

1-1-1999

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Recommended Citation

4 Suffolk J. Trial & App. Advoc. 143 (1999)

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EQUITABLE DIVISION OF SEPARATE PROPERTY IN MASSACHUSETTS: A BROAD GRANT OF DISCRETION TO JUDGES OR NO DISCRETION AT ALL?

*"(Massachusetts General Laws chapter 208 section 34) does not call for a division of marital property in accordance with how title is held; nor does it call for an equal distribution of property. Section 34 calls for an equitable distribution ... [B]ecause the facts of each case are unique, complete uniformity is impossible to achieve and undesirable. However, predictability and consistency in approach are helpful to counsel and parties in understanding the decision making process of a judge and thereby assisting them in settling their cases."*¹

I. INTRODUCTION

Upon a divorce, the court faces the task of sorting out the property rights of the former spouses.² One major approach dealing with property division upon a divorce is the community property approach, which eight states currently utilize.³ Under this approach, states recognize that each spouse acquires a present, vested, undivided, and equal interest in the property acquired by either or both parties during the marriage.⁴ Such marital property is divided equally upon a divorce in community property jurisdictions.⁵

¹ Hon. Edward M. Ginsburg, *M.G.L. c. 208, § 34 - Some Observations About the Division of Property Leading To Predictability And Consistency*, 25 BOSTON BAR J. 10, 10 (Jan. 1981).

² See HOMER H. CLARK AND CAROL GLOWINSKY, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 785-92 (4th ed. 1990) (discussing court's role in determining property rights of husband and wife in divorce proceedings).

³ See *id.* at 788 (explaining the manner in which such a regime distributes property). Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington are the states maintaining this type of property division statute. *Id.*

⁴ See *id.* at 788 (describing how property is recognized in community property approach).

⁵ See *id.* (explaining how this type of regime divides property).

A second major approach to property division upon a divorce is commonly known as equitable distribution and is employed by the remaining forty-two states.⁶ Jurisdictions adopting such an approach are granted the power to equitably divide, distribute, and assign property upon a divorce.⁷ The majority of the states following the equitable distribution approach incorporate only marital property into property division.⁸ Massachusetts is one of the minority of equitable distribution states adopting a statute which empowers a court to erase the distinction between marital and separate property and include both in equitable property divisions as it deems necessary.⁹

This note will examine the history of Massachusetts General Law ("Mass. Gen. Laws") chapter 208, § 34 and will analyze the case law applying and interpreting this minority rule statute. Such examination will illustrate how the pattern of predictability and consistency in both approach and result existing in the Massachusetts court decisions interpreting the statute in order to determine what constitutes an equitable division of separate property arose.

Part II of the note will examine the statute and its history. Part III will analyze the early legal applications of the amended statute and the additional procedural requirements and safeguards that developed through case law. Part IV will examine more recent case law dealing with the equitable division of separate property under the amended statute. Part V of the note will discuss the emerging trend that commentators and legal scholars suggest is arising in Massachusetts's courts. Finally, Part VI concludes by stating that the statute's in-

⁶ See *id.* at 785-86 (discussing method of division utilized by majority of states)

⁷ See CLARK AND GLOWINSKY, *supra* note 2, at 785-786 (setting forth scope of court's powers in such jurisdictions).

⁸ See *id.* at 786 (discussing the types of property division statutes existing throughout country). These states classify property as either marital or separate and authorize the courts to assign to each party their separate property and to include only the marital property in the equitable division between the spouses. *Id.*

⁹ See MASS. GEN. LAWS. ch. 208, § 34 (1990)(providing that the court "may assign to either husband or wife all or any part of the estate of the other").

creased procedural requirements have chipped away at the broad discretion granted to trial judges in 1974 and have produced the pattern of predictability and consistency that has seemingly arisen in Massachusetts.

II. HISTORY

On July 19, 1974, Massachusetts clearly recognized the concept of marriage as a partnership by empowering its courts to equitably divide spouses' property upon divorce.¹⁰ Prior to 1974, Massachusetts's courts did not possess the power to create a fair and just property assignment or division upon divorce.¹¹ Chapter 565 of the Massachusetts Acts and Resolves of 1974¹² amended the earlier version of § 34 of Mass. Gen. Laws, chapter 208,¹³ and extended broad discretion to probate judges to create equitable property divisions upon a divorce.¹⁴

In designing the amended statute, Massachusetts sought to bestow upon the Probate and Superior Courts the ability and power to

¹⁰ See Monroe L. Inker et al., *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 10 SUFFOLK U. L. REV. 1 (1975)(discussing the passage of amended § 34 of MASS. GEN. LAWS, chapter 208)

¹¹ See *id.* (stating that proposed statute would empower courts to divide all property of spouses upon divorce).

¹² 1974 Mass Acts 574.

¹³ See *Bianco v. Bianco*, 371 Mass. 420, n.1, 358 N.E.2d 243, n.1 (1976)(interpreting for the first time the statute's amended § 34). The footnote provides the language of the statute both prior to amendment and after the passage of Chapter 565. *Id.* Prior to 1974, § 34 read: "upon a divorce, or upon petition at any time after a divorce, the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband." *Id.*

¹⁴ See *Rice v. Rice*, 372 Mass. 398, 401, 361 N.E.2d 1305, 1307 (1977)(describing the grant of broad discretion to trial judges under the amended § 34). The court stated that such discretion was "necessary in order that courts can handle the myriad of different fact situations which surround divorces and arrive at a fair financial settlement in each case." *Id.*

completely dispose of all the litigants' marital and separate property.¹⁵ The proposed revision would empower courts to divide all property in a manner that would recognize the parties' respective contributions to the marital partnership.¹⁶ The amended statute's eventual passage achieved that goal by presenting the Commonwealth's trial judges with very broad discretion regarding the division of any and all of the spouses' property upon the marriage's dissolution.¹⁷

The amended statute mandated that judges exercise their new discretionary power to create a fair and equitable division of property with due regard to the fourteen mandatory factors listed in the statute.¹⁸ The weight to be given to each of the mandatory factors was left within the judge's broad discretion and the judge would not be

¹⁵ See *Bianco*, 371 Mass. at 422, 358 N.E.2d at 245 (explaining rationale behind Massachusetts' passage of § 34's amended version); see also *Rice*, 372 Mass. at 401, 361 N.E.2d at 1307 (1977)(discussing the powers which the amended § 34 bestows upon trial courts). The case states that the purpose of § 34 is "to empower the courts to deal broadly with property and its equitable division incident to a divorce proceeding." *Id.*

¹⁶ See, e.g., *Savides v. Savides*, 400 Mass. 250, 253, 508 N.E.2d 617, 619 (1987)(stating "the equitable factors . . . reflect a view of marriage as an implied partnership"); *Harris v. Harris*, 26 Mass. App. Ct. 1004, 530 N.E.2d 368, 369 (1988)(stating purpose is "to recognize and equitably recompense parties' respective contributions to the marital partnership"); *Putnam v. Putnam*, 5 Mass. App. Ct. 10, 17, 358 N.E.2d 837, 842 (1977)(interpreting amended statute as applying to value of all contributions of spouses to marital enterprise).

¹⁷ See *Inker*, *supra* note 10 (discussing Massachusetts' passage of Mass. Gen. Laws, chapter 208, amended § 34); see also *Monroe Inker et al., Alimony and Assignment of Property: A Survey of the Last Decade of Massachusetts Law*, 26 SUFFOLK U. L. REV. 21, 22-23 (1992) (reviewing the impact and effects of the passage of the amended § 34).

¹⁸ MASS. GEN. LAWS. ch. 208, § 34 (1990). The statute reads in part, the court shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income.

Id.

required to follow any specific formula in fashioning an equitable judgment.¹⁹ In addition to the mandatory factors enumerated in the statute, the revised section 34 also listed several discretionary factors that the courts are entitled, but not mandated, to consider to create a fair and equitable division of property.²⁰

In 1974, the amended § 34 guaranteed very little.²¹ Essentially, the revised statute only guaranteed that trial judges would now have the broad power and discretion to distribute all property upon a divorce, regardless of how the parties acquired title.²² Only time and case law could determine how the courts would apply the amended statute to achieve its goals, to monitor the exercise of the trial judge's broad discretion to include and divide separate property, and to create patterns of consistency and predictability in results.

III. THE EARLY LEGAL APPLICATIONS OF § 34

In 1977, the Supreme Judicial Court of Massachusetts ("SJC") made its first attempt to add consistency and structure to a § 34 property division. In *King v. King*,²³ the SJC commenced its effort to control the broad discretion granted to trial judges under the statute, holding in part that a judge making a Mass. Gen. Laws chapter 208 §

¹⁹ See, e.g., *Harris*, 26 Mass. App. Ct. at 1005, 530 N.E.2d at 369 (discussing broad discretion which amended § 34 confers on trial judges); *Cabot v. Cabot*, 18 Mass. App. Ct. 903, 905, 462 N.E.2d 1128, 1130 (1984) (reiterating the discretionary power a judge possesses under the amended § 34); *Caldwell v. Caldwell*, 17 Mass. App. Ct. 1032, 1035, 461 N.E.2d 834, 835 (1984) (stressing the judge's broad discretion to make determinations and awards under amended § 34).

²⁰ MASS. GEN. LAWS. ch. 208, § 34 (1990). The statute reads in part, "the court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit." *Id.*

²¹ See *Inker*, *supra* note 10, at 6 (discussing "broad and expansive powers" which courts were now armed with).

²² See *Inker*, *supra* note 10, at 6 (distinguishing new power under amended § 34 from pre-existing powers).

²³ 373 Mass. 37, 364 N.E.2d 1218 (1977).

34 property division would now be required to make findings of fact that show that she weighed all of the statutory factors in reaching her decision.²⁴ The court emphasized the importance of such findings as an aid to review whether or not the judge considered each of the mandatory factors.²⁵ More importantly, the court, for the first time, explicitly stated the absolute requirement that a judge dividing property pursuant to § 34 make such findings of fact on each of the mandatory and, if considered, discretionary factors set out in the statute in his decision.²⁶

In *Redding v. Redding*,²⁷ the SJC continued its attempt to limit the broad discretion of trial judges and to produce some level of consistency in application and results in Mass. Gen. Laws chapter 208, § 34 cases. In *Redding*, the SJC explicitly enumerated a second requirement in all Mass. Gen. Laws § 34 decisions made by trial judges.²⁸ Earlier § 34 cases suggested this requirement, but never explicitly ordered its implementation.²⁹ This requirement mandated that the rationale for the trial judge's decision now appear in the findings

²⁴ See *id.* at 40, 364 N.E.2d at 1220 (mandating that judges indicate their findings on record).

²⁵ See *id.* (stating the rationale for such a requirement in § 34 cases)

²⁶ *Id.* But see Monroe Inker et al., *Alimony and Assignment of Property: A Survey of the Last Decade of Massachusetts Law*, 26 SUFFOLK U. L. REV. 21, 47 (1992) (discussing 1984 amendment to Rule 52(a) which now requires findings only when appeal is filed). The legislative intent behind this amendment was to alleviate the burden placed on probate judges by the King mandate. *Id.* Now, findings of fact would be required only if a notice of appeal was filed. *Id.* If no appeal is filed, the probate judge need not make such detailed findings. *Id.*

²⁷ 398 Mass. 102, 495 N.E.2d 297 (1986).

²⁸ See *id.* at 108, 495 N.E.2d at 301 (placing a second mandate on trial judges in § 34 cases).

²⁹ See, e.g., *Bianco v. Bianco*, 371 Mass. 420, 423, 358 N.E.2d 243, 245, 246 (suggesting "it would be well in future decisions" for judge to frame more careful findings); *Putnam v. Putnam*, 5 Mass. App. Ct. 10, 17, 358 N.E.2d 837, 842 (1977) (stating rationale does not appear either explicitly or by clear implication); *Mancuso v. Mancuso*, 12 Mass. App. Ct. 973, 975, 428 N.E.2d 339, 341 (1981) (suggesting prompt attention be paid to preparation of mandatory findings to provide explanation to parties).

and rulings in all cases involving the application of the statute to create a fair and equitable property division.³⁰ No longer would a mere listing of findings be sufficient to support a judgment pursuant to the statute.³¹ This requirement ordered a trial judge to consider and explain the effect of any important fact on her decision-making process, or suffer potential reversal on appeal.³²

In *Bowring v Reid*,³³ the SJC reiterated this second procedural requirement, mandating that the reasoning guiding the trial judge's decision appear in the judgment either explicitly or by clear implication.³⁴ In addition to explicitly restating this second requirement placed on trial judges below, the SJC added a further safeguard against the abuse of the trial judge's broad discretion under the statute.³⁵ This limitation embodied a two-step appellate review of judgments made pursuant to Mass. Gen. Laws chapter 208 § 34 by a trial judge.³⁶ Appellate courts could utilize this two-prong test to reverse

³⁰ See *Redding*, 398 Mass. at 108, 495 N.E.2d at 301 (explaining this second requirement which trial judges faced).

³¹ See Monroe L. Inker and Margot Ames Clower, *Towards A New Justice In Marital Dissolution: The Massachusetts Statutory Scheme and Due Process Analysis*, 16 SUFFOLK U. L. REV. 907, 925 (1982) (discussing mandate for required findings as "badge of personal analysis" by trial judge).

³² See *Redding*, 398 Mass. at 108, 495 N.E.2d at 301 (describing requirement that trial judges place rationale on record as well).

³³ 399 Mass. 265, 503 N.E.2d 966 (1987).

³⁴ See *id.* at 267-68, 503 N.E.2d at 968 (restating clearly what was ordered in earlier § 34 cases).

³⁵ See *id.* (describing the second procedural safeguard now mandated in § 34 property division cases).

³⁶ See *id.* (explaining appellate review process to be utilized upon property division). The two-step analysis essentially serves to confirm that the two procedural requirements set out in earlier cases have been met in the judgment of the judge below. *Id.* The first step in the review calls for an examination of the judge's findings to determine whether all relevant factors under Mass. Gen. Laws, chapter 208, § 34 (the fourteen mandatory factors which the judge must consider and the four discretionary factors which the judge may consider) were considered, and whether the judge impermissibly considered any factors not enumerated in the statute. *Bowring*, 399 Mass. at 267-68, 503 N.E.2d at 968.

a property division judgment below only if after careful analysis and review, the appellate court determined that the judgment was plainly wrong and excessive.³⁷

IV. WHAT CONSTITUTES AN EQUITABLE DIVISION?

The earlier decisions cited played an integral role in providing the amended § 34 with the procedural structure it lacked upon its passage in 1974.³⁸ This section will examine several cases that have utilized the amended statute in equitable divisions involving separate property and will begin to illustrate the effect of these additional procedural safeguards on the results of future cases.

In *Bacon v. Bacon*,³⁹ the Massachusetts Appeals Court affirmed a property division made in the trial court that substantially favored the wife.⁴⁰ The court determined that the trial judge properly considered all the statutory factors and clearly stated the rationale for the decision in the judgment below.⁴¹ The trial judge included in the property division various assets that the wife held in her own name, as well as

The second step is to determine whether the reasons and rationale for the judge's conclusions are apparent in her findings and rulings. *Id.*

³⁷ See *id.* at 267, 503 N.E.2d at 968 (laying out standard which appellate court judges should apply when utilizing review process).

³⁸ See *id.* at 267, 503 N.E.2d at 968 (placing significant limits on broad discretion guaranteed to trial judges by statute in 1974).

³⁹ 26 Mass. App. Ct. 117, 524 N.E.2d 401 (1988).

⁴⁰ See *id.* at 117, 524 N.E.2d at 401 (discussing court's holding after applying appellate review process). The court allowed the wife to retain the bulk of her financial estate, an estate she acquired through a family trust created prior to marriage. *Id.* at 119, 524 N.E.2d at 402. The court also ordered the husband to convey to the wife his interest in the marital home, which was purchased primarily with the wife's funds. *Id.* The court ordered the wife to pay the husband \$200,000 and \$20,000 in attorney's fees and was ordered to assume financial support of the minor children to the marriage. *Id.*

⁴¹ See *Bacon*, 26 Mass. App. Ct. at 120-21, 524 N.E.2d at 403 (stating reason behind court's decision to affirm trial judge's order).

the jointly owned marital home.⁴² The wife acquired her separate property assets through gifts and family inheritance.⁴³

Aside from the separate and marital property's source, the judge took into consideration various other factors in her attempt to achieve substantial justice through the property division.⁴⁴ In *Bacon*, the marriage was of medium length, ending after twelve years.⁴⁵ The findings indicated that the husband was abusive to the wife early in the marriage.⁴⁶ The court also found that the husband worked occasionally during the marriage, but that he used the money for his own purposes and relied on the wife's funds to support the family.⁴⁷ The court considered additional items indicating the husband's lack of contribution to the marital partnership as well.⁴⁸ The findings indicated that the husband took a substantial sum of money from the family checking account prior to leaving the marriage and that he shouldered no significant responsibility for his children's financial support.⁴⁹ Finally, the court found that the husband was very capable of supporting himself adequately at that present time as well as in the future.⁵⁰ Al-

⁴² See *id.* at 118, 524 N.E.2d at 401 (listing assets of wife included in order by trial judge below).

⁴³ See *id.* (explaining how wife acquired her assets, valued at \$3,020,552).

⁴⁴ *Id.* at 119, 524 N.E.2d at 402 (1988).

⁴⁵ See *id.* at 120, 524 N.E.2d at 403 (reviewing time period during which parties were married).

⁴⁶ See *Bacon*, 26 Mass. App. Ct. at 120-21, 524 N.E.2d at 403 (setting forth aspects of relationship between parties in case)

⁴⁷ See *id.* (discussing husband's minimal financial contributions to marriage).

⁴⁸ See *id.* (highlighting the remainder of items which judge took into consideration in findings).

⁴⁹ See *id.* (continuing discussion of husband's failure to contribute financially to marriage). The court listed in its findings that the husband had taken \$34,000 from the family checking account prior to the dissolution of the marriage. *Id.*

⁵⁰ See *Bacon*, 26 Mass. App. Ct. at 120-21, 524 N.E.2d at 403 (describing husband's apparent ability to survive financially on his own without aid of wife's assets). The court found that the husband maintained a position as an assistant dean at Harvard University which allowed him to support himself adequately

though the husband desired a new division to avoid any loss in his standard of living, the appeals court affirmed the trial judge's division because it reflected an attempt to create an equitable, rather than equal, division based on findings of contributions, entitlement, and realistic needs.⁵¹

In *Comins v. Comins*,⁵² the Massachusetts Appeals Court dealt with a different scenario when it affirmed the trial court's decision ordering the wife to transfer her interest in the marital home and to pay moneys from her separate personal estate to her husband.⁵³ Again, the appellate court affirmed only after determining that the trial judge's findings indicated that she considered all relevant factors set forth in the statute and that her reasoning for the conclusion was apparent in those findings.⁵⁴

In *Comins*, the court dealt with a lengthy, forty-eight year marriage.⁵⁵ At the time of the trial judge's property division, the husband and wife were seventy-six years old and seventy-five years old respectively, were in good health, and had no minor children.⁵⁶ The property division left the husband with net assets amounting to ap-

(\$38,400 per annum) and which carried retirement benefits. The husband was living rent free in a two-bedroom apartment by virtue of a tutor position he had taken as well. *Id.*

⁵¹ See *id.* at 121, 524 N.E.2d at 403 (summarizing rationale of appellate court's holding).

⁵² 33 Mass. App. Ct. 28, 595 N.E.2d 804 (1992).

⁵³ See *id.* at 28-29, 595 N.E.2d at 805 (explaining holding of appellate court dealing with property division below). The court included as part of the marital estate the wife's interest in a trust (\$200,000) settled and funded by the wife's father after finding that she "had a present, enforceable, equitable right to the use of the trust property for her benefit." *Id.* at 31, 595 N.E.2d at 806.

⁵⁴ See *id.* (indicating that all procedural requirements were met by judge below). The court stated, "In our view, the 'clear implication[s]' of the judge's findings are sufficient to support the asset division ordered." *Id.*

⁵⁵ See *Comins*, 33 Mass. App. Ct. at 28, 595 N.E.2d at 805 (explaining the length of time parties to case were married).

⁵⁶ See *id.* at 29, 595 N.E.2d at 805 (summarizing couple's respective situations and circumstances at time of property division).

proximately forty-four percent of the marital estate, while the court awarded the wife fifty-six percent of the same estate.⁵⁷

The required findings indicated that the parties to this lengthy marriage enjoyed a mutually satisfying relationship and that both husband and wife contributed to the marital estate, despite the fact that it was the wife's separate trust property that was responsible for allowing the couple to maintain their level of life-style and financial success.⁵⁸ Faced with these facts, the appellate court affirmed the lower court decision awarding a portion of the wife's separate property to the husband.⁵⁹ The court achieved the goal of a Mass. Gen. Laws chapter 208 § 34 property division by affirming and recognizing the elderly husband's contribution to the marital partnership.⁶⁰

In *Denninger v. Denninger*,⁶¹ the Massachusetts appeals court again dealt with a review of a division of separate property, holding that it was error for the trial judge to award the husband only fifteen percent of the parties' marital assets and that the judge gave exces-

⁵⁷ See *id.* at 28, 595 N.E.2d at 805 (explaining rationale of court for ordering this percentage split for respective parties). The court reasoned that "[s]ince gifts from the wife's family were largely responsible for permitting the couple to enjoy a high standard of living during their marriage and to acquire the capital assets which they possessed at the time of their divorce," the wife was entitled to a larger share of the property division. *Id.* at 29-30.

⁵⁸ See *id.* at 29, 595 N.E.2d at 805 (distinguishing facts of this case from facts found by court in *Bacon*). While the trust did enhance the standard of living of both parties, it also permitted both husband and wife to direct and contribute their other marital assets to maintaining the high standard of living to which they became accustomed. *Id.*

⁵⁹ See *Comins*, 33 Mass. App. Ct. at 32, 595 N.E.2d at 807 (discussing rationale of appellate court in awarding portion of wife's assets to husband).

⁶⁰ See *id.* at 32-33, 595 N.E.2d at 806-07 (explaining chief aim of all property divisions under § 34). The court stated, "[t]he judge seems to have appreciated that 'the underpinning of any order for division of property under section 34 is . . . consideration of the contributions, in the statutory terms, of each spouse, as well as any other factors in existence at the dissolution of the partnership which have been traditionally applied in determining alimony.'" *Id.*

⁶¹ 34 Mass. App. Ct. 429, 612 N.E.2d 262 (1993).

sive weight to the original source of the parties' respective assets.⁶² The court held that the award below did not meet the requirements set forth in the two-step method of review laid out in the *Bowring* case.⁶³

The marriage in this case was long-term, spanning twenty-seven years.⁶⁴ At the time of the divorce, the husband was seventy-one years old and was suffering from failing health and illness that required surgery, while the wife was fifty-five years old and fairly healthy.⁶⁵ The findings indicated that during the majority of the marriage, the husband worked as a commission salesman.⁶⁶ The court also indicated that the husband placed all portions of this modest income into a joint bank account established solely to support the family.⁶⁷

Throughout the marriage, the couple and their children enjoyed a standard of living higher than the husband's income alone could have

⁶² See *id.* at 430, 612 N.E.2d at 263 (setting forth scope of court's review in particular case). The court determined that due to the circumstances existing surrounding the marriage and the future of the parties, the division of property made below could not stand as it failed to allocate assets (consisting primarily of gifts provided by the wife's family) in a manner which would allow each party to sustain the standard of living each became accustomed to during their marriage. *Id.*

⁶³ See *id.* (summarizing holding of appeals court after review of property division below). The court held that the judge below gave excessive weight to the original source of the assets, and that the husband was disadvantaged by a judge's decision below which does not flow rationally from the findings made by that judge. *Id.* at 431, 612 N.E.2d at 264.

⁶⁴ See *Denninger*, 34 Mass. App. Ct. at 431, 612 N.E.2d at 264 (pointing to length of time parties to case were married).

⁶⁵ See *id.* at 432, 612 N.E.2d at 264-65 (outlining parties' situation at time of divorce proceedings).

⁶⁶ See *id.* at 431, 612 N.E.2d at 264 (stating husband's occupation and income during period of marriage). The husband's earnings ran from \$30,000 to \$40,000 each year. *Id.*

⁶⁷ See *id.* (acknowledging husband's contribution to family during period of marriage).

achieved.⁶⁸ This was in large part due to the financial support of the wife's family.⁶⁹ The court certainly took notice of this fact, but distinguished the case's facts from the findings detailed in the *Bacon* judgment and made its decision with due regard to the remaining factors listed in the trial court's findings.⁷⁰ Due to the marriage's length, the husband's consistent contribution to the marital estate, and the fact that the husband's ability to earn income was on a downward curve, the court reversed the financial components of the divorce judgment.⁷¹

In *Zeh v. Zeh*,⁷² the appellate court held that the trial judge did not properly consider the husband's inheritance as part of the divisible marital estate, and also erred in not considering her contributions to the marriage in dividing their assets.⁷³ As a result of this error below,

⁶⁸ See *Denninger*, 34 Mass. App. Ct. at 431, 612 N.E.2d at 264 (discussing financial level at which family lived during the parties' marriage).

⁶⁹ See *id.* (explaining how family maintained their standard of living). The support ranged from financial support to advice and decision making involving finances and household management. *Id.*

⁷⁰ See *id.* at 432-33, 612 N.E.2d at 265 (distinguishing facts of this case from facts of earlier cases). In deciding that the property division below was "off-target," the court relied on the judge's findings, which stated that "[D]ay in and day out, for twenty plus years, the [husband] contributed all of the [husband's] financial resources to the family and ... neither sought nor desired (nor indeed took personal advantage of) the financial involvement of the wife's family." *Id.*

⁷¹ See *Denninger*, 34 Mass. App. Ct. at 433, 612 N.E.2d at 265 (summarizing rationale behind court's decision to reverse trial judge's order). The court recognized that in an equitable property division jurisdiction, as Massachusetts is, financial parity is not the goal of such a division. *Id.* Despite this fact, the court stated "the comparison of the comfortable financial security of the wife with the fragile financial status of the husband is too stark to accept the apportionment of assets as conformable with cases which require an attempt to sustain the mode and level of living during the marriage." *Id.*

⁷² 35 Mass. App. Ct. 260, 618 N.E.2d 1376 (1993).

⁷³ See *id.* at 260, 618 N.E.2d at 1377 (highlighting essential holding of court of appeals).

the appellate court vacated the financial component of the judgment and remanded the case to the trial court.⁷⁴

Zeh involved another lengthy marriage.⁷⁵ At the time of the divorce proceedings, there were no minor children to consider.⁷⁶ The wife was fifty-two years old, while the husband was fifty-six years old and both were relatively healthy.⁷⁷ The findings below indicated that both parties maintained employment during the marriage and contributed financially to the marriage.⁷⁸ Although both parties were in their mid-fifties at the time of the divorce, both were healthy enough to continue their employment.⁷⁹ The court also found that the wife served as the children's primary caretaker and the home's primary caretaker during the marriage and that her earnings from her employment went toward supporting the children and the home as well.⁸⁰

At issue in the case was the status of the separate property that the husband's father gave to the husband to supplement the parties' income.⁸¹ The court below decided not to include the husband's leg-

⁷⁴ See *id.* at 261, 618 N.E.2d at 1377 (explaining rationale supporting court's decision to vacate award and remand case).

⁷⁵ See *id.* (highlighting fact that couple married in 1964 and began divorce proceedings in 1988).

⁷⁶ See *id.* at 261, 618 N.E.2d at 1377 (discussing parties' respective living circumstances at time of divorce).

⁷⁷ See *Zeh*, 35 Mass. App. Ct. at 261, 618 N.E.2d at 1377 (explaining health situation of respective parties to the case at time of divorce).

⁷⁸ See *id.* at 261, 618 N.E.2d at 1378 (acknowledging each party's contributions to the lengthy marriage). The court below found that the husband was self-employed as a manager of residential property owned by his father while the wife was employed in various part-time positions. *Id.*

⁷⁹ See *id.* (stating court's finding that each party could continue to support him or herself).

⁸⁰ See *id.* (acknowledging wife's contributions as homemaker as well as financial contributions).

⁸¹ See *id.* at 262-63, 618 N.E.2d at 1378-79 (setting forth issue facing appellate court in this particular case).

acy within the § 34 property division.⁸² The trial judge exercised his discretion in deciding that the gifted and inherited property would not be included in the equitable property division since, in his mind, the wife had little or nothing to do with the acquisition of such property.⁸³

The appellate court reached a different conclusion, and held that this inheritance was an inheritance in possession, and therefore fell well within the category of assets subject to division.⁸⁴ Including the husband's inheritance in the property division created yet another problem for the appellate court.⁸⁵ If the prior property division stood with the inheritance now included in the divisible estate, the wife's share would amount to less than nine percent of the divisible assets.⁸⁶ Such a result could withstand appellate review only if valid reasons

⁸² See *Zeh*, 35 Mass. App. Ct. at 262-63, 618 N.E.2d at 1378-79 (reviewing decision of trial judge below as to division of separate property). The husband had received gifts from his father throughout the marriage in the form of property and money until the father's death in 1984. *Id.* Upon the death of the father, the husband acquired a one quarter interest in the residual estate of the father, an inheritance interest that was valued at \$421,918.82. *Id.* at 262, 618 N.E.2d at 1378.

⁸³ See *id.* at 263, 618 N.E.2d at 1379 (discussing rationale for division order set forth by trial judge below).

⁸⁴ See *id.* at 264, 618 N.E.2d at 1379 (differentiating an inheritance in possession from an expectancy of an inheritance). The latter cannot qualify as property subject to a § 34 property division, while the former certainly can. *Zeh*, 35 Mass. App. Ct. at 264, 618 N.E.2d at 1379. Since the husband's legacy was noncontingent and had vested as of the date of the father's death, it clearly became part of the divisible estate as "all property to which [a spouse] holds title...whenever and however acquired."*Id.* at 265, 618 N.E.2d at 1380.

⁸⁵ See *id.* at 266, 618 N.E.2d at 1380 (stating problem facing court once deciding to include husband's separate property in division).

⁸⁶ See *id.* at 266, 618 N.E.2d at 1380 (explaining why inclusion of husband's separate property forced court to re-address division). Even without including within the divisible estate the assets located in the probate estate of the husband's father, the findings indicated that, at the time of the divorce hearing, the husband had a gross estate of \$603,820 and liabilities of \$73,341, while the wife's estate amounted to \$24,000 and liabilities of \$32,417. *Id.* at 261, 618 N.E.2d at 1378.

existed and were apparent in the trial judge's findings and rulings.⁸⁷ The appellate court found that the judge below attached too much importance to the assets' original source and not enough to the wife's contributions as a homemaker, and further held that once a judge gives weight to the discretionary factor of spousal contribution, that judge must consider both financial and homemaking efforts and clearly illustrate in her findings the effect that each type of contribution had on the final judgment.⁸⁸ In *Zeh*, no reasoning or rationale existed for such a disparate apportionment; therefore, the appellate court remanded the case with orders to include the inheritance in the property division, and to make explicit findings regarding consideration of the wife's spousal contributions as homemaker.⁸⁹

V. OUTLOOK

In 1974, when Massachusetts amended Mass. Gen. Laws chapter 208, § 34, the statute's sole guarantee was that trial judges would have the broad discretion to equitably assign any and all spousal property upon a divorce to provide for a fair and just assignment of property.⁹⁰ Trial judges, with no procedural guidelines or case law to adhere to, were presented with the immense task of utilizing their broad discretion to divide spousal property and create an equitable distribution.⁹¹ Early on, legal scholars began to search for some type of predictability and consistency in attempts to achieve substantial

⁸⁷ See *Zeh*, 35 Mass. App. Ct. at 266, 618 N.E.2d at 1380 (employing language from *Bowring v. Reid*, 399 Mass. at 267, 503 N.E.2d at 968).

⁸⁸ See *id.* (noting that judge must utilize discretionary factor in findings if giving weight to the factor). The appellate court felt that the focus on the genesis of the funds combined with the obvious absence of any findings or rationale dealing with the value of the wife's homemaking contributions amounted to a complete turning away from the goals of the statute itself. *Id.*

⁸⁹ See *id.* at 266-67, 618 N.E.2d at 1381 (summarizing holding and rationale behind court's order to remand and include separate property in division).

⁹⁰ See *Inker*, *supra* note 10 (discussing the passage and purpose of the amended Massachusetts' statute).

⁹¹ See *Ginsburg*, *supra* note 1, at 10.

justice in property divisions under the amended statute.⁹² After several decades of § 34 case law limiting the broad discretion of trial judges, such predictability and consistency is arising in property divisions which involve separate property assets.⁹³

Unlike the law in a majority of the states, Massachusetts' law clearly dictates that separate property falls well within the boundaries of assets available for assignment in an equitable property division.⁹⁴ The issue facing a Massachusetts trial judge is deciding whether one party's separate property should be assigned to the other party to create such an equitable division of the marital assets.⁹⁵ Massachusetts case law indicates that the marital asset's source is a major factor for a judge to consider in an equitable division and serves as the basis for the presumption that separate property will generally remain with the

⁹² See generally Ginsburg, *supra* note 1 (making observations about the future of property division in Massachusetts).

⁹³ See Mark A. Cohen, *Division of Inheritances: A Grey Area In Divorce*, MASS. LAW. WKLY., June 3, 1996, at 1 (analyzing attorneys' roles in recent unpublished appellate court decision dealing with a section 34 division). The article discusses a case in which the appellate court overturned a trial court decision awarding the husband a substantial portion of the assets available for equitable division. *Id.* These assets included the husband's separate property (inheritance). *Id.* The appellate court determined that the lower court decision did not "flow rationally from the trial judge's findings", and failed the two-step appellate test announced in *Bowring*, therefore requiring reversal. *Id.* See also Monroe L. Inker & Charles P. Kindregan Jr., *Focus on Family Law: Inherited, Gifted and Premarital Property*, MASS. LAW. WKLY., August 19, 1996, 11 (stating their belief that a consensus is developing in Massachusetts divorce law on the topic).

⁹⁴ See MASS. GEN. LAWS. ch. 208 § 34 (1990) (providing that the court "may assign to either husband or wife all or any part of the estate of the other").

⁹⁵ See Inker & Clower, *supra* note 31, at 907-911 (highlighting task of trial judges in light of Massachusetts acceptance of marriage as "partnership model"). This "partnership model" suggests that marriage is a "joint enterprise and shared undertaking" and that this entitles each spouse to an equitable share of any family assets upon divorce. *Id.* at 908.

party responsible for its acquisition.⁹⁶ However, this factor, which weighs heavily in favor of the party bringing the separate asset into the marriage, appears to lose its importance when additional special circumstances materialize in a judge's findings.⁹⁷

The statute's procedural requirements have combined to limit the judge's broad discretion under the statute to such an extent that the existence of certain special circumstances and scenarios now leave the trial judge with no discretion when deciding whether to include separate property to create an equitable division.⁹⁸ The cases examined in this note present factual findings and results that give some indication as to exactly what those special circumstances and scenarios are, as well as when they arise.⁹⁹ These special situations generally arise in lengthier marriages, as they do not have the opportunity

⁹⁶ See *Tanner v. Tanner*, 14 Mass. App. Ct. 922, 923, 436 N.E.2d 984, 986 (1982) (stating it is appropriate to consider the original source of the assets to be divided); see also *Inker & Kindregan Jr.*, *supra* note 93, at 12 (stating that the origin of the separate property is a factor weighing in favor of the acquiring party).

⁹⁷ See generally *Zeh*, 35 Mass. App. Ct. 260, 618 N.E.2d 1218 (1993) (reversing decision that left wife only 9% of marital assets in light of special circumstances); see also *Denninger*, 34 Mass. App. Ct. 429, 612 N.E.2d 262 (1993) (reversing trial court decision leaving elderly husband fifteen percent of marital assets, avoiding inequitable result).

⁹⁸ See generally *Cohen*, *supra* note 93, at 1 (discussing lawyer reaction to recent case whose results illustrate this trend). The article discusses a recent appellate court decision in which the court, armed with the facts in the required findings, determined that the trial judge's order apportioning the separate assets amounted to an abuse of discretion and vacated the order. *Id.* See also *Inker & Kindregan Jr.*, *supra* note 93, at 11 (highlighting special circumstances that call for inclusion of separate property in property assignments).

⁹⁹ See, e.g., *Bacon v. Bacon*, 26 Mass. App. Ct. 117, 524 N.E.2d 401 (1988) (holding wife entitled to higher percentage of her separate assets based on review of factors); *Comins v. Comins*, 33 Mass. App. Ct. 28, 595 N.E.2d 804 (1992) (holding wife must transfer portions of her separate assets to create equitable results); *Denninger v. Denninger*, 33 Mass. App. Ct. 429, 612 N.E.2d 262 (1993) (holding circumstances required reversal of division order issued below to create equitable results).

to materialize in shorter marriages.¹⁰⁰ These circumstances tend to include the existence of children and substantial homemaking contributions, coupled with insufficient non-separate property with which to make an equitable division.¹⁰¹ In addition, in these special circumstances the separate property assets have usually been intermingled with the marriage and used by both parties throughout the marriage.¹⁰² This intermingling creates a situation in which the standard of living that each party has grown accustomed to depends upon the separate property assets' existence.¹⁰³

Scenarios and circumstances such as these now seem to rebut the presumption that separate property should remain with the party responsible for acquiring it and mandate an equitable division between the party spouses which includes the separate property and rationally flows from the required findings.¹⁰⁴ In the absence of these special circumstances, the presumption remains intact and trial judges retain the discretion to leave the property with the party responsible for bringing it into the marriage.¹⁰⁵ In the face of the existence of such special circumstances, though, any attempt by a trial judge to utilize her discretion under the statute to exclude the separate property from

¹⁰⁰ See Cohen, *supra* note 93, at 1 (stating why longer marriages are more likely to create special circumstances); *but see* Lauricella v. Lauricella, 409 Mass. 211, 212-13, 565 N.E.2d 436, 437 (1991)(holding that these special circumstances can arise in marriages of shorter duration).

¹⁰¹ See Inker & Kindregan Jr., *supra* note 93, at 12 (highlighting special circumstances that call for inclusion of separate property in property assignments). The article suggests scenarios in which courts are more likely to assign separate property. *Id.*

¹⁰² See Cohen, *supra* note 93, at 1 (suggesting that separate assets more likely to be considered "communal" in these circumstances).

¹⁰³ See *id.* at 2. (suggesting court is "less likely to carve out assets as one spouse's" in these circumstances).

¹⁰⁴ See Inker & Kindregan Jr., *supra* note 93, at 13 (proposing that some circumstances exist which justify including separate property in equitable division).

¹⁰⁵ See Inker & Kindregan Jr., *supra* note 93, at 13 (suggesting that Massachusetts does not require equal division of property, even in long-term marriages).

the property division is very likely to be reversed upon review at the appellate level as a decision which does not flow rationally from the findings.¹⁰⁶

VI. CONCLUSION

Upon passage in 1974, the amended § 34 granted very broad discretion to trial judges to equitably divide any and all property in order to reach a fair and just property assignment. The addition of procedural guidelines and requirements to the amended statute's equitable division process clearly limited this broad discretion. After years of additional case law interpreting and applying the amended statute with its added procedural requirements, the effect of the limitations placed on judges' discretion has begun to materialize in the area of assignment of separate property under the statute.

Several family law commentators have suggested the development of a consensus in approach and results in cases dealing with the assignment of separate property under the statute.¹⁰⁷ This suggested consensus serves to clearly illustrate the effect of the procedural requirements and guidelines added by case law: a judge's loss of her statutory discretion in the area of assigning separate property. When the special circumstances enumerated above are present in the facts of a case, it appears that a judge must include the separate property in the equitable division and divide it in a manner that rationally flows from the facts. When no special circumstances exist, a judge generally will not have the power to exercise her discretion to include the separate property in the equitable division at all. Any use of discretion by a judge to create a property division under the amended statute, which deviates from these general principles, will likely be reversed on appeal as an abuse of such discretion. Only time will indi-

¹⁰⁶ See *Zeh*, 35 Mass. App. Ct. at 266-67, 618 N.E.2d at 1380-81 (stating division was plainly unfair and outside realm of discretion in light of required findings); see also *Denninger*, 34 Mass. App. Ct. at 433, 612 N.E.2d at 265 (reversing trial judge as "off-target" in light of required findings and objectives of revised statute).

¹⁰⁷ See generally *Inker & Kindregan Jr.*, *supra* note 93 (suggesting that a consensus is developing through section 34 case law); see also *Cohen*, *supra* note 93, at 1 (illustrating this emerging trend through recent appellate court decision).

cate what effect this lack of discretion in this area will have on the manner in which family law practitioners approach and attack such cases.¹⁰⁸ What is clear is that the predictability and consistency in approach and results that practitioners have sought since the statute's passage in 1974 is emerging in at least one area of equitable property division in Massachusetts. The trial judges' loss of discretion in this area of property division is a small price to pay to gain some level of predictability and consistency in attempts to realize the amended statute's intended goal: achieving substantial justice in equitable property divisions.

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¹⁰⁸ See *id.* at 1 (discussing potential effects of current trend under the statute on practitioner's approach). The article suggests that since all marital property is "up for grabs" in Massachusetts, the best advice for a lawyer might be to focus on keeping the property out of the marital estate rather than seeking a larger portion of those assets just because the separate property was gifted to or inherited by her client. *Id.* at 3. The author also suggests that a person planning to marry who wishes to retain his or her separate assets must "keep them separate and not even minimally bring them into the marriage." *Id.* at 3.

