

2.

Brief in Support of Vaughan Parents'
Petition to the Appeals Court

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

* * * * *

ALLAN P. VAUGHAN,

Plaintiff,

v.

ELIZABETH H. VAUGHAN,

Defendant.

* * * * *

C.A. _____

BRIEF OF SAMUEL AND JOAN R. VAUGHAN
 IN SUPPORT OF THE PETITION FOR RELIEF
PURSUANT TO M.G.L. c. 231, §118, PARA. 1

I. INTRODUCTION

This case involves not only an abuse of discretion regarding the denial of a protective order, but an error of law, based on the court's incorrect assumption that expectancy rights in a parent's estate plan must be factored into an alimony award. Mass. Gen. Laws ch. 208, §34 lists several factors which a court must consider when making an alimony award, including: "amount and sources of income . . . estate . . . liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." M.G.L.A ch. 208, §34, West Suppl. 1990. The court apparently assumed that Allan's non-vested expectancy interest in some future inheritance must be factored into the division of property. Though Massachusetts courts have not

directly addressed the issue, several cases in dictum reject application of such tenuous rights to the division of property. See Hanify v. Hanify, 403 Mass. 184, 188 (1988); Davidson v. Davidson, 19 Mass. App. Ct. 364, 374 (1985); see also Rice v. Rice, 361 N.E.2d 1305, 1307 (1977) (establishing "estate" as "all property to which he holds title, however acquired").

Further, Mass. R. Civ. P. 26(c) required the Probate Court to balance the interests in additional discovery against the imposition of annoyance, oppression or embarrassment that might occur due to the increased discovery. Wangson v. Wangson, 395 Mass. 154, 156, 478 N.E.2d 1270, 1272, cert. denied, 474 U.S. 1014 (1985). As demonstrated by its Memorandum the court failed to perform this required balancing test, and denied the protective order out of hand.

II. FACTS

The relevant facts are set forth in the Petition accompanying this Memorandum. In brief summary, they are as follows:

This is a divorce action instituted by Allan Vaughan against his wife Elizabeth Vaughan.

During the discovery phase of the divorce action, Samuel and Joan Vaughan, the parents of Allan Vaughan, were subpoenaed to surrender documents regarding their estate plans and their wills. The parents agreed to supply the Court with all information regarding any vested interests inuring to Allan but

refused to divulge their other estate plans. As a consequence of the depositions, scheduled for October 16, 1991, the parents moved, on September 26, 1991, for a protective order to prevent such intrusive discovery of confidential matters. On October 3, 1991, Justice Harms of the Essex Probate Court in an abbreviated Memorandum denied the protective order. The parents now file this appeal to reverse that Order and enter a protective order preventing disclosure of their sensitive and confidential estate plans and financial matters.

III. ARGUMENT

A. This Appeal is properly before the Single Justice

Mass. Gen. Laws. ch. 231, §118, paragraph 1, allows a party "aggrieved by an interlocutory order of a trial court justice in . . . the probate or family court department [to] file, within thirty days of the entry of such order, a petition in the appropriate appellate court seeking relief from such order." The single justice must examine the Probate Court's action for an abuse of discretion, Hanify, supra, 403 Mass. at 191, and may, in its discretion, vacate, suspend or modify the order and enter such further orders as the single justice deems appropriate. Packaging Indus. Group v. Cheney, 380 Mass. 609, 614 (1980); Wangson, supra, 478 N.E.2d at 1272; see also Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 25 (1981).

This matter falls squarely within the province of the powers of the single justice. Justice Harms of the Essex Probate Court abuse her discretion by denying the petitioners'

motion for a protective order. The matter is scheduled for trial on October 24 and 25, 1991 and the instant depositions are planned for October 16, 1991 requiring immediate review. Justice Harms has continued this action until disposition of this appeal.

B. Non-vested expectancy rights do not constitute title in property and cannot factor into an alimony award

The Probate Court committed error by assuming that Allan Vaughan's non-vested expectancy rights appropriately factor into an award of alimony. Mass. Gen. Laws ch. 208, §34 lists several factors which a court must consider when determining a property division, including: "amount and sources of income . . . estate . . . liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." M.G.L.A ch. 208, §34, West Suppl. 1990. It is well settled that a party's "estate includes property to which he holds title, however acquired." Rice, 361 N.E.2d 1305, 1307; Hanify, 403 Mass. at 187; Davidson, 19 Mass. App. Ct. at 369-370; Drapek v. Drapek, 399 Mass. 240, 503 N.E.2d 946, 948 (1987). Massachusetts courts have agreed that inheritance may play a decisive role in the division of property. See Earle v. Earle, 13 Mass. App. Ct. 1062, 1063 (1982); Frederick v. Frederick, 29 Mass. App. Ct. 329, 334 (1990) (likelihood of substantial inheritance played role in alimony award); Davidson v. Davidson, 19 Mass. App. Ct. 364, 374-75 (1985). "Inheritance," however, includes vested rights;

courts have declined to apply non-vested expectancy rights to property division determination.

In Davidson, for example, the court factored into the alimony award the husband's interest in a unfunded trust, even though the trust might never be funded. Id. at 371-72. Even though ambiguous in monetary terms, the husband possessed a vested interest in the trust as the life income beneficiary. Id. at 366. His vested rights supplied a sufficient property interest to influence the alimony award. Id.

Conversely, the husband's non-vested inheritance was too tenuous to enter the analysis. The court reasoned that unlike the vested trust rights which were clearly established, expectancy rights required an examination of collateral issues, such as "the validity of the will, current and future testamentary capacity, the valuation of the estates of others, familial relationships, and so forth." Id. at 374. Though a court might consider these collateral issues, evidentiary constraints "deflect secondary considerations." Id.

The Supreme Judicial Court, in dictum, supports this rejection of expectancy rights in property division. In Hanify v. Hanify, 403 Mass. at 188, the court allowed a prospective award of money damages to influence the division of property. There, the husband was awaiting results of pending employment litigation. The trial court factored his impending money damages into its division of property. Id. at 186-87. The court upheld this action by the trial judge. The husband's

impending lawsuit constituted a "chose in action" and therefore qualified as the husband's property. Id. at 187. His claim was "enforceable, ripened and pending" and therefore was an appropriate factor in determining property division. Id. at 188.

The Court, however, distinguished prospective money damages from expectancy interests which "embody no enforceable rights accruing during marriage." Id. at 188, citing Drapek v. Drapek, 399 Mass. 240, 244 (1987); Yannas v. Frondistou-Yannas, 395 Mass. 704, 714 (1985) and Davidson, 19 Mass. App. Ct. at 374; see also Lauricella v. Lauricella, 409 Mass. 211 (1991) (beneficial interest in trust unlike a mere expectancy which court has held to lie outside of estate). Judge Liacos, in his concurring opinion, further rejected application of expectancy rights where "at the time of the divorce, the testator was still alive and could have changed the inheritance provisions." Id. at 192; Davidson, supra, 19 Mass. App. Ct. at 374.

Here, Allan has no right to the net worth or assets of his parents, who have attested that no vested interests inure to Allan. Moreover, as living testators, they may alter their estate plans, requiring further changes in alimony if the award is based on testamentary interests. All of these considerations, together with the reasoning of the Supreme Judicial Court in Hanify, support exclusion of expectancy rights from the property division.

C. The Court abused its discretion in failing to balance interests in this discovery dispute as required by law.

Samuel and Joan Vaughan relied upon the protections of Mass. R. Civ. P. 26(c) to prevent their "annoyance, oppression and embarrassment." That rule requires a court to examine all of the attendant circumstances in deciding whether to allow additional discovery. The Probate Court must balance the parents' interest in preserving their confidentiality and avoiding annoyance, embarrassment and oppression, with Elizabeth Vaughan's need for the additional information. See Wangson, supra, 478 N.E.2d at 1272. After balancing these factors, the Court exercises its discretion in granting or denying the protective order. Id. On appeal, this Court reviews the order for an abuse of discretion. Id. Any failure by the trial judge to apply the proper legal standard constitutes an abuse of discretion. Edwin R. Sage, supra, 12 Mass. App. Ct. at 25.

On its face, the Order lacks any attention to the Rule 26(c) factors. Nowhere does the court analyze the attendant circumstances nor perform the required balancing of interests. While recognizing "that an exhaustive deposition and document request might be overkill," the court neglects to balance the parents' interests against Elizabeth Vaughan's. Having failed to perform its duty, the Probate Court abused its discretion in denying the protective order. The Order ignores the required legal standards, both for protective orders and for property division and should be reversed.


IV. CONCLUSION

WHEREFORE, Samuel and Joan R. Vaughan request that the Single Justice:

- (1) Vacate the Order of the Essex Probate Court denying the protective order;
- (2) Enter an Order preventing disclosure of the parents net worth, assets and estate plans; and
- (3) For such further orders or relief as deemed proper.

SAMUEL AND JOAN R. VAUGHAN

By their attorneys,



Samuel Hoar (BBO #235880)
Yvette C. Mendez (BBO #558219)
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, Massachusetts 02109
617/570-1000


Dated: October 17, 1991

WP-8166/V
10/16/91

Certificate of Service

I, Yvette C. Mendez, attorney for Samuel and Joan Revell Vaughan, hereby certify that on October 17, 1991, I served the foregoing Petition for Relief Pursuant to M.G.L. c. 231, §118, Para. 1, Brief of Samuel and Joan R. Vaughan in Support of the Petition for Relief Pursuant to M.G.L. c. 231, §118, Para. 1; and Proposed Order of the Court, upon defendant Elizabeth Vaughan by mailing a copy of same by first class mail, postage prepaid, to her counsel, Nancy R. Van Tine, Esq., Burns & Levinson, 125 Summer Street, Boston, Massachusetts 02110.

Signed under the penalties of perjury.



Yvette C. Mendez

WP-8173/V