access. To do justice between the parties what is left in the beaker on the flame needs to be distributed between the parties in a way that acknowledges the water in both beakers. In shorter marriages there usually won't be as much water in the second beaker.

I add this for some brevity and for those who prefer science beakers to gold bars!

HAS ALEKOVSKI BEEN FOLLOWED

The short answer is yes

See for instance

DICKONS V DICKONS (2012) Fam CAFC 154

In Dickons the full court was critical of an approach that suggested there need be a causal relationship between moneys contributed by a party and specific assets or available property to be considered contributions for the purpose of section 79

In that case there had been a number of inheritances received by the appellant throughout the marriage and there was confusion in the approach of the lower court to how to approach that

Having quoted the passages in ALEKSOVSKI above the Full court said this (at para 23,24)

- 23. *We wish also to refer to the approach of the Federal Magistrate in* ***attributing percentages to differing periods within the relationship, or types of contribution made. There is in our view little to be gained, and much to be said against, approaching the task of assessing contributions by attaching percentages to components of it. (The same, it might be said, applies to attributing a percentage to each of the relevant s 75(2) factors).***

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- *24. There can be little doubt that the classification of contributions by reference to terms such as "initial contributions", "contributions during the relationship", and "post-separation contributions", can be helpful as a convenient means of giving coherent expression to the evidence in a s 79 case and to giving coherence to the nature, form and extent of the parties' respective contributions.* ***However, the task of assessing contributions is holistic and but part of a yet further holistic determination of what orders, if any, represent justice and equity in the particular circumstances of this particular relationship. So much is clear from the terms of s 79 itself and, in particular, s 79(2).*** *The essential task is to assess the nature, form and extent of the contributions of all types made by each of the parties within the context of an analysis of their particular relationship.*

  AND THIS at para 25 and 26

- *25. Doing so is also consistent with the demands of authority that the ultimate assessment of contributions should be made without "…giving over-zealous attention to the ascertainment of the parties' contributions…"*
  (Norbis v Norbis [(1986) 161 CLR 513](#) at 524) and the well-established recognition in the authorities (acknowledged specifically by her Honour in this case) ***that the process required of the Court by s 79 is the exercise of a wide discretion, not the performance of a mathematical or accounting exercise****.*

- *26.* ***The necessarily imprecise "wide discretion" inherent in what is required by the section is made no more precise or coherent by attributing percentage figures to arbitrary time frames or categorisations of contributions within the relationship. Indeed, we consider that doing so is contrary to the holistic analysis required by the section and, in the usual course of events, should be avoided.***

See also WALLIS V MANNING (2017) Fam CAFC 14

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that again points out to an assessment on an **HOLISTIC** approach to all matters set out under the Family Law Act

SO WHAT IF THE GOLD BAR ARRIVES LATE IN THE MARRIAGE OR AFTER THE MARRIAGE???

CAN THE INHERITANCE BE QUARANTINED???

The short answer is yes it can

The BIGGER question is in what circumstances is the Court likely to do so

How many applications do we see where that is sought perhaps most unwisely?

Remember what Kay J said in ALEKSOVSKI ? About the other considerations needing to be more powerful to make any alteration??

> **It has long been held that inheritances received either late in the marriage of post separation can be treated separately**

See for instance **IN THE MARRIAGE OF BONNICI (1992) FLC 92-272**

In Bonnici the Husband received late in the marriage around 430K, he had tried to hide that money claiming his sister got half. (that approach did not help his cause.) The other assets, totalled around 585K after a 21 year relationship. The husband had also received a smaller inheritance of around 20K during the marriage from an uncle. At first instance contributions to all assets were found to be equal

The Full court said of that

> *The problem that presently faces the Court is as to whether a finding that the parties had contributed equally can be justified given the very substantial assets that came into the husband's hands shortly prior to the end of the marriage.*

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We have no doubt that his Honour was correct in rejecting the submission that these assets were a "resource" and not property…

The more difficult issue in this case is as to whether the same should be treated differently from other types of property in which the parties clearly have an interest.

The answer, we consider, must depend upon the circumstances of individual cases. If, for example, in the present case, there had been no other assets than the husband's inheritance, but the wife had, as his Honour found, clearly carried the main financial burden in the support of a family and also performed a more substantial role as a homemaker and parent than the husband, then it would clearly be open and indeed incumbent upon a Court to make a property settlement in her favour from such an inheritance.

A property does not fall into a protected category merely because it is an inheritance. *On the other hand, if there are ample funds from which an appropriate property settlement can be made and a just result arrived at, then the fact of a recently acquired inheritance would normally be treated as an entitlement of the party in question.*

The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances. *Such circumstances might include the care of the testator prior to death by the husband or wife as the case may be or other particular services to protect a property…. But there was no evidence of this in the present case.*

NOTE

The full court GAVE an example here of "**protecting property**" that is the case of **JAMES V JAMES (1978) FLC**

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Do not forget that case as it deals with the parties both expecting to receive a property that they lived on in the fullness of time by inheritance and it was in the context of that expectation that the wife made a myriad of contributions as a Wife and mother

The full court talked about falling into error by using a global approach rather than an asset by asset approach at page 79,021,
However one must note that on appeal the amount the Wife received was only **15K** less in a total asset list found to be around 615 K (one must be careful in these cases given what is at stake)

BISHOP V BISHOP (2013) Fam CAFC 138

Bishop was a farming case The relationship was **25** years and there were three children
The cohabitation lasted from 1982 to 2007. **The Husband had a farm at cohabitation.**
The parties had three children born in 1988, 1990 and 1993.
The parties purchased additional land from the Husband's mother of 300 acres for $100,000 in 1988 using $25,000; which the wife had received by way **of inheritance**, and the balance by mortgage.
They sold the original farm and bought more farming land from the Husband's mother.
The wife was employed as a schoolteacher.
The wife had been lent funds by an aunt to buy a house property that she lived on at trial.
In **August 2005 the wife received an inheritance from an aunt in England in the amount of $227,000, with a further amount of $25,000 being received in November 2005. These funds were placed in a separate trust.**
On appeal the husband asserted that the Federal Magistrate erred in a number of ways including **leaving out the Wife's recent inheritance** and the **weight to the Husband for his initial contributions in this 23-year marriage:**

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The full court noted at paras 30 to 32 regarding the different treatment of the inheritance and the Farming land:

> 30. It is relevant to mention in this context that counsel for the husband endeavoured to persuade us that it was in some way inconsistent, **or even unjust, that the wife's inheritance had been effectively quarantined**, while the rural property which could be traced to an initial contribution by the husband was included in the so-called "asset pool", and that the husband's contribution of that property was ultimately given no greater weight than the wife's contributions to the parties' property (being property other than her inheritance and both parties' superannuation interests).
>
> 31. The difficulty with such an argument is **that although the husband brought some rural property (subject to a mortgage) into the marriage, over the years of the marriage, that property, and the property subsequently acquired with the proceeds of sale of the first property, were used for the benefit of the family (as a home and a source of income), with the wife having made significant financial and non-financial contributions to both properties. On the other hand, the husband was found to have made no contribution to the wife's inheritance.**
>
> 32. His Honour cannot be said to have been wrong in having treated, in what can be termed, separate categories, property to which both parties had contributed and property to which only one (or perhaps neither) had contributed. **Whether each party's contributions to the property to which they had contributed were adequately recognised by his Honour is a different consideration, and is one to which we will return.**

The full court then considered the argument that there was not enough weight given to the Husband's initial contributions.

They did NOT determine that there had not been enough weight accorded to the Husband (the trial judge said this was a 50/50 case on that issue)

"58. Having identified all these contributions, his Honour concluded:

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- 77. Were it not for the wife's contributions to the welfare of the family in the form of her financial support of [S] post-separation, and the capital contributions made by her and referred to at [72] above. I consider that the contributions of the husband in the form of the value of [property T] at the time the parties married and the Gosper contributions made by the husband's parents (see [62]–[63] hereof) would have required some small weighting in the husband's favour (something of the order of ten per centum i.e. 55/45% in the husband's favour). But I think that those matters leave me in a position where I should regard their contributions-based entitlements as being equal. **In the context of a 23-year marriage it is not appropriate for me to pretend that I am undertaking something analogous to an accounting or auditing exercise.** The evaluation of contributions under s 79 of the Act is an exercise involving a broad exercise of discretion. I accept that the evaluation of the contributions-based entitlements is an exercise more amenable to mathematical precision than the final step in the process — the just and equitable requirement — but it is a discretionary exercise, nevertheless. **It is to be borne in mind that I do not consider that there was sufficient evidence before me to enable me to find that the acquisition of [property T] in its final form or the acquisition of [property E] were made by the parties upon the basis of the purchase prices being discounted by the husband's parents.**
- 78. Significant for me in the decision I have come to as to the contributions-based entitlements of the parties **is the view I have taken that both parties worked extremely hard throughout the marriage. At the end of such a marriage to give additional weighting to an asset introduced at the commencement of the marriage in a way that ultimately discriminates between all of the contributions the parties made over such a long period would be inappropriate.**

59. Before us, counsel for the husband acknowledged that the challenge to this finding of equality of contributions must ultimately be one of weight only. While we acknowledge that another judge may have made a more generous contribution finding to the husband on the basis of his initial contribution to the rural property, we are not persuaded, having regard to the limitations on appellate interference with discretionary judgments on the basis only of weight (as expressed in cases such as *Gronow* **v** *Gronow* (1979) 144 CLR 513), that our interference with his Honour's assessment of an equality of contribution to the assets (other than the superannuation interests and the wife's inheritance) would be justified. Accordingly, the grounds directed to his Honour's contributions assessment cannot succeed

WHAT DID THE FULL COURT SAY ABOUT THE "TWO POOL" APPROACH

At first instance there was a determination that the latter inheritance of the Wife would not be included in the assets for division but would be taken into account under section 75(2) on the basis that BONNICI compelled the court to do so
That was found to be incorrect

The full court said this (Finn May and Strickland JJ)

We agree … his Honour was not constrained by what the Full Court said in Bonnici about the treatment of inheritances.

As the Full Court emphasised in that decision, and as we cannot emphasise too strongly, each case in this jurisdiction will depend on its own facts or circumstances.

However, we would not interfere with his Honour's decision because of his view that he was bound by authority to exclude the inheritance from the calculation of "the asset pool". This is because his findings or conclusions … would support the approach which he took of excluding the wife's inheritance

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from the "asset pool" and regarding the husband's contributions to it as "nil". ***His Honour did, however, have regard to the inheritance in the context of his consideration as to whether any adjustment was required to be made to the division of the property to which the parties had contributed, on account of the matters contained of s 75(2) of the Act. This, in our view, was an approach open to him.***

A WORD ON EVIDENCE

Clearly the above case is an example where had there been some documented evidence that might have had more influence on what is a discretionary decision

ANOTHER LATE INHERITANCE CASE A different outcome

SINGERSON V JOANS (2014) Fam CAFC 238

In this case the Husband's father died and the Husband inherited just prior to separation some 3 million. The relationship was 13 years. The Wife had made far greater contributions to the care of the children and financially during the marriage as the Husband suffered from depression and had sporadic employment in the latter years as a result. There were two children 13 and ten and the Husband had sporadic employment. The wife earned good money and by trial the Husband had used some of the inheritance for his own needs

At trial the court provided the wife with 60% of the non-inherited assets and 20% of the inherited assets or 46% of the combined assets

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On appeal the Husband sought 40% of the non-inherited assets and to keep what was left of his inheritance or 61% of all assets

The full court had no difficulty with accepting that the Wife had made far greater contributions to the non-inherited assets
(at 94-98)

"***We have no difficulty accepting that over a period of approximately 15 years cohabitation and a further four years between separation and the trial that the wife made the significantly greater contribution to the property acquired prior to separation. In particular we refer, as did the trial judge, to her greater contribution both in a financial sense and in terms of her care of the home and for the children***.

This assessment acknowledges the initial contributions of the husband The parties' respective roles remained much the same throughout the entire relationship in every sense. The husband introduced a substantial sum of money late in the marriage and after the parties had separated. This has made a noticeable impact on the property pool.

Despite the timing of the receipt of the inheritance we consider that over this long marriage a global approach is appropriate. The contributions the parties made to various components of their assets are assessed carefully and then looked at holistically to arrive at an overall assessment.

On this basis and utilising the trial judge's largely unchallenged findings of fact we would assess the parties' contributions to all their property to the date of trial as 52.5 per cent in favour of the husband.

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and also his post separation inheritance. However, this is more than matched by, inter alia, the considerable contributions of the wife to the family including her post separation contributions."

The Husband ended up WORSE OFF after the appeal!

The case confirms that one can use a two-pool approach, however that is not what the full court chose to do[2]

I note the Full Court said this at para 65 and 66

65. We are of the view that his Honour misled himself, and thus fell into error, in identifying only the four years between separation and trial as being the appropriate time upon which to assess contributions to the inheritance rather than across their 15 year relationship.

66. *Section 79(4) of the Act is clear.* ***There is nothing to suggest that any category of contributions needs to be quarantined and applied solely to particular assets. The court is mandated to look at the totality of what the parties have contributed in a financial and non-financial sense, including contributions to the welfare of the family and to the acquisition, conservation and improvement of assets. The court is required to evaluate the significance of all the various contributions to the property, notwithstanding there may be different categories of that property.***

SO WHERE DOES THAT LEAVE US IN ADVISING CLIENTS?

WHEN IS IT APPROPRIATE TO USE A TWO POOL APPROACH?

[2] See paras 42,43 of Singerson & Joans quoting Nygh J in G& G (1984) Fam CA 60 and para 44 the High Court in Norbis V Norbis (1986) HCA 17 (1986) 161 CLR

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BEVIS & BEVIS 2014 FAM CAFC 147

In BEVIS the court adopted a **three pool approach** There was superannuation, assets acquired during the marriage and the husbands equity in a unit that he acquired with a post separation inheritance. There was significant superannuation in the husband's name, virtually nothing in assets acquired during the marriage and the inheritance received after separation. The husband appealed as he claimed he got inadequate credit for his super contributions post separation and the inheritance

The relationship was 27 years, there were four children the youngest 15 at trial, the facts are conveniently set out in the appeal judgement which summarises the decision at first instance

In essence the wife got 387k of super and some chattels, the Husband paid the shortfall on the sale of the FMH and the Husband ended up with around 543K which included his unit at 186K and the balance mainly super

At appeal some limited evidence was permitted to show that the net affect was H 56.2% Wife 43.8 % globally and the Husband got 117K more than the Wife

The full court left the orders as they were even though the Husband had less of his inheritance than had he left it sitting in the bank

There is interesting discussion of the trial Judge's assessment to the post separation inheritance as being 3% at paras 75 to 78

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The "take home" message from this case

The Full court agreed with the trial judge that the Husband's post separation contributions could not be considered in isolation to all the other contributions

POST SEPARATION INHERITANCE AND NO OTHER ASSETS

There is one classic case we all must not forget

FARMER V BRAMLEY 2000 FLC 95-060

Whilst Farmer V Bramley is NOT an inheritance case and is indeed a "Tatts" case, it is pertinent in my view; despite what Kay J said of same in ALEKSOVSKI

The facts should be well known

The father; a heroin addict in the early years of the relationship, purchased a Tatts ticket well post separation and won 5 Million There were of course no other assets. There was a15 year old child at trial in the care of the mother By the time of trial the father had already gambled 100K of the money and denied it was his ticket and said it was his mothers' (she did not intervene to grab the money!)

Yet again we get a clear interpretation of the matters relevant under the Family Law Act from **Kay J** sitting in the appeal Court

The summary of his Honours review is from CCH and I repeat it below

> ***Clearly contributions made towards the acquisition of an asset by one party and the lack of contributions made towards its acquisition by the other party may weigh heavily in the exercise of discretion. However, it is wrong to say that contributions made under s 79(4)(a), (b) or (c) before an existing asset was acquired could have no bearing on the outcome of the proceedings.***

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• *The Court's task is to evaluate* ***all of the contributions from the time of the commencement of the parties' relationship until the time of the hearing and give such weight to such contributions as the Court thinks is appropriate in the circumstances. Further, there is nothing in the legislation that requires s 79(4) (a) (b) and (c) contributions to be measured only in terms of what either party contributed to the assets of which they are presently possessed.***

• *As it is not possible to discern how the trial Judge reached the conclusion that $750,000 was an appropriate award, the Full Court needed to re-exercise the discretion.*

• *The $5,000,000 presently attributed to the husband should be divided between the parties as* ***to 87.5:12.5 in the husband's favour based on an evaluation of contributions.*** *There should be a further adjustment to the wife* ***of $125,000 under s 75(2).*** *The resulting award to the wife is the same as that arrived at by the trial Judge albeit by a different route. Accordingly, the appeal should be dismissed.*

Two years after Farmer v Bramley a case came along where the parties were somewhat more privileged

There was a vast inheritance

It is the case of **FIGGINS V FIGGINS (2002) FLC 93-122**

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The marriage was short; 6 years, with one year of cohabitation prior and there was one child aged five in the Wife's care. The parties owned little at cohabitation and tragically the husband's father and stepmother were killed in a helicopter accident some two weeks after the wedding. The husband inherited around 28 million dollars. At trial, the net worth of the Husband was agreed at 22.5 million and the wife had a negative position of around 21K of debt

At first instance the wife was given 600K for contributions and 500K for 75(2) factors and the Judge dismissed the Wife's application for spousal maintenance on the basis that the 1.1 million would provide investment opportunity for the wife

The wife sought 2.5 million on appeal **and got it**

It was held by the Full Court that an inheritance is not a "special contribution" (see para 57) and that the trial judge had allowed the inheritance to overshadow the Wife's contributions, including indirect contributions to the maintenance of the inheritance following the accident

INHERITANCE SEPARATE POOL

NIKAS & ANTHIS 2015 FCCA 187

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In this case the Husband was a gambler, and one might call him a bit of a failure. He gambled over 200K of funds including 100K borrowed for renovations to the home, and the Wife's mother provided funds to purchase a property and gifted the FMH. The Wife then inherited funds from her mother shortly after separation

The inherited funds were left out and after considering the Wife's greater earning capacity and her ongoing care of the ten year old child she received 77.5 % of the pre separation assets and the inheritance intact. The superannuation was split

The Husband made minimal contributions to the marital property that arose largely from the largesse of the Wife's mother and benefited from that for the entire relationship.
If one reads this judgement once sees that Bender J (commencing at para 70) **takes us through the legislative matters in a clear manner as they pertain to the facts of the case**

That is what **Kay J did back in 1996 in Aleksovski** albeit not with specific reference to each section It is clear however that his Honour was mindful of the legislature and followed it.

THE MOST RECENT DECISION
BACK TO THE FUTURE
ROVERATI & ROVERATI (2021) FLC 94-027

SHORT FACTS

The parties were married 33 years and during the marriage BOTH received substantial inheritances. The Husband's over 400K the Wife's 50K

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The Husband's income from his inheritance was used towards expenses or reinvested, the Wife's income from hers was to go to the children or her siblings i.e. no benefit arose. At first instance the trial judge made a 50/50 contribution determination

The Husband appealed

Whilst the decision is based upon a lack of reasons it is clear that both Strickland and Ryan JJ held that there **was no recognition that around 30% at least of the assets at trial derived from the Husband's inheritance**

Austin J held that there were adequate reasons

> **AND (quoting the learned authors of CCH)** ***"that whilst the capital value of the Husbands inheritance was greater , it had to be weighed HOLISTICALLY against all other contributions made over so many years Without being exhaustive, other material contributions included the wife's superior capital contribution at marriage (at [62]), the wife's longer history of paid employment (at [63]–[64]), and the wife's superior contribution as a homemaker and parent (at [82]–[86])".***

Curiously the end result was an increase from 50% to 55% to the Husband and that amounted to around 65K in the case

One presumes it cost more or about that to run the appeal

SO WHERE DOES THAT LEAVE US NOW??

It is my contention that one MUST always turn to the legislation

Remind oneself of the matters in section 79(2)79 (4) and then Section 75 and the mirror sections in the defacto law

Set out your case fully under the relevant sections

Read ALEKOVSKI

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And of course;

BRIEF AND BRIEF EARLY

I hope this paper has assisted the reader.

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MELBOURNE AUGUST 2021

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