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Pensions are Divided as Assets in Massachusetts Divorce Cases

By Carmela M. Miraglia | March 27, 2018

Family Law Divorce Division of Assets

Divorce attorney Carmela M. Miraglia reviews an Appeals Court opinion reversing a divorce judgment that excluded a pension from the division of assets.

When [dividing marital assets](#), Massachusetts Probate and Family Court judges have broad discretion to divide property as they see fit, so long as he or she stays within the loosely defined statutory bounds of [M.G.L. c. 208 s. 34](#). Probate court judges have the power to determine what constitutes an “equitable” division of assets, and once the decision on asset distribution has been made, it is largely immune from appeal because appellate courts in Massachusetts give great deference to the judge presiding over the trial.



There are instances, however, when the Massachusetts Appeals Court or Supreme Judicial Court takes the [rare step of overturning a probate court](#)

[judge’s asset division](#). This was just the case in the recent unpublished Appeals Court decision in [Letteri v. Letteri \(2017\)](#), which was handed down at the very end of 2017.

Retired Couple’s Divorce: Husband’s Pension at Heart of Trial

According to the Appeals Court’s summary of facts, the parties were married in August 1987, and lived in Florida until early 2012, when the husband retired from

his city Police Department. After his retirement, the couple moved to Massachusetts. The parties separated in October 2014, and filed for divorce several months later. The parties' youngest child chose to reside primarily with the husband. The divorce went to trial regarding the division of substantial pensions and retirement funds held by the parties arising out of jobs the parties held in Florida.

Although the husband had used some of his retirement benefits to pay for the move to Massachusetts, his pension from the police force paid him \$1,098 per week. The wife's retirement funds consisted of a small pension – one that would eventually pay her \$910 per month when she reached 65 – as well as two 403(b) accounts with a combined value of \$184,809 at the time of the trial.

In the final decision, the judge determined that retirement assets should be divided equally, where both spouses had contributed roughly the same to the marriage through their respective earnings, child-rearing, and home-making. The wife's 403(b) accounts were divided equally between the parties. In contrast, however, the judge considered the husband's pension to be a "stream of income" rather than a marital asset that should be divided between the separating spouses, apparently to help in determining the cost of [child support](#) to be paid by the wife for the couple's youngest son.

Pensions are Usually (But not Always) Divided as Assets in a Massachusetts Divorce

Because [retirement assets](#) are often associated with a job, and typically come in the form of benefits like 401(k) plans or pensions, they are usually seen as one spouse's property according to when the assets were earned, as opposed to when the assets are paid out. Therefore, if they accrued during the marriage, the retirement funds are often considered to be marital assets that should be divided between the two spouses during a divorce.

However, this is not a hard and fast rule. Skilled attorneys can, and sometimes do, convince judges that certain retirement funds should only be treated as income when they pay out, rather than when they were earned. This is known as the "stream of income" approach.

Attorney Owens commented on the "stream of income" theory [in a previous blog](#), writing

It is always tempting for a probate court judge to treat one spouse's right to receive payments from an asset earned during the marriage as a "stream of income" from which that spouse can pay alimony after the divorce. ...

Guaranteed payments from an asset [should] still be divided as an asset, even if the payments look a bit like wages – if you squint your eyes – because the party “gets paid” from the asset once a month.

In *Letteri*, the probate court judge’s decision to treat the husband’s pension as a “stream of income” – from which the husband could pay child support – rather than an asset, had a major impact. Instead of the wife receiving 50% of the pension as an asset, she was relegated to a much smaller share based on the child support guidelines (i.e. typically about 20% of the gross value). If the pension was divided as an asset, the wife would have received her share for the remainder of the husband’s life (and possibly longer with survivorship benefits). As a stream of income for child support, the wife would only receive a share of the pension until her children were [emancipated](#).



The advertisement features a woman, Carmela M. Miraglia, in a red blazer, standing in front of a city skyline. The text includes the firm's logo 'L&O', the tagline 'Need a family law lawyer? Hire the Best', and a call to action 'Need a Divorce Attorney? CONTACT CARMELA TODAY!'.

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Appeals Court Overrules Trial Judge’s Pension Decision

In *Letteri*, the husband’s counsel managed to convince the judge that the husband’s pension should be treated as a stream of income, rather than a divisible asset because the pension represented the husband’s primary source of income at the time of the divorce. The Appeals Court described the impact of this decision on the parties’ post-divorce finances:

In the present case, the judge found that "the total marital estate should be divided equally." However, in excluding the husband's pension from the asset division, the judgment of divorce ultimately placed the husband in a far superior financial position compared to that of the wife. The judgment leaves the husband with a net weekly surplus of \$741 after deducting his reported expenses from his net income (including the attributed income and child support order), whereas the wife has a weekly shortfall of \$320 after decreasing her income by expenses (including the child support order). In essence, while the judge purported to make "an exactly equal division of the assets, the financial arrangement as a whole shows that the evenhanded

treatment was illusory," because only the husband is capable of maintaining his standard of living after the divorce.

In most cases, a probate court judge's asset division will be upheld on appeal, so long as the judge recited the [factors listed in Section 34](#), where "a division of marital property... will not be disturbed on appeal unless 'plainly wrong and excessive.'" *Passemato v. Passemato* (1998).

However, *Letteri* proved to be the exception to this rule.

According to the Appeals Court, the only reason the judge treated the husband's pension as a stream of income was to avoid an alimony obligation for the wife. The Appeals Court criticized this reasoning as follows:

The judge's sole articulated reason for treating the husband's pension as a stream of income was to relieve the wife of an alimony obligation. However, the judge made no findings concerning this hypothetical alimony obligation, including, but not limited to, the husband's need for alimony. ... Based on the record before us, it appears unlikely that the husband would be able to demonstrate a need for alimony if his pension were included in the asset division.

In Most Cases, Pensions Should be Divided as Assets

As the Appeals Court makes clear in its decision, there may be instances where it is appropriate to treat a pension as a "stream of income" from which child support or alimony can be paid. However, the Court suggests that the "stream of income" theory should be deployed sparingly, where it represents one of the rare "hot spots" under the law where probate court judges face the possibility of a reversal on the division of assets on appeal.

About the Author: [Carmela M. Miraglia](#) is a Massachusetts divorce lawyer and Massachusetts family law attorney for Lynch & Owens, located in Hingham, Massachusetts and East Sandwich, Massachusetts. She is also a mediator for [South Shore Divorce Mediation](#).

Schedule a consultation with [Carmela M. Miraglia](#) today at (781) 253-2049 or send [her an email](#).

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