INHERITANCES, GIFTS, AND TRUST INTERESTS IN DIVORCE

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This chapter focuses on two of the most difficult financial issues that the practitioner will confront in a Massachusetts divorce action. The first part will focus on inherited assets and their impact on the division of assets and, to a lesser extent, support. This discussion shall also include the impact of an expectancy in a divorce action. The second part will focus on trust interests in the divorce context with a particular focus on whether the interest of a spouse in a trust is included within the marital estate and, to a lesser extent, how such an interest is valued.

I. INHERITANCES AND GIFTS

a. The Section 34 Estate

Our equitable distribution statute, G.L. c.208 §34, frames the subject and is, therefore, a logical starting point. The estate of a spouse subject to property division in Massachusetts includes all property in which the spouse holds title, however acquired, *Rice v. Rice*, 372 Mass. 398 (1977), and also includes, as a result of a 1990 amendment to the statute, "all vested and non-vested benefits accrued during the marriage," G.L. c. 208 §34.

Section 34, however, is not unlimited in its breadth. As we will see from the discussion on trusts, interests "too remote and speculative" are not included in the marital estate but, instead, may factor under the Section 34 criterion of "opportunity of each [spouse] for future acquisition of capital assets and income" in dividing the marital property. *S.L. v. R.L.*, 55 Mass.App.Ct. 880, 883 (2002), *citing Williams v. Massa*, 431 Mass. 619, 629 (2000)

An asset of one spouse that was inherited many years prior to the marriage may, therefore, be subject to division under Section 34.

b. The Section 34 Factors

In analyzing whether any asset, including an inheritance or gift, should be divided, the trial court must consider the Section 34 factors presented, and no irrelevant factors, *Bowring v. Reid*, 399 Mass. 265 (1987). The decision will not be disturbed absent a clear error of law and, in the absence of a clear error of law, unless the decision was plainly wrong and excessive. However, the reasons for the judge's conclusions must be apparent from the judge's findings and rulings. The judge has wide latitude in

determining how much weight s/he may give to one factor over others, *Ross v. Ross*, 385 Mass. 30 (1982). In practice, this means that two different judges, evaluating the same evidence, could render very different judgments and the appellate courts could uphold both of them.

Although each of the Section 34 factors must be considered and the judge has discretion in how s/he weighs each factor, the relative economic and noneconomic contributions of the parties (ironically a permissive factor in the statute) is actually considered, in some ways, the most critical. "The parties respective contributions to the marital partnership remain the touchstone of an equitable division of property," *Moriarty v. Stone*, 41 Mass.App.Ct. 151, 157 (1996).

c. Contribution and the Source of the Asset

Contribution, then, is central to how inherited assets, as well as any other assets, are divided upon divorce. Moreover, a party's contribution under Section 34 refers also to the *original source* of the asset, *i.e.*, a wife's inherited assets are her contribution under Section 34. Indeed, the Appeals Court has made clear that "evidence of contributions made by third parties [permits a Court] to assess accurately the actual contributions of each of the parties to the marital estate." *Tanner v. Tanner*, 14 Mass.App.Ct. 922, 923 (1982).

*i. **Bacon v. Bacon***

Low contributions were the driving force in *Bacon v. Bacon*, 26 Mass.App.Ct. 117 (1988), in which the Appeals Court affirmed a grossly disproportionate division of the Section 34 estate. On a twelve-year marriage, where the wife inherited substantial assets prior to the marriage, the trial court had awarded her 95% of the marital estate.

The inherited funds appreciated significantly during the marriage and the court found that the husband had nothing to do with the appreciation of those assets. Rather, the wife's father had made all the investment decisions related to the assets. The husband, for his part, spent his earned income on himself and, additionally, spent income derived from the wife's assets.

Judge Kaplan, in a concurring opinion that would echo in subsequent cases, expressed concern that the division may have reflected "too strongly a notion that inherited wealth should remain in bloodlines." *Bacon* at 123 (Kaplan, J., concurring)

ii. Denninger v. Denninger

A counterpoint to *Bacon* can be found in *Denninger v. Denninger*, 34 Mass.App.Ct. 429 (1993), a case involving a twenty-seven year marriage in which the wife's inherited and gifted assets comprised most of the estate. The trial court awarded 85% of the estate to the wife and 15% to the husband.

Citing Judge Kaplan's *Bacon* concurrence about keeping wealth in the "bloodlines," the Appeals Court reversed, implying that the trial court overweighed the source of the assets, and finding the division "off target," *Id.* at 433. In contrast to Mr. Bacon, the Appeals Court found that Mr. Denninger "contributed all of [his] financial resources to the family… day in and day out for twenty plus years." *Id.* at 432-33.

Further, the Appeals Court noted, although the source of most of the assets was the wife's parents, "the husband made at least some contribution by helping to pay taxes on the portfolio income." *Id.* at 434. Where the non-inheriting spouse has paid taxes (or more typically, when payments of taxes are made from marital funds) on assets that the inheriting spouse seeks to exclude from division, the practitioner representing the non-inheriting spouse might consider raising the issue to the court as both an indicator of contribution and of an intention to treat the asset as a joint one, notwithstanding title.

The *Denninger* court was most concerned that the judgment left the husband financially "disadvantaged in a fashion which does not follow logically from the judge's findings." *Id.* Section 34, the Appeals Court noted, is intended "'to provide a mechanism whereby no matter how the property has been acquired or how it is held, the court can distribute it between the parties in such a way as to provide for a balanced disposition and economic justice.'" *Hay v. Cloutier*, 389 Mass. 248, 254 (1983), quoting Hon. Edward M. Ginsburg, *G. L. c. 208, §34 -- Some Observations About the Division of Property Leading to Predictability and Consistency*, 25 B.B.J. No. 1, at 10 (1981). *Id.* at 434-435.

iii. Williams v. Massa

In *Williams v. Massa*, 431 Mass. 619 (2000), the Supreme Judicial Court upheld a division of assets in an approximately twenty-five year marriage in which the husband was awarded 75% of the marital estate. He received all of the inherited and gifted assets and the wife was awarded most of the jointly produced assets.

The disposition turned primarily on the disparate contributions of the parties. The husband was a breadwinner and, to a large extent, homemaker while the wife, on the other hand, was a meager contributor to the marital enterprise. In affirming the judgment, the SJC reminded practitioners that the judge was "required to consider the respective contributions of the parties to the marital partnership and [that] a disparity in contributions may be reflected in the distribution of the inherited and gifted assets." *Id.* at 626. So, again, contributions were essential to the outcome.

Further, the Court went on, a judge "*may* also consider [as this judge did], the source of the assets, each parties' roles in managing the assets, and whether the assets in question had been kept separate or commingled with the couple's jointly owned property." *Id.* at 626-627.

iv. Zeh v. Zeh

Whereas the *Williams* wife failed to convince the SJC that the judge gave excessive weight to the source of the assets, the wife in *Zeh v. Zeh*, 35 Mass.App.Ct. 260 (1993), succeeded with that argument to the Appeals Court. The *Zeh* court overturned a property division that left the wife with only 9% of the divisible assets.

The *Zeh* court found that the judge appropriately took into account the source of the assets – that most of the estate was comprised of or derived from inherited assets. However, referencing Judge Kaplan's concurrence in *Bacon*, *supra*, the *Zeh* court felt that the "judge appears to have attached inordinate importance – especially in light of the length of the marriage – to allowing the husband to retain wealth which was derived from his parents." *Id.* at 266. (Emphasis supplied). The length of the marriage in *Zeh* was critical, as well as the judge's failure to consider the wife's non-economic contributions.

d. Length of the Marriage

As in *Zeh*, the length of the marriage can be a significant factor in the division of assets in general and, particularly, in the division of gifted and inherited assets. Judges and scholars seeking to inject more predictability in the laws of property division often utilize the length of the marriage as a metric.

i. ALI Principles of the Law of Family Dissolution Model Statute

The American Law Institute proposed a formula in its *Principles of the Law of Family Dissolution: Analysis and Recommendations* ("ALI") in which inherited property, in the absence of a valid prenuptial agreement, largely stays with its owner except in long-term marriages at which point the property is recharacterized as marital property. *ALI* (2002), §4.12.[1]

While "long-term marriage" is undefined, the section comments provide some loose boundaries. "The share begins at zero in the marriage's earliest years" but thirty to thirty-five years into the marriage, "spouses will have made many important and largely irreversible life decisions premised upon a shared economic fate, including shared access to assets either [spouse] brought into the marriage." §4.12 comments a & b. [2]

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[1] ALI recognizes that the formula may not be appropriate in all cases, such as where its application would result in a "substantial injustice." §4.12(6). Also, the intent of a spouse receiving an inheritance is critical; if s/he sends a written notification to the other spouse that s/he intends to exclude the asset with a specified period, that asset would be excluded. §4.12(4). The intent of the donor is also critical; "the provision of a will or deed of gift specif[ies] that a bequest or gift is not subject to claims under [§4.12] should be given effect." §4.12(5).

[2] Although ALI's model statutes are mostly silent as to quantitative particulars, leaving the state legislatures (to whom the ALI is directed) to "fill in the blanks," ALI does provide an illustrative model statute that purports to reflect the underlying purpose of the section. For each year of marriage after the 5th year, 4% of the value of separate property is marital property. In a marriage of 30 years or more, all

The ALI rationale is founded on the presumption[3] that spouses' expectations and reliance on assets increase as the marriage continues:

> Both spouses are likely to believe, for example, that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for other personal emergencies. The longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on such expectations about the separate property of both spouses.

§4.12 comment a. ALI also factors in the time elapsed since the inherited asset was acquired to the effect that assets acquired earlier in the marriage should be shared with the non-owning spouse to a greater extent than assets acquired later in the marriage. §4.12 (2). The rationale here, too, turns on reliance – the parties were more likely to have relied on the older asset than the newer one.

Although ALI's model statutes are not the law in Massachusetts, the SJC and Appeals Court consistently reference them.[4] Practitioners, therefore, should be well-

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separate property is marital property. The model also includes language that factors in the time elapsed since the inherited asset was acquired. §4.12 comment b.

[3] ALI acknowledges that the "[d]ata on what spouses actually expect in their marriage [is] sparse" and that, in fact, most people have "unrealistically optimistic expectations about the durability of their marriage." §4.12 Reporter's Notes to comment a. Therefore, "it may be pointless to ask about the parties' expectations at the time of their marriage as to the disposition of their property should they divorce, for they probably have no expectation at all because they do not expect to divorce." *Id.* Indeed, "[t]he data suggest[s] that economic decisions made during marriage are largely premised on the assumption that the marriage will continue" which, ALI points out, "is a premise of this section." *Id.* "Another premise of the section," discussed *supra*, is the assumption that, after 30 to 35 years of marriage, "most people will expect that property their spouses brought into the marriage will be available to them jointly upon retirement or in an emergency." *Id.* This assumption, too, "remains untested," according to ALI. *Id.* However, ALI continues, citing two Massachusetts cases, *Zeh*, *supra* and *Comins*, *infra*, the courts of some "states may share this assumption, for they appear more likely to allocate inherited or premarital property at the dissolution of a lengthy marriage than at the dissolution of a short one." *Id.*

[4] *See, e.g.*, *Ansin v. Craven-Ansin*, 457 Mass. 283, 289 (2010); *T.F. v. B.L.*, 442 Mass. 522, 539 (2004); *M.C. v. T.K.*, 463 Mass. 226, 235 (2012); *Braun v. Braun*, 68 Mass. App. Ct. 846, 856 (2007); *Abbott v. Virusso*, 68 Mass. App. Ct. 326, 329 (2007); *Eccleston v. Bankosky*, 438 Mass. 428, 436 n. 16 (2003); *Kittredge v. Kittredge*, 441 Mass. 28, 36-37 (2004); *Eyster v. Pechenik*, 71 Mass. App. Ct. 773, 783 (2008); *L.M. v. R.L.R.*, 451 Mass. 682, 688 (2008); *J.F. v. J.F.*, 72 Mass. App. Ct. 782, 793 (2008); *Mason v. Coleman*, 447 Mass. 177, 184 (2006); *Ketterle v. Ketterle*, 61 Mass. App. Ct. 758, 767 (2004); *Brooks v. Piela*, 61 Mass. App. Ct. 731, 735 n. 5 (2004); *Cohan v. Feuer*, 442 Mass. 151, 154-155 (2004); *LaBrecque v. Parsons*, 74 Mass. App. Ct. 766 771 n. 7 (2009); *Pierce v. Pierce*, 455 Mass. 286, 296 (2009)

versed with ALI because with the right set of facts, framed in terms consistent with Section 34, the model statutes and commentary might prove useful for a particular client.

ii. Ginsburg Guidelines for Dividing Inherited Assets

The Hon. Edward M. Ginsburg (Ret.), formerly of the Massachusetts Probate and Family Court, articulated presumptive guidelines[5] for dividing inherited or gifted assets that was based largely on the length of the marriage and the holding period of the asset in question.

> In a short-term marriage of five years or less, whatever a party has brought into the marriage remains with that spouse. For marriages of five years or more, property brought into the marriage or acquired in exchange for property brought into the marriage would be integrated into the pool of other assets subject to division at the rate of 5 percent per year dating back to year one. Thus, after 10 years, 50 percent of the inherited property brought into the marriage would be subject to equitable distribution and after 20 years, all the inherited property brought into the marriage would be integrated into the marital pool.

Edward M. Ginsburg, *Premarital Gifted and Inherited Property Under G.L. c. 208 s.34*, Mass. Bar Ass'n Sec. Rev., December 1998, at 27.

As to the holding period for assets acquired during the marriage, the extent to which they are integrated would depend on when the asset was acquired and the length of the marriage. *Id.* at 27. Judge Ginsburg comments that the longer the parties are married, "the greater the mutual expectation in the probable or even possible receipt of an inheritance." *Id.* In some cases, he notes, parties "may be justified in spending a disproportionate amount on current assets" based on an assumption of a future inheritance. *Id.*

In a marriage of fifteen years or more, an asset acquired at any time during the marriage would be treated the same as if the assets were premarital, *supra*. Therefore,

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[5] Judicial discretion still has a role in Judge Ginsburg's guidelines as in the "exceptional case" which warrants deviation from the norm. Ginsburg, *infra* at 27.

"after a 20 year marriage, assets inherited after marriage, even if not received until the time of the divorce, would be fully integrated into the asset pool." [6] *Id.* In marriages between five and fifteen years, assets received during the marriage would be integrated at a rate of five percent per year from the date of receipt. *Id.* In marriages of five years or less, such assets would remain with the receiving spouse. *Id.*

Once they are integrated in the marital pool, Judge Ginsburg writes, they should be divided "like any other asset," *i.e.* without regard to the source of the asset. *Id.*

e. Treatment of Assets by Parties

i. Comins v. Comins

The length of the marriage was a significant factor -- but not the only one -- in *Comins v. Comins*, 33 Mass.App.Ct. 28 (1992). *Comins* involved a forty-eight year marriage and an estate comprised largely of the wife' inherited assets, including a trust. The court awarded 56% of the marital estate to the wife and 44% to the husband.

On the wife's appeal, the award was upheld because this was a long-term marriage, both parties were in their seventies, their needs would be met by the award and, most interestingly, because of their "implicit reliance" on the trust. Particularly, the court found that the wife's assets "provided the parties with a substantial insurance policy against economic hardship and also permitted them to direct their other marital assets, such as the husband's salary, to the maintenance of a higher standard of living than their earned income allowed." *Id* at 32.

ii. Bak v. Bak

The *Comins* court, then, was impressed, in part, by the parties' implicit reliance on the wife's trust. Similarly, the court in *Bak v. Bak*, 24 Mass.App.Ct. 608 (1987) also focused on the parties' treatment of inherited property in interpreting an implied agreement to keep property out of the marital partnership. The trial court awarded a vacation home in Truro to the husband, the wife appealed, and the Appeals Court upheld the award.

Notably, the *Bak* Court points out that the home was titled in the husband's name and "had not been the marital home [but rather] had long been a Bak family [vacation] home used not only by [father] but also by his mother and uncle." *Id.* at 621. Further, the wife had made "little or no contribution to the … property." *Id.* From this set of facts, the Appeals Court interpreted an implied agreement to keep the Truro property "outside the marital partnership." *Id.*

[6] *Contra Cherin v. Cherin*, 2008 Mass. App. Unpub. LEXIS 228 (2008) (unpublished), discussed *infra.*

iii. Tanner v. Tanner

Interestingly, in granting the Truro home to the husband, the *Bak* court was impressed, in part, that it was not the *marital* home – one indicator, in a sense, that the parties intended it to be separate. In *Tanner v. Tanner*, 14 Mass.App.Ct. 922 (1982), the marital home was the largest marital asset. In contrast to *Bak*, however, the *Tanner* Court upheld a disparate division of property in which contributions of wife's mother to the marital home were generally credited to the wife. Because the judge's findings were sparse and the record thin, it is unclear whether other factors apart from the source of the assets played a role in the division[7].

iv. Johnson v. Johnson

The division of gifted property in *Johnson v. Johnson*, 22 Mass.App.Ct. 955 (1986) also turned, in part, on how the parties treated the assets at issue. The trial court awarded to the wife several accounts that her mother had gifted to her, finding that the parties "considered the [assets] to be the wife's separate and individual property during the marriage." *Id.* at 956. The husband appealed and the Appeals Court affirmed the judgment.

Here, the wife's mother had gifted to the wife about $38,000 in cash. The funds were deposited in accounts titled to the wife, remained in her name throughout the marriage, and had appreciated to $80,000 through the wife's careful and prudent investment. Therefore, in *Johnson*, the parties' treatment of the assets was a central factor in the division of the inherited asset.

Two other factors, however, played a significant role -- the husband's "abusive conduct, both physical and mental, directed at the wife and her mother" and the wife's "precarious health." *Id.*

f. Timing of Inheritance or Gift

As in the ALI and Ginsburg Guidelines, *infra*, the timing of the inheritance can be critical. In one case, *Cherin v. Cherin*, 2008 Mass. App. Unpub. LEXIS 228 (unpublished) (2008), the wife's father passed away prior to the last day of trial. In his will, he left the wife an inheritance of $560,000. The marital estate was valued at over $8,000,000. *Id.* at 12. The husband sought a division of this asset, the trial court did not do so, and the Appeals Court affirmed:

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[7] *Contra Pare v. Pare*, 409 Mass. 292 (1991) where the SJC overturned a judgment awarding husband a division of assets based on his down payment to the marital home. Here, the SJC noted that, "[b]y focusing on the narrow issue of which spouse paid more toward the house, the judge overlooked [the wife's non-economic contributions.]" *Id.* at 297. The Court further noted that Section 34 "contemplates something *more* than determining which spouse's money purchased a particular asset," *citing Putnam v. Putnam,* 5 Mass.App.Ct. 10, 17 (1977) (Emphasis in original). *Id.*

> The judge found that it was equitable to allow the wife's father's estate to pass in accordance with his last will and testament rather than allocate it as a marital asset. She found that the parties did not rely upon the wife's father's assets during their marriage for financial support, nor did they receive regular financial gifts from him. The parties did not spend any of their own income in reliance on the prospect of the inheritance.

Id. at 13.

In *Caruso v. Caruso*, 2008 Mass. App. Unpub. LEXIS 1078 (2008) (unpublished), the husband complained that the trial court improperly included a trust in the marital estate that was created after the marriage had irretrievably broken down. The Appeals Court panel, unimpressed with his timing argument, affirmed the judgment, finding:

> [that the husband's beneficial interest consisted] of an ownership interest in two multi-unit apartment buildings that the husband had managed since 1994; the management fees received from those properties over the years were indisputably marital assets, and, therefore, the trust res, being the property that generated that income, in practical effect had long been woven into the fabric of the marriage.

Id. at 6 & n. 8.

See also D.L. v. G.L. at 492 (where the trial court articulated as a factor favoring exclusion of the wife's interest in two trusts the fact that "they were created after the parties' separation.")

g. Inherited Assets for Support Purposes

Thus far, we have dealt only with inherited and gifted assets in the context of a Section 34 division. Inherited and gifted assets, however, can also impact child support or alimony.

For example, income from an inherited asset may be used for support purposes even where the asset is not subject to division under Section 34. In *D.L. v. G.L.*, 61 Mass. App. Ct. 488 (2004), the trial court treated the husband's discretionary income interest in

various trusts as streams of income in establishing alimony and child support and the Appeals Court affirmed.

In *Croak v. Bergeron*, 67 Mass.App.Ct. 750 (2006), an unusual case that also exemplifies the breadth of judicial discretion with respect to inherited assets, the issue was whether Mr. Croak's post-divorce lump sum inheritance could be considered income for child support purposes. The trial court counted as income a one-time lump sum distribution from the estate of Mr. Croak's relative. While the Appeals Court found "troubling" the judge's inclusion of the entire proceeds for support purposes despite its "non-periodic" nature, it upheld the award reluctantly. *Id.* at 757.

Affirming the judgment, in part, because of Mr. Croak's substantial resources, the Appeals Court noted:

> It is for the judge, in the exercise of her discretion upon consideration of all the circumstances, to determine how substantial the assets possessed by a support provider must be (in circumstances where the support provider has otherwise experienced a decrease in income) to justify the dismissal of a modification complaint. *Schuler v. Schuler*, 382 Mass. 366, 375 (1981).

In affirming the judgment, the Appeals Court was also impressed with Mr. Croak's evasiveness about finances and his "carefully orchestrated periods of unemployment to coincide with court appearances so that he could evade the payment of guidelines support." *Id*. at 750. Considering, too, that Ms. Bergeron's financial struggles compelled her at times to resort to the food pantry for free food, the Appeals Court found that the judge here did not abuse her discretion. *Id*. at 758 n. 15.

h. Expectancies

A vested, fee simple interest in an inherited asset is an asset subject to division under Section 34. On the other hand, a divorcing spouse who is named in a will, for example, does not have an interest that is subject to division pursuant to Section 34. Rather, such a future inheritance is known as a "mere" expectancy and not a "sufficient property [interest] to be considered a part of the marital estate." See *Williams v. Massa*, 431 Mass. 619, 628-29 (2000).[8] It can, however, be considered by the judge under the

[8] Curiously, the SJC cites, without comment, to *Davidson v. Davidson*, 19 Mass. App. Ct. 364 (1985) for this proposition. *Davidson*, however, was not categorical in excluding expectancies from the marital estate, allowing, incredibly, that an expectancy could be included in the marital estate under "extraordinary circumstances." *Id.* at 374.

Section 34 criterion of "opportunity of each for future acquisition of capital assets and income" in determining what disposition to make of the property subject to division. *Id.*

i. Vaughan Affidavits

Because a court must consider a spouse's "opportunity of each for future acquisition of capital assets and income" under Section 34, practitioners may wish to conduct discovery regarding a spouse's expectancy interests. This is typically accomplished through a "Vaughan Affidavit," so named after the parties in *Vaughan v. Vaughan*, SJC Single Justice, No. 91-485 (1991) (unpublished opinion).

In *Vaughan*, the wife sought to depose her in-laws regarding their estate plan and, in addition, sought certain estate planning documents. The in-laws sought a protective order, arguing that their assets were not subject to division and were, therefore, not discoverable. The Probate and Family Court denied the motion but offered the in-laws the opportunity to comply with the discovery order by affidavit rather than by deposition or production of documents. *Id.* at 5.

Further, the court permitted the parents to limit the information disclosed in the affidavit to (1) their approximate current total net worth (plus or minus $500,000); (2) a general description of their current estate plan and wills; and (3) the date, if any, when the estate plan and wills were last amended. *Id.*

On an interlocutory appeal from the discovery order, the Single Justice affirmed the Probate and Family Court order, noting that the judge's novel solution struck a good balance between the need for discovery under Section 34 as well as "a laudable regard" for the privacy concerns of the in-laws who were not parties to the action. *Id.*

As a practical matter, where future inheritances are at issue, practitioners should request a Vaughan Affidavit from opposing counsel in the first instance. If there is no cooperation from opposing counsel or the request is met with resistance, the practitioner should consider serving a notice of deposition requesting all relevant estate planning documents. This may very well encourage the non-parties to comply with the request for the Vaughan Affidavit. The non-parties may still not wish to complete the Vaughan Affidavit and may seek, through independent counsel, a protective order. They might argue that, given the facts of the particular case, the request for an affidavit is unnecessarily intrusive – an uphill battle considering that the filing of Vaughan Affidavits has become such an accepted practice.

j. Summary – Gifts and Inheritances

The equitable nature and judicial discretion inherent in Massachusetts domestic relations law resists tidy generalizations – the law surrounding the division of inherited

assets is no exception. Nevertheless, as a shorthand analysis, practitioners might consider four factors in particular that loom large in the reported appellate decisions:

> (1) the length of the marriage, (2) the non-propertied spouses' contribution not only to the enhancement of the inherited asset but to the marital enterprise as a whole, (3) the significance of the inherited property in proportion to the other assets available for division, and (4) the extent of the non-propertied spouse's justifiable reliance on the inherited property.

Ginsburg, *supra* at 26 (citations omitted).

II. TRUST INTERESTS AND DIVORCE

Perhaps even more so than gifts and inheritances, the interplay between divorce and trust interests may be one of the most vexing for practitioners. This primer attempts to synthesize the legal landscape in this area and to demystify the issue so that we may better serve our clients.

a. Interpretation of Trust

In interpreting a trust, a court must "ascertain the …. [donor's] intention from the whole instrument… and to give effect to that intent unless [the law forbids]." *Upham v. Siskind*, 16 Mass.App.Ct. 588, 594 (1983) *citing Putnam v. Putnam*, 366 Mass. 261, 266-67 (1974). Where the donor's intent is ambiguous, one must now consult, in addition to case law, the newly enacted *Massachusetts Uniform Trust Code*, G.L. c.203E generally ("MUTC").

b. Trust Assets as Part of Marital Estate

Where a trust asset is an issue in a divorce, G.L. c.208, § 34 comes into play. Our equitable distribution statute, as the practitioner knows, is quite expansive -- the estate of a party includes all property to which he or she holds title, however acquired, *Rice v. Rice*, 372 Mass. 398, 401 (1977) and the trial judge has broad discretion to assign assets in the pursuit of equity, *Bianco v. Bianco*, 371 Mass. 420 (1976).

Moreover, "[i]n making the determination of what to include in the estate, the judge is not bound by traditional concepts of title or property." *S.L. v. R.L.*, 55 Mass. App. Ct. 880, 882 (2002).

Interests do not have to be vested in order to be included in a §34 estate, *see Baccanti v. Morton*, 434 Mass. 787 (2001) (unvested stock options are part of the estate).

c. Is the Trust Revocable?

The first question to consider when dealing with a trust in a divorce case is whether it is revocable or irrevocable. Where a trust established by a party can be revoked at will, courts across the United States have "generally refused to treat the trust as a distinct entity …[because they consider]… the power to revoke … as tantamount to … ownership." 2 Brett R. Turner, *Equitable Distribution of Property* § 6:93 (3rd Ed. 2005).

In a divorce, since the assets in a revocable trust would be viewed as owned by the settlor-spouse, they are subject to division under §34.[9] *See, e.g. Wolfe v. Wolfe*, 21 Mass. App. Ct. 254 (1985) (Where a settlor of a revocable trust had the absolute right and power to withdraw up to five-sixths of the trust corpus for his own use and benefit, the corpus could be invaded to that extent in order to meet payments due from the settlor to his former wife pursuant to a probate judge's order under G. L. c. 208 §34.) *See also D.L. v. G.L.*, 61 Mass. App. Ct. 488, 491 (Husband's interest in revocable trust properly included in marital estate).

Similarly, where a non-spouse third party sets up a revocable trust for the benefit of a spouse, the courts generally treat the trust as an asset of that non-spouse. *Id.* While the court cannot consider this revocable trust an asset subject to division, the court can consider this as an expectancy interest in rendering a division of assets. G.L. c.208 § 34.

d. Interests Subject to Power of Appointment

A power of appointment is "a power created in a written instrument, usually a trust or will, which allows" the "holder" to designate recipients of the property subject to the power. 1 John H. Clymer, Katherine L. Babson, Jr., Robert G. Bannish, *Massachusetts Estate Planning, Will Drafting and Estate Administration: Forms* §3.07.

Courts have consistently held that a spouse with a beneficial interest subject to a power of appointment has only an expectancy that should not be included in the marital estate. For example, one case involved a trust in which the husband's father had a testamentary power of appointment over the principal – specifically, he could devise the principal to any beneficiary of his choosing. The Appeals Court agreed with the trial court that the interest was like an expectancy interest under a will and that it was properly excluded from the marital estate. *D.L. v. G.L.*, 61 Mass.App.Ct 488 (2004).

In another case, a trust was properly excluded because the wife's mother, a lifetime income beneficiary under her father's trust, had a power of appointment over any remaining corpus. Furthermore, the wife's mother had the ability, upon request, to withdraw all of the trust assets. *S.L. v. R.L.*, 55 Mass. App. Ct. 880, 882 (2002).

[9] Note that an asset "subject to division" is not necessarily one that will be divided – it simply means that the court may consider the asset for division.

Where the settlor-spouse holds a power of appointment, as in *Ruml v. Ruml*, 50 Mass.App.Ct. 500 (2000), the assets in the trust are subject to equitable distribution. In other words, if the spouse owns it, it is in the estate.

e. Withdrawal Rights in Irrevocable Life Insurance Trusts

Another general power of appointment that surfaces in our practices is the beneficiary's right of withdrawal in an irrevocable life insurance trust. 3 Phyllis E. Federico, Peter F. Zupcofska, *et al.*, *Massachusetts Divorce Law Practice Manual* § 29.10.4 (3rd Ed. 2014).

Some background for those less familiar with estate planning might be useful.

When the life insurance policy is owned by the trust rather than the insured, the proceeds of the policy are not included in the insured's gross estate for estate tax purposes. *See generally* I.R.C. §2042. How does the trustee, then, pay the premiums without gift tax consequences? Usually, the trustee utilizes the annual gift tax exclusion under I.R.C. §2503 (currently $14,000 for 2015).

Unfortunately, the gift tax exclusion only covers gifts of a "present interest" – which does not include gifts to a trust unless the beneficiary has an immediate right to the gift. Therefore, the trust will typically provide that when funds are added to the trust (or in the case of a whole life policy, when income is earned), the beneficiaries have a right to withdraw all or part of the gift within thirty days, after which it lapses. The idea, of course, is that the beneficiaries will not exercise the withdrawal right because the ultimate benefit of the trust is the life insurance proceeds.

Since, as noted earlier, the withdrawal right is a general power of appointment, the gift property is reachable by creditors and, arguably, included in the marital estate and subject to division. *See, e.g., State Street Bank & Trust v. Reiser*, 7 Mass. App. Ct. 633 (1979) and *Lipsitt v. Sweeney*, 317 Mass. 706 (1945) (creditor's right to attach gifted property prior to lapsing). Again: since the spouse owns it, it is in the estate.

As to whether the spouse's share of the death benefit would be a §34 asset, the court would apply the "fairly certain" test, Section g *infra*.

ILIT's are the most common of the irrevocable gifting trusts. But there are other types that might arise in our practices. For example, a case might involve trusts that "hold stock in a closely held company as part of a gifting strategy to shift the stock to a younger generation without putting the stock directly in their hands." Federico and Zupcofska, *supra* at §29.10.4.

f. Nominee trusts

As with the withdrawal right in an ILIT, a beneficiary's ownership interest in a nominee trust is similarly unencumbered.

Briefly, a nominee trust is often used to conceal the identity of the true owner of property, typically real estate; this is accomplished because the beneficiaries are not set forth in the trust instrument but in a separate unrecorded schedule of beneficiaries. Further, the nominee trustee holds legal title to the property and acts only at the discretion of the beneficiaries, *see, e.g. Roberts v. Roberts*, 419 Mass. 685, 687 (1995), who have fully vested transferable interests in the property, Charles E. Rounds, Jr. *et al*., *Loring and Rounds: A Trustee's Handbook* §9.6 (2014).

These factors have led most commentators to conclude that the nominee trust is in most cases "not really a trust at all" but "an agency agreement." Robert L. Marzelli and Elizabeth S. Marzelli, *Massachusetts Real Estate* §7.4 (2003).

Considering the nature of the beneficiary's interest in the nominee trust, it is certainly subject to equitable distribution. Once more: if the spouse owns it, it is in the estate.

g. The "Fairly Certain" Standard

In and of itself, the characterization of an interest in an irrevocable trust -- whether it is a contingent or remainder interest, for example -- does not dictate whether it is included in the marital estate. These categories, central to trust law, are less important in cases involving the division of a marital estate. In the latter context, equity predominates over bright-line trust concepts -- the core issue for the Court is to determine what to include in the marital estate and to render an "equitable" division of property.

That is where the "fairly certain" requirement comes in.

Consider, for example, two hypothetical cases in which a spouse has a contingent interest in a trust. In one case, the interest of a healthy 25-year-old beneficiary is contingent on surviving his 95-year-old mother. One might consider that interest "fairly certain" as opposed to "highly speculative" or "remote." In another case, the spouse-beneficiary is a 25-year-old cancer patient whose interest is contingent on surviving her 50-year-old father. Most of us would agree that this case stands on a different footing. Although they are both contingent interests, one can see how inequitable it would be to include both interests in the marital estate.

Massachusetts law recognizes that equity demands a flexible approach to trusts in the context of a divorce. The SJC has made clear that so long as "the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment under §34." *Williams v. Massa*, 431 Mass. 619, 628 (2000). Interests considered "too remote or speculative" for inclusion within the estate are instead weighed under the §34 criterion of "opportunity of each [spouse] for future acquisition of capital assets and income" in dividing the marital property. *Williams v. Massa*, *supra* at 629.

A threshold question in determining whether a trust interest is included in the §34 estate is whether the beneficiary has a "present, enforceable, equitable right to use the

trust property for his benefit." *Lauricella v. Lauricella*, 409 Mass 211 (1991). Practitioners beware, however, that the lack of such an interest does not necessarily guarantee its exclusion where the issue was never raised at trial. *Child v. Child*, 58 Mass. App. Ct. 76, 84 (2003).

h. The Extent of Trustee Discretion

The right of a beneficiary to income or principal where the trustee has discretion to invade principal or distribute income is frequently controversial. In determining those rights, it is critical to examine the specific language of the trust. Many of the cases turn on the extent of trustee discretion.

i. Trustee's Discretion Subject to Fiduciary Standards

In *Woodberry v. Bunker*, 359 Mass. 239 (1971), a trustee had the discretion to invade principal "as in the opinion of [the] trustees shall be needed for his or her comfortable support, medical or nursing care, or other purposes which seem wise to [the] trustees." *Id.* at 240.

While the standard on its face may seem amorphous and unenforceable, this, like most other "broadly expressed fiduciary standards," is a "judicially enforceable, external, and ascertainable standard." *Id.* at 241. Specifically, the court went on, the beneficiary in this case has a right to be maintained "in accordance with the standard of living which was normal for him before he became a beneficiary of the trust." Moreover, the phrase "which seem wise to [the] trustees" does not affect the judicial enforceability of the standard. *Id.*

At issue in *Marsman v. Nasca*, 30 Mass.App.Ct. 789 (1991), was the trustee's discretion to pay the beneficiaries such amounts "as they deem advisable for his comfortable support and maintenance." *Id.* at 795. As with *Woodberry*, the Court interpreted a judicially enforceable standard – "to maintain the … beneficiary in accordance with the standard of living which was normal for him before he became a beneficiary of the trust." *Id.*

In *Comins v. Comins*, 33 Mass. App. Ct. 28 (1992), the trustee was empowered to distribute income and principal as "in its discretion it deems advisable to provide for the comfort, welfare, support, travel and happiness of [the wife]." *Id.* at 30. Since the trustee standard here was judicially enforceable, see *Woodberry, supra*, the Court found that the wife had a "present, enforceable, equitable right to use the trust property for her benefit." *Id.* at 31. Her beneficial interest was properly included in the marital estate.

The trust in *Pfannenstiehl v. Pfannenstiehl*, 88 Mass. App. Ct. 121 (2015) involved a trustee fiduciary standard similar to that in *Woodberry*, *supra*. The trial court found and the Appeals Court affirmed the trust's inclusion in the marital estate, noting that the husband had a present enforceable right to distributions and distinguishing it "from wholly discretionary trusts, with no distribution standards regarding support,

health, maintenance, welfare, or education." *Id.* at 133.

ii. Trustee's Sole Discretion without Fiduciary Standards

In *Child, supra*, the trustee had "sole discretion" to distribute principal and income to the husband, the beneficiary spouse, without any judicially enforceable standard. Because the husband, however, conceded at trial that the trust was a marital asset, the Appeals Court did not disturb the trial court's finding that it was a marital asset. However, were the issue properly before them, the Appeals Court opined, the "sole discretion" standard appeared to suggest that the husband's interests were "too remote and speculative" and that he probably did not have a present enforceable right to trust assets. *Id.* at 83 n. 4

In one of the several trusts at issue in *D.L. v. G.L.*, 61 Mass.App.Ct 488 (2004), the trustees had the authority to distribute income and principal to the husband in their "uncontrolled discretion" as they deemed "advisable." *Id.* at 497. Upon the termination of the trust, the remaining corpus was to be distributed to the husband's children.

The trial court found that, over the past 38 years, all of the income was distributed to the husband and none of the principal. The Appeals Court affirmed the trial court's finding that the husband did not have a present and enforceable right to the principal and, therefore, it was proper to conclude that the trust was not a part of the §34 estate. The trial court correctly considered the trust under the §34 factor ″opportunity of each spouse for future acquisition of capital assets and income.″ *Id.* at 498. As will be discussed further in this chapter, however, the Appeals Court affirmed the trial court's inclusion of income from the trust for support and alimony purposes.

Finally, practitioners should note that courts are not prohibited from including a spouse's interest in a discretionary trust in the martial estate but "because of the peculiar nature of such a trust, the trust instrument and other relevant evidence must be examined closely to determine whether that party's interest is too remote or speculative to be so included." *D.L. v. G.L.* at 497.

i. Interests Contingent on Survival of Another

Often, a spouse-beneficiary will have a vested remainder interest in trust property -- the right to receive trust property when the trust terminates. In that case, the only uncertainty may be if the spouse is not alive to take possession. A "vested remainder interest in a trust is a sufficient property interest for inclusion for consideration in connection with a property division under §34." *Williams v. Massa* at 628.

The husband in *Lauricella, supra,* had a vested remainder interest in the trust corpus, a two-family house in West Newton. He was 26 years old at the time of divorce and would receive a share of the trust principal when the trust terminated in seventeen years. Additionally, he was a current equitable beneficiary in that he had the right to use

the property and to rent the property. In fact, he was living in the house. Here, the interest was properly included in the marital estate.

From the relative certainty of vested remainder interests, we move to a common set of slightly less certain interests – specifically, interests contingent on a spouse surviving his/her parent. In and of itself, considering the equitable nature of the landscape, this condition does not guarantee exclusion or inclusion in the §34 estate. The cases, instead, reveal "no clear consensus," and the "decisions turn more on the particular attributes of the respective disputed interests than on principles of general application." *S.L. v. R.L, 550* Mass.App.Ct at 883, *citing Lauricella* at 215-216. See also *Williams v. Massa* at 628 ("Whether a contingent remainder interest also constitutes part of the marital estate has yet to be squarely addressed by a Massachusetts court.")

In four of the other trusts in *D.L. v. G.L, supra*, the husband's contingent remainder interests were properly excluded from the marital estate. All of these trusts terminated at a date that was seven years from the divorce judgment – at which point husband would receive a share of the trust principal provided that he survived his father. His father, at the time of trial, was 67 years old and no evidence was presented regarding his health. Therefore, since it cannot be "fairly certain" that those contingencies would be met, the trust interests were properly excluded from the marital estate.

In four of the trusts at issue in *S.L. v. R.L., supra*, the only contingency was the wife, 55 years old at trial, surviving her mother, 77 years old at trial. The court found that the wife was healthy and there was no evidence as to her mother's health. All four of the trusts were properly included in the marital estate, according to the Appeals Court.

In one *S.L. v. R.L.* trust, the wife's mother was a lifetime income beneficiary. The trustees had the discretion to distribute principal to the mother "taking into consideration other income and assets available to her, to allow her to maintain the standard of living enjoyed during [her father's] life." *Id.* at 886. Upon the mother's death, the trust assets would be distributed in equal shares to the wife and her siblings. This trust was properly included in the marital estate, according to the Appeals Court.

In another *S.L. v. R.L.* trust, the wife's mother was also a lifetime income beneficiary and, upon her death, the trust income was to be paid to wife and her siblings until each of the siblings reached 21 years of age – at which point, the principal would be distributed in equal shares. The wife's mother had no right to principal. This trust was properly included in the marital estate, according to the Appeals Court.

The wife's mother was a lifetime income beneficiary in two of the other trusts in *S.L. v. R.L., supra.* In both trusts, during the wife's mother's life, the trustee had discretion to distribute principal subject to specific objective financial condition of the trust and certain other trusts. Upon the wife's mother's death, both trusts would be divided into separate equal portions for the wife and her siblings who would be lifetime income beneficiaries. Upon wife's death, the wife's children would receive distribution

of the wife's portion of the trust principal. These trusts were properly included in the marital estate, according to the Appeals Court.

Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985) involved a remainder interest contingent on survivorship. Here, the interest was subject to the husband surviving his mother. But the remainder interest at issue was a vulnerable one. Despite the fact that the trustees had the right to invade principal for the mother in their "uncontrolled discretion," the trial court included the trust in the marital estate. The Appeals Court upheld it warily, noting that this was on the "outer limits" of what might be properly included in the marital estate. As *Davidson* predates the *Williams v. Massa*, *supra* "fairly certain" requirement, it would seem an open question as to whether a similar trust could be included in a §34 estate today. Note, however, that *Williams* cites with approval the *Davidson* court's inclusion of the vested remainder interest in the marital estate. *Williams v. Massa* at 628.

j. Spendthrift Clauses

By itself, a spendthrift clause, *i.e*. a clause that seeks to prevent attachment of trust property by creditors, is generally not a bar to including the interest in the marital estate. See *Davidson, supra* (that the remainder interest was subject to a spendthrift provision did not prevent its inclusion in the marital estate), *S.L. v. R.L., supra* (three of the trusts properly included in the marital estate contained valid spendthrift clauses) and *Ruml v. Ruml*, 50 Mass. App. Ct. 500, 512 n. 19 ("We also note that the spendthrift clause in the trust agreement does not preclude the distribution of trust assets to the wife.")

Most recently, the Appeals Court in *Pfannenstiehl*, *supra*, reaffirmed that a spendthrift clause, *per se*, does not bring a trust outside of the marital estate. *Id.* at 132.

However, although a spendthrift interest may be properly included in the marital estate, courts generally do not order a spendthrift trustee to make payments from a trust in order to satisfy obligations related to the divorce. This becomes relevant for the spouse or ex-spouse who is a creditor.

> [T]he path of the wife seeking recovery from her husband's trust interest for alimony or support of children is more difficult in Massachusetts. . . It has been held that she can recover neither as a judgment creditor . . . nor in a suit to require the trustee to pay reasonable sums from the trust income for the support of legal dependents of the beneficiary.

Pemberton v. Pemberton, 9 Mass. App. Ct. 9 (1980) summarizing the holdings of *Bucknam v. Bucknam*, 294 Mass. 214 (1936) and *Burrage v. Bucknam*, 301 Mass. 235 (1938) (holding that where the trust does not mention the ex-husband's family, it would

"do violence to the plain words" of the settlor to read their names into the instrument and direct the trustee to pay anything to them.)

The recently enacted MUTC did not change the law. Notably, our state's version of the uniform law does not include Section 503 which would have created "spendthrift exceptions for certain preferred creditors, including children, spouses and former spouses with court orders against the beneficiary for support." *Report of the Ad Hoc Massachusetts Uniform Trust Code Committee*, p. 26, §503 (2012).

k. What Happens Once Trust Asset is in Marital Estate?

Once it is determined that a spouse's trust interest is divisible, the question becomes whether that interest will be divided with the other spouse. And, to that question, courts, of course, look to G.L. c.208, §34 generally – length of marriage, age, health, station, conduct, relative contributions, *etc*. Much of this was discussed in the first part of this chapter. Of particular relevance in the trust context are many of the principles that attach generally to the division of inherited assets. Two factors surface in the case law about trusts -- the extent to which parties relied upon the asset and the history of the distributions. [10]

The reliance factors were central in *Lauricella* and *Comins*.

In *Lauricella*, *supra*, the husband's father created a trust which held title to the marital home which had been occupied by the family for the whole marriage. Thus, the trust principal, the only asset available for distribution upon divorce, was fully incorporated into the marriage.

The family in *Comins*, *supra*, similarly, relied upon the wife's trust assets during the marriage. This factor, among others, was significant in the court's decision to include the asset in the marital estate.

In *Pfannenstiehl*, *supra*, the trust at issue was settled by the husband's father and distributed income to the husband and his siblings on a regular basis. The husband received regular distributions that ceased just prior to his filing for divorce -- while they continued for his siblings. Moreover, the trust income funded the lifestyle of the parties

[10] These factors, reliance and distribution history, are also relevant to whether a trust is included in the marital estate in the first instance, and not only to the extent of division with the non-beneficiary spouse. With respect to inclusion, however, the primary factor in the cases appears to be whether the spouse has an enforceable right to distributions. *See infra*, discussion in this chapter related to the extent of trustee discretion and *Woodberry*, *Comins*, among other cases. *See also*, however, the dissenting opinion in *Pfannenstiehl*, which points out, correctly, that an enforceable right to distribution is *but one factor* to consider regarding the inclusion of a trust interest in the marital estate and that, "the 'ascertainable standard' in [a] case cannot be read in isolation [and] must be considered in the context of the terms of discretion in which it is found and of the entire trust instrument." *Pfannenstiehl* at 39 (Fecteau & Kantrowitz, JJ., dissenting).

and was "woven into the fabric of the marriage." *Id.* at 134. This was a significant factor in the trial court's award to the wife of a portion of the trust – and in the Appeals Court's affirming that portion of the judgment.

Finally, in *D.L. v. G.L.*, discussed *infra* in the following section, the reader will note the significance of distribution history to the decision.

l. Trust Income for Support Purposes

A review of the cases indicate that practitioners should (1) focus separately on both on trust *principal* and trust *income* and to distinguish between the two in any trust analysis and (2) recognize that trusts may be utilized for *property division* as well as for *support* purposes.

i. Discretionary Income Interest

In *D.L. v. G.L.*, 61 Mass.App.Ct 488 (2004), one trust was a "purely discretionary" trust in which the trustees had the authority to distribute income and principal to the husband-beneficiary in their "uncontrolled discretion" as they deemed "advisable." *Id.* at 502. The Appeals Court affirmed the trial court's judgment in which the trust was (1) not included in the marital estate for property division but was (2) treated as a stream of income for support purposes.

Per the terms of the trust, any remaining *principal* was to be distributed to the husband's children. In finding that the husband did not have a present and enforceable right to the principal, the trial court and Appeals Court were influenced both by the pure discretionary nature of the trust as well as the fact that over the past 38 years, the trustee did not distribute any of the principal to the husband.

On the contrary, in the same case, over the past 10 years, *all of the income was distributed to the husband*. The *D.L* Court affirmed the judge's decision not to include the husband's income interest in the trust as part of the marital estate for purposes of property division but, rather, as a stream of income for child support and alimony – at least, as here, "where income from the trust has historically been distributed to the husband on a consistent basis." *Id.* at 498. The wife sought to convert the husband's discretionary income interest to a present value for purposes of a property division. The Appeals Court left the trial court judgment undisturbed arguably because the husband lacked a present and enforceable right to such income.

ii. Enforceable Income Interest

T.C. v. J.L., 2006 Mass. App. Unpub. LEXIS 174, 20 n. 16 (2006) (unpublished), on the other hand, concerned a trust with an ascertainable distribution standard as to income (but discretionary as to principal). The Court there acknowledged that regular distributions of trust income can form the basis of a support award. But, unlike the *D.L.* wife, since the wife here arguably had an enforceable right to income distribution, an

income stream could also be discounted to present value for purposes of property division. Where the wife could "expect to receive, annually, one-third" of net trust income for her "comfort and welfare," the Court noted, a party could proffer expert testimony as to a present value on the stream of income. *Id.*

iii. Double Dipping

Finally, in considering the issue of support based on trust income, *Pfannenstiehl, supra,* cautions against double-dipping. In that case, the wife complained that the trust income stream should have been used in the calculation of alimony. The trial court rejected this claim, opting instead to award to the wife a share of the trust principal. The Appeals Court affirmed the trial court here on the basis that such the award sought by the wife would be inappropriate double-dipping. *Id.* at 127 n. 20.

m. Timing of Division of Trust Assets: Present Division v. Deferred Division

In general, there is a strong judicial preference for a *present* rather than a *deferred* "if and when received" division of a marital asset. *See Dewan v. Dewan*, 399 Mass. 754, 757 (1987) (involving the division of a federal pension). However, a present division is only appropriate where there are "sufficient assets available …. to divide …. without causing an undue hardship on either spouse." *Id.* (Emphasis supplied).

Reflecting that judicial preference, courts may reject a party's request for an "if and when received" distribution in favor of an offset, for example. Where valuation is uncontested and the parties have sufficient assets to permit a present division, the Supreme Judicial Court, in a non-trust case, upheld the trial court's assignment to the husband of "a particular investment vehicle" and crediting the wife with a sum equal to one-half the value. *Zaleski v. Zaleski*, 469 Mass. 230 (2014).

Regarding trust interests that are not possessory, the Appeals Court has acknowledged that deferred divisions are "generally disfavored" because, among other reasons, they create "continued strife and uncertainty between the parties." *S.L. v. R.L* at 885 n. 15, *citing Dewan v. Dewan*, 399 Mass. 754, 757 (1987).

In one case, a judgment ordering an "if and when received" division was reversed on appeal. In *Krintzman v. Honig*, 2010 Mass. App. Unpub. LEXIS 1012 (2010) (unpublished), the wife was the sole lifetime beneficiary of an irrevocable trust whose purpose was "to sustain [her] throughout her lifetime" and in which she was entitled to receive all the income on an annual basis. *Id.* at 2 n. 2. Further, although distributions of principal were left to the sole discretion of the trustees, the *Krintzman* wife had a history of receiving them. *Id.* The trial court judge ordered a deferred division on an "if and when received" basis rather than a present division because he believed that a lump sum distribution would cause the wife "undue hardship," as articulated in *Dewan, infra*. *Id.* at 1 n.1. The Appeals Court panel reversed, holding that a deferred division, "in this particular case was beyond the scope of judicial discretion." *Id.* at 1.

Notwithstanding the judicial preference, present divisions of trust interests are rare in the reported cases and where an offset is not practical, such a division can be problematic. In *Pfannenstiehl, supra*, the Appeals Court affirmed the trial court's award of a present division to the wife of a share of the husband's trust interests.[11] Specifically, the husband was ordered to transfer as a property division approximately $48,000 per month in 24 installments. The husband made the first few payments, borrowing money from his father to do so. At some point, after the father refused to give his son any more money, the husband wrote to the trustees requesting distributions to satisfy the judgment. The trustees, not surprisingly, refused. *Id.* at 136. The wife then filed a contempt complaint against the husband for failure to pay the monthly payments and the trial court adjudged him in contempt. The Appeals Court (the same court that upheld the finding that the Husband's trust interest was part of the marital estate) vacated the contempt judgment, holding that there was no clear and convincing evidence that the husband had the ability to pay the judgment.[12] *Id.*

As noted above, deferred divisions of trust assets are appropriate where there are insufficient non-trust assets and a present division of trust assets would cause "an undue hardship on either spouse." *S.L. v. R.L* at 885, *citing Dewan v. Dewan*, 399 Mass. 754, 757 (1987) and *Williams v. Massa* at 628.

Valuation, a subject examined in the next section, can also factor into whether a present or deferred division of a trust asset is appropriate. The Supreme Judicial Court, in a non-trust case, held that "where a present valuation of [an asset] is uncertain or impractical, the better practice is to order that any future recovery or payment be divided, if and when received, according to a formula fixed in the property assignment." *Adams v. Adams*, 459 Mass. 361, 379 n.14 (2011), quoting from *Hanify v. Hanify*, 403 Mass. 184, 188 (1988).

n. Valuation of Trust Interests

Perhaps because trust interests are divided more often on a deferred "if, as and when" basis, valuation issues are rarely treated in depth in the appellate trust/divorce caselaw. While discussion of trust valuation methodology is beyond the scope of this chapter, the caselaw that exists in the divorce context provides some rough boundaries for the practitioner to consider.

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[11] The wife, at trial, sought a present rather than a deferred division on the theory that the latter "could enable the trustees to make distributions in a manner that would prevent her from obtaining the value of the marital asset to which she is entitled." *Pfannenstiehl* at 141 n. 5 (Fecteau & Kantrowitz, JJ., dissenting).

[12] Assuming the judgment survives any further appellate review, how or whether the wife ever receives any part of the trust-related property division awarded her is, perhaps, the most intriguing aspect of the case. If a trial court compels the husband to sue the trust, what will the outcome be? Or will the husband be forced to pay from the assets already awarded him in the divorce?

At the outset, best practices dictate that, if the attorney believes valuation to be necessary at trial, expert testimony should be proffered. *See, e.g., Williams v. Massa* at 630 ("In the absence of expert testimony on the subject, which would have been appropriate and undoubtedly helpful to the judge, we cannot say that the judge's valuation of the real estate, which is apparently based on the husband's figures, is in error.")

In *Pfannenstiehl*, *supra*, although it is unclear whether expert testimony was proffered, the trial court valued the trust at issue at nearly $25,000,000. The trial court calculated the husband's interest at one-eleventh of that value based on the current number of beneficiaries – eleven. The Appeals Court did not disturb the trial court's "fractional share" approach to valuation.[13]

Trust valuation methodology scarcely figures in the caselaw. An exception is the 1:28 decision, *Krintzman v. Honig supra* at 5-6 n. 4, in which the Appeals Court panel remanded to the trial court with instruction to value the wife's trust, noting that the judge must "ascertain the amount of the future payments to be considered by the experts in arriving at a present value." The Court briefly elaborated:

> [o]n findings already issued, an expert could be asked for his opinion of present value based on the anticipated future distributions from the trust to the wife (which could be based on the required distributions of income, or some other figure warranted by the evidence). Applying this factor to the expected lifetime of the wife at the time of divorce, and the applicable interest rate, as it would have been calculated at the time of trial, a present value will be arrived at. See, *e.g., Butler, supra* at 183-188. *See also Turcotte v. DeWitt*, 332 Mass. 160, 163-164, 124 N.E.2d 241 (1955) (mortality table and testimony of actuary admissible as evidence of life expectancy); *Roddy v. Fleischman Distilling Sales Corp.*, 360 Mass. 623, 628, 277 N.E.2d 284 (1971) (″An actuarial expert was allowed. . . to answer a hypothetical question which asked him to calculate the present value of a sum of money which, if invested at three per cent, would yield $ 56 a week for the working life expectancy of 35.1 years, and at the end of that time would be exhausted″). *Id.*

[13] The dissent's critique of the valuation is discussed, *infra*, in the "Generational Nature of a Trust" section in this chapter.

o. Independent Trustee

In *Pfannenstiehl*, the Appeals Court was undoubtedly persuaded to affirm the valuation because, among other reasons, the trial court found that the trust was not administered impartially. The co-trustees were the husband's brother and an outside trustee. As noted above, the trust distributed income to the husband and his siblings on a regular basis except that the distributions to the husband ceased just prior to his filing for divorce -- while they continued for his siblings.

As the trial judge put it, "the proverbial family wagons circled the family money." *Id.* at 128-29. The professional trustee, "ostensibly an outside trustee" administered the trust in a "hands-off" manner, exercising little if any scrutiny to distributions. *Id.* at 128. He was not independent but, rather, "inextricably interconnected with, and aligned with, the husband's family." [14] *Id.*

p. Generational Nature of the Trust

The dissenting opinion in *Pfannenstiehl* argued that the 'valuation of the husband's interest is too speculative to stand and further demonstrates why the interest should not have been included in the marital estate.' [15] *Pfannenstiehl* at 140 (Fecteau & Kantrowitz, JJ., dissenting opinion). The fractional share approach, therefore, cannot withstand scrutiny.

First, "the trust also allows for distributions to be made in equal or unequal shares, and upon consideration, in the trustees' discretion, of funds available from other sources for the needs of each beneficiary." *Id.* at 141.

Second, "the trust instrument make[s] clear that the class of beneficiaries is open (and the number of beneficiaries may well increase)" and "both the near-term and long-term interests of the beneficiaries are implicated." Citing *D.L. v. G.L.* at 497, *supra*, the dissent argued that the "generational nature" of a trust is one factor that militates against its inclusion.[16] *Pfannenstiehl* at 139 (Fecteau & Kantrowitz, JJ., dissenting opinion).

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[14] An unpublished opinion, *Caruso v. Caruso*, *supra*, also focused on the actions of the "disinterested trustee." As in *Pfannenstiehl*, there was a ″family″ trustee (the husband) and a ″disinterested″ trustee (the family's long-time accountant). *Id.* at 4. The Appeals Court upheld the trial court's finding that the trust was included in the marital estate, finding, among other things, that the ″disinterested″ trustee … was … little more than the husband's 'yes man′ who would go along with anything the husband wanted." *Id.*

[15] Further, argues the dissent, the majority's focus on "what it considers machinations on the part of the trustees," *see supra*, is misplaced. Instead, it argues that "[t]he primary focus of the instant inquiry should be the terms of the trust instrument itself, not how those terms may be or have been manipulated." *Pfannenstiehl* at 141 (Fecteau & Kantrowitz, JJ., dissenting opinion).

[16] Although the exclusion from the marital estate of the trust in *D.L. v. G.L.*, *supra*, arguably turned more on its discretionary character (*i.e.* lack of an ascertainable distribution standard), the reader is directed to a portion of the applicable "generational" provision:

q. Fraudulent Conveyances to an Irrevocable Trust

Although a detailed analysis of Fraudulent Conveyance law is outside the scope of this chapter, no primer on trust interests is complete without a discussion about fraudulent conveyances.

In particular, where the settlor of an irrevocable trust is one of the divorcing parties, the practitioner needs to consider whether the transfer of assets to an irrevocable trust may be set aside as a fraudulent conveyance under the Uniform Fraudulent Transfer Act, G.L. c. 109A, generally.

Aronson v. Aronson, 25 Mass. App. Ct. 164 (1987) is instructive. Here, the husband transferred certain assets to an irrevocable trust for the benefit of his children shortly after he filed for divorce. The trial court set aside the conveyance finding that it was "made in fraud of the Plaintiff's rights" in violation of G.L. c. 109A. *Id.* at 167. Specifically, the court found that the "husband had transferred the land to deprive the wife of her right to claim it as part of the marital estate." The Appeals Court affirmed.

r. Summary -- Trusts

A few parting thoughts are in order.

The first is that trust assets are commonly misunderstood by clients going through divorce and that, before we can opine how a court might view such an interest, the documents must be closely reviewed. Further, emotional issues around trusts and inheritances are common. As such, we might remind the beneficiary resisting disclosure or claiming non-access that they often have the right to information about the trust -- depending on the remoteness of their interest. *See* MUTC at §§103, 813 (trustee's duty to

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> While [Husband] is living, the disinterested trustees, in their uncontrolled discretion, shall pay to [Husband] such amount or amounts from the net income and principal as the disinterested trustees, in their uncontrolled discretion, think advisable; and from any balance of the net income and principal, the disinterested trustees may also, in their uncontrolled discretion, pay such amount or amounts, in such proportions, as they think advisable, in their uncontrolled discretion, to any one or more of the following persons living from time to time: [Husband's] spouse, [Husband's] issue, and the spouses of such issue. Any net income not so paid may be added to principal at any time or times in the uncontrolled discretion of the disinterested trustees.

Id. at 494 n. 10.

inform a “qualified beneficiary”). And, moreover, they might be reminded that the Probate and Family Court having personal jurisdiction over them would have the right to compel them to demand information from the trustee if necessary.

The second point is that, putting aside the arcane terminology, the way to think about how a trust asset intersects with divorce is straightforward. Compare it first to a simple asset. If a spouse owns an asset (a bank account, for example), it is in the marital estate. Put that on one end of the continuum. On the other end, put an expectancy interest – for example, the hope that your mother will remember you in her will. So, when you look at a trust, ask yourself – is it reasonable that this interest should be counted as an asset? How far across the continuum is the trust interest from, say, your everyday checking account?

The "fairly certain" test properly recognizes that rigid rules have no place in equity and, instead, attempts to locate that interest on an ownership continuum, as set forth above. When contextualized in this way, the soundness of the Massachusetts approach to trust interests in a divorce context is apparent.