MASSACHUSETTS FAMILY LAW
A Periodic Review

By Jonathan E. Fields

Last-Minute Inheritance Still Counts In a case involving really bad timing, the Appeals Court found that the Probate and Family Court properly considered the husband's substantial inheritance that vested *after the final day of trial* but prior to the judgment of divorce nisi. The Husband argued that the marital estate should be identified at the close of trial. The Wife argued that the marital estate should be identified at the date of divorce. In upholding the lower court judgment, the Appeals Court noted the wide judicial discretion in the area of property division. *Nicholas v. Nicholas*, 2010 Mass App. Unpub. LEXIS 593 (May 28, 2010) (Unpublished)

Wife Entitled to Post-Divorce Pension Accruals A recent case provides yet another illustration of the importance of careful drafting. A separation agreement provided simply that the "Alternate Payee [the wife] is assigned 60% of the Participant's [the husband's] pension benefits." The agreement was incorporated into a divorce judgment and all provisions relating to the distribution of assets survived. The husband later prepared a QDRO which provided that the wife receive "60% of the Participant's Vested Accrued Benefit earned as of the date of the Judgment of Divorce Nisi." The Wife filed a complaint for contempt; she objected to the husband's QDRO because, contrary to the agreement, it did not permit her to share in *post-divorce* accruals to the husband's pension. Noting that the provision did not "limit her entitlement to that amount of the pension that was accrued during the marriage," the Probate and Family Court agreed with the wife's interpretation of the agreement and found the husband in contempt. The Appeals Court vacated the contempt but otherwise affirmed the judgment. (Editorial Comment: It seems clear that the language at issue here was the result of a drafting error or oversight – and that the wife exploited this. That said, I can't help but wonder whether the husband would have had any success had he filed a complaint in equity.) *Johnson v. Johnson*, 2010 Mass. App. Unpub. LEXIS 711 (June 2, 2010) (Unpublished).

"Mean" Provision Means Something According to the Appeals Court, it is unequivocally mean for an ex-husband to tell an ex-wife that her son wished she would die. A judgment (incorporating an agreement) prohibited interparty communications that were "negative or mean." The Probate and Family Court found the ex-husband in contempt for sending a letter alleging that his ex-wife suffered from a "mental illness" and claiming

that her son "wished [her] to die." The ex-husband appealed, presumably on the grounds that his action did not rise to a "clear and undoubted disobedience" of the judgment. After all, what does "mean" mean anyway? Distinguishing the "mean" prohibition here from the "customary nondisparagement provision," the Appeals Court affirmed, concluding that the ex-husband's language was so clearly "mean" and "well outside the range of possible ambiguity," that a contempt finding was appropriate. The lesson for mediators may be that the nondisparagement provisions the Appeals Court sought to distinguish here may not be as unenforceable as we might think. *Fawzi v. Elaskalani*, 2010 Mass. App. Unpub. LEXIS 602 (June 4, 2010) (Unpublished).

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**"I chose my wife,
as she did her
wedding-gown,
not for a fine glossy surface,
but such qualities
as would wear well."**

Oliver Goldsmith (1728 - 1774)