Read more at www.lynchowens.com/blog

A Future Inheritance Cannot Be Divided in a Massachusetts Divorce

By Nicole K. Levy | April 16, 2018

Family Law Divorce Division of Assets

Every Massachusetts divorce includes a division of assets. Even if spouses don't own any assets, a judgment or Separation Agreement must specifically state this fact. One area where Probate Courts sometimes struggle is potential assets or those that have not yet vested at the time of the divorce. The struggle for courts is to determine whether a potential asset is merely "unvested", in which case it might still be divided in a divorce, or is an "expectancy interest", which cannot be divided by a court in a divorce.

A classic example of an unvested asset that can be divided in a divorce is a pension, which only becomes payable upon a spouse reaching retirement age. Even if a pension is not paying benefits at the time of a divorce, the benefit can still be divided as an asset – even if the employee spouse has not worked long enough for the pension rights to become "vested". Massachusetts courts will divide unvested pension interests – even if the employee spouse still hasn't worked long enough to guarantee he or she will receive benefits – because the value of a pension is based on objective criteria that is fairly easy to quantify.

In contrast, a classic example of an "expectancy interest" is a spouse's potential inheritance of family wealth. Courts will not divide expectancy interests, in large part, because such interests often cannot be quantified. An individual's interest under a will can be changed or eliminated at any time, as long the person making the will remains alive. A living person can alter their will – or go bankrupt before they die. The point is, a living person's will can change any time, as can their assets. For this reason, whatever "right" an individual has to assets under a living person's will is treated as an "expectancy interest", which is too imprecise and speculative for a court to divide in a divorce.

Such an inheritance was the central issue in a recent Appeals Court case, *Frasca v. Frasca (2018)*, which resulted in the reversal of a Probate and Family Court judgment that sought to divide a husband's interest in a potential inheritance.

Division of Husband's Future Inheritance Reversed on Appeal

The *Frasca* decision arose out of a trial heard in the Suffolk Probate and Family Court by Hon. Abbe L. Ross in March of 2015. *Frasca* involved a couple that had been married for 34 years. According to Appeals Court, the husband and wife "lived an upper-middle-class lifestyle, funded in large part by the husband's mother." The Court's recitation of facts indicated that the husband's mother had purchased the marital home in which they resided, bought them an investment property to provide them a steady income, and funded the private schooling of the couple's children through college.

The Court indicated that the husband held a Ph.D. and taught at elite colleges and the wife had a high school education and did not work outside the home. The trial court judge found that the wife was "completely financially dependent on the husband and his family's wealth." On this basis, the trial judge included the husband's expected inheritance from his mother's inheritance in the marital estate, giving the wife a 35% share in it. (Notably, the trial court judge seemed to suggest that the 35% assignment of the inheritance would serve as a substitute for an alimony order. The Appeals Court included a quote from the judge's rationale stating, "that the grant of thirty-five percent of any of the husband's future inheritances will 'mirror the alimony statutory guidelines . . . to meet [w]ife's needs.'")

The husband appealed the trial judge's decision and the Appeals Court reversed the Probate Court judge's decision on the grounds that future inheritances, as mere expectancy interests, are not a part of the marital estate that is subject to division in a divorce.

Appeals Court: Future Inheritances are Not Part of the Marital Estate

When a court is assigned to determine the equitable division of marital assets, it must consider the fourteen mandatory factors (and two non-mandatory factors) that are outlined in M.G.L. c. 208 s. 34. However, in dividing assets, the court must first determine what assets the parties actually own. Gray areas can arise in divorce cases when courts are faced with uncertain, non-guaranteed assets. As

we have noted in previous blogs, however, the mere fact that an asset is not guaranteed will not prevent a court from dividing it in a divorce:

> [W]e know from Attorney Lynch's blog that unvested RSUs can be divided as asset in a divorce, despite their non-guaranteed nature. A similar example is often found in employee 401(k) plans in which the employer's "match" does not vest until the employee has worked at the company for several years. As such, the employer match portion of the 401(k) is subject to "defeasance" – the employee does not receive the match if he or she leaves the firm before vesting.) Like RSU's, 401(k) employer match funds can be divided in a divorce, despite being subject to "defeasance". Yet another example is defined benefit pensions. Many pension plans require employees to work for upwards of ten years before the employee becomes eligible for the employer's pension plan. However, a Massachusetts Probate and Family Court may divide the unvested portion of a spouse's pension, even though the benefit subject to defeasance if the spouse leaves the employer before reaching the vesting date.

In short, just because an asset may end up having zero value won't stop a probate court from dividing the asset. The real issue that causes courts to exclude assets from division is *uncertain value* at the time of the divorce. While pension benefits or unvested stock shares could end up valueless, a court can at least determine how much of the asset was earned during the marriage. This is not the case with expectancy interests, such a parent's inheritance, the value of which can be drastically affected by events that occur *after* the marriage.

In addition to future inheritances, the issue of expectancy interests often rears its head around revocable trusts and discretionary trusts. Revocable trusts are generally considered expectancy interests because the trust-maker (known as the "settlor") can revoke or alter the trust at any time, rendering any beneficial interest uncertain and speculative. Discretionary trusts are more complicated but will be considered expectancy interests if the beneficiary lacks a legal basis for demanding trust benefits from the trustee.

The *Frasca* decision is somewhat surprising, inasmuch as future inheritances are generally the easiest expectancy interests for a judge to spot and exclude from the division of marital assets. The Appeals Court decision provides few details on the Probate Court's judge's rationale for including the husband's future inheritance from his still-living mother in the asset division, but the Court's curt reversal of the judgment was short and to the point.

Future Inheritances Can Be (Indirectly) Considered in Asset Distribution

A future inheritance is not included in the marital estate as an asset, and therefore cannot be divided between the divorcing spouses. However, the possibility that one spouse will receive a future inheritance can still be *indirectly* considered by a judge when it comes to the distribution of the marital assets that the Court has identified. As we noted in a recent blog:

> Under G. L. c. 208, § 34, a court may consider an expectancy interest in the factors the court uses to determine an equitable division of the marital estate. One such factor is the opportunity of each spouse for future acquisition of capital assets and income.

In most cases, the right to a future inheritance won't have a huge impact. But this is not always true:

> In the majority of divorce cases, one or both parties' potential right to receive an inheritance from a parent or family member will have minimal effect on the division of assets. However, if one party appears well positioned to receive a very substantial inheritance – think $1 million or more – then a judge may factor the likelihood of a future inheritance into the division of assets. While a judge is very unlikely to award the other spouse a direct share of the future inheritance, the division of current assets – i.e. those actually owned by the parties in the present tense – can be influenced by the likely inheritance.

For example, if one spouse comes from a wealthy family, as was the situation in the *Frasca* case, and there is a significant chance of that spouse benefitting from a large inheritance left by an aging parent, a judge may use that likelihood as justification for giving the other spouse a relatively generous portion of the marital estate. One of the goals of the Probate and Family Court is to ensure that both spouses are provided for after the marriage; thus, if one spouse can expect a substantial inheritance from which the other spouse will not benefit, the statutes allow for an opportunity to help the other spouse.

About the Author: Nicole K. Levy is a Massachusetts divorce lawyer and Massachusetts family law attorney for Lynch & Owens, located in Hingham, Massachusetts.

Schedule a consultation with Nicole K. Levy today at (781) 253-2049 or send her an email.