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**Vaughan Parents' Brief in Support of Petition
to Supreme Judicial Court***

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS.

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SAMUEL AND JOAN R. VAUGHAN,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 91-485
	*	
ELIZABETH VAUGHAN,	*	
	*	
Defendant.	*	
	*	

* * * * *

PLAINTIFFS BRIEF IN SUPPORT OF
MOTION TO INVOKE POWERS OF
GENERAL SUPERINTENDENCY

I. INTRODUCTION

This case presents a novel issue; whether parents of a party to a divorce must supply their financial information to the Probate Court in cases when the expectancy rights of the party are purely contingent and not vested.

Mass. Gen. Laws ch. 208, §34 lists several factors which a court must consider when dividing property between spouses, 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 statute does not contemplate the inclusion of non-vested expectancy interests in a property division determination; indeed, this Court, in dictum, has rejected the inclusion of

such tentative rights in a property division determination.

See Hanify v. Hanify, 403 Mass. 184, 188 (1988)

("Expectancies ... embody no enforceable rights accruing during marriage."); Davidson v. Davidson, 19 Mass. App. Ct. 364, 374 (1985).

Notwithstanding this Court's unequivocal interpretation of the statute as applied to expectancy interests, the Essex County Probate Court, in its Order dated October 3, 1991, required Samuel and Joan R. Vaughan to disclose their financial net worth, estate plans and wills, to aid in the division of property between their son, Allan and his wife Elizabeth. An appeal of this order to Justice Brown of the Appellate Court aggravated the wrong, by refusing [without opinion] to grant the Vaughans petition for interlocutory relief, without opinion.

II. FACTS

The relevant facts are set forth in the Petition filed with this Court on November 7, 1991. In brief, they are as follows:

During the discovery phase of the underlying divorce action, Samuel and Joan R. Vaughan (The "Vaughans"), the parents of Allan Vaughan, were subpoenaed to surrender documents regarding their financial net worth, 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 the content of their estate plan and their net worth. As a consequence of these depositions being

scheduled for October 16, 1991, the Vaughans moved for a protective order to prevent such intrusive discovery of highly confidential and private matters. On October 3, 1991, Justice Harms of the Essex Probate Court in an abbreviated Memorandum denied the protective order.

On October 17, 1991, the Vaughans filed an appeal before the Single Justice of the Appeals Court. The Single Justice (Brown, J.) denied the petition without opinion on October 23, 1991.

III. ARGUMENT

A. This Appeal Is Properly Before the Single Justice.

Mass. Gen. Laws ch. 211, § 3 offers the Vaughans their only opportunity to further assert their substantive rights. Generally, an interlocutory appeal may be heard only after final judgment in the underlying action. Rollins Environmental Serv. v. Superior Court, 330 N.E.2d 814, 817 (1975); Packaging Industries Group, Inc. v. Cheney, 405 N.E.2d 106, 110 (1980). This Court, however, has exercised its general power of superintendence where the regular appeals process could not provide sufficient relief nor restore the complainant to the status quo. See e.g. Planned Parenthood v. Operation Rescue, 406 Mass. 701, 706-08, 550 N.E.2d 1361, 1365-66 (1990); Doe v. Doe, 399 Mass. 1006, 1007, 504 N.E.2d 1058, 1059 (1987). Where rights are lost during an appeal, this Court may appropriately exercise its general superintendency power, pursuant to Mass.

Gen. Laws ch. 211, § 3. Planned Parenthood, supra, 406 Mass. at 708.

The Vaughans present just the dilemma for which Mass. Gen. Laws. ch. 211, § 3 was created. Appeal of the discovery order, after disclosure is completed, does not restore the Vaughans to the status quo, but violates their substantive rights without effective review. Under these circumstances, this Court may appropriately invoke its power of general superintendence.

Planned Parenthood, supra.

Moreover, public policy considerations support review. The instant orders require a parent to supply financial information, estate and testamentary plans apparently to assist the court in ordering a division of property between divorcing parties. Although inheritance plays a role in property division, Earle v. Earle, 13 Mass. App. Ct. 1062, 1063 (1982); Frederick v. Frederick, 29 Mass. App. Ct. 329, 334 (1990); Davidson v. Davidson, 19 Mass. App. Ct. 364, 374-75 (1985), the issue of whether expectancies should be factored into the property division remains unanswered. The Vaughans are willing to disclose any vested rights inuring to Allan, but refuse to divulge estate plans and financial net worth information which is not germane to this domestic dispute.

B. Inheritance Rights, not Expectancy Rights,
Factor Into a Division of Property.

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. 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 include vested inheritance rights in property division determinations. 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). This practice conforms to the underlying purpose of the statute; to promote the equitable distribution of property between spouses by allowing judges to consider all the circumstances in devising the property division. See Inker, "Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts," 10 Suffolk University Law Review 1, Fall 1975 (hereinafter "Inker"). Inheritance, the courts reason, reflects the financial prospects of a spouse and should be factored into the division of property. See Earle, supra, 13 Mass. App. Ct. at 1063; Frederick, supra, 29 Mass. App. Ct. at 334; Davidson, supra, 19 Mass. App. Ct. at 374-75.

Inheritance, however, represents vested interests, not expectancies. In Frederick, supra, for example, the court

factored a wife's inheritance into a property division. There, however, the wife had received a deed for property from her aunt, although she had never recorded the deed. Such an interest was vested and appropriately factored into the property division.

Similarly, in Davidson, supra, 19 Mass. App. Ct. at 371-72, an unfunded trust in which the Husband possessed a vested income interest was considered. Id. at 366. This vested right supplied a sufficient property interest to be considered in the property division. Id.

Conversely, in Davidson, the husband's non-vested inheritance was not considered in the property division determination. The court pointed out that expectancy rights in an inheritance involved 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.

The vested inheritance rights in Frederick and Davidson, supra, differ widely from the non-vested expectancy interests at hand. Allan possesses no deed to any property, nor does he have an interest in trust property.

C. Expectancy Interests Do Not Reflect Marital Interests and Cannot Be Factored Into a Property Division.

This Court, in dictum, has rejected application of expectancy interests to the division of property. In Hanify v. Hanify, 403 Mass. at 188, this 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 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.

Money damages, however, differed 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.

The Vaughans do not deny that Allan's vested interests play a role in the property division and they are willing to disclose those interests. Any other expectancy interests, however, based on tentative estate or testamentary plans, are

not germane to this domestic dispute and should not be disclosed.

D. The Probate Court Committed Error in Requiring Disclosure of Expectancy Interests.

Without any discussion of section 34 and its requirements, the Probate Court denied plaintiffs motion for a protective order, mistakenly assuming that the Vaughans' financial information was relevant to the property division. The statute, however, according to its author, Professor Inker, was designed to be strictly construed. Inker, supra, at 17. "To permit consideration of factors beyond the statute would invite the conflicting and arbitrary results which the statute was designed to eliminate, and which would eventually lead judges and lawyers back into the morass of confusion as to what factors are relevant to the awarding of alimony." Id.

Here, the trial judge's "practical alternative" tramples upon the plaintiffs' rights to keep their highly private and confidential financial net worth and estate plans confidential. The Probate Court's broad, rather than strict, application of section 34, constitutes an abuse of discretion.

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) Vacate the order of the Single Justice of the Appeals Court, denying the Vaughan's petition for relief;