1 of 2 DOCUMENTS

CURT F. PFANNENSTIEHL vs. DIANE L. PFANNENSTIEHL (and two consolidated cases[1]).

1 Both involving the same parties.

Nos. 13-P-906, 13-P-686, & 13-P-1385.

APPEALS COURT OF MASSACHUSETTS

2015 Mass. App. LEXIS 123

February 11, 2014, Argued
***August 27, 2015*, Decided**

PRIOR HISTORY: [*1] Norfolk. Complaint for divorce filed in the Norfolk Division of the ***Probate*** and Family Court Department on September 22, 2010. The case was heard by Angela M. Ordoñez, J.; a complaint for contempt, filed on January 24, 2013, was also heard by her; and a motion to stay enforcement of the judgment pending appeal was considered by her. A motion to stay the proceedings pending appeal was considered in this court by Vuono, J.

HEADNOTES *Divorce and Separation*, Division of property, Findings, Attorney's fees. ***Trust***, Spendthrift provision. *Contempt. Practice, Civil*, Findings by judge, Contempt, Stay of proceedings.

COUNSEL: Robert J. O'Regan for the husband.

Jillian B. Hirsch for the wife.

JUDGES: Present: Kafker, C.J., Cypher, Kantrowitz, Berry, & Fecteau, JJ.[2]

2 These consolidated cases were initially heard by a panel comprised of Justices Kantrowitz, Berry, and Fecteau. After circulation of the opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Kafker and Justice Cypher. See *Sciaba Constr. Corp.* v. *Boston*, 35 Mass. App. Ct. 181, 181 n.2 (1993). Justice Kantrowitz participated in the deliberation on this case while an Associate Justice of this court, prior to his retirement.

OPINION BY: BERRY

OPINION

Berry, J. The main issue presented -- in what is the lead of three appeals[3] related to these divorce proceedings -- concerns the [*2] decision of a judge of the ***Probate*** and Family Court (***probate*** judge or judge) to include in the marital ***estate,*** for purposes of the G. L. c. 208, § 34, division, the husband's interest in a multi-million dollar ***trust*** established by the husband's father (the 2004 ***trust***[4]). The principal of the 2004 ***trust*** was, in the main, associated with funding from the family's operation of corporations that own and operate for-profit colleges, including Bay State College in Massachusetts and Harrison College in Indiana.[5] The husband claims as error the assignment of $1,333,047 of the ***trust*** value to the wife and the requirement that the husband pay $48,699.77 monthly for twenty-four months to effectuate the division of assets set forth in the amended judgment.[6]

3 The three consolidated appeals are from the amended judgment of divorce, the judgment of contempt, and the single justice's order denying the motion for a stay.

4 The legal title of the 2004 ***trust*** is the "Frederick G. Pfannenstiehl 2004 ***Trust.***"

5 These two colleges are owned by Bay State Educational Corporation and Educational Management Corporation, corporations controlled by the husband's family. Bay State Education Corporation does business as Bay

State College in Massachusetts. [*3] Educational Management Corporation does business as Harrison College which is a postsecondary higher education institution with thirteen to fourteen campuses in Indiana and surrounding States and which, at the time of trial, had an enrollment of approximately 6,000 students. See note 13, *infra*.

6 Other issues presented in the three consolidated appeals include the husband's arguments that he was denied his right to trial before an impartial magistrate; that many of the judge's findings of fact are plainly wrong; that the judge's award of attorney's fees to the wife was an abuse of discretion; that the judgment finding him in contempt was in error; and that an order denying his motion for a stay should be set aside.

In a cross appeal the wife argues that the award of attorney's fees was insufficient; that the judge erred by not considering future distributions from the 2004 ***trust*** as income in calculating support; and that the judge should have included the husband's hypothetical claim for breach of fiduciary duty in the marital ***estate.***

We address these other issues, after first turning to the principal issue involving the 2004 ***trust.*** In summary, as to these various other issues, we determine [*4] with respect to the major claims that (1) the wife's attorney's fees were warranted; (2) the contempt finding against the husband is not sustainable; and (3) the stay which ordered no further payments to the wife pending appeal shall be vacated. The husband's claim that his case was not decided by an impartial magistrate lacks any merit.

As to this issue, the husband, citing a spendthrift provision in the subject ***trust,*** argues that the 2004 ***trust*** value and income therefrom were isolated, were not within the marital ***estate,*** and, therefore, should have been excluded from consideration under G. L. c. 208, § 34.[7]

7 General Laws c. 208, § 34, as amended by St. 2011, c. 124, § 2, states:

> "In fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each of the parties, 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, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony . . . In fixing the nature and value of the property [*5] to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage . . . 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."

This spendthrift isolation theory, as detailed *infra*, is advanced notwithstanding that the 2004 ***trust*** had made distributions to the husband -- including an outright $300,000 in 2008 followed by 2009-2010 monthly payments of several thousand dollars -- all of which were distributed from the 2004 ***trust*** to the husband, his twin brother, and a sister. *Only as to the husband did these substantial monthly payments end, and they did so precisely on the eve of the husband's divorce filing*. In contrast to the finale for the husband, the 2004 ***trust*** payments continued to the husband's brother and sister. Specifically, there was a cutoff of the monthly payments to the husband of from $20,000 to $65,000 in August, 2010, one month before the commencement of divorce proceedings in September, 2010. This cutoff, of course, stands in stark contrast to the continuing pattern of distributions [*6] to the husband's two other siblings and undermines the husband's theory of exclusion of the 2004 ***trust.***

For the reasons stated herein, we conclude that the record in the case, including but not limited to ***trust*** documentary exhibits, provides telling evidence that the spendthrift provision is being invoked as a subterfuge to mask the husband's income stream and thwart the division of the martial ***estate*** in the divorce. A chart set forth *infra* shows a spendthrift scheme that is virtually empty of purpose except as a form of insulation to inclusion and valuation in the divorce process. On this issue, we look to settled ***trust*** law, which holds that the mere statement of a spendthrift provision in a ***trust*** does not render distributions from a ***trust,*** such as this one, immune to inclusion in the marital ***estate*** for G. L. c. 208, § 34, calculations.

In addition to our determination that the ***probate*** judge correctly included the 2004 ***trust*** in the marital ***estate,*** we further conclude that the judge appropriately divided the marital ***estate*** by allocating sixty percent to the wife and forty percent to the husband.[8]

8 It is more than worthy of note that in this complicated, intensely litigated case with eight days of trial, [*7] this judge did a masterful job in marshalling the facts and compiling the record in a memorandum of decision spanning forty-two pages, including 344 fact findings (which often provide clarity in a maze of seemingly non-transparent financial arrangements) and accompanying legal analysis and rationale. That memorandum decision provides an insightful backdrop to the eight appellate briefs of 295 pages and the 4,769 pages of record appendices submitted to this court in the three separate appeals.

1. *Divorce appeal*. a. *Factual background*. The following is taken from the case record of the divorce. The parties were married in February, 2000, and last lived together in August, 2010. The parties have two children. At the time of trial, the son was eleven years old, and the daughter was eight years old. Both children have special needs. The son has been diagnosed with dyslexia and Attention Deficit Disorder (ADD) and attends a private school that specializes in teaching students with dyslexia. The daughter has been diagnosed with Down syndrome and has had significant medical and developmental issues throughout her life. The daughter currently is treated by nine specialists for her medical needs [*8] and attends a specialized school that provides her with physical, occupational, and speech therapy. She requires "around the clock supervision."

i. *The husband*. At the time of the 2012 trial, the husband was forty-two years old. He had attended college for one and one-half years. He has dyslexia and ADD but is otherwise in good health. The husband comes from a family of substantial means. Those substantial family holdings are principally connected to the family's running of for-profit colleges. The tuition income from these for-profit educational businesses was substantial, and, indeed, was a main source of funding for the 2004 ***trust.***

In addition, the husband was employed as an assistant bookstore manager for one such university and earned about $170,000 per year. The judge found that a "normal incumbent" in this assistant bookstore manager position would earn roughly $50,000 to $60,000 per year. The judge found that this handsome and inflated salary flowed from the husband's "familial relations."[9]

9 These same familial relations provided the husband the opportunity to take a four-year leave of absence from his employment between 2007 and 2011 to pursue carpentry and building work. During [*9] his leave of absence, the husband earned only modest income from his carpentry work and continued to receive his full salary as an assistant bookstore manager. The husband has also earned modest amounts as an on-call firefighter and a snowplow driver.

Between 2008 and 2010, the husband received tax-free distributions from the 2004 ***trust*** as follows: $300,000 received in one payment in 2008, $340,000 received in six payments in 2009, and $160,000 received at a rate of $20,000 per month for the first eight months of 2010. Payments from the ***trust*** ceased after August, 2010, the month preceding the husband's filing for divorce.

In 2010, the husband's gross income, including the ***trust*** distributions of $160,000, amounted to approximately $350,000. At the time of trial, given the cessation of the ***trust*** income, the husband's gross annual income had diminished to $180,000. The husband has substantial opportunities to acquire capital assets and income in the future.

ii. *The wife*. The wife is forty-eight years old and is generally in good health. She is a college graduate who served as an officer in the United States Army Reserves for eighteen years. The wife left the military in 2004, just two years [*10] short of the twenty years of service that would have entitled her to a military pension. The decision to retire came after pressure from the husband and his family following the birth of the parties' daughter, who, as noted, is medically challenged. The wife currently works as an ultrasound technician one day each week and is paid approximately forty-six dollars per hour. At the time of trial, her gross yearly income from this position was $22,672.

The wife was the primary homemaker and caretaker of the two children throughout the entirety of the marriage. She has devoted extraordinary amounts of time and effort addressing the children's (and particularly the daughter's) personal, medical, educational, and extracurricular needs and activities. The judge found that the wife "currently spends most of her time caring for [the parties' daughter]." The daughter's needs are ongoing, and she will likely reside with the wife for numerous years to come. Although the wife has some opportunity to acquire assets in the future, her opportunity is limited considerably by her care of the parties' daughter.

b. *The family lifestyle as interconnected to the 2004* ***trust*** *distributions*. During the marriage, [*11] the family was able to enjoy an upper middle class lifestyle. This expansive lifestyle was financially attributable, in large measure, to the distributions to the husband from the 2004 ***trust,*** the beneficence of the husband's father, and the rather large salary of $170,000 which the husband received as the assistant bookstore manager. The ***probate*** judge did "not credit [the husband's] testimony that he lacked knowledge concerning where he spent the 2004 ***Trust*** distributions as well as whether he paid taxes on said distributions."

c. *The amended judgment*. The pertinent parts of the judgment, as amended and dated August 13, 2012, are summarized as follows.

Including the husband's interest in the 2004 ***trust,*** the judge calculated the total value of the combined marital ***estate*** at $4,305,380. The judge divided assets in the marital ***estate*** (including the husband's interest in the 2004 ***trust)*** by allocating sixty percent to the wife and forty percent to the husband. In the final calculations including that division, and certain other assets, the wife received total assets valued at $2,328,688 and the husband received total assets valued at $1,976,692.

The judge found that the total value of the 2004 [*12] ***trust*** was $24,920,217.37. The judge calculated the husband's one-eleventh interest[10] in the ***trust*** at $2,265,474.31. The wife was allocated a portion of the 2004 ***trust*** worth $1,133,047.79. The husband retained a portion of the 2004 ***trust*** valued at $1,132,426.52.

10 The husband's interest was formulated on the basis of the current number of beneficiaries.

To effectuate the asset transfers to the wife, the judge ordered the husband to make twenty-four monthly payments to the wife in the amount of $48,699.77.[11]

11 These $48,699.77 payments were the subject of the wife's contempt action against the husband, see part 2, and were stayed during a part of the pendency of this appeal, see part 3.

In other provisions of the amended judgment, the wife was designated the primary custodial parent of the children, subject to the husband's parenting schedule. The husband was ordered to pay child support in the amount of $1,100 per week, an amount to which the parties stipulated. Neither party was awarded alimony.

The judge also ordered the parties to maintain life insurance policies for the benefit of the children and, based on the judge's findings concerning the husband's obstructionist conduct at trial, ordered [*13] the husband to contribute $175,000 towards the wife's attorney's fees. As we have indicated, both the husband and the wife have appealed.

d. *The 2004* ***trust***. i. *General principles*. At the outset, we set forth the general principles that bear upon the authority of the ***probate*** judge to determine whether to include an asset or an interest in the marital ***estate.*** In *D.L.* v. *G.L.*, 61 Mass. App. Ct. 488, 492-493 (2004), we stated:

> "General Laws c. 208, § 34, defines the scope of a trial judge's discretion to assign interests in the marital ***estate*** to the wife or husband, based on a number of specified factors. . . . Separate from the division of assets within the ***estate*** is the question whether certain assets properly are considered a part of the ***estate.*** In making the determination of what to include in the ***estate,*** the judge is not bound by traditional concepts of title or property. 'Instead, we have held a number of intangible interests (even those not within the complete possession or control of their holders) to be part of a spouse's ***estate*** for purposes of § 34.' *Baccanti* v. *Morton*, 434 Mass. 787, 794 (2001), quoting from *Lauricella* v. *Lauricella*, 409 Mass. 211, 214 (1991). 'When the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment under § 34.' *Williams* v. *Massa*, 431 Mass. 619, 628 (2000)."

D.L. v. *G.L., supra*, quoting [*14] from *S.L.* v. *R.L.*, 55 Mass. App. Ct. 880, 882-883 (2002).[12]

12 Whether a party's interest in ***trust*** property is part of the marital ***estate*** for purposes of § 34 has been said to present a question of law. See *Lauricella* v. *Lauricella*, 409 Mass. at 213 & n.2; *D.L.* v. *G.L., supra* at 493-494. The instant case also presents intensive and supported fact finding on the part of the ***probate*** judge concerning the distributions from the ***trust*** leading up to the time of the divorce and thereafter.

In this case, we determine that the judge acted properly in including the husband's interest in the 2004 ***trust*** in the marital ***estate,*** which we further describe below, and appropriately valued and divided the ***trust*** assets.

ii. ***Trust*** *background.* We outline the only parts of the 2004 ***trust*** material to these appeals. The 2004 ***trust*** is an irrevocable spendthrift ***trust*** that was established by the husband's father. The 2004 ***trust*** holds shares of stock in the husband's family-controlled private corporations, which corporations, in turn, own and operate for-profit colleges.[13] Among additional assets and liabilities in the 2004 ***trust,*** there are promissory notes owed to the husband's father, and life insurance policies.[14]

13 The 2004 ***trust*** shares are comprised of thirty-six percent of the outstanding shares (i.e., currently 3,600 shares) of Educational Management [*15] Corporation and fifteen percent of the outstanding shares (i.e., 1,569 shares) of Bay State Education Corporation. The 2004 ***trust*** holds three life insurance policies on the life of the husband's father (which are intended to pay any ***estate*** tax in the event of his death) and a cash account.

14 Thus, as of the date of trial, the husband's father had been paid close to $7 million on a promissory note from the ***trust.*** At the time of trial, approximately $5,378,701 in principal and interest were still owed to the husband's father pursuant to the promissory note and a later amended promissory note. The ***trust*** is also obligated to pay the premiums on the three life insurance policies held by the ***trust*** (annual payments amount to $435,000 per year). Although not obligated to do so, the ***trust*** makes payments to the husband's father for taxes owed on income in addition to the principal and interest owed on the amended promissory note.

There are two trustees of the 2004 ***trust.*** The husband's twin brother is one trustee. This brother is also vice-president and secretary of Educational Management Corporation and president and treasurer of Bay State College, which is owned by Bay State Education Corporation [*16] and holds stock in that particular for-profit college (see note 5, *supra*). The brother and the father serve as officers and directors of the corporations. Thus, in these corporate roles, the brother and father decide and control what dividends are to be paid to the ***trust,*** impacting the funding to the 2004 ***trust,*** and, in turn, the 2004 ***trust*** principal and income available for distributions.

The second trustee was ostensibly an outside trustee, but this trustee was also inextricably interconnected with, and aligned with, the husband's family. This trustee is a lawyer, and he and his law firm have represented the husband's father and his businesses since 1972. His law firm also represents the trustees of the 2004 ***trust.*** At trial, this trustee's testimony manifested not only hands-off administration, but also little, if any, scrutiny of the 2004 ***trust*** distributions; indeed, this trustee appeared unaware of the level of, or timing of, the distributions.

To use understatement: the record shows the 2004 ***trust*** was not administrated impartially by the two trustees. To the contrary, the judge expressly found that as the divorce began, "the proverbial family wagons circled the family money." We [*17] have described some record facts that support the judge's graphic image and findings, but there are far more. Among other facts, the judge cited the cessation before the divorce of distributions to the husband and continuing pattern of monthly distributions to the husband's brother and sister; the judge also considered the unusual testimony of the supposedly independent cotrustee concerning the ongoing payments to the brother and sister. This trustee said that the reason why the distributions to the husband were discontinued was out of a concern that the intent of the donor (the husband's father) to keep funds within the family might be violated if distributions continued. This statement was not indicative of independence.

iii. *Chart showing cutoff of 2004* ***trust*** *distributions to the husband.* In calculating the 2004 ***trust*** distributions, the judge added the numbers as follows: between April, 2008, and August, 2010, the husband received $800,000 from the ***trust*** and, since April, 2008, the husband's brother received $1,133,207 and his sister received $1,180,000.

The following chart reveals how the spigot from the 2004 ***trust*** of substantial monthly income distribution was deliberately and abruptly [*18] shut off for the husband *alone* as the divorce proceedings were in the immediate offing. (Again, to be noted is that this chart does not include the $300,000 outright distribution in 2008.)

Date	***Trust* Funding from College Income**	***Trust* Funding from Investment Account**	**Brother Distributions from *Trust***	**HUSBAND Distributions from *Trust***	**Sister Distributions from *Trust***
Jul-07	1,584,000	95,000			
Aug-07					
Sep-07		30,000			
Oct-07		130,000			

Date	***Trust* Funding from College Income**	***Trust* Funding from Investment Account**	**Brother Distributions from *Trust***	**HUSBAND Distributions from *Trust***	**Sister Distributions from *Trust***
Nov-07					
Dec-07					
Jan-08		90,000			
Feb-08					
Mar-08					
Apr-08		90,000			
May-08					
Jun-08	(1,332,000)				
Jul-08	1,332,000	95,700			
Aug-08					
Sep-08					
Oct-08					
Nov-08					
Dec-08					
Jan-09		95,000			
Feb-09					
Mar-09					
Apr-09		100,000			
May-09		225,000	(65,000)	(65,000)	(65,000)
Jun-09		280,000	(85,000)	(85,000)	(85,000)
Jul-09		265,000	(60,000)	(60,000)	(60,000)
Aug-09		90,000	(30,000)	(30,000)	(30,000)
Sep-09		150,000	(50,000)	(50,000)	(50,000)
Oct-09		140,000			
Nov-09	135,000		(50,000)	(50,000)	
Dec-09	135,000				
Jan-10	135,000		(20,000)		(20,000)
Feb-10	135,000		(20,000)	(40,000)	(20,000)
Mar-10	135,000		(20,000)	(20,000)	(20,000)
Apr-10	877,500			(20,000)	(20,000)
May-10	135,000			(20,000)	(20,000)
Jun-10	135,000		(13,207)	(20,000)	(20,000)
Jul-10	225,000		(20,000)	(20,000)	(20,000)
Aug-10	225,000		(20,000)	(20,000)	(20,000)
Sep-10	225,000		(20,000)		(20,000)
Oct-10	225,000		(20,000)		(20,000)
Nov-10	225,000		(20,000)		(20,000)
Dec-10	225,000		(20,000)		(20,000)
Jan-11	253,127		(20,000) [*19]		(20,000)
Feb-11	253,127		(20,000)		(20,000)
Mar-11	253,127		(20,000)		(20,000)
Apr-11	253,127		(20,000)		(20,000)
May-11			(20,000)		(20,000)
Jun-11			(20,000)		(20,000)
Jul-11	253,127		(20,000)		(20,000)
Aug-11	253,127		(20,000)		(20,000)
Sep-11	253,127		(20,000)		(20,000)
Oct-11	107,207		(20,000)		(20,000)

Date	*Trust* Funding from College Income	*Trust* Funding from Investment Account	Brother Distributions from *Trust*	HUSBAND Distributions from *Trust*	Sister Distributions from *Trust*
Nov-11	107,207		(20,000)		(20,000)
Dec-11	107,207		(20,000)		(20,000)
Jan-12	154,735		(20,000)		(20,000)
Feb-12	154,735		(20,000)		(20,000)
Mar-12	154,735		(20,000)		(20,000)

It is clear that this cutoff of the distributions from the 2004 ***trust*** only to the husband and just on the eve of divorce was a deliberate manipulation to erase a major component of the husband's annual income and to silence his interest in the ***trust*** -- for a convenient time while the divorce was ongoing. Significantly, the judge found it likely that the husband would receive distributions from the 2004 ***trust*** after the divorce was over. The judge found as follows. "The Court finds that the suspension of ***trust*** distributions occurred because [the husband] filed for divorce and the Trustees deemed it risky to give [the husband] money that might be shared with [the wife], a non-beneficiary." The husband now seeks to cover this manipulation by invoking the spendthrift provision.[15]

15 Notwithstanding the [*20] significant assets and distributions, there were no annual accountings by the trustees of the 2004 ***trust.***

iv. *The spendthrift provision*. This pattern of distribution -- substantial distributions before the divorce, then zero as the divorce loomed -- belies the husband's invocation of a spendthrift provision to exclude the 2004 ***trust*** from his marital ***estate.*** The spendthrift provision provides as follows:

> "Neither the principal nor income of any ***trust*** created hereunder shall be subject to alienation, pledge, assignment or other anticipation by the person for whom the same is intended, nor to attachment, execution, garnishment or other seizure under any legal, equitable or other process."

It is well established by law that a ***trust,*** even one with a spendthrift provision, may be included in a marital ***estate*** for purposes of division under § 34. "Common sense and basic concepts of fairness support the notion that ownership of a valuable asset demonstrates ability to pay without further inquiry as to whether payment can be enforced directly against the asset. . . . The law does not require that an obligor be allowed to enjoy an asset--such as a valuable home or the beneficial interest in a spendthrift [*21] ***trust*** -- while he neglects to provide for those persons whom he is legally required to support." *Krokyn* v. *Krokyn*, 378 Mass. 206, 213-214 (1979). Accord *Lauricella* v. *Lauricella*, 409 Mass. at 216. "[W]e have held a number of intangible interests (even those not within the complete possession or control of their holders) to be part of a spouse's ***estate*** for purposes of § 34." *Id.* at 214. Thus, in *Lauricella* it was held that a ***trust*** with a spendthrift clause was includable under § 34. See *Davidson* v. *Davidson*, 19 Mass. App. Ct. 364, 371 (1985) (remainder interest subject to valid spendthrift clause included in ***estate*** for property division under § 34).

v. *The ascertainable distribution standard in the 2004* ***trust***. We also consider, as did the ***probate*** judge, whether in this case the ***trust*** is subject to an ascertainable standard which supports the inclusion of this asset in the marital ***estate.*** The income stream was not too remote or speculative, nor purely discretionary.

As to the ascertainable standard for distribution, the 2004 ***trust*** provides in art. first, par. A, a common distribution standard tied to such life matters as support, welfare and maintenance.

> "Until the division of the ***Trust*** into separate shares pursuant to paragraph B below, the Trustee shall pay to, or apply for the benefit of, a class composed of any one or more of the Donor's then living [*22] issue such amounts of income and principal as the Trustee, in its sole discretion, may deem advisable from time to time, whether in equal or unequal shares, *to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class* . . . . In the exercise of such discretion, the Trustee may take into account funds available from other sources for such needs of each beneficiary . . . . At the end of each taxable year, any net income which is not disposed of by the terms of this paragraph shall be added to the principal of the ***trust estate.***" (Emphasis added.)

Thus, the husband had a present enforceable right to distributions from the 2004 ***trust.*** That factor, among others, was appropriately assessed by the ***probate*** judge in weighing the value and manner of the total asset division to the wife. Significantly, the judge found it likely that the husband would receive distributions from the 2004 ***trust*** after the divorce was over.

In these respects, the 2004 ***trust*** differs from wholly discretionary ***trusts,*** with no distribution standards regarding support, health, maintenance, welfare, or education. Thus, we are not persuaded by the husband's citation [*23] to *D.L.* v. *G.L.*, 61 Mass. App. Ct. 488, because the ***trust*** at issue in that case involved payments that were wholly discretionary, and, consequently, the ***trust*** was not includable in the marital ***estate.*** (In *D.L., supra*, neither income nor principal had ever been distributed from the subject ***trust*** to the husband, a marked contrast to this case where there were serial monthly distributions to the husband.)

Reduced to essentials, it is clear that the 2004 ***trust*** has an ascertainable standard pursuant to which the trustees, as fiduciaries, were obligated to, and actually did, distribute the ***trust*** assets to the beneficiaries, including the husband, for such things as comfortable support, health, maintenance, welfare, and education. Illustrative of ascertainable standards which govern ***trust*** distributions, see, e.g., *Marsman* v. *Nasca*, 30 Mass. App. Ct. 789, 795 (1991), quoting from *Woodbury* v. *Bunker*, 359 Mass. 239, 243 (1971) (language directing trustees to pay beneficiary such amounts as they "shall deem advisable for his comfortable support and maintenance" has been interpreted to set an ascertainable standard, namely to maintain life beneficiary "in accordance with the standard of living which was normal for him before he became a beneficiary of the ***trust***"). See also *Dana* v. *Gring*, 374 Mass. 109, 117 (1977); *Dwight* v. *Dwight*, 52 Mass. App. Ct. 739, 744 n.5 (2001) ("the trustee would be under a duty [*24] to provide income from the ***trust*** to the husband should the trustee determine, upon inquiry, that the husband needed it").

Given these ascertainable standards, the husband's interest in the ***trust*** is vested in possession, with a presently enforceable right to the ***trust*** distributions to support his lifestyle during his lifetime including for maintenance, welfare, and education (and including educational funds needed for the special needs of the two children). Indeed, the pattern of distributions up to the time of the divorce filing (with the husband regularly receiving distributions until the eve of the divorce filing) reflects distributions from the 2004 ***trust*** that fall within these ascertainable standards.

Finally, it cannot be gainsaid that the substantial income distributions for support, maintenance, and welfare from the 2004 ***trust*** were woven into the fabric of the marriage. The 2004 ***trust*** distributions were integral to the family unit, and the family depended upon these ***trust*** distributions monies to meet their routine expenses and to maintain their standard of living. It was mostly the large cash distributions from the 2004 ***trust*** which allowed the husband and wife to live an upper [*25] middle class lifestyle, own an expensive home, supplement the expenses for their special needs children's services, and live well beyond the husband's inflated bookstore income of $170,000. The judge found the husband had expenses of $3,557 per week and wife had expenses of $2,910. Their combined annual expenses are $336,284. As the judge found, such high-level expenses could *only* have been met with augmentation from the 2004 ***trust*** distributions. Notably, the ***trust*** distributions were all tax-free, so the disposable income was significant. In short, the family lifestyle and expenses, as a matter of financial mathematics, could not have been met on the husband's after-tax net income *without* the 2004 ***trust*** income stream as woven into the marriage fabric.

Furthermore, upon termination of the distributions from the 2004 ***trust,*** the husband will receive a share equal to his siblings. The husband therefore has a vested beneficial interest subject to inclusion in the marital ***estate.*** Even a "remainder interest under [a] testamentary ***trust*** . . . constituted a sufficient property interest to make it a part of [the] ***estate*** for consideration in connection with a property division under § 34." *Davidson* v. *Davidson*, 19 Mass. App. Ct. at 372.[16]

16 We reject [*26] the husband's argument that simply because the pool of beneficiaries remains open to future offspring, the 2004 ***trust*** is not subject to valuation and division as an asset of the marital ***estate.***

vi. *The 2004* ***trust*** *valuation and division.* Having decided that the 2004 ***trust*** was includable in the marital ***estate,*** the judge had discretion to divide that asset. "Once the judge included these assets as part of the marital ***estate,*** [he] had broad discretion to determine how to divide the entire ***estate*** equitably . . . ." *Williams* v. *Massa*, 431 Mass. at 625-626. Moreover, the fact that the value of a vested, but not yet distributed, interest may not be susceptible of precise calculation "does not alter its character as a divisible asset." *Lauricella* v. *Lauricella*, 409 Mass at 217. See *Davidson* v. *Davidson*, 19 Mass. App. Ct. at 373 n.12.

Our divorce law takes an expansive view of what may comprise the marital ***estate*** of a party, including a beneficial interest in a ***trust.*** In this case, the distributions to the husband from the 2004 ***trust*** from 2008 to 2010 (prior to the divorce) support including the 2004 ***trust*** in the ***estate*** of the recipient subject to division under G. L. c. 208, § 34. See *Earle* v. *Earle*, 13 Mass. App. Ct. 1062, 1063 (1982); *Davidson* v. *Davidson*, 19 Mass. App. Ct. at 374 n.13; *Comins* v. *Comins*, 33 Mass. App. Ct. at 30.

For these reasons, we conclude that the ascertainable standard embedded in the 2004 ***trust,*** the enforceability of that standard for distributions to the [*27] husband, and the vested nature of the husband's interest in the 2004 ***trust*** warranted the judge in including the 2004 ***trust*** in the marital ***estate.***[17]

17 The value the judge assigned to the husband's interest in the 2004 ***trust*** was justified on the record.

e. *Attorney's fees.* The award of attorney's fees to the wife's counsel in the amount of $175,000 was based, in large part, on the husband's failure to obtain information concerning, and to list a value for (other than as "uncertain"), his beneficial interest in the 2004 ***trust.*** On this record, including, but not limited to, the attorney's fees unnecessarily incurred by the wife in "scorched earth litigation" and discovery violations,[18] we conclude the fees awarded are reasonable and shall be affirmed.

18 We note two limited examples, from an array of such tactics. In the husband's trial testimony (on a point *not* credited by the ***probate*** judge), the husband testified that he did *not* know what he did with $800,000 in distributions he received. Likewise, in discovery, in an act reflecting his nonproduction of ***trust*** information, the husband in one of his financial statements referred to a beneficial interest in a ***trust*** set up by his father, but listed [*28] that ***trust*** as having *no value*.

2. *The contempt case.* On January 24, 2013, the wife filed a complaint for contempt, alleging that the husband had failed to comply with the amended judgment of divorce because he had not made a required monthly payment in the amount of $48,699.77.

The husband stated that he had no independent ability to make the monthly payments and, therefore, could not be adjudged in contempt. In his answer, and later through the representations of his counsel at the contempt hearing and in his own affidavit, the husband stated that while he had been making monthly payments to the wife in the required amount as a result of loans he had been receiving from his father, in January, 2013, his father had indicated that he would no longer be lending monies to the husband for this purpose.[19]

19 The wife acknowledges in her brief that the husband made five monthly payments to her from August 15, 2012, to December 15, 2012.

After his father decided to stop lending money to him, the husband requested, by letter, that the two trustees of the 2004 ***trust*** make distributions to him on a monthly basis so that he could comply with the judgment. Not surprisingly given the distribution cutoff, [*29] which was tied to the divorce, the trustees declined the husband's request for distributions.

After hearing, the husband was adjudicated guilty of contempt for failing to pay to the wife each month the sum of $48,699.77 for the period between January 15, 2013, and April 15, 2013. Arrearages (including the interest thereon) were fixed at $200,634.05, and the husband was ordered to pay attorney's fees to the wife's counsel in the amount of $5,250. The husband was ordered to jail for a period of sixty days unless released earlier by the payment of the amounts due. In her findings, the judge stated that the husband had violated a clear and unequivocal order and that he had sufficient assets to pay what he currently owed.

On this convoluted record, we are not persuaded that the contempt judgment can stand under the standard of *Birchall, petitioner*, 454 Mass. 837, 853 (2009). Here the husband did, or at least ostensibly tried to do, what he was supposed to do (write the letter to the trustees requesting distributions from the 2004 ***trust)***. Although one might be disposed to question the genuineness of all these machinations given the bias of the two trustees and the husband's father, the outcome of the matter is that [*30] it was not proved by clear and convincing evidence that the husband wilfully and intentionally violated a clear and unequivocal order. Accordingly, the judgment of contempt is set aside. See *Dominick* v. *Dominick*, 18 Mass. App. Ct. 85, 94 (1984); *Flaherty* v. *Flaherty*, 40 Mass. App. Ct. 289, 289 (1996).

3. *The motions to stay.* Following the entry of the amended judgment of divorce, the husband filed a motion for stay pending appeal, which was denied by the ***probate*** judge on March 7, 2013. Thereafter, the husband filed a motion for

stay in this court pursuant to Mass.R.A.P. 6(a), as appearing in 454 Mass. 1601 (2009), which was denied by a single justice, without comment, on April 12, 2013. The husband has appealed from the order of the single justice. We see no merit in this appeal. Indeed, we note that on February 11, 2014, a panel of this court stayed so much of the amended judgment as required the husband to pay to the wife the monthly sum of $48,699.77 for twenty-four months to effectuate the judgment.

As to the stay during this appeal, that stay shall be vacated upon entry of the rescript by this court.[20]

20 Contrary to the wife's assertion, we decline to hold that the judge improperly failed to include the husband's hypothetical breach of fiduciary duty claim (which she values at $380,000) as a marital asset under G. L. c. 208, § 34. Where, as here, [*31] there is no pending lawsuit against the trustees, contrast *Hanify* v. *Hanify*, 403 Mass. 184, 188 [1988]), and the record is devoid of indication that the husband intends to file such an action, we think the hypothetical breach of fiduciary duty claim is too speculative to be included in the marital ***estate.***

We also reject the wife's argument that future ***trust*** distributions to the husband should have been included in the determination concerning alimony. The judge correctly decided that "[s]ince Husband's share of the 2004 ***trust*** is being divided, the court will not use any future stream of income from distributions in assessing alimony."

Conclusion. In the divorce appeal, docket no. 13-P-906, the amended judgment is affirmed. In the contempt action, docket no. 13-P-1385, the judgment of contempt is vacated. The wife's request for appellate attorney's fees and costs is denied. In the appeal from the order of the single justice denying the stay pending appeal, docket no. 13-P-686, the appeal is dismissed.

So ordered.

DISSENT BY: FECTEAU

DISSENT

Fecteau, J. (dissenting, with whom Kantrowitz, J., joins). In my view, the husband's interest in the 2004 income distribution ***trust*** (the 2004 ***trust)*** is too remote and speculative, too dependent on trustee discretion, and [*32] too elusive of valuation to have been included in the marital ***estate*** for purposes of division. Therefore, I respectfully dissent from that part of the majority opinion affirming the portion of the amended judgment which includes the husband's interest in the 2004 ***trust*** in the marital ***estate*** for purposes of division pursuant to G. L. c. 208, § 34.

I recognize, as the majority points out, that the existence of a spendthrift clause within a ***trust*** instrument, such as the ***trust*** instrument at issue here, does not necessarily preclude the ***trust*** from being included in the marital ***estate.*** See *Lauricella* v. *Lauricella*, 409 Mass. 211, 216 (1991). Moreover, it is also accurate for the majority to state that the uncertainty of value of a party's interest in an asset alone is not necessarily sufficient to preclude consideration of the interest as subject to division. See *id.* at 217. Last, I agree that the ***trust*** at issue here contains an ascertainable standard -- namely, the "comfortable support, health, maintenance, welfare, and education" of each member of the class. However, each of the aforementioned propositions cannot be viewed in isolation but, rather, must be read together and in the context of the entire ***trust*** instrument. As discussed further *infra*, the ***trust*** instrument [*33] as a whole, including but not specifically limited to the spendthrift clause, the uncertain value of the interest, and the discretionary nature of the instrument, renders the husband's interest in the ***trust*** too speculative and remote for inclusion in the divisible ***estate.*** See *D.L.* v. *G.L.*, 61 Mass. App. Ct. 488, 496-497 (2004).

At the outset, the wife's reliance upon *Comins* v. *Comins*, 33 Mass. App. Ct. 28 (1992), is misplaced, as it does not govern the present case in material respects. In *Comins*, the wife was the beneficiary of a fund "held as a separate ***trust,***" for her sole benefit, that had been settled and funded by her father, the terms of which provided that "the trustee should 'in its discretion pay to [the wife] so much or all of the income and principal of [the ***trust***] as in its discretion it deems advisable to provide for the *comfort, welfare, support, travel and happiness* of [the wife].'" *Id.* at 30 & n.4 (emphasis in original). The wife was also granted the power to appoint recipients of the ***trust*** corpus upon her death. *Ibid.* In addition, the ***trust*** had a fixed fair market value. *Id.* at 30. It was in this context that we concluded that the judge properly included in the marital ***estate*** the wife's interest in the ***trust,*** stating, inter alia, that "[a]s in *Lauricella* [*34] [v. *Lauricella*, 409 Mass. at 216,] the wife has a 'present, enforceable, equitable right to use the ***trust*** property for [her] benefit.'" *Id.* at 31. Compare *Randolph* v. *Roberts*, 346 Mass. 578, 579 (1964) (where Supreme Judicial Court, in discussing ***trust*** estab-

lished for support of named beneficiary, stated: "[t]he ***trust*** confided exclusively to the discretion of the trustees the decision whether any principal should be used for the support of the defendant [beneficiary]. She has no absolute right to the use of any part of the principal, and could herself compel principal payments only by showing that the trustees had abused their discretion by acting arbitrarily, capriciously, or in bad faith"); *Pemberton* v. *Pemberton*, 9 Mass. App. Ct. 9, 20-21 (1980) (where, in case in which ***trust*** appears to have contained ascertainable standard, we stated, "if even apart from the spendthrift clause a trustee is given the discretionary power to distribute income or principal to described beneficiaries, 'any right of any beneficiary to receive anything is subject to the condition precedent of the trustee having first exercised his discretion" [quotation and citation omitted]).

> 1 The sole asset of the ***trust*** in *Lauricella* was a two-family house, and the Supreme Judicial Court stated that the husband in that case had exercised his right to use the [*35] property during the marriage by residing in one of the dwelling units in the house. *Lauricella* v. *Lauricella*, 409 Mass. at 212, 216.

Unlike the ***trust*** in *Comins*, there are a number of considerations regarding the ***trust*** in the present case that militate against inclusion of the husband's interest in the ***trust,*** for purposes of a division of property in the marital ***estate.*** First, the ***trust*** at issue has an open class and multiple beneficiaries, in different generations, to whom the trustees owe fiduciary duties.[2] This is in obvious contrast to the ***trust*** in *Comins*, which had as its sole beneficiary the wife, and the ***trust*** in *Lauricella*, of which the husband was one of two beneficiaries. Given that the ***trust*** at issue here has an open class, both the near-term and long-term interests of the beneficiaries are implicated. See *D.L.* v. *G.L.*, 61 Mass. App. Ct. at 497 (citing as one factor generational nature of ***trust*** in concluding that husband's interest in ***trust*** was too remote and speculative).

> 2 There are currently eleven beneficiaries of the 2004 ***trust*** -- the husband and his two siblings, and their eight children. The judge noted that neither the husband nor his siblings have grandchildren "at this time." Only the husband and his two siblings have received any distributions [*36] from the 2004 ***trust*** to date. The ***trust*** also provides that, until the death of the donor, the independent trustee is authorized, "in its sole and absolute discretion, to add one or more spouses of the Donor's issue as a permissible beneficiary of the income and principal of any ***trust*** established hereunder."

Second, the "ascertainable standard" in the present case cannot be read in isolation. It must be considered in the context of the terms of discretion in which it is found and of the entire ***trust*** instrument. While the ***trust*** instrument evinces an intent on the part of the husband's father to benefit the husband (and the other beneficiaries) for specified purposes, it grants to the trustees discretion as to the amounts and timing of distributions and allows the trustees to take into account (among other factors) funds available from other sources. The trustees have made distributions in some years and not in others. In short, the husband's interest in the 2004 ***trust*** stands on different footing from a party's interest in cases where interests are more clearly fixed and certain. Compare *Lauricella* v. *Lauricella*, 409 Mass. at 216-217 (husband's interest in ***trust*** rightfully included in marital ***estate*** where husband was one of two beneficiaries, [*37] and ***trust*** was completely funded by sole asset, which was house in which husband had regularly resided previously and from sale of which husband could profit); *Comins* v. *Comins*, 33 Mass. App. Ct. at 30-31 (wife's interest in ***trust*** properly included in marital ***estate*** where wife was sole beneficiary of separate ***trust*** which had fixed fair market value).

Significantly, valuation of the husband's interest is too speculative to stand and further demonstrates why the interest should not have been included in the ***estate.*** There are serious problems in this case with respect to the judge's determination that the husband has a one-eleventh interest in the 2004 ***trust*** which underscore the difficulty of establishing the husband's interest and undermine the judge's valuation of that interest. Simply put, the judge's determination of the husband's one-eleventh interest, and the valuation that flows therefrom, should not stand. Not only does the ***trust*** instrument make clear that the class of beneficiaries is open (and the number of beneficiaries may well increase), but the ***trust*** also allows for distributions to be made in equal or unequal shares, and upon consideration, in the trustees' discretion, of funds available from other sources for the [*38] needs of each beneficiary.[3] Furthermore, determination of the husband's interest in the principal amount at that time at one-eleventh places him, and the wife, by virtue of this ruling, in an unfair advantage, not only vis-à-vis possible additional beneficiaries, but also in the event of a deterioration in the ***trust*** corpus (which appears not unlikely given the scrutiny of "for-profit" educational institutions by the Federal government).[4] In the circumstances of this case, the fractional share methodology employed by the judge has produced an arbitrary result. See *Adams* v. *Adams*, 459 Mass. 361, 386 (2011); *Ray-Tek Servs., Inc.* v. *Parker*, 64 Mass. App. Ct. 165, 175 (2005) ("Valuation of assets . . . should be based on evidence that shows it by a fair degree of certainty and accuracy" [citation omitted]).[5]

3 Indeed, the judge acknowledged in her order denying the motion for stay pending appeal that the exact amount of the husband's interest in the ***trust*** may be uncertain.

4 There are two additional problems relating to valuation of the stocks at issue. First, the nature of the corporations -- for-profit colleges -- is such that shareholders of the corporations, such as the ***trust,*** are obligated to contribute money to the corporations yearly when the corporations are attempting to comply with Federal rules [*39] and regulations. Therefore, the ***trust*** corpus can fluctuate greatly depending on the financial needs of the corporations in relation to compliance with Federal law. Second, the two corporations in which the ***trust*** owns stock are close family corporations and, thus, it appears that the stocks are not publicly traded. Common sense dictates that this fact renders the stock even more difficult to value and presumably more difficult to sell (if the trustees decided, in their discretion, to sell the stocks), and valuation necessarily depends on third-party appraisals only. It should also be noted that the ***trust's*** thirty-six percent share in one corporation is a nonvoting share, and the professional trustee testified that there would not be a buyer for nonvoting shares such as these.

5 The wife, in her proposed rationale, took the position that a disposition of the husband's interest in the 2004 ***trust*** should not be made on an "if and when received" basis. Relying, in part, on *Krintzman* v. *Honig*, 73 Mass. App. Ct. 1124 (2009) (a case decided pursuant to Appeals Court rule 1:28), she asserted that such an approach is inappropriate (and essentially constitutes an illusory division) when it could enable the trustees to make distributions in a manner that would prevent [*40] her from obtaining the value of the marital asset to which she is entitled.

The majority makes note of what it considers machinations on the part of the trustees to discontinue ***trust*** payments to the husband on the eve of the divorce filing in an effort to paint the husband's interest as remote and speculative where it never had been previously. However, the primary focus of the instant inquiry should be the terms of the ***trust*** instrument itself, not how those terms may be or have been manipulated. In other words, consideration of such manipulation must be secondary to the terms of the ***trust*** instrument itself.[6]

6 It is worth noting that a ***trust*** for the parties' son was established by the husband's father when the son was born. The son's private school tuition is currently paid by the ***trust*** which, as of March, 2012, had a market value of approximately $158,000. The husband's father and his husband's father's wife pay money into the ***trust*** and the husband is the trustee. The judge found that the husband's father had indicated at trial that if the husband could not pay for something in connection with the son's education, he and his wife would ensure that the son is taken care of through the [*41] age of twenty-three, or through an undergraduate program.

Similarly, the husband's father established a ***trust*** for the parties' daughter in her name. The husband's father and his wife deposit money into the ***trust*** and the husband is the trustee. As of March, 2012, the ***trust*** had a market value of approximately $157,000. The judge found that the husband had indicated that should the funds in the daughter's ***trust*** become insufficient to meet her needs, he would cover any expense. The husband's father also testified that that he and his wife would ensure that the needs of the parties' daughter were taken care of.

In addition to the aforementioned issues, inclusion of the husband's interest in the ***trust*** will create practical problems. Namely, the judge's decision to include the husband's beneficial interest in the ***trust*** as a divisible asset of the marital ***estate*** means that administrative hardships -- in the form of future litigation -- are not only possible but very likely. See *Williams* v. *Massa*, 431 Mass. 619, 628 (2000) (court, in discussing husband's unspecified "contingent remainder interests," stated: "[n]either the present assignment of a percentage of a contingent interest's value, nor a future award on an 'if and when' basis, avoids administrative [*42] hardships inherent in the valuation of expectant interests or in the requirement of continued court supervision"). Here, not only are there administrative hardships inherent in the valuation of the husband's interest, but continued court supervision looms large, as the judge's decision appears to envision future actions by the husband and the trustees (which could conceivably result in ancillary litigation). Also, it should be noted that, unlike alimony, property divisions are not subject to modification. See *Hanify* v. *Hanify*, 403 Mass. 184, 193 (1988) (Liacos, J., concurring in part and dissenting in part). This is important given that the class is open and subject to growth, thereby making the valuation even more dubious.

On all of the circumstances, the husband's interest in the ***trust*** should not have been included in the marital ***estate.*** Rather, this interest should have been weighed under the G. L. c. 208, § 34, criterion of "opportunity of each [spouse] for future acquisition of capital assets and income." For this reason, I dissent.