

## A Spouse's Bad Conduct and its Impact on Property Division in a Massachusetts Divorce

By Jonathan Fields

One of the most frequent questions clients ask divorce attorneys is whether a spouse's bad conduct will impact the financial settlement in a divorce. This article explores the Massachusetts law in this area.

The Massachusetts property division statute, G.L. c.208 s.34, requires courts to examine multiple factors in determining the division of the marital estate upon divorce. The statute articulates mandatory and non-mandatory considerations. Practically speaking, the length of the marriage may be the most important consideration upon which all further analyses depends.<sup>1</sup> The relative economic and non-economic contributions of the parties (paradoxically, a non-mandatory consideration under the statute) has been elevated by the case law to be the "touchstone of an equitable division of the marital estate." *Moriarty v. Stone*, 41 Mass. App. Ct. 151, 157 (1996). The character of an asset (whether it was inherited and/or premarital) is another prominent consideration. *Rice v. Rice*, 372 Mass. 398 (1977).

The statute also includes, as a mandatory consideration, "the conduct of the parties during the marriage." On the far end of the spectrum of conduct affecting a property division is a case in which the wife solicited the husband's murder. The trial court awarded the husband 90% of the marital estate and the Appeals Court upheld the division. *Wolcott v. Wolcott*, 78 Mass. App. Ct. 539 (2011).

Obviously, conduct less egregious than that in *Wolcott* can also form the basis of a disparate division. *Johnson v. Johnson*, 22 Mass. App. Ct. 955, 956 (1986) (judge properly considered "husband's abusive conduct, both physical and mental"); *Bacon v. Bacon*, 26 Mass. App. Ct. 117, 120 (1988) (judgment affirmed where judge considered fact that "[a]t times, early in the marriage, the husband was abusive to the wife").

Conduct, of course, cannot be the sole consideration -- as G.L. c.208 s.34 requires judges to consider many factors. *Putnam v. Putnam*, 5 Mass. App. Ct. 10, 16 (1977) ("we caution against the view that [a division of property] may be justified purely on the basis of the blameworthy conduct of one of the spouses.")

Even in the case involving the murderous Mrs. Wolcott, the Appeals Court noted that the division was not based exclusively on the wife's conduct but, rather, that her actions "caused [the husband] to take on total responsibility for the children's care"; "ma[de] [the husband] totally responsible for maintaining the parties' home"; and will "always" adversely affect the husband as it "diminishes his ability to be totally focused on life and work issues." Horrific as it was, the wife's misconduct was not relevant for purposes of equitable distribution "solely for its negative emotional

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<sup>1</sup> As a leading article describing the theory underlying the enactment of G.L. c.208 s.34 in 1974 puts it, the "length of the marriage is a critical consideration in assignment of property. The equities of assigning to one party a portion of the other's estate are clearly diminished where the marriage is only of brief duration ..." Inker, Walsh and Perocchi, *Alimony and the Assignment of Property*, X Suffolk Univ.Law.Rev 1 (1975).

impact on the marriage.” *Wolcott* at 544. Mrs. Wolcott’s conduct weighed considerably in the property division because of its “negative ongoing economic effect.” *D.R. v. D.A.*, 93 Mass.App.Ct. 1109 (2018) (1:28 Memorandum).

Adulterous affairs can justify a disparate division but Probate and Family Court judges rarely order a disparate division for an affair – except, to the extent, sometimes, that monies were spent on a paramour. In *Johnston v. Johnston*, 38 Mass.App.Ct. 531, 534-535 (1994), the Appeals Court upheld a trial court finding of a dissipation of assets where the husband, following the separation, “embarked on a binge of high living” with other women, including frequent vacation trips and the “purchase of lavish homes.” Similarly, in *Ross v. Ross*, 385 Mass. 30 (1982), the Supreme Judicial Court affirmed a disparate division in the wife’s favor where the husband, among other acts of financial waste he committed, spent money on another woman. See also *McMahon v. McMahon*, 31 Mass.App.Ct. 504, 509 (1991) (trial court properly considered that the husband “had dissipated marital assets in maintaining a relationship with another woman”)

Another common form of dissipation can be gambling – but various factors must be present in order for it to be considered dissipation. In *Kittredge v. Kittredge*, 441 Mass. 28 (2004), the husband spent \$400,000 on gambling (some illegal and some legal) during the course of their marriage. The wife sought to characterize the entire portion as a dissipation. The trial court found that only \$40,000, the portion he spent while the divorce was pending, was dissipation. The Supreme Judicial Court ultimately affirmed the trial court judgment, noting that a finding of dissipation must be predicated not on the morality or legality of the underlying behavior but, rather:

on the circumstances of the . . . activity in question — its timing, the [spouse’s] intent to deprive the other spouse, and the resulting inability to meet financial obligations to the other spouse — that make it equitable for the . . . spouse to bear the brunt of the losses that he or she has incurred.

*Kittredge* at 40.

Since the Kittredges lived an upper-class lifestyle and the husband’s gambling “did not and will not undermine the family’s financial security or cause sacrifices in their high standard of living,” the Supreme Judicial Court found that the trial court’s judgment on dissipation was a sound one. In addition, the Court also found relevant that the wife was aware of the gambling and the lack of evidence suggesting that she did anything to protest that. *Kittredge* at 42.

The poor man’s *Kittredge* is *Yee v. Yee*, 23 Mass.App.Ct. 483, 484 (1987), which involved gambling in a divorce with a small marital estate in which the wife was of “middle income” and the husband lived in an “elderly housing project” at the time of divorce. There, the Appeals Court affirmed a disparate property division in favor of the wife, in part, because the “husband had been responsible for some wasting of the parties’ joint assets by his gambling activities.”

Of course, there are limits as to the extent the bad conduct of a spouse can impact a property division. A recent Appeals Court case vacated a property division which allocated more than 90 percent of the marital estate to the wife. The court found that the trial judge overweighed

the husband's bad conduct such that the vastly disparate property division was "outside the range of reasonable alternatives." *D.R. v. D.A.* at 1109. The conduct at issue here included voluntary underemployment, controlling and abusive behavior, and a lack of contribution to household tasks. Additional conduct, not fully explained in the decision, was the husband's "unreasonable actions" that rendered the marital home "uninhabitable, diminishing its utility and increasing its costs to the wife." *Id.*

Notably, the Appeals Court agreed that even a "significantly disproportion[ate]" division of assets based on the husband's conduct would not be an abuse of discretion. However, according to the Appeals Court, the "extreme allocation" here was not justified, particularly where the husband's conduct did not affect "the wife's earning capacity during the marriage [and] her retention and accumulation of earnings/compensation during the marriage or her future earnings capacity." *Id.* Since the conduct had no "negative ongoing economic effect," the Appeals Court found that the division ordered could not withstand appellate scrutiny. *Id.*

A parting word -- bear in mind reading these cases that it is difficult to predict how a trial court would rule in these highly variable factual scenarios. The trial judge has wide discretion in fashioning property division awards, *Kittredge* at 43-44, and an appellate court will only disturb those rulings if they are "plainly wrong and excessive." *Redding v. Redding*, 398 Mass. 102, 107 (1986). In other words, there are cases where a trial court judge may consider particular conduct to merit a disparate division -- and an appellate court may uphold the division as a proper exercise of judicial discretion. On the other hand, a trial court may consider the very same conduct *not* to merit a disparate division -- and such a judgment may also be upheld as a proper exercise of judicial discretion.