

# The treatment of Gifts and Inheritances in Family Law Financial Cases

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## Part 1 - Gifts

### 1. Introduction

In family law financial proceedings, the classification and treatment of **gifts** often play a significant role in determining the fair distribution of assets upon divorce or dissolution of a civil partnership. Gifts may be made between spouses, by third parties (commonly parents or other relatives), or even to one spouse alone, and they can substantially affect the size and composition of the matrimonial pot. The legal complexity arises from the need to distinguish gifts from loans, inheritances, or trust assets, and from the court's discretionary approach to financial relief. This essay examines how gifts are defined, assessed, and treated in family law financial cases, with particular emphasis on principles developed in common law jurisdictions such as England and Wales.

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### 2. Defining a Gift in Family Law

A **gift** in legal terms generally requires:

1. **Donative intent** – a clear intention by the donor to give without expectation of repayment;
2. **Delivery or transfer** – actual or constructive transfer of the property or money; and
3. **Acceptance** – usually presumed where the gift is beneficial.

In family law disputes, the definition becomes more nuanced. Courts frequently scrutinise whether an alleged gift was truly intended as such, especially where large sums are transferred within families. This is particularly common in cases involving parental assistance with property purchases, business start-ups, or living expenses.

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### 3. Gifts Versus Loans: A Central Distinction

One of the most contentious issues in financial remedy proceedings is whether money received from a third party constitutes a **gift or a loan**. This distinction is crucial because:

- **Gifts** are treated as assets available to the recipient;
- **Loans** may be considered liabilities, reducing the net matrimonial assets.

Courts assess this question by examining:

- Documentary evidence (loan agreements, emails, repayment schedules);
- Conduct of the parties (whether repayments were made or demanded);
- The likelihood of enforcement (whether the lender realistically intends to pursue repayment);
- The family context (informality is common, but informality alone does not preclude a loan).

Where a “soft loan” exists—often from parents—the court may disregard it as a liability if there is little prospect of enforcement, effectively treating the funds as a gift for practical purposes.

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## 4. Matrimonial and Non-Matrimonial Property

In jurisdictions such as England and Wales, the courts distinguish between:

- **Matrimonial property:** assets acquired during the marriage through joint endeavour;
- **Non-matrimonial property:** assets acquired before the marriage or received by gift or inheritance from third parties.

Gifts from third parties to one spouse are often classified as **non-matrimonial property**, particularly where they are:

- Clearly intended for one spouse only;
- Kept separate from matrimonial finances;
- Received late in the marriage or post-separation.

However, the court retains discretion to **invade non-matrimonial assets**, including gifts, if required to meet the other party’s needs, especially where resources are limited.

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## 5. Inter-Spousal Gifts

Gifts between spouses raise additional complexities. Common examples include:

- Transfers of property into joint names;
- Expensive jewellery or personal items;
- Business shares or investments.

Courts generally presume that such transfers are **outright gifts**, particularly where assets are placed in joint names. However, arguments may arise that:

- The transfer was for convenience or tax planning;
- The donor spouse did not intend to relinquish beneficial ownership.

In most cases, once an asset is transferred between spouses during the marriage, it is treated as matrimonial property unless compelling evidence suggests otherwise.

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## 6. The Timing and Use of Gifts

The **timing** and **use** of a gift are key factors in its treatment:

- **Early marriage gifts**, especially those used to acquire the family home, are more likely to become matrimonialised.
- **Late marriage or post-separation gifts** are more likely to retain their non-matrimonial character.
- Gifts that are **mingled** with joint finances (e.g. paid into a joint account or used for family expenses) often lose their separate identity.

The concept of **matrimonialisation** reflects the idea that even non-matrimonial assets can become part of the shared economic life of the marriage.

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## 7. Judicial Discretion and Statutory Framework

Family courts typically operate within a statutory framework that prioritises **fairness**, with discretion guided by factors such as:

- The welfare of any children;
- The parties' financial needs, obligations, and responsibilities;
- The standard of living during the marriage;
- Contributions (financial and non-financial);
- The duration of the marriage.

While the source of an asset as a gift is relevant, it is not determinative. Courts frequently emphasise that **needs can override property distinctions**, particularly where excluding gifted assets would leave one party inadequately housed or supported.

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## 8. Evidential and Practical Considerations

From a practical perspective, parties seeking to rely on the gifted nature of assets should consider:

- Maintaining clear documentation confirming the donor's intention;
- Avoiding commingling gifted assets with joint funds where separation is desired;
- Obtaining formal loan agreements if repayment is intended.

Conversely, parties challenging the classification of an asset as a gift may rely on evidence of shared use, joint decision-making, or the absence of express donor intent.

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## 9. Policy Considerations and Criticisms

The treatment of gifts in family law reflects broader policy tensions:

- Respecting family autonomy and donor intention;
- Avoiding injustice to the non-recipient spouse;
- Ensuring that financial outcomes meet basic needs.

Critics argue that the discretionary approach can lead to unpredictability, while proponents contend that flexibility is essential to achieve fairness in diverse family circumstances.

# Part 2 – Inheritances

Below is a **detailed, structured essay** on the treatment of **inheritances in family law financial cases**, written in a style suitable for academic study, professional reference, or practitioner use. The focus is primarily on principles applied in **England and Wales**, while remaining broadly relevant to other discretionary family law systems.

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## Inheritances in Family Law Financial Cases

### 1. Introduction

Inheritances frequently arise as a contentious issue in family law financial proceedings following divorce or the dissolution of a civil partnership. Unlike assets generated through joint marital endeavour, inherited wealth typically originates from third parties and raises difficult questions of fairness, ownership, and need. The central tension lies between respecting the intention of the deceased to benefit a particular individual and ensuring that financial outcomes upon relationship breakdown meet the reasonable needs of both parties and any children. This essay examines how inheritances are treated in family law financial cases, the principles governing their classification, and the circumstances in which courts may include inherited assets in the financial award.

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## 2. Legal Nature of Inheritance

An inheritance is property received by a party on the death of another, whether under a will or through the rules of intestacy. From a family law perspective, inheritances are distinct from income earned or assets acquired during the marriage, as they arise from **external and unilateral sources** rather than joint spousal effort.

Courts generally recognise inheritances as a form of **non-matrimonial property**, particularly where they are:

- Received from a third party;
- Intended for the benefit of one spouse alone; and
- Not generated through the parties' shared endeavours.

However, the mere fact that an asset is inherited does not automatically exclude it from consideration in financial proceedings.

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## 3. Matrimonial Versus Non-Matrimonial Property

In jurisdictions such as England and Wales, the courts differentiate between **matrimonial property** and **non-matrimonial property**. Inherited assets typically fall into the latter category. This distinction is important because:

- Matrimonial property is usually subject to the sharing principle;
- Non-matrimonial property may be excluded from equal division, subject to needs.

The concept of **fairness**, rather than strict property rights, governs the outcome. As a result, even non-matrimonial assets such as inheritances may be brought into account where fairness requires it.

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## 4. Timing of the Inheritance

The **timing** of an inheritance is a crucial factor in determining its treatment:

- **Pre-marital inheritances:** Assets inherited before the marriage are more likely to be treated as non-matrimonial, particularly if kept separate.
- **Inheritances received during the marriage:** These may retain their non-matrimonial character, but the risk of inclusion increases if they are used for family purposes.
- **Post-separation inheritances:** Generally afforded the strongest protection, especially where they are clearly unconnected to the marital partnership.

Courts often take the view that the closer the inheritance is to the marital partnership in time and use, the more likely it is to be considered available for distribution.

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## 5. Matrimonialisation of Inherited Assets

A key concept in family law is **matrimonialisation**, which occurs when non-matrimonial property becomes part of the marital economy. Inheritances may be matrimonialised where they are:

- Used to purchase or improve the family home;
- Placed into joint names;
- Mixed with joint savings or investments;
- Applied to meet routine family expenditure.

Once matrimonialised, inherited assets may lose their separate identity and become subject to the sharing principle, particularly in long marriages.

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## 6. The Role of Needs

Even where an inheritance clearly retains its non-matrimonial character, the court may still have regard to it when assessing the parties' **needs**. The needs principle often overrides strict property classification, especially where:

- The matrimonial assets alone are insufficient to rehouse both parties;
- One party has limited earning capacity;
- There are dependent children whose welfare must be prioritised.

In such cases, the court may "invade" inherited assets to the extent necessary to achieve a fair outcome, while attempting, where possible, to preserve the core of the inheritance.

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## 7. Future and Prospective Inheritances

Courts distinguish between **actual inheritances** and **mere expectations**. A future or prospective inheritance is generally not treated as a resource unless:

- It is imminent;
- The amount is reasonably certain; and
- There is evidence that the inheritance will materialise in the near future.

Speculative or remote expectations are usually disregarded, although they may be relevant in limited ways, such as influencing the court's approach to capital provision or maintenance.

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## 8. Trusts and Inherited Wealth

Inherited wealth is sometimes held in **trust structures**, which add further complexity. The court will examine:

- The nature of the trust (discretionary or fixed);
- The beneficiary's degree of control or expectation;
- The history of distributions.

Where a spouse is a discretionary beneficiary, the court may treat trust assets as a financial resource rather than as property, depending on the likelihood of future benefit.

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## 9. Evidential and Practical Considerations

Parties seeking to preserve inherited assets should consider:

- Keeping inherited funds separate from joint accounts;
- Avoiding placing inherited property into joint names;
- Maintaining clear records tracing the source of funds.

Conversely, a party seeking inclusion of inherited assets may rely on evidence of:

- Shared use for family purposes;
- Reliance on inherited funds to sustain the marital lifestyle;
- The inadequacy of matrimonial assets to meet needs.

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## 10. Policy Considerations and Critique

The law's treatment of inheritances reflects competing policy concerns:

- Respecting the autonomy and intentions of the deceased;
- Preventing unfair outcomes for economically weaker spouses;
- Promoting flexibility over rigid rules.

While judicial discretion allows tailored solutions, it can also lead to unpredictability. Critics argue that clearer statutory guidance would improve consistency, while supporters maintain that flexibility is essential given the diversity of family circumstances.

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## 11. Conclusion Gifts

Gifts occupy a complex and often contentious position in family law financial cases. While gifts from third parties are frequently characterised as non-matrimonial property, their treatment ultimately depends on intention, timing, use, and the overarching requirement of fairness. Courts balance respect for donor intent against the practical realities of family life and the financial needs arising from relationship breakdown. As a result, the law of gifts in family proceedings is less about rigid classification and more about nuanced, fact-sensitive judicial discretion.

## 12. Conclusion - Inheritances

Inheritances occupy a distinctive and sensitive position in family law financial cases. Although generally classified as non-matrimonial property, their ultimate treatment depends on timing, use, duration of the marriage, and—most importantly—the financial needs of the parties. Courts seek to balance respect for inherited wealth with the overarching objective of fairness, often resulting in nuanced, fact-specific outcomes. As such, inheritances are not automatically excluded from financial provision, but neither are they routinely shared; instead, they are assessed through the lens of discretion, need, and fairness.



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## About the Author

**Richard Maurice** holds degrees in Law and Economics from Sydney University. He works as a Barrister & Mediator in Family Law financial and parenting matters.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like Pierce and Pierce (1999) FLC 92-844 and Black v. Black (1991) DFC ¶ 95-113 and Jonah & White [2011] FamCA 221 and more recently Sand & Sand [2012] FamCAFC 179 and Vega and Riggs [2015] FamCA 797.

He completed the LEADR mediation course on 2006 (taught by Sir Lawrence Street) and a refresher course at the Resolution Institute in 2024. He is a member of the Family Law Section of the Law Council of Australia, is registered with the Civil Mediation Council (UK) and member of the International Society of Family Law. He is an Australian NMAS Accredited Mediator.

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