

Financial statements: the importance of being earnest

By E. Steven Coren



How often have we family law attorneys observed the unfortunate consequences resulting from hastily conceived and inaccurately

written financial statements (sometimes done by hand outside the door to the courtroom prior to filing)?

Experienced family law practitioners are well aware that the financial statement is one of the most important documents that is foiled during a family case. Most family law seminars emphasize that the financial statement is one of the most important documents that will be filed with the court.

The importance of accuracy and completeness cannot be stressed enough. Any mistakes made on the financial statement, no matter how inadvertent, will usually come back to haunt the proponent of the statement. It is of little solace to a client when an attorney's inadvertent omission or inaccuracy is attached to the client as if permanently glued despite the attorney's mea culpa to the court.

A very instructive case is *Gexler v. Roberts*, 92 Mass. App. Ct. 1109 (2017). While its significance is obscured by its Rule 1:28 designation, it is a very significant decision.

In *Gexler*, the parties executed a separation agreement that was incorporated into a judgment of divorce nisi in January 2001. The agreement divided the following assets: marital home, automobiles, personal property, and an escrow account containing proceeds from Gexler's workers' compensation claim. The agreement was silent as to any retirement assets of either party.

At the time of the divorce judgment, Gexler's financial statement stated the handwritten word "NONE" for the category of "Pensions" on his financial statement. Both parties were represented by counsel.

In 2014, Roberts filed a complaint for property assignment of a marital asset (Gexler's UPS Teamsters pension). In response, Gexler raised the affirmative defenses of laches, res judicata and collateral estoppel.

A trial occurred at which Gexler represented himself. After trial, at which both parties testified, the judge ruled that the defense of laches was unavailable in a post-divorce division of assets. The trial court also ruled that Gexler did not meet his burden of proof on the remaining affirmative defenses, as



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the issue of Gexler's pension was not actually litigated. The judge issued a judgment directing division of the pension. Gexler obtained appellate counsel and filed an appeal.

Gexler's appeal issues were laches and res judicata/collateral estoppel. It was argued that Gexler's most recent financial statement listed his pension interest as \$0 on the grounds that (1) the pension did not have an ascertainable value at the time, and (2) Gexler's attorney had arranged with opposing counsel that Roberts would be granted the sum of \$18,500 from Terry's personal injury settlement in lieu of splitting the UPS pension.

Gexler's earlier financial statement also did not list the pension. Gexler's divorce attorney died prior to this complaint for division being filed and his records could not be located, thus making the defendant's prior counsel unavailable to shed any light on this issue.

It was also argued that the records showed trial testimony of Roberts to the effect that she stated on several occasions that, at the time of the couple's divorce, she knew that Gexler possessed a Teamsters pension from which he would receive distributions once he retired.

Roberts also agreed at trial during her testimony that, when the couple divorced, both parties were properly advised, and the result reached was equitable.

The laches argument was based on *Carpenter v. Carpenter*, 73 Mass. App. Ct. 732 (2009), and *Hovey v. Geraigery*, Massachusetts Land Court (2004), affirmed by the Appeals Court at 65 Mass. App. Ct. 1117 (2006) (rescript opinion, unpublished, Rule 1:28).

Both cases focused not on mere delay but on irreparable prejudice resulting from the delay.

In *Hovey*, a party delayed bringing an action for 13 years, adding ambiguity into the statements. In the interim, the respondent's attorney had passed away, depriving the respondent of the potentially relevant testimony of the attorney as to the intent of the parties. The court held that these facts warranted a finding of a laches defense and

that there was prejudice to the respondent and the trustees by loss of possibly relevant testimony from the deceased attorney.

Carpenter held that a pension omitted from a judgment of divorce was nonetheless litigated based upon evidence that the parties contemplated division of the asset in

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drafting their separation agreement.

Despite what seemed evidence that the pension was contemplated for division at the time of the judgment of divorce, and that Gexler was prejudiced by the passing of his attorney during the 14-year delay before Roberts brought her complaint for division of the pension, the Appeals Court affirmed the lower court's ruling.

The Appeals Court dispensed with the defense of laches and held that "Gexler's reliance on the doctrine of laches is misplaced. This is an action for a post-divorce division of assets, as specifically contemplated by G. L. c. 208, § 34. An action for the division of property may be brought at any time after divorce, and therefore the defenses of laches is not available, citing in support *Brash v. Brash*, 407 Mass. 101, 104-105 (1990)."

The Appeals Court further stated that "at issue here is whether the parties contemplated and actually litigated the division of Gexler's pension." See *Maze v. Mihalovich*, 7 Mass. App. Ct. 323, 324 (1979); *Carpenter v. Carpenter*, 73 Mass. App. Ct. 732 (2009).

The court concluded that "[i]f the issue of the pension had been litigated at the time of the divorce,

then Gexler may have met his burden of establishing the facts to support these affirmative defenses. Indeed, a judgment of divorce is res judicata as to those issues that have been actually been litigated and determined." *Hay v. Cloutier*, 389 Mass. 248, 252 (1983).

However, the court focused on the fact that it was undisputed that the divorce agreement made no mention of any pensions, and Gexler's financial statement, filed at the time of the divorce hearing pursuant to Rule 401 of Supplemental Rules of the Probate and Family Court, lists the handwritten word "NONE" under the \$10b heading for "pensions and other retirement plans."

They acknowledged Gexler's argument that, "notwithstanding, Gexler contends that the parties agreed that Gexler would retain his pension in exchange for Roberts receiving a portion of his worker's compensation settlement and that his attorney at the time could verify his claim. This attorney died in November of 2012, two years before this action was filed."

However, the court accepted the lower court's finding that Roberts' testimony was credible in that she believed no pension remained after Gexler received his workers' compensation settlement and that she learned of the pension years later, which prompted her to bring this action.

It should be noted that, without counsel, Gexler unfortunately offered inconsistent testimony at the hearing and as noted in footnote 3, "the judge found Gexler's testimony contradictory and confusing, as he testified both that his pension was an asset and was not an asset, and that his worker's compensation settlement was not divisible despite the agreement providing for its division and that the Court does not credit Gexler's testimony."

Thus, the Appeals Court upheld the trial court's decision, which found the issue of the pension had not been litigated and that the doctrines of res judicata and collateral estoppel did not apply. Issues of credibility are within the purview of the trial court judge and should not be disturbed on appeal. See *Pierce v. Pierce*, 455 Mass. 286, 213 (2009).

As in Oscar Wilde's stories, there is a moral to this tale. Any carelessness and lack of due diligence on the part of the attorney in preparing a complete and accurate financial statement may result in your client being treated harshly by the courts.

Further, had the attorney for Gexler survived, he may have faced exposure for treating the existence of any asset so casually. Trust, but verify, the information you obtain from your clients before filling out a financial statement.

As the police sergeant said at the beginning of the TV series "Hill Street Blues": "Be careful out there!"

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