

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

MIDDLESEX, SS

No. SJC-12551 (Transferred)
Appeals Court No. 2017-P-1382

LAYNE C. CONNOR

Plaintiff-Appellee

v.

WILLIAM P. BENEDICT

Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF DIVORCE, AS AMENDED,
ISSUED BY THE MIDDLESEX PROBATE AND FAMILY COURT

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

- I. Did the trial court commit reversible error by attributing to the length of the parties' marriage their approximately six-year period of premarital cohabitation where:
 - a. The wife/alimony recipient continued to receive alimony from her former spouse for nearly all of the period of cohabitation;
 - b. The trial court found that the wife had refused the husband's marriage proposal in order to continue receiving alimony;
 - c. The trial court found that the parties did not marry until after the termination of the wife's alimony and health insurance coverage; and
 - d. During the parties' cohabitation, the parties' economic partnership was limited to the acquisition and maintenance of the former marital residence.
- II. Did the trial court abuse its discretion where, having determined that the proper duration for accumulation of the parties' marital estate was four years, it ordered the division of premarital and postmarital assets?

III. Did the trial court commit reversible error where, in ordering the division of the parties' retirement accounts, it failed to establish dates upon which said accounts would be segregated, or to order the means by which the said accounts were to be divided?

IV. Did the trial court commit reversible error where, in connection with a division of marital assets, it allocated between the parties consumer debt accumulated by the wife during the pendency of the proceedings, and after entry of temporary orders providing for the payment of alimony by the husband to the wife?

STATEMENT OF THE CASE

The parties, William P. Benedict (the appellant, hereinafter referred to as the "husband") and Layne Connor (the appellee, hereinafter referred to as the "wife") were married on February 18, 2012 and last lived together on May 25, 2014. The wife filed her Complaint for Divorce in Middlesex Probate and Family Court on June 2, 2014, alleging that the marriage had irretrievably broken down on or about May 13, 2014. The husband was served with the complaint and summons on June 13, 2014.

In accordance with M.G.L. ch. 208, §48, the length of the marriage was almost 28 months, from February 18, 2012 to June 13, 2014.

The case was assigned to Connelly, J., and on July 11, 2014, the parties appeared for hearing on the wife's motions for temporary orders. After hearing, the Court, Abber, J., ordered that the husband pay the wife temporary alimony in the amount of \$215.00 per week and pay to the wife, pendente lite, \$3,500.00 as an advance distribution of marital assets. The Court also allowed the parties' Stipulation, which provided that:

- a. The husband would retain exclusive use and occupancy of the former marital residence located at 6 Coppersmith Way, Townsend, MA;
- b. The Husband would be responsible for any and all costs associated with the home, including the mortgage, property taxes, insurance, utilities, maintenance, and other costs as of the date of the parties' separation;
- c. The husband would forward the wife's mail to her through counsel; and
- d. Neither party would dispose of any property in his or her possession in the absence of an appropriate Order.

The matter was scheduled for pretrial conference on December 9, 2014 and pretried, after continuance, on April 7, 2015. The parties subsequently engaged in conciliation without success.

The divorce was tried before Connelly, J. on January 7, March 14, and March 23, 2016. The husband and the wife were the only witnesses. On August 25, 2016, the Court issued its Judgment, together with Procedural History, Findings of Fact, Rationale, and Judgment.

In pertinent part, the judgment:

- a. Ordered the husband to pay the wife alimony in the amount of \$511.00 per week for a period of 61 months, corresponding to the Court's finding that the length of the parties' marriage had been 8.58 years;
- b. Ordered the division of three retirement accounts, namely, the husband's "Fidelity Benefit Plan Account" [Hewlett-Packard Company Cash Account Pension Plan], the husband's "Fidelity Contribution Plan Account" [Hewlett-Packard Company 401(k) Plan], and the wife's "Fidelity Mass. Muni Account," such that the husband would receive 55% of the total account value thereof and the wife would receive 45%;
- c. Ordered the division of the parties' other financial assets such that the husband would receive 55% of the aggregate value thereof and the wife would receive 45%; and
- d. Ordered the division of "the liabilities Wife listed on her March 14, 2016 financial statement" such that the wife would remain liable for 55% of said liabilities and the husband would be liable for 45% thereof.

The defendant timely requested a stay of as to the distribution of assets, App.v1 35, as well as amendment of the findings and judgment pursuant to Mass. R. Dom. Rel. P. 52(b) and 59. App.v1 36. By order dated January 5, 2017, both motions were denied, App.v1 35-37, though by stipulation of the parties, the Court subsequently excluded from its asset division a small custodial account held by the husband on behalf of his granddaughter. App.v1 38-39.

In delineating the divisible marital estate, the Court identified divisible marital assets of \$342,194.59, exclusive of the marital home and the parties' retirement assets. With the exception of references to the wife's Fidelity Mass. Muni account, to which she ceased contributing around 1999, App.v1 27, and the balance in the husband's 401(k) at the end of 2005, App.v1 29, the Court made no reference to the extent of the parties' assets at the beginning of the marriage. Neither did the Court reference the husband's defined benefit pension, which ceased to vest in 2000 or 2001. Tr.3 15-16.

Notably, although the Court determined that "[f]or purposes of property division, the length of the parties' marriage is four years, only two of which the

parties lived together", App.v1 32, the Court did not limit the asset division specified in the judgment to those assets which had been accumulated during the marriage or, for that matter, during the parties' cohabitation, or even the period after the parties first met. Rather, the judgment subjected to division the parties' lifetime assets, without regard to the origins of those assets.

The Court placed no temporal limitation on the division of the parties' retirement assets. With respect to the husband's pension, the Court set forth no formula by which to determine a "marital" portion thereof. With respect to the husband's 401(k), the Court failed to establish a "segregation date" after which further contributions to the account might be excluded, or to specify whether the wife's portion would be subject to market gains or losses after a specified date. With respect to all three identified retirement accounts, the Court failed to provide instructions as to the means for dividing the accounts (such as by Qualified Domestic Relations Order) or to designate which party would pay the cost of preparing any documents necessary to effect the division.

STATEMENT OF THE FACTS

Except as noted below, the husband does not dispute the Trial Court's findings of fact, and he hereby adopts the same.

The parties were married on February 18, 2012, separated on May 25, 2014, App.v1 11, and the wife served her Complaint for Divorce on the husband on June 13, 2014. App.v1 22. For purposes of M.G.L. ch. 208, §48, the length of the marriage was five days shy of 28 months.¹

The parties first met in August 2000 and moved in together in August 2001. App.v1 23. In August 2001, the wife purchased a home in Maynard, Massachusetts, where the parties continued to reside together with the wife's son from her marriage. The husband did not participate in the purchase of the home, and he characterized his payment toward his housing expense as "rent" paid to the wife. In April 2002, the husband obtained health insurance benefits for the wife, who then qualified as an eligible domestic partner pursuant to the husband's employer's policy. App.v1 23.

¹ The Court identified the length of the marriage as "27 full months." App.v1 22.

During this time, the parties divided their household expenses, and neither paid any personal expenses of the other. App. v1 23. Further, during this time, and continuing until approximately December 2011, the wife received alimony from her ex-husband, from whom she was divorced in 2001. Although the husband was unaware of the amount of alimony the wife received, the wife testified that she received bimonthly payments of \$560.00. Tr.2 63. The wife also acknowledged that her ongoing transaction with respect to alimony and child support constituted an economic relationship with her ex-husband. Tr.2 69.

Due to health issues which contributed to her qualifying for Social Security disability benefits in 2003, in March 2004 the wife moved from the home with her son to Australia. App.v1 23. The husband remained in the wife's house and coordinated the sale of the property in September 2004. During the wife's absence, the parties continued to share the expenses associated with the home, and, as compensation for preparing the home and undertaking sale-related repairs, the wife paid the husband approximately \$5,000.00 from the sale proceeds. App.v1 23. The wife's health insurance benefits lapsed when she left the country.

The wife returned to the United States in October 2005, and she and her son moved in with the husband, who at that time was living with his son (also from a previous marriage) in Shirley, Massachusetts. The husband proposed marriage to her in December 2005. The wife declined his proposal, indicating that she was still working on her health issues, and also that she did not wish to terminate her right to receive alimony. App.v1 24. The husband again obtained domestic-partner health insurance benefits for the wife.

In November 2006, the parties purchased the house at 6 Coppersmith Way, Townsend, Massachusetts, which eventually would become the marital residence. They contributed equally to the down payment, and they took joint title to the property. App.v1 24. After the purchase of the home, the parties continued to divide their household expenses approximately equally, to the point that the husband paid a larger share of utility expenses due to his maintaining a home office. Tr.2 183.

During their cohabitation, the parties maintained no joint accounts. The husband testified to his understanding that the wife refused to combine her

finances with his due to her fear of losing the financial support she continued to receive from her ex-husband. Tr.2 186.

In 2008, due to a change in the policies of the husband's employer, the wife became ineligible for health insurance coverage as a domestic partner, and the wife thereafter obtained an extension of her health coverage through COBRA. App.v1 25. Although the parties' testimony conflicted on the question, the Court found that the husband "contributed slightly more to the household expenses" while the wife received COBRA coverage. App.v1 25. The wife's COBRA coverage terminated at the end of 2011. Tr.2 107-08. The wife also made a verbal agreement with her ex-husband that his alimony obligation would terminate in late 2011. App.v1 23.

Shortly thereafter, the parties were married on February 18, 2012. In the context of the period from the parties' marriage to the date of their separation, neither party offered exhaustive testimony relevant to the factors set forth under M.G.L. ch. 208, §34.

The husband testified that he paid the wife's credit card liabilities after the marriage, but that he was unaware of the wife's debts prior to the

marriage. Tr.2 199. With respect to the credit card liabilities the wife reported at the time of trial, the wife testified that she had accumulated all of the liabilities reported on her March 14, 2016 financial statement after the parties' separation, and that she had incurred a portion of her debt with respect to her attorney fees. Tr.2 56-57. Her testimony is consistent with her reporting, on her financial statement dated July 11, 2014, that her outstanding liability amounted to only \$190.00, incurred in July 2014. App.v2 5.

The Court's corresponding finding noted that the wife had furnished her apartment and paid various living expenses on credit, but did not relate the wife's reference to attorney fees. App.v1 30.

Both parties testified that they had not combined any of their financial accounts, or that either contributed to the financial accounts of the other, prior to the marriage. The wife testified that, following the marriage, the husband added her to IC Credit Union account xxx9746, to which she had not contributed, Tr.1 62, and which she had never accessed. Tr.1 63. The husband also added the wife to two DCU accounts with aggregate balance of

approximately \$150,000.00 as of February 2012. App.v2 34.

The parties' financial exhibits further illuminate the assets which they brought to the marriage: The balance of the husband's 401(k) amounted to \$91,051.66 as of the end of 2005, App.v2 48, but the balance had increased to \$236,617.49 as of February 29, 2012, eleven days after the date of the marriage. App.v2 52.

The Court made a finding that:

"the parties began an economic marital partnership when they started living together in 2001. However, this economic partnership was terminated when Wife moved to Australia in March of 2004. Accordingly, the length of the parties' marriage is increased to include their cohabitation period from November 2005 - when Wife moved in with Husband after returning from Australia - until the date of the marriage."

App.v1 22-23.

The Court made no finding as to its interpretation of the term "economic marital partnership," or how an economic marital partnership might differ from any other economic partnership. In this regard, the Court found that "the Husband was at least somewhat aware of Wife's finances while they were living together in the

marital home. Husband testified that Wife asked for his advice regarding child support and alimony from her ex-husband and Husband knew that Wife had credit card debt prior to the parties' marriage." App.v1 25.²

The Court further found that the parties had "purchased a home together and shared the mortgage, utilities, and other household expenses The parties acted as a married couple in all respects." App.v1 25.

The Court based its determination of the marital estate on the parties' financial statements dated March 14, 2016. App.v1 27. In his financial statement of that date, the husband reported that he continued to make weekly contributions of \$316.00 to his retirement account, App.v2 26, as compared to a weekly contribution of \$412.00 on July 11, 2014. App.v2 18.

Without meaningful additional explanation, the Court found that "For the purpose of alimony, the parties have been married for 8.58 years," App.v1 32,

²This finding conflicts with the husband's uncontradicted testimony, which was that he was unaware of the amount of money the wife was receiving even during the marriage, Tr.2 186-87, and that he paid the wife's credit card debt, of which he previously had been unaware, only after the parties were married. Tr.2 199.

and assigned a term of alimony on the basis of that term. Conversely, the Court also found that "[f]or the purpose of property division, the length of the parties' marriage is four years, only two of which the parties lived together." App.v1 33. The apparent conflict between the two findings was of no moment, however, because the Court offered no indication whether it intended to include or exclude premarital assets within the distributable marital estate. In its Judgment, however, the Court did not segregate from the marital estate any assets that either party had brought into the marriage or which either had accumulated after the parties' separation.

Although it made detailed findings regarding the parties' estate, App.v1 27-29, the Court did not distinguish what portion of the assets had been accumulated prior to the parties' cohabitation, prior to the marriage, or after the parties' separation. Similarly absent from the Court's findings was indication that the Court intended to make a general distribution of the parties' lifetime assets.

In its discussion of contribution to the marital estate, which the Court conflated with discussion of the parties' conduct, the Court made the summary

finding that the parties had contributed equally to the marriage. App.v1 31. In its rationale, the Court found that "Both parties contributed equally to the marriage" but that "Husband contributed significantly more to the acquisition of marital assets." App.v1 33.

The Court therefore opined that a disproportionate division whereby 60% of the assets would be distributed to the husband would be appropriate. Due to the wife's disability and needs, however, the Court moderated that opinion to one assigning 55% to the husband and 45% to the wife. App.v1 33.

The Court identified the parties' retirement assets subject to division as follows (App.v1 15-16):

Husband's defined benefit plan:	\$59,405.00
Husband's H-P 401(k):	\$384,414.00
Wife's Fidelity Mass. Muni account:	\$16,236.71

Regarding these accounts, the record is clear that the husband's 401(k) was the only retirement account to which either party contributed at any time after they met in 2000. With regard to the 401(k), the Court identified its balance as of December 31, 2005 at the beginning of what the Court determined to be the start of the "economic marital partnership," and admitted evidence that the account's balance was at least

\$226,862.84 at the start of the marriage. The asset division nonetheless addressed the lifetime balance of the account, to which the husband had begun contributing in 1988, and it ordered that the husband receive 55% of the total balance of each of the three accounts and the wife receive 45%.

In addition to its failure to limit the divisible portions of the parties' retirement accounts to reflect the extent to which each was accumulated during the marriage, the Court failed to provide any guidance as to how those accounts were to be divided. Thus, the Court made no provision for the preparation of Qualified Domestic Relations Orders, offered no marital coverture formula or segregation dates, or even specified how the cost of preparing QDROs was to be shared by the parties. Without guidance as to the mechanics of dividing the accounts, this portion of the judgment is functionally unenforceable.

The judgment also identified two accounts at IC Credit Union (referred to by the Court as ICU) as "joint financial accounts," with an aggregate balance of \$31,732.95. App.v1 16. Despite the wife's testimony that she had neither contributed to nor withdrawn from

this account, it nonetheless was subjected to division.

The judgment further ordered distribution of the husband's balances in four DCU accounts, in total amount of \$153,420.00. App.v1 17.

After aggregating the parties' assets (excluding the marital home and retirement accounts), the Court ordered that the husband pay the wife \$65,749.98 as an "equalizing payment." App.v1 18. The Court further ordered that the wife was entitled to 45% of the balance of the joint IC Credit Union account, App.v1 16, and ordered the husband to pay \$10,675.67, representing 45% of the wife's credit card liabilities. App.v1 18.

It should be noted that the aggregate amount of assets referred to in the preceding paragraphs represent most, but not all of the husband's assets to which the court refers in its findings and judgment, in total amount of \$628,971.95. By comparison, the Court found that the husband's gross income from 2012 through 2015 amounted to approximately \$773,640.00. App.v1 26. Deducting only the \$84,000.00 tax liability which the Court found the husband paid in 2014 (but not that for 2012, 2013, or 2015), App.v1 27, the

Court appears to have distributed a marital estate nearly equal in value to the husband's total income during the marriage.

ARGUMENT

The husband identifies two critical errors in the Trial Court's reasoning: First, that the Court, in finding that the parties had engaged in a "economic marital partnership" during their cohabitation from 2006 through 2011, failed either to define the term "economic marital partnership" or to explain adequately how the parties had engaged in it. Second, the husband contends that the Court, having determined that the parties had enjoyed a marriage of four years "[f]or the purpose of property division," failed to limit its distribution of the marital estate to those assets which the parties had accumulated during that four-year period.

Secondarily, the husband cites as error the Court's division of assets as of the time of trial, rather than as of the date of the parties' financial separation, July 11, 2014, when it entered temporary orders providing for the payment of alimony from the husband to the wife. Finally, the husband asserts that the Court clearly erred in assigning to the husband a portion of the wife's consumer debt accumulated after the July 11, 2014 financial separation.

The husband does not, of course, assert that he and the wife did not engage in an economic partnership prior to the marriage. To the contrary, having acted in concert to acquire maintain an asset, the parties clearly engaged in a joint economic venture. Within the limited context of that real property transaction, however, the parties' respective interests in the venture could be determined by application of generally accepted partnership principles. The mere existence of a financial partnership, however, even when viewed together with the parties' romantic relationship, cannot lead inevitably to a finding that the economic partnership was "marital" in nature.

Due to the parties' assiduous segregation of their financial affairs and detailed apportionment of the contribution that each made to household expenses and mortgage payments, all viewed in the context of the wife's continued financial cooperation with her former husband and continued enjoyment of spousal support, the parties cannot be viewed as having engaged in a "marital" economic partnership during the period of their premarital contribution. Furthermore, within the context of M.G.L. ch. 208, §34, both the division of assets and the assignment of spousal support should be

viewed in the context of the nonmarital nature of the parties' premarital economic partnership.

I. STANDARD OF REVIEW

In reviewing the Trial Court's findings pursuant to M.G.L. ch. 208, §34, this Court must first "review the judge's findings to determine whether he considered all the relevant factors under §34 and no irrelevant factors." Baccanti v. Morton, 434 Mass. 787, 790 (2001), citing Williams v. Massa, 431 Mass. 619, 631 (2000); Mahoney v. Mahoney, 425 Mass. 441, 447 (1997); Bowring v. Reid, 399 Mass. 265, 267-68 (1987); Rice v. Rice, 372 Mass. 398, 402-403 (1977). Next, the Court must "determine whether the reasons for the trial judge's conclusions are 'apparent and flow rationally' from his findings and rulings." Baccanti, 434 Mass. at 790, quoting Williams v. Massa, supra. In general, a judgment with respect to property division should not be reversed unless it is "plainly wrong and excessive." Baccanti at 793, quoting Mahoney, 425 Mass. at 447.

II. THE TRIAL COURT COMMITTED CLEAR ERROR IN FINDING THAT THE PARTIES ENGAGED IN AN ECONOMIC MARITAL PARTNERSHIP PRIOR TO THE MARRIAGE.

In determining the length of a marriage for purposes of assigning general-term alimony, the Court

has the authority to "increase the length of the marriage if there is evidence that the parties' economic marital partnership began during their cohabitation period prior to the marriage." M.G.L. ch. 208, §48. The statute, however, does not define "economic marital partnership."

Although the Court found that the parties engaged in an economic marital partnership during their premarital cohabitation, it did not explain what rendered the parties' relationship "marital" in nature. In finding that the parties "acted as a married couple in all respects," the Court failed to mention the wife's continued reliance on her ex-husband for financial support or the parties' continued segregation of their financial affairs.

Section 48 does not clearly define "economic marital partnership." Naturally, cohabitation is a prerequisite to such a finding, see Duff-Kareores v. Kareores, 474 Mass. 528, 534-35 (2016), and section 49(d)(1) provides relevant criteria, particularly that the "economic interdependence of the couple or economic dependence of [one] person on the other." M.G.L. ch. 208, §49(d)(1)(ii), Duff-Kareores, supra, at 535. Whereas a trial court's authority to extend

the length of a marriage for purposes of determining alimony duration is predicated upon cohabitation, however, a finding that an economic marital partnership existed requires something more than mere cohabitation. Rather, the defining element must lie in the parties' economic interdependence.

The Court's reliance on the parties' transactions with respect to their home does little to establish an economic marital partnership. Due to their joint title, the parties' marital status would not have been relevant to a division of home equity. Particularly with regard to their disproportionate assignment of utility costs to the husband, the parties appear to have apportioned their expenses as individuals, rather than sharing them as a couple. Although they clearly maintained a common household, see M.G.L. ch. 208, §49(d), such a relationship cannot, without more, be construed as "marital" in nature.

Ordinarily, the threshold should be viewed by reference to the extent to which the parties combined their resources as would a married couple. For example, "A party seeking to show an implied contract to hold property as though married must generally show [that] the parties acted as though they were married,

pooled their earnings, held property in joint names, perhaps even represented to other parties that they were husband and wife." Alexander C. Morey & Dixie Grossman, Property Rights of Unmarried Cohabitants - Nothing New Under the Sun, 25 J. Am. Acad. Matrimonial Lawyers 87, 94 (2012).

In the instant case, and with the exception of their joint residence, the parties maintained their financial distance. They maintained separate accounts, they filed separate income tax returns, and, at least from the husband's perspective, each maintained little awareness of the financial affairs of the other. Functionally, the parties' financial transactions were undistinguishable from similar transactions engaged in by unrelated roommates, and the parties' romantic involvement did nothing to alter their financial arrangements.

The fact which the Trial Court should have viewed as dispositive, however, was the wife's continued financial relationship with her ex-husband. As she testified and the Court found, the wife predicated her refusal to marry upon her desire to continue to receive alimony. Just as the wife's remarriage presumably would have terminated her ex-husband's

obligation to pay alimony, the wife must be viewed as barred from engaging in an economic marital partnership for such time as she continued to rely on her ex-husband for alimony.

Whereas the evidence does not show in the instant case that the parties established a meaningful level of economic interdependence during their cohabitation, it is clear that "some measure of mutual dependence and benefit [is] enjoyed by formerly married partners where one party is paying the other court-ordered alimony." Duff-Kareores, supra, at 537. Because Ms. Connor maintained some level of economic dependence upon her ex-husband, and predicated her refusal to marry Mr. Benedict lest she lose that benefit, she made an affirmative decision to avoid entering into an economic marital partnership with her eventual husband.

Additionally, an individual should be limited to one economic marital partnership at a time. The Commonwealth defines marriage as "the voluntary union of two persons as spouses, to the exclusion of all others." Goodridge v. Dep't of Public Health, 440 Mass. 309, 343 (2003)(emphasis added). If marriage is monogamous by definition, therefore, an "economic

marital relationship" must be also. In the context of the parties' premarital relationship, the wife's receipt of alimony her ex-husband might be viewed as a financial infidelity.

The statute defines "alimony," however, as "the payment of support from a spouse . . . to a spouse." M.G.L. ch. 208, §48 (emphasis added). The statutory language thus views the payment of alimony as an economic extension of the marriage which gives rise to it. Viewed in this light, a finding that the wife engaged in economic marital partnership with the husband while receiving alimony from her ex-husband would leave her in a state of financial bigamy. To the extent that the Court's finding sanctions such financial polyandry, it is contrary to the public policy of the Commonwealth of Massachusetts and must be reversed.

The husband therefore says that the Court's findings are insufficient to demonstrate that the parties engaged in an economic marital partnership during their cohabitation from November 2005 through 2011, and that the finding therefore is clearly erroneous. Furthermore, the husband says that the existence of an active alimony obligation from the

wife's former spouse to the wife should absolutely preclude such a finding.

Construed in accordance with the guidance provided by Duff-Kareores, the parties to the instant case did not become financially interdependent until the end of 2011, when the wife lost both her alimony and her access to COBRA health insurance coverage. For purposes of determining the length of the marriage under §48, therefore, the parties' economic financial partnership is properly viewed as having started no earlier than January 2012.

III. THE TRIAL COURT'S DISTRIBUTION OF THE MARITAL ESTATE WAS CLEARLY ERRONEOUS AND EXCESSIVE

A. The Trial Court Erred in Valuing Marital Assets as of the Date of Trial.

The Court's footnoted reference to the parties' March 14, 2016 financial statements indicates its intention to value the marital estate as of that date and to divide marital assets accordingly.³ By the time the trial concluded, however, the parties had been separated for twenty-two months, and the husband had been paying alimony pursuant to temporary orders for

³ By failing to specify any segregation dates with respect to the division of the parties' retirement accounts, however, it appears that the Court - intentionally or not - ordered that such assets be divided based on their values at the time of division.

more than twenty months. Moreover, during that time, the husband had continued to contribute to his 401(k), and, being solely responsible for paying the mortgage on the parties' home during that time, he had contributed to the wife's equity in the home.⁴

Clearly, identifying the date for valuing divisible marital assets must be addressed on a case-by-case basis. Davidson v. Davidson, 19 Mass.App.Ct. 364, 370, n.9 (1985) ("We intend no suggestion of a rule fixing any [specific] dates or excluding some earlier time in appropriate circumstances, e.g., the date of the separation of the parties, as determinative in identifying divisible property. We think the development of the law in this respect is best left to a case-by-case analysis."). Where, however, divorcing parties have separated and orders for support entered in anticipation of a formal dissolution of their marriage, the date of those orders may indicate a definitive end to the marital partnership. See Daugherty v. Daugherty, 50 Mass.App.Ct. 738, 740-41 (2001)(identifying divisible

⁴ The husband does not allege that he is entitled to additional relief for contributions to the parties' home equity.

marital property as of date of separation, where "uncontroverted evidence at the trial indicates that the marital partnership effectively ended at that time").

In the instant case, the parties' marital partnership appears to have ended as of the date of their separation, and the entry, approximately six weeks later, of temporary orders for spousal support, reinforces that conclusion.

B. The Trial Court's Findings Fail to Define the Marital Estate by Reference to the Marital Partnership.

M.G.L. ch. 208, §34 bestows broad discretion on the Trial Court to divide the parties' assets in connection with a divorce. See, e.g., Adams v. Adams, 459 Mass. 361, 372-73 (2011). That discretion, however, is not unlimited, and "[a]n equitable division must be grounded in the respective contributions of the parties." Putnam v. Putnam, 5 Mass.App.Ct. 10, 15 (1977). Although the parties' contributions naturally may take various financial and non-financial forms, the court's evaluation of the marital estate and its appropriate division is based on a partnership model that acknowledges divorcing spouses' tangible and intangible contributions to the

marital enterprise. See generally Monroe L. Inker, Joseph H. Walsh, & Paul P. Perocchi, Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts, 10 Suffolk L. Rev. 1, 8 (1975).

In this regard, the Trial Court's findings are grossly inadequate. Although a finding that the parties contributed equally to the marital estate is unobjectionable, the Court's failure to define the marital estate by reference to the marriage clearly is not. Although a court may reasonably include in a divisible estate assets acquired prior to a marriage, see Moriarty v. Stone, 41 Mass.App.Ct. 151 (1996)(assigning interests accumulated during premarital cohabitation where parties had operated business prior to marrying), or after a divorce, see Brower v. Brower, 61 Mass.App.Ct. 216 (2004)(assigning wife's portion of husband's pension as of date of husband's retirement, where value of asset increased over time but was not determinable at time of divorce), such an asset division must be grounded rationally in the theory of the marital partnership, and it must flow rationally from the judge's findings.

In the instant case, the Court's findings prove insufficient by largely failing to identify which

assets were acquired during the marriage and which were not. Even where the findings do refer to premarital assets, such as the retirement account to which the wife stopped contributing during the 1990s or the Court's reference to the husband's 401(k) balance in 1995, such findings were ignored in the Court's eventual asset division. Whereas the finding that the marriage was one of four years for purposes of asset division implies an intention to exclude assets which pre-date the marriage, the judgment ignores entirely that reasonable finding.

Thus, in the instant case, not only does the Court's asset division not flow rationally from its findings, the judgment appears to be wholly divorced from those findings. Having neglected to identify the nature or extent of the marital estate as of the time of the marriage, let alone make any findings illuminating the parties' respective contributions to that estate, the judgment is irretrievably flawed and must be reversed.

C. The Court's Assignment of Post-Separation Consumer Debt to the Husband was Clearly Erroneous.

Supplemental Probate and Family Court Rule 411, commonly referred to as the "automatic restraining

order" generally prohibits parties to a divorce action from dissipating assets, encumbering property, or otherwise causing financial harm during the pendency of a divorce action. Of relevance to this matter, the Rule provides that "[n]either party shall incur any further debts that would burden the credit of the other party, including but not limited to further borrowing against any credit line secured by the marital residence or unreasonably using credit cards or cash advances against credit or bank cards." Prob. Ct. Supp. R. 411(a)(2).

Although violations of Rule 411 occasionally give rise to actions for contempt, the husband does not allege such in this instance. Nonetheless, the uncontroverted evidence, admitted through the wife's testimony, was that she had accumulated her approximately \$23,723.00 in consumer debt after the parties' separation and, for that matter, after entry of the temporary alimony order. Moreover, she testified that she had used credit to furnish her apartment (representing personal property not subject to division) and to pay an unspecified sum for attorney fees.

Particularly in light of the judgment's prescription that each party pay his and her own attorney fees, the Court's assignment of the wife's debt to the husband is contrary with the judgment itself. Further, consistent with the distribution of marital assets, the wife's post-marital debt should stand separate from the marital estate.

The husband also notes that because Rule 411 prohibited the wife from incurring indebtedness for which the husband might be liable during the pendency of the proceeding, the Court's order that he pay a share of such indebtedness appears to sanction violation of the Court's own rule.

The Court's distribution of the wife's consumer indebtedness thus was clearly erroneous, and it must be reversed.

D. The Trial Court's Failure to Clarify its
Order Distributing Retirement Accounts
Renders it Unenforceably Vague.

In its judgment, the Trial Court identifies three retirement accounts which it deems divisible. The judgment states only that "[t]he parties' retirement assets shall be divided between the parties, such that Wife receives 45% of the total value in the accounts and Husband receives 55%." The Court does not, however

specify a segregation date upon which the accounts are to be divided, whether the designated alternate payee with respect to a divided account would be entitled to market gains or losses on the segregated portion between the segregation date and the time the account was divided, the means for dividing the accounts, such as qualified domestic relations order, or how the parties would bear the cost of QDRO preparation.

The Court further appears to have neglected to note that the husband's Hewlett-Packard pension is a defined benefit plan which will provide a future stream of income.

The means for dividing a retirement account ordinarily is governed by the internal rules of the account's administrator. In the case of a tax-deferred defined contribution plan such as a 401(k) or IRA, division incident to divorce ordinarily requires the use of a qualified domestic relations order so as to avoid treatment as an early distribution, which would trigger a 10% tax penalty as well as tax treatment of the distributed amount as ordinary income. I.R.C. §§72(t), 414(p)(1). Because the owner of such a plan may continue to contribute to it following a judgment of divorce, the QDRO ordinarily will specify a

specific date upon which the account division will be effected and further specify whether or not the segregated portion will be subject to market gains or losses following that date, which may precede the date of the QDRO by a period of years. Some plans further require, for instance, that the parties to the QDRO specify how the cost of processing the QDRO is to be apportioned between the parties. In the instant case, the Court simply neglected to specify such details of any necessary QDRO, leaving the parties without guidance as to how the Court intended them to carry out its direction.

Use of a QDRO is generally necessary in the case of a traditional defined-benefit pension, such as the husband's Hewlett-Packard pension in the instant case. Because a defined-benefit plan ordinarily provides for payment of an income stream at some point in the future, the plan ordinarily will provide for multiple options, various beneficiary designations (and options for beneficiaries), and alternate means by which the pension may be paid out. The Court's failure to designate the means by which the parties were to allocate the husband's pension similarly leaves the

parties without guidance as to implementing the Court's judgment.

In addition to its failure properly to identify the divisible marital portion of the parties' retirement assets, the Court's failure to instruct the parties as to the division of their retirement accounts is clear error which must be corrected or reversed.

IV. CONCLUSION

The judgment entered by the Probate and Family Court in this matter does not meet the standards required in an analysis pursuant to M.G.L. ch. 208, §34. The Court's findings are occasionally inconsistent with the uncontroverted evidence provided at trial, and the judgment is generally inconsistent with the findings. As a result, the judgment cannot be sustained. The appellant husband therefore requests (i) that, as to duration of alimony, the judgment be reversed in favor of a judgment based on a marriage of no more than 30 months; and (ii) that, as to the division of assets, the judgment be reversed and remanded for purposes of dividing marital assets accumulated between the date of the marriage, February

18, 2012, and the date of the parties' financial separation, July 11, 2014.