

# *Privacy Rights of Parents Versus Fair Division of Marital Assets*

MAX VOLTERRA, ESQ.  
JAMES GOLDBERG, ESQ.

It has been thought recently that in the consideration of the application of Chapter 208, 534, the court could consider the likelihood of a substantial inheritance in fashioning an appropriate alimony and division of marital assets award, being included in the criterion of "opportunity of each (party) for future acquisition of capital assets and income." See *Frederick v. Frederick*, 29 Mass. App. Ct. 329 (1990); *Davi&on v. Davldson*, 19 Mass. App. Ct. 364 (1985); *Bak v. Bak*, 24 Mass. App. Ct. 608 (1987).

In a recent Barnstable County Probate Court case, the issue arose in this way. The parties had been married for 27 years. The parties' marital assets were substantial. One of the larger assets was the marital home, which had been inherited by the wife four years prior to the separation. The husband's father was alleged to have a net worth of somewhere between \$3 million and \$15 million. The wife sought to depose the husband's father to obtain estate plan information as well as the value of the father's assets. The father filed for a protective order to avoid being required to provide any information concerning his assets or his estate plan. The Probate Court ordered that he could be deposed, but that he was not required to provide any financial records nor disclose his estate plan. A petition for review of that order was filed with a single justice of the Appeals Court, who ordered that the deposition take place, that disputed issues of discovery that might develop at the deposition be reviewed by the Probate Court, and that if necessary the parties could return to the single justice to further deal with the issue. At no time did the single justice indicate that the information sought was privileged to the extent of not being discoverable. (**See Appeals Court, 92-5-644.**)

Upon then being advised by the father that he would again refuse to provide any information at a deposition proceeding the wife filed a motion to compel discovery with the Probate Court seeking an order which would require certain specific documents pertaining to the father's assets and his estate plan be produced, and that the father be ordered to comply with the deposition request. At the hearing on the motion, the wife suggested as an alternative that the court could adopt the reasoning in a recent Supreme Judicial Court single justice case, *Vaughn v. Vaughn*, Supreme Judicial Court for Suffolk County No. 91-485. In *Vaughn*, the Probate Court had given the parent a choice, either be deposed fully, or provide an affidavit setting forth the parent's net worth and the basic thrust of the estate plan. The single justice (Greaney, J.) upheld that order as reaching a reasonable balance between privacy and the need to obtain the information. However, in the Barnstable case, the Probate Court instead issued an order repeating its earlier order. That is, the father could be deposed, but he was not required to provide any financial documents or answer any questions dealing with his assets or his estate plan. The *Vaughn* case remedy was rejected as being an invasion of privacy.

The wife again sought relief from the single justice. This time the single justice changed positions. The court stated that the petitioner had "failed to demonstrate the extraordinary circumstances that would make such information relevant ..." The justice asserted that there was lacking a specific fact affidavit showing the critical nature of the information sought by the petitioner. The single justice determined that the refusal by the Trial Court to order discovery concerning expectancies and other forms of non-vested property interests was not an abuse of discretion by the trial judge. The court did not explain how a party could file a "specific fact affidavit" prior to obtaining discovery. (See Appeals Court 92-J-760.) The wife was forced to go to trial lacking the information dealing with the parent's estate.

This court's reasoning and the *Vaughn* case do not seem to be reconcilable. In *Vaughn*, and of course from the cases of *Davidson*, *Frederick*, and *Bak*, *supra*, we learned that this information can be considered by a trial judge. In *Vaughn*, Justice Greaney specifically dealt with the issue of balancing

the competing interests of privacy and information to achieve a just result. None of the above decisions required "extraordinary circumstances to make the information relevant" and none of the cases required a showing that the information sought was critical. What was at stake was providing all of the information necessary for a judge to make a fair division of assets. Once the information is made available and considered, then each party can at least be assured that he or she was fully heard. This latest decision leaves the assurance of a fair hearing in grave doubt in these types of cases.

The bar is faced with a dilemma. The case law would appear to support the idea that expected inheritances, while obviously not assets to be divided at the section 34 trial, can be indeed relevant as to one of the criteria to be considered under Chapter 208, section 34, at least in considering how to divide those assets that *are* subject to division. See *Davidson*. However, if a judge refuses to permit the discovery necessary to produce the information, then that ends the inquiry. Further, even if a party can produce the information from third parties, this decision would seem to indicate that the trial judge can refuse to consider the evidence in any event, and the Appeals Court will find that this is within the Trial Court's discretion. What is already a difficult case to evaluate, either for settlement purposes or at trial, becomes even worse. The result is that a conscientious lawyer now must explore this aspect of marital assets division even though subject to the whim of the Trial Court as to the extent of discovery. Yet, if not pursued, questions of malpractice could arise. Let us hope that this particular dilemma is resolved without delay.

This article is reprinted with permission from the **Family Law Section News**, January 1993. *Max Volterra, Esq.*, and James Goldberg, *Esq.*, are partners with Volterra, Goldberg & Jacobs, Attleboro.