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The Use of Support Modification to Re-Litigate Equitably Divided Property in Massachusetts: Does Heins v. Ledis Draw the Line

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THE USE OF SUPPORT MODIFICATION TO RE-LITIGATE EQUITABLY DIVIDED PROPERTY IN MASSACHUSETTS: DOES *HEINS V. LEDIS*[1] DRAW THE LINE?

I. INTRODUCTION

Massachusetts probate courts restructure a divorcing couple's finances in two distinct ways, equitable distribution of marital assets and traditional alimony.[2] In most jurisdictions, including Massachusetts, alimony is an ongoing obligation subject to modification, while equitable distribution, a legal judgment, cannot be re-litigated once the divorce is final.[3] Notwithstanding their separate legal underpinnings, attempts to coordinate alimony and equitable distribution awards have blurred the distinctions between them.[4] The concept of the final and enduring equitable distribution is now largely illusory, subordinated to alimony and child support considerations.[5] Consequently, when assets taken through an

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[1] 422 Mass. 477, 664 N.E.2d 10 (1996).

[2] *See* Putnam v. Putnam, 5 Mass. App. Ct. 10, 15, 358 N.E.2d 837, 839-40 (1977) (containing an explanation of alimony and property division); *see* Monroe Inker, Joseph Walsh and Paul Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 10 SUFFOLK U. L. REV. 1, 10-13 (1975) (hereinafter *Inker*) (discussing the primary cases that interpret Massachusetts General Laws chapter 208, § 34 (1975)).

[3] *See* Kirtz v. Kirtz, 12 Mass. App. Ct. 141, 144, 421 N.E.2d 1270, 1272 (1981) (denying reconsideration of property division following allegations that husband understated asset values); Maze v. Mihalovich, 7 Mass. App. Ct. 323, 325, 387 N.E.2d 196, 198 (1979) (holding property division could be awarded where not previously adjudicated).

[4] *See* Dewan v. Dewan, 399 Mass. 754, 759, 506 N.E.2d 879, 882 (1987) (noting that "symmetry was broken" where trial court altered award on remand); Hamblett v. Lewis, 114 N.H. 258, 260, 319 A.2d 629, 631 (1974) (noting that property division and alimony are necessarily interrelated); Monroe Inker, Charles Kindregan, Ann Wagner & Marcia Boumil, *Alimony and Assignment of Property: A Survey of the Last Decade of Massachusetts Law*, 26 SUFFOLK U. L. REV. 21, 39-48 (1992) (hereinafter *Inker & Kindregan*) (surveying cases interpreting Massachusetts General Laws chapter 208, § 34 (1974)); *cf.* Jana Singer, *Divorce Obligations & Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARVARD J. ON LEGIS. 43, 45 (1993) (attributing change in nature of awards to consideration of formerly excluded intangible property).

[5] *See, e.g.*, Schuler v. Schuler, 382 Mass. 366, 369, 416 N.E.2d 197, 201 (1981) (including proceeds from previously divided property in alimony analysis); Krokyn v. Krokyn, 378 Mass. 206, 213, 390 N.E.2d 733, 737 (1979) (recasting occupancy and sale provision as child support); Hartog v. Hartog, 27 Mass. App. Ct. 124, 128, 535 N.E.2d 239, 241 (1989) (including newly created property interest in alimony analysis).

equitable division are lost or diminished, there is no barrier in either current law or judicial precedent that prevents recipient spouses from re-litigating through alimony or child support avenues.[6] Presently, probate court judges have near-absolute discretion to redistribute property through alimony and child support modification orders (support orders).[7] This "back-door" to re-litigating property divisions should gain popularity where assets from an equitable division lose their value due to unforeseen circumstances or negligent dissipation.[8]

This article proposes a halt in the erosion of reliable and final equitable distribution. The Supreme Judicial Court should adhere to the legal principles espoused in its lead cases and used in other jurisdictions, to prevent the de-facto relitigation endemic in Massachusetts.[9] Recently, in *Heins v. Ledis*,[10] the Supreme Judicial Court had an opportunity to clarify its position on inequitable valuations, but the Court specifically refused to address the issue. Instead, the court narrowly held that initial alimony cannot be used as a vehicle to reimburse

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[6] *See* Belsky v. Belsky, 9 Mass. App. Ct. 852, 853, 400 N.E.2d 878, 880 (1980) (holding there should be a reconsideration of alimony should equitably-divided pension become diminished); Inker, *supra* note 2, at 21-22 (summarizing the impact of equitable distribution upon alimony modification); *cf. Schuler*, 382 Mass. at 369, 416 N.E.2d at 201 (upholding modifications due in part to the "substantial assets" awarded to husband in divorce decree).

[7] *See* Dominick v. Dominick, 18 Mass. App. Ct. 85, 89-90, 463 N.E.2d 564, 568 (1984) (holding court not required to re-open proceedings on evidentiary issues); Robbins v. Robbins, 16 Mass. App. Ct. 576, 578, 453 N.E.2d 1058, 1060 (1983) (holding that "an exercise of judgment . . . will be entitled to considerable respect").

[8] *See* Inker, *supra* note 2, at 21-22 (discussing the "indirect affects" that Massachusetts General Laws chapter 208, § 34 (1975) will have on valuation analysis).

[9] *See, e.g.*, Hay v. Cloutier, 389 Mass. 248, 252, 449 N.E.2d 361, 363 (1983) (holding issues raised in divorce litigation were res judicata); Kirtz v. Kirtz, 12 Mass. App. Ct. 141, 144, 421 N.E.2d 1270, 1272 (1981) (denying reconsideration of property division following allegations that husband understated asset values); Maze v. Mihalovich, 7 Mass. App. Ct. 323, 325, 387 N.E.2d 196, 198 (1979) (holding property division proper where not previously adjudicated); *accord* Olski v. Olski, 197 Wis. 2d 237, 250, 540 N.W.2d 412, 417 (1995) (excluding assets from modification where that asset was equitably divided at the divorce proceeding). The *Olski* decision rejected the premise that a pension was a single asset, instead holding that a pension was a pool of funds that could be segregated into marital and post-marital earnings. *Olski*, 197 Wis.2d at 250, 540 N.W.2d at 417; *see also* Thiese v. Thiese, 164 Vt. 577, 579, 674 A.2d 789, 790-91 (1996) (striking down order requiring obligor to name ex-wife as beneficiary of life insurance policy to provide post-mortem maintenance). In *Thiese*, the policy had been previously awarded to the husband in the property settlement at the time of divorce. *Thiese*, 164 Vt. at 579, 674 A.2d at 791.

[10] 422 Mass. 477, 478, 664 N.E.2d 10, 12 (1996).

a spouse for marital contributions. Consequently, the Supreme Judicial Court has sent a subtle message to probate practitioners that perpetuates the "double-counting" of assets in Massachusetts by preserving form over function.[11]

II. DEVELOPMENT OF EQUITABLE DISTRIBUTION IN MASSACHUSETTS

Prior to the passage of the equitable distribution statute,[12] assets owned in the name of one spouse were not subject to any form of division because each party kept assets in their own name, thus removing them from the marriage "pot" of divisible property.[13] Traditional alimony derived from the husband's duty to support his wife, and the amount of an award depended on the wife's future needs and the husband's ability to pay.[14] Alimony and child support were statutory devices intended to deal with the economic disparities created by the title system, however, their concurrent use as vehicles for continuing marital warfare made them inefficient remedies.[15] In response, the legislature developed equitable distribution, a concept based on the community property model.[16] Nearly every state now employs an equitable distribution form of property division.[17] This form of distribution has largely replaced alimony, either in part or altogether, depending on the jurisdiction and the facts of each case.[18]

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[11] *Id.* at 485, 664 N.E.2d at 17.

[12] MASS. GEN. L. CH. 208, § 34 (1975).

[13] Heins v. Ledis, 422 Mass. 477, 486-87, 664 N.E.2d 10, 16 (1996); *see* Patricia A. Cullen, *Does Anybody Know the Rules in Federal Divorce Court?: A Case for Revision of the Bankruptcy Code*, 46 RUTGERS L. REV. 427, 434-36 (1993) (advocating nondischargeability of property division in bankruptcy). Irrespective of title, courts did often oversee transfers of property in lieu of alimony. Inker, *supra* note 2, at 12. Often, this is due to the illiquid nature of the couple's investments, usually a marital home, that is transferred in order to satisfy the judgment. Inker, *supra* note 2, at 12.

[14] *See* O'Brien v. O'Brien, 325 Mass. 523, 577, 91 N.E.2d 775, 777 (1950) (determining wife's financial need a factor in awarding alimony); Inker, *supra* note 2, at 12 (discussing the Massachusetts common-law title system of alimony). *But see* Orr v. Orr, 444 U.S. 1060, 1065, 100 S. Ct. 993, 997 (1980) (requiring alimony laws to be gender-neutral in order to withstand constitutional challenge).

[15] *See* Inker, *supra* note 2, at 8-11 (discussing shortcomings of traditional alimony).

[16] *See* Deering v. Deering, 292 Md. 115, 122-23, 437 A.2d 883, 887-89 (1981) (discussing the relation of community property and property division).

[17] *See* Cullen, *supra* note 13, at 437-38 (noting majority of states use equitable distribution to directly divest titleholder).

[18] *See* Cullen, *supra* note 13, at 437-38. In Massachusetts, the courts hear property division matters and will make orders dividing the property prior to making any orders for alimony. *See* Inker, *supra* note 2, at 11. (discussing the need to make the division first in

Equitable distribution, also called "property division," focuses on the past contributions made by the parties during marriage to determine each party's rights and obligations.[19] Equitable distribution is also used to enlarge those rights and obligations by expanding the definition of contribution to include non-monetary contributions, such as homemaking and child care.[20] To make equitable distribution work, courts have intruded upon common law property principles by rewarding the less affluent spouse with a greater share of the joint marital assets and creating a debt to be satisfied by the newly indebted spouse.[21] Massachusetts courts have done away with the last vestiges of the title system and will order assets conveyed directly to the recipient spouse.[22] This equitable intrusion on a legal property concept was justified by comparing marriage to a partnership and divorce to a dissolution of that partnership with each partner entitled to a share irrespective of the nature of their contribution.[23]

Property division is also used to eliminate future dealings between parties.[24] The rationale assumes that friction is lessened or eliminated when a division of marital assets makes the dependent spouse self-sufficient.[25] As a judgment bearing on legal rights, a division fixes these rights and obligations, thus no

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order to assess post-marital finances).

[19] Putnam v. Putnam, 17 Mass. App. Ct. 673, 675, 389 N.E.2d 777, 779 (1979) (hereinafter *Putnam II*); *see* Inker, *supra* note 2, at 22 (discussing the use of guidelines in property division). Recently, the Appeals Court extended the definition of "contribution" to include premarital accumulation by cohabitants. Moriarty v. Stone, 41 Mass. App. Ct. 151, 157-58, 668 N.E.2d 1338, 1344 (1996).

[20] *See* Inker, *supra* note 2, at 11 (outlining the various "noneconomic" contributions made by spouses to the marital estate).

[21] Inker, *supra* note 2, at 11; *cf.* Dumont v. Godbey, 382 Mass. 234, 237, 415 N.E.2d 188, 190 (1981) (holding that spouse becomes a creditor for purposes of judgment).

[22] *See* Rice v. Rice, 372 Mass. 398, 400, 361 N.E.2d 1305, 1307 (1977) (upholding Massachusetts General Laws chapter 208, § 34 in favor of equitable considerations over traditional property notions); *see* Inker, *supra* note 2, at 6-7 (discussing the new equity powers to transfer title).

[23] *See, e.g.*, Bianco v. Bianco, 371 Mass. 420, 422, 358 N.E.2d 243, 244 (1976); Davidson v. Davidson, 19 Mass. App. Ct. 364, 474 N.E.2d 1137, 1142-43 (1985); Rolde v. Rolde, 12 Mass. App. Ct. 398, 402, 425 N.E.2d 388, 390 (1981); *see also* Inker, *supra*, note 2, at 3 n.8 (comparing the marital institution to a partnership for contribution purposes).

[24] *Rolde*, 12 Mass. App. Ct. at 402, 425 N.E.2d at 390; *see* Inker, *supra* note 2, at 10 (discussing beneficial effects of property division).

[25] Inker, *supra* note 2, at 10. Massachusetts General Laws chapter 208, § 34 (1975), states in pertinent part that property may be equitably distributed "in addition to *or in lieu of* alimony." (emphasis added).

further court intervention is allowed once a judgment is satisfied.[26] Consequently, a division of marital assets is final and can only be set aside by a showing of judicial error or by fraud on the part of the non-moving party.[27] When contemplating property division and support awards, however, the probate court has nearly absolute discretion in how it will fashion an award.[28] The statute does, however, require a consideration of specific factors that must be reviewed by the trial judge and appear in the judge's opinion.[29] The standard of review on appeal is "clear abuse of discretion" or a "plain error of fact or law."[30]

Support orders are usually awarded in addition to any division of marital assets.[31] Like property division, alimony and child support orders may also be

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[26] *See* cases cited, *supra* note 3 (stating proposition that equitable distributions cannot be relitigated).

[27] *See* Hager v. Hager, 6 Mass. App. Ct. 903, 912, 378 N.E.2d 459, 465 (1978) (holding that court has power to set aside judgment for fraud or duress); *cf.* Dominick v. Dominick, 18 Mass. App. Ct. 85, 89, 463 N.E.2d 564, 568 1984) (affirming a denial to re-open case on alleged valuation error); Kirtz v. Kirtz, 12 Mass. App. Ct. 141, 144, 421 N.E.2d 1270, 1272 (1981) (declining to vacate division absent a showing of fraud). *But see* Grubert v. Grubert, 20 Mass. App. Ct. 811, 817-19, 483 N.E.2d 100, 104 (1985) (overruling judicial discretion in modification order). In *Grubert*, the Appeals Court reversed the trial court's economic orders on "equitable" grounds because it left a wife with little disposable income and a lower standard of living. *Grubert* 20 Mass. App. Ct. at 817-19, 483 N.E.2d at 104; *see also* Brash v. Brash, 407 Mass. 101, 106, 551 N.E.2d 523, 526 (1990) (affirming trial court's modification of an absolute decree and property division after a 10-year hiatus). In *Brash*, the wife did answer or appear at the original proceedings. *Brash*, 407 Mass at 102, 551 N.E.2d at 524. Ten years after the final judgment, she sought modification and property division. *Id.* The trial court rejected the defense of laches and deemed the couple's oral agreement void for unconscionability. *Brash*, 407 Mass. at 105, 551 N.E.2d at 525.

[28] *See Rolde*, 12 Mass. App. Ct. at 400, 425 N.E.2d at 389 (holding discretion not abused by set-off); Inker & Kindregan, *supra* note 4, at 38 (discussing the broad parameters of judge's discretion); *cf. Brash*, 407 Mass. at 105, 551 N.E.2d at 525 (holding that judge has broad discretion in setting and awarding attorney's fees).

[29] *See* Rice v. Rice, 372 Mass. 398, 401, 361 N.E.2d 1305, 1306 (1977) (findings of fact for Massachusetts General Laws chapter 208, § 34 cases); Bianco v. Bianco, 371 Mass. 420, 422, 358 N.E.2d 243, 244 (1976) (outlining Massachusetts General Laws chapter 208, § 34 requirement); Bahceli v. Bahceli, 10 Mass. App. Ct. 449, 449, 409 N.E.2d 207, 207 (1980) (noting the propriety of making statutorily required findings even absent a request for division).

[30] Dominick v. Dominick, 18 Mass. App. Ct. 85, 89-90, 463 N.E.2d 564, 568 (1984); Robbins v. Robbins, 16 Mass. App. Ct. 576, 578, 453 N.E.2d 1058, 1060 (1983).

[31] *See Kirtz*, 12 Mass. App. Ct. at 144, 421 N.E.2d at 1272; *Rolde*, 12 Mass. App. Ct. at 402, 425 N.E.2d at 390; (discussing the use of separate analyses for property division and alimony).

awarded remotely, sometimes well after the original judgment.[32] Only where the petitioner is seeking to modify an existing support award, or reinstate an expiring one, does the petitioner need to demonstrate a material and substantial change in circumstances.[33] Finally, when a court hears a petition to award or modify support, it may consider the assets of obligor spouses in addition to their future earning potential.[34] The equitable distribution statute is also interpreted broadly, and the courts have held that nearly any conceivable property right is subject to division.[35]

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[32] *See* Davidson v. Davidson, 19 Mass. App. Ct. 364, 367, 474 N.E.2d 1137, 1142 (1985) (holding probate court that has not specifically ruled out support to recipient spouse may later award it); Maze v. Mihalovich, 7 Mass. App. Ct. 323, 325, 387 N.E.2d 196, 197 (1979) (holding property division or support claims not raised in pleadings or included in ruling are not res judicata and may be tried later). Moreover, if the petition is for initial support, there is no requirement that the petitioner demonstrate a "material change in circumstances." Cherrington v. Cherrington, 404 Mass 267, 271, 534 N.E.2d 1159, 1162 (1989). Massachusetts General Laws chapter 208, § 37 (1975) states in pertinent part, "[a]fter a judgment . . . a court may . . . revise and alter its judgment relative to the amount of such alimony or annual allowance and the payment thereof, *and may make any judgment relative thereto that it might have made in the original action.*" (emphasis added). Where change of circumstances is not an element in an original complaint for alimony, it is not required for an initial award. *Cherrington*, 404 Mass at 271, 534 N.E.2d at 1162.

[33] *Davidson*, 19 Mass. App. Ct. at 366-67, 474 N.E.2d at 1141; *see also* Harris v. Harris, 23 Mass. App. Ct. 931, 932, 500 N.E.2d 1359, 1360 (1986) (finding inheritance of $165,000 as a material change permitting alimony termination). Change in circumstances is viewed liberally and can even extend to claims based solely on an obligor's increase in wealth. Bak v. Bak, 24 Mass. App. Ct. 608, 622, 511 N.E.2d 625, 634 (1987) (finding material change based on appreciation of West German Mark). *But see* Binder v. Binder, 7 Mass. App. Ct. 751, 756, 390 N.E.2d 260, 263 (1979) (denied downward modification to surgeon who contracted osteoarthritis in hands). Where, however, an agreement survives the divorce, the court applies the threshold standard of "countervailing equities" in allowing modification. Knox v. Remick, 371 Mass. 433, 437, 358 N.E.2d 432, 436 (1976). The courts will also allow modification contrary to an agreement where the recipient would become a ward of the state. *Id.* Consequently, even a prior surviving agreement between the parties does not prevent modification. *See* Ryan v. Ryan, 371 Mass. 430, 432, 358 N.E.2d 431, 432 (1976) (discussing court's retention of jurisdiction over support irrespective of party's agreement).

[34] *See, e.g.*, Schuler v. Schuler, 382 Mass. 366, 369, 416 N.E.2d 197, 200 (1981) (including proceeds of previously divided stock holdings); Krokyn v. Krokyn, 378 Mass. 206, 210, 390 N.E.2d 733, 736 (1979) (including tenancy by the entirety interest held with second wife); *Davidson*, 19 Mass. App. Ct. at 369, 474 N.E.2d at 1142 (including beneficial interest in trust).

[35] *See Davidson*, 19 Mass. App. Ct. at 369, 474 N.E.2d at 1143 (citing Rice v. Rice, 372 Mass. 398, 401, 361 N.E.2d 1305, 1306 (1977); Frederick v. Frederick, 29 Mass. App. Ct. 329, 334, 560 N.E.2d 151, 154 (1990) (affirming finding that wife can let or refinance home in order to become self-sufficient).

Massachusetts broadened the scope of the available marital estate, holding that *all* assets of the obligor spouse are considered in modifying support orders.[36] In *Krokyn v. Krokyn*,[37] the Supreme Judicial Court interpreted this section to include previously exempt assets.[38] The property at issue in *Krokyn* had not been part of the marital estate, thus could not have been considered in any property division.[39] *Krokyn* is significant because the Supreme Judicial Court, citing authority from Massachusetts and other jurisdictions, held that exempt property, which could not be reached by the former spouse, was to be included in the ability to pay analysis irrespective of its source, the nature of the obligor's interest, or the liquidity of the asset.[40] As long as the obligor spouse derived any benefit from the property, it was includable in the analysis, even if it was inalienable by either party.[41]

Three years later, in *Schuler v. Schuler*,[42] the Supreme Judicial Court relied on *Krokyn* in disallowing a modification petition brought by an obligor spouse.[43]

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[36] *See Rice*, 372 Mass. at 401, 361 N.E.2d at 1305 (including premarital property and gifts in modification decisions); *Davidson*, 19 Mass. App. Ct. at 369, 474 N.E.2d at 1137 (1985) (including interests in trust). *But see* Olski v. Olski, 197 Wis. 2d 237, 250, 540 N.W.2d 412, 417 (1995) (excluding assets from modification where that asset was equitably divided at the divorce proceeding); Thiese v. Thiese, 169 Vt. 577, 579, 674 A.2d 789, 790-91 (1996) (noting other jurisdictions observe a res judicata approach to divided assets). The "available interest" standard also applies to child support and is extended to include the assets of a second wife in an ability to pay analysis. Silvia v. Silvia, 9 Mass. App. Ct., 330, 340, 400 N.E.2d 1330, 1331-32 (1980).

[37] 378 Mass. 206, 390 N.E.2d 733 (1979).

[38] *Id.* at 213, 390 N.E.2d at 737.

[39] Id. at 212, 390 N.E.2d at 735-36. The Krokyns divorced prior to the passage of Massachusetts General Laws chapter 208, § 34 (1975). *Id.* Property not in existence at the termination of the marriage cannot be subjected to property division. *See* Pare v. Pare, 409 Mass. 292, 297, 565 N.E.2d 1195, 1196-97 (1991) (allowing inclusion of post-separation increase in value only). In *Krokyn*, the Supreme Judicial Court held that a husband's interest in a marital home, held as tenants by the entirety with his present wife, was includable in order to satisfy an alimony arrearage despite his inability to alienate the interest. *Krokyn*, 378 Mass. at 212, 390 N.E.2d at 735-36.

[40] *See Krokyn*, 378 Mass. at 213, 390 N.E.2d at 737 (citing Howard v. Howard, 130 So. 2d 83, 85-86 (Fla. Dist. Ct. App. 1961)). In *Howard*, the Florida District Court of Appeals allowed the lower court to consider the residence of the obligor husband and his second wife, held as tenants by the entirety, as an includable asset for determining ability to pay. *Howard*, 130 So. 2d at 86; *cf.* Silvia, 9 Mass. App. Ct. at 340, 400 N.E.2d at 1332 (finding assets of second wife included in child support analysis).

[41] *Krokyn*, 378 Mass. at 213-14, 390 N.E.2d at 737.

[42] 382 Mass. 366, 416 N.E.2d 197 (1981).

[43] *Schuler*, 382 Mass. at 375, 416 N.E.2d at 204.

The probate court had included the proceeds from the obligor husband's sale of stock to the majority shareholder to determine that he had sufficient means to continue paying alimony, notwithstanding an involuntary job loss.[44] The couple's separation agreement included an executed provision for the distribution of any proceeds from the subsequent sale of this stock.[45] In holding that the remaining proceeds were subject to inclusion in the husband's ability to pay analysis, the Supreme Judicial Court affirmed a subsequent reallocation of the assets originally distributed by the separation agreement.[46]

The Massachusetts Appeals Court eventually ruled on a direct challenge to the redistributive effect of a modification order in *Hartog v. Hartog*.[47] Here, the court awarded the use of the marital home to the wife for two years, after which the parties were to sell the home and divide the proceeds.[48] Before the two year period expired, the wife petitioned to extend it for an additional eight years, and the probate court granted the petition.[49] The husband appealed the order as an impermissible modification of a court order which affected his interest in the property.[50] In upholding the trial court, the Appeals Court held that the occupancy period was in the nature of child support, and therefore could be modified.[51] The effect of this reclassification was two fold. First, it converted the time-value of this interest into child support, and second, it subjected the holders to risk of loss due to market fluctuations.[52] The second risk is borne equally by the parties, however, losing the potential use value of the proceeds for eight years still works a substantial hardship upon the obligor spouse because of the delay in receipt and a diminution in the value of the obligor's equitably divided share.

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[44] *Id.*

[45] *Schuler*, 382 Mass. at 369, 416 N.E.2d at 200. The separation agreement called for a distribution to the wife of ten percent of the net sale proceeds, which were paid over prior to this action. *Id.*

[46] *Schuler*, 382 Mass. at 369, 416 N.E.2d at 200.

[47] 27 Mass. App. Ct. 124, 125, 535 N.E.2d 239, 240 (1989).

[48] *Id.* at 125, 535 N.E.2d at 240.

[49] *Id.*

[50] *Id.* Under the terms of the division, as modified by the support order, the wife would receive a larger percentage of the sale proceeds in the event of a market decline from 1986 to 1996. *Id.* at 128, 535 N.E.2d at 242.

[51] *Id.* at 128-29, 535 N.E.2d at 242.

[52] *See* Hartog v. Hartog, 27 Mass. App. Ct. 124, 128, 535 N.E.2d 239, 242 (1989) (stating the fact that "the order affects the economic value of the husband's distribution is not determinative").

III. HEINS V. LEDIS

Heins v. Ledis involved a challenge to a property division and alimony awarded to the respondent-wife.[53] The only significant marital property was the marital home, which also housed the couples's veterinary practice.[54] The trial judge ordered the marital home conveyed to the husband, while requiring him to pay the wife $17,500 and assume the outstanding mortgage.[55] The order also required him to give his wife an interest-bearing note for $15,000, payable in three years, as a division of the veterinary practice.[56] Finally, the judge ordered alimony in the amount of $300 per week for a period of six years to reimburse the wife for sums she had invested in the property.[57] The husband appealed both the alimony award and property division, and the Supreme Judicial Court granted direct appellate review.[58] On appeal, the Supreme Judicial Court vacated the alimony provision, finding the award unsupported by the evidence and an abuse of discretion by the trial judge.[59] In doing so, the court held that reimbursement for financial contributions is not a proper basis for awarding alimony.[60]

IV. ANALYSIS

The holding in *Heins* prevents judges from using reimbursement as a

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[53] 422 Mass. 477, 479, 664 N.E.2d 10, 13 (1996).

[54] *Heins*, 422 Mass. at 479, 664 N.E.2d at 13. The trial court found that the husband, a veterinarian, ran the clinic while the wife made substantial investments in the house and equipment and also helped in its administration. *Id.* The award of attorney fees to the wife is not at issue. *Id.*

[55] *Heins*, 422 Mass. at 479-80, 664 N.E.2d at 13.

[56] *Id.*

[57] *Id.* at 479-80, 664 N.E.2d at 13. The total alimony award, if both parties survived for six years, would amount to $93,600, exclusive of property division. *Id.* The wife paid approximately $85,000 toward the house in a down payment and contributed time and money to the veterinary business. *Id.* The husband contributed approximately $22,000 to the purchase and renovation of the property. *Heins* 422 Mass. at 479-80, 664 N.E.2d at 13.

[58] *Id.* at 478, 664 N.E.2d at 12.

[59] *Id.* at 478, 664 N.E.2d at 12. The court invalidated provisions of the property division in addition to the alimony provision and remanded the case. *Id.* at 486, 664 N.E.2d at 18.

[60] Heins v. Ledis, 422 Mass. 477, 486, 664 N.E.2d 10, 18 (1996).

rationale for awarding alimony.[61] The court noted that the property subject to division is limited to marital property in existence at the time of trial.[62] As previously noted, however, the property that may be considered in awarding support is all of the property owned by, or potentially available to, the paying spouse.[63] While the *Heins* decision would seemingly reign in a probate judge's discretion, it does not prevent a court from first dividing the marital property and then factoring the property back into its consideration for a modification award.[64] *Heins* only relates to the stated reasons for awarding alimony, not the nature of what may be awarded.[65] Indeed, the "ledger approach" to asset allocation takes all property available to the obligor spouse into account, even if this property cannot be reached by the parties.[66] Reimbursement may still be employed as a

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[61] *Id.* at 486. *Heins* changes existing doctrine inasmuch as reimbursement alimony should only be employed where there is no property to equitably divide. *See id.* at 483, 664 N.E.2d at 13 (limiting holding to reimbursement rationale employed by trial judge).

[62] *Id.* at 483, 664 N.E.2d at 13.

[63] *See, e.g.*, Krokyn v. Krokyn, 378 Mass. 206, 210, 390 N.E.2d 733, 736 (1979) (including tenancy by the entirety interest held with second wife); Rice v. Rice, 372 Mass. 398, 401, 361 N.E.2d 1305, 1308 (1977) (including premarital property and gifts); Davidson v. Davidson, 19 Mass. App. Ct. 364, 369, 474 N.E.2d 1137, 1142 (including interest in trusts).

[64] *See Heins*, 422 Mass. at 484, 664 N.E.2d at 14 (holding probate court erred by excluding payee's property in statutory factor analysis).

[65] *Id.*

[66] *See, e.g., Krokyn*, 382 Mass. at 213-14, 390 N.E.2d at 737 (permitting consideration of husband's interest in home held as tenants by the entirety with second wife); Silvia v. Silvia, 9 Mass. App. Ct. 330, 340, 400 N.E.2d 1330, 1332 (1980) (approving consideration of second wife's assets for modification); *Davidson*, 19 Mass. App. Ct. at 369, 474 N.E.2d at 1143 (allowing consideration of trust interests). One of the major rationales for property division is that it seeks to end dealings between the parties and to make each spouse as self-sufficient as possible. Lee R. Russ, Annotation, DIVORCE - EQUITABLE DISTRIBUTION, 41 A.L.R. 4th 481 (1985). Because many assets do not lend themselves readily to division, the courts may use a "set-off" approach awarding whole assets to one party in consideration of other illiquid or liquid assets, or a combination of both. Rolde v. Rolde, 12 Mass. App. Ct. 398, 400, 425 N.E.2d 388, 389 (1981). The primary criticism of this approach is that assets of different characters behave differently and subject the parties to different risks. Hanify v. Hanify, 403 Mass. 184, 191, 526 N.E.2d 1056, 1062 (1968) (Liacos, J., concurring). Justice Liacos stated in dictum that "a final and equitable property division under Massachusetts General Laws chapter 208, section 34 should not be based on speculative assets." *Id.* This inequality in character, allocating a unique risk to only one party, forms one of the bases for the tension between property division and support where the property depreciates significantly, be it a business, pension, or residence, the risk is not equally allocated. *Id.; cf.* Dewan v. Dewan, 17 Mass. App. Ct. 97, 99, 455 N.E.2d 1236, 1239 (1983) (promulgating rules designed to mitigate risk in dividing pensions).

grounds for effecting a property division, thus the only limitation on reimbursement is the valuation of the husband's total estate at the commencement of the action.[67] Consequently, the court's holding regarding alimony merely directs the probate court to take a different road to the same destination, disregarding the important valuation question presented in the appeal.[68]

The *Heins* court chose to forego answering the appellant's contention that the valuation and redistributive effect of the trial court's decision improperly awarded the wife a sum in excess of the marital property's value.[69] As previously stated, there is no barrier or defense to re-distribution in the modification proceeding.[70] While the facts in *Heins* do not address this possibility, the reimbursement question along with the overlooked valuation question could arise when the movant who requests modification bases the need on the loss of part or all of the previously divided property.[71]

Generally, a spouse is barred from seeking modification where the changes

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[67] *Heins*, 422 Mass. at 484, 664 N.E.2d at 16. (citing Handrahan v. Handrahan, 28 Mass. App. Ct. 167, 170, 547 N.E.2d 1141, 1143 (1989)). Citing mootness, the *Heins* court declined to address the issue of making an award which would provide the wife with more money than she invested in the marital property despite a decline in its value. *Heins*, 422 Mass. at 487, 664 N.E.2d at 18. Here, the total value of the awards made to the wife totaled in excess of $126,000 while the court found her initial contribution was $85,000. *Id.* at 478-79, 664 N.E.2d at 13. The net effect of the "reimbursement" alimony allocates all of the unrealized loss to the husband while awarding the wife an artificial $41,000 profit, exclusive of any prior mortgage payments. *Id.*

[68] *See Heins*, 422 Mass. at 485-86, 664 N.E.2d at 17 (holding the appeal regarding valuation moot).

[69] *See Heins*, 422 Mass. at 488, 664 N.E.2d at 21 (pointing to apparent award to wife in excess of marital estate). By its own operation, a property division cannot award a value greater than the marital estate at the time of dissolution. *See* Pare v. Pare, 409 Mass. 292, 297, 565 N.E.2d 1195, 1199 (1991) (including increase in value during pendency of action); *cf.* Savides v. Savides, 400 Mass. 250, 252, 508 N.E.2d 617, 618 (1987) (holding adjustments to valuation at time of divorce permissible).

[70] *See* Kirtz v. Kirtz, 12 Mass. App. Ct. 141, 144, 421 N.E.2d 1270, 1272 (1981) (denying reconsideration of property division following allegations that husband understated asset values); Maze v. Mihalovich, 7 Mass. App. Ct. 323, 325, 387 N.E.2d 196, 198 (1979) (holding property division could be awarded where not previously adjudicated).

[71] *See* Churbuck v. Churbuck, 9 Mass. App. Ct. 464, 401 N.E.2d 893, 894 (1980) (allowing modification based on bank foreclosure on former marital home). In *Churbuck*, the mortgagee of the marital home, previously awarded to the wife, exercised an acceleration clause and foreclosed on the home. *Id.* The Appeals Court found that this was a material change in circumstances which warranted an award modification in the wife's favor. *Id.*

in circumstances are characterized as voluntary.[72] Courts have consistently recognized willful dissipation as a consideration in making divisions and alimony awards, in effect treating the spendthrift spouse as though they still possessed the value of the assets.[73] When, however, a spouse seeks relief from financial difficulty as a result of negligent conduct or a simple failure to insure against loss, there are no clear standards. Irrespective of how equitably divided assets are lost, alimony modification implicitly gives a negligent party the right of contribution from an ex-spouse simply by stating the necessary grounds for modification.[74] For example, a spouse in possession of a divided asset can routinely seek modification against their ex-spouse for a casualty loss irrespective of fault.[75] This reflects the evolving willingness of the courts to stretch the bounds of modification to include routine and foreseeable expenses.[76] As previously stated, there is no barrier to prevent a court from ordering additional alimony as a result of changed circumstances, irrespective of the reason for them.[77] The result is indistinguishable from an order that reconsiders the original property division and recalculates the formula, a recalculation that

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[72] *See* Tydings v. Tydings, 349 A.2d 462, 462 (D.C. 1975) (denying modification for reduction in income where spouse retires or resigns). *But see* Dennis v. Dennis, 29 Mass. App. Ct. 161, 165, 558 N.E.2d 991, 993 (1990) (reversing modification denied by trial court where wife spent sums on vacations, home improvements, and outstanding personal loans).

[73] *See* Pagar v. Pagar, 9 Mass. App. Ct. 1, 3, 397 N.E.2d 1293, 1295 (1980) (disallowing support where misuse of assets found); *cf.* Harris v. Harris, 23 Mass. App. Ct. 931, 933, 500 N.E.2d 1359, 1361 (1986) (declining to reinstate alimony where wife had deliberately foregone income production). *But see Dennis*, 29 Mass. App. Ct. at 165, 558 N.E.2d at 993 (allowing modification despite nonessential dissipation of assets).

[74] *Dennis*, 29 Mass. App. Ct. at 165, 558 N.E.2d at 993; *Churbuck*, 9 Mass. App. Ct. at 464, 401 N.E.2d at 893.

[75] *See* Furr v. Furr, 413 S.E.2d 72, 73 (Va. Ct. App. 1992) (reversing modification denial and trial court's finding that movant could have foreseen change in circumstances); *compare* Pagar v. Pagar, 9 Mass. App. Ct. 1, 3, 397 N.E.2d 1293, 1295 (1980) (disallowing support where misuse of assets found) *with Dennis*, 29 Mass. App. Ct. at 165, 558 N.E.2d at 993 (allowing modification despite asset dissipation).

[76] *Furr*, 413 S.E.2d at 74-75. The *Furr* court overturned a lower court decision that denied modification to a petitioner where the petitioner could have foreseen the need for automobile expenses. *Id.*

[77] *See, e.g.*, Schuler v. Schuler, 382 Mass. 366, 370, 416 N.E.2d 197, 199; Krokyn v. Krokyn, 378 Mass. 206, 210, 390 N.E.2d 733, 737; Kirtz v. Kirtz, , 12 Mass. App. Ct. 141, 146, 421 N.E.2d 1270, 1273 (1981). The "public charge" test may be employed to indemnify a recipient spouse for dissipating their marital estate. *See* Knox v. Remick, 371 Mass. 433, 437, 358 N.E.2d 432, 436 (1976) (holding judge may invalidate an agreement in order to prevent a spouse from becoming a public charge).

is prohibited on its face, but allowable under alimony modification.[78] Thus, the courts may interpret *Heins* as supporting the proposition that the label attached to the order should conform to the statutory criteria irrespective of the redistributive effect it has on previously divided property.

Additionally, subsequent support orders or alimony modifications can still be predicated on reimbursement because the *Heins* opinion only applies to initial support orders.[79] The development of equitable distribution in Massachusetts suggests that *Heins* will not bar retroactive reimbursement through an alimony order because the Supreme Judicial Court narrowly construes decisions bearing on obligors' rights.[80] While the court discussed the prospect of an obligor's dwindling estate, overall the court has consistently expanded the base of property interests subject to the statute.[81]

Additionally, *Heins* and its companion cases may have the unintended effect of reviving attempts to discharge obligations in bankruptcy. The court's opinion states that probate judges should not "blur the distinction between alimony and property division."[82] Where the obligation is a property division, both in name and substance, it may be discharged in bankruptcy proceedings.[83]

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[78] *See* Belsky v. Belsky, 9 Mass. App. Ct. 852, 853, 400 N.E.2d 878, 880 (1980) (holding future change in pension values a material change in circumstances); Hay v. Cloutier, 389 Mass. 248, 252-53, 449 N.E.2d 361, 364 (1983) (allowing alimony where property division opportunity had lapsed).

[79] *Cf.* Hartog v. Hartog, 27 Mass. App. Ct. 124, 128, 535 N.E.2d 239, 242 (1989) (holding occupation of home distinguishable as support rather than divided interest).

[80] *See* Hanify v. Hanify, 403 Mass. 184, 187, 526 N.E.2d 1056, 1059 (holding ripened damages in tort actions included); *Belsky*, 9 Mass. App. Ct. at 853, 400 N.E.2d at 880 (holding interest in future inheritance included).

[81] *Compare* Heins v. Ledis, 422 Mass. 477, 486, 664 N.E.2d 10, 17-18 (1996) (refusing to address valuation issue) *with Schuler*, 382 Mass. at 375, 416 N.E.2d at 204 (finding husband not impoverished) *and* Davidson v. Davidson, 19 Mass. App. Ct. 364, 366, 477 N.E.2d 1137, 1141-42 (1985) (noting prior interpretations of law to limit defenses by obligor spouses).

[82] *Heins*, 422 Mass. at 480, 664 N.E.2d at 13 (citing Inker, *supra* note 2, at 11).

[83] 11 U.S.C. § 523(a)(5). The statute states, in pertinent part, "A discharge . . . does not discharge an individual debtor for any debt . . . to a spouse, former spouse or child of the debtor for *alimony to, maintenance for or support of* such spouse or child" (emphasis added). *Id.*

State courts cannot alter discharges because of constitutional limitations and the automatic stay provisions of the Bankruptcy Code. *See, e.g.*, Abram v. Burg, 367 Mass. 617, 327 N.E.2d 745, 746-47 (1975) (holding unsatisfied obligations dischargeable if not for support or maintenance); LaFleur v. LaFleur, 11 B.R. 26, 28 (Bankr. D. Mass. 1981) (holding discharging debt owed to former mother-in-law as support law only covered former spouses); Plotski v. Tunny, 44 B.R. 911, 913-14 (Bankr. D. N.H. 1984) (construing second mortgage to be support and thus non-dischargeable).

The obligee spouse must return to the probate court and petition for initial or modified support in order to replace discharged debts.[84] The dicta in *Heins* could be employed to challenge support orders which are thinly veiled reimpositions of discharged debts where there is no required showing of changed circumstances.[85] This argument is without force, however, as the courts will likely limit *Heins* to prevent this result.

In other jurisdictions, divorce courts have reimposed the debts discharged in bankruptcy as non-dischargeable alimony.[86] Massachusetts has not ruled directly on this issue, however as an issue of first impression, the Supreme Judicial Court will likely limit *Heins* and follow these other jurisdictions by allowing modification actions after a successful bankruptcy discharge.[87]

Often, debts imposed by trial courts are installment debts between spouses with the obligee comparable to an unsecured creditor. *See Plotski*, 44 B.R. at 911. Some state courts will reclassify the debts as alimony. *See* Siragusa v. Siragusa, 108 Nev. 987, 995, 843 P.2d 807, 812 (1992) (upholding a lower court finding that a master could properly consider the discharge of a property division liability in modifying alimony). The *Siragusa* court rejected the premise that state courts were reimposing the same debts that the federal court had discharged in bankruptcy, focusing instead on the improved financial position of the discharged debtor husband. *See Siragusa*, 108 Nev. at 996, 843 P.2d at 813 (finding alimony modification was new debt imposed by the state in their capacity to regulate marital relations).

The rationale for modification is predicated on the improved finances of the discharged debtor. *Siragusa*, 108 Nev. at 995, 843 P.2d at 812. It should be noted, however, that the discharged debts were often payable to, or on behalf of, the ex-spouse, thus creating a corresponding "change in circumstances." *Cf.* Welford v. Nobrega, 30 Mass. App. Ct. 92, 100-01, 565 N.E.2d 1239, 1244 (1991) (refusing to extend this rationale to lottery winnings held jointly with another).

[84] Albin v. Albin, 591 F.2d 94, 96-7 (9th Cir. 1979); *Plotski*, 44 B.R. at 913-14. *See generally* Singer, *supra*, note 4, at 93-97. Increasingly, the bankruptcy courts look past orders to the nature of the obligation and refuse to discharge orders in the nature of support. *See* Darrel Olidge, *Divorce Liens under Section 522(f) of the Federal Bankruptcy Code: Resolving Tensions between Family and Bankruptcy Law*, 67 N.Y.U. L. REV. 879, 885 (Oct. 1992) (discussing judicial interpretation of equitable distribution orders in bankruptcy proceedings); *accord* Sinewitz v. Sinewitz, 166 B.R. 786, 788 (D. Mass. 1994).

[85] *Heins*, 422 Mass. at 484, 664 N.E.2d at 16.

[86] *See Plotski*, 44 B.R. at 913-14; *Siragusa*, 108 Nev. at 995, 843 P.2d at 812 (analyzing the reimposition of property divisions via alimony after discharge).

[87] *Compare Churbuck*, 9 Mass. App. Ct. at 468, 401 N.E.2d at 894 *with Siragusa*, 108 Nev. at 996, 843 P.2d at 813 (distinguishing discharged debt and new obligation); *cf. Brash*, 407 Mass. at 107, 551 N.E.2d at 527 (refusing to apply the automatic stay provision of Mass. R. Dom. Rel. P. 62(d) to attorney's fees awarded to wife). Note that the 1994 revisions to the Bankruptcy Code did include property divisions as non-dischargeable debts under certain conditions. 11 U.S.C. § 523(a)(15).

V. CONCLUSION

The concept of finality in dissolution cases is a legal fiction that cannot be maintained in light of the conflicting equitable considerations employed by the courts interpreting the Massachusetts equitable distribution statute. Judges use wide discretion to make redistributive awards that are unassailable when the accepted statutory findings have been made. The *Heins* decision, notwithstanding its apparent departure from precedent, does nothing to impede redistribution of divided assets. It is, at best, a "speed bump" for probate judges looking to redistribute a wealthier spouse's estate.

Looking forward, economic uncertainties will make the flexibility and tax benefit of alimony payments attractive to payor spouses. These payor spouses will not want to be locked into an onerous property settlement only to see their share further eroded by subsequent modification orders. Previously, the payor's only defense to repeated redistributions was bankruptcy, however, the 1994 revisions to the Bankruptcy Code and the aggressive expansion of the "changed circumstances" doctrine have foreclosed this avenue. These spouses may instead elect to make larger alimony payments and preserve the modification option for themselves in the event of financial difficulties.[88] While the courts consistently find reasons to avoid downward modifications, they will inevitably become bound by their own precedents and will have to make them in some cases or risk a charge of gender bias. Consequently, property division has gone from a concept that promised to liberate the parties from each other to one that makes continued economic ties more attractive and litigation more prevalent. In this sense the Massachusetts equitable distribution statute cannot meet its primary objective unless the courts return some stability to the post-marital ownership picture. While the *Heins* court successfully established a minor boundary in alimony jurisprudence, it also drew the map that future judges and litigants will use to circumvent it.

Michael J. DelTergo

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[88] *Cf.* Rosenberg v. Rosenberg, 33 Mass. App. Ct. 903, 905, 595 N.E.2d 792, 794 (1992) (noting tax benefits and flexibility as rationales for awarding alimony).