STATE OF MAINE

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Docket No. OXF-24-84

THOMAS E. RIDEOUT

Plaintiff/Appellant

V.

MARTHA L. VANDERWOLK

Defendant/Appellee

ON APPEAL FROM RUMFORD DISTRICT COURT

APPELLANT'S BRIEF

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[1] While Plaintiff provided testimony of his pre-marital contributions to the corporation, this amount is not ripe for argument.

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

OTHER AUTHORITIES

APPELLANT BRIEF

GLOSSARY OF TERMS

TT	Transcript of Referee Hearing (Appendix pgs. 125 - 135)
LIM-T	Transcript of Motion in Limine Hearing (4/30/2023) (Appendix pgs. 114 – 121)
PC-T	Transcript of Phone Conference (12/1/23) (Appendix pgs. 123 - 124)
MPLLC	Magalloway Publishing LLC
NHOG	New Hampshire Outdoor Gazette
ROA	Registry of Actions (FM-2020-064)(Appendix pgs. 1-14)
SPC	Sturtevant Pond Camps

I. INTRODUCTION

Pending since May 2020, this divorce action presents a unique set of issues including, but not limited to, determination of marital v. non-marital property, valuation of shares of a foreign (New Hampshire) corporation operating – and owning real and personal property – in the State of Maine, jurisdiction of the Court to award assets purportedly held by that foreign corporation, equitable award of marital assets, including spousal support, and the elongated and ineffective use of the referee process. While the Court file is rife pretrial motions and pleadings, with concomitant admonishments to both parties for the delay in getting to final judgment, the record reflects "decisions" on pretrial matters to be deferred to the final hearing. While repeatedly set for "docket call" and a trial month, given the prioritization of child protective and family matters involving children, a final hearing before the District Court judge who presided over all of the pretrial matters

was never scheduled. Consequently, the parties opted for the referee process as prescribed in M.R.Civ.P. 53, an avenue that exacerbated the complexity of the presentation to the Court.

II. PROCEDURAL HISTORY

Plaintiff Thomas Rideout (hereinafter referred to as "Plaintiff" or "Tom") filed a Complaint for Divorce dated April 22, 2020 on or about May 14, 2020. *See ROA p.1* and *Appendix p. 34.* Defendant Martha Vanderwolk (hereinafter referred to as "Defendant" or "Martha") filed an Answer to Plaintiff's Complaint for Divorce dated May 18, 2020 on or about May 20, 2020. *See ROA p.2* and *Appendix p.35.* .

Defendant filed a Motion in Limine on or about June 23, 2020 to declare MPLLC and its sole asset Sturtevant Pond Camps to be Martha's non-marital property. Plaintiff filed an Objection on or about July 27, 2020. The Court conducted a hearing on the Motion in Limine on April 30, 2021, and issued an order on May 11, 2021, denying Defendant's Motion. The Court specifically found that Martha's assertion that the funds used to purchase and improve the property were a gift to her from the 1988 trust, was not borne out by the evidence. The Court also found that "the comingling of funds and income from each party – used for Camp purposes – and Plaintiff's contributed marital labor establishes a marital component to the MPLLC." *See Appendix p. 68 [Order on Defendant's Motion in*

Limine]. The Court additionally issued an Order on Discovery Dispute on that same day. *See ROA p.5* and *Appendix p. 73.* The Court directed Defendant to provide supplemental and specific discovery answers, and written or electronic copies of requested documents.

After no trial dates became available,[1] the parties agreed to utilize the Referee process. The hearing was held before a referee on June 6, 2022, July 1, 2022, and July 22, 2022. The Referee filed an initial Report with the Court on or about November 22, 2022. *See ROA p.10.* Timely objections were filed by the parties on November 30, 2022 (Plaintiff) and December 1, 2022 (Defendant). The Referee then issued a supplemental report on February 9, 2023, to which written objections were filed on March 23, 2023 (Defendant) and March 24, 2023 (Plaintiff). *See Appendix p. 36.* The parties requested that the Court issue a decision regarding these objections on the basis of these written submissions.

The Court issued an Order on the objections to the Referee Report on May 31, 2023. *See Appendix p. 56.*

The Court issued an Order of Court on October 19, 2023 citing procedural steps required before the Court could issue a final order. *See Appendix p. 81.* A

[1] The case had been scheduled for final hearing in August 2021, January 2022 (as a fourth back-up case), and February 9, 2022 (as a third back-up case). *See Appendix p. 1-14 (ROA).*

final telephonic conference was conducted on December 1, 2023. *See Appendix pgs. 122-123 (PC-T*).

The Court issued a final Divorce Judgment on January 29, 2024. *See Appendix p. 15.* Plaintiff timely appealed on February 20, 2022. *See Appendix p. 13 (ROA).*

STATEMENT OF BACKGROUND FACTS

Tom (DOB 1/7/1951) and Martha (DOB 7/30/52) began dating in late 2006. *See Report of Referee and Divorce Judgment,* and were married on July 16, 2008. *See LIM-T p. 15.* On September 25, 2007, Martha formed Magalloway Publishing LLC in the State of New Hampshire. *LIM-T p. 17.* The parties together started an outdoor publication called the New Hampshire Outdoor Gazette (NHOG), and wanted NHOG to be primarily in New Hampshire. *LIM-T p. 18:21; 45:5-6.*

After the marriage, Martha filed an amendment to the MPLLC certificate changing the primary purpose of the corporation to become outdoor recreation, information, and education. *LIM-T p. 19.* On September 24, 2009, MPLLC purchased real estate, not a business, previously known as Big Buck Camps for $375,000. *See LIM-T p. 20:18.* The parties renamed the property Sturtevant Pond Camps. *LIM-T p. 20:8.*

The funds to purchase the property were provided to MPLLC by The Walter W. Vanderwolk, Jr. 1988 Trust, hereinafter referred to as "1988 Trust." *See*

Appendix pgs. 82-91. This financial transaction is memorialized in a written Agreement between Martha in her personal capacity and Jefferson P. VanderWolk ("Jeff") as sole trustee of the Walter W. VanderWolk, Jr. 1988 Trust and the Marital Trust provided for under Article Seventh of the 1988 Trust ("the Marital Trust.").[2] The language in the Agreement states that references to "the Trust" refer to the 1988 Trust until such time as its assets are transferred to the Marital Trust…" *See Appendix p. 82.* The agreement further states that the Marital Trust will terminate on the death of Anne VanderWolk ("Anne"), at which time the assets will be distributed in equal parts to four beneficiaries.

Martha was not a beneficiary of the 1988 Trust. *See LIM-T p. 21:25.*[3] Once the father's wife died, Martha understood that the "loan" would be distributed among the four remaining siblings. *LIM-T p.22:22.* Martha understood that upon her stepmother's death, she would owe the trust back $400,000, a "loan" that she could buy from her siblings. *LIM-T p. 24:4, 7.*

MPLLC and Martha individually executed documents to establish the parameters of the investment, the creation of classes of shares, and the specific performance requirements imposed by the 1988 Trust upon MPLLC. *See Appendix*

[2] It is noteworthy that during the course of this litigation, no copies of the trust documents were received or offered. In fact, at the hearing on Defendant's Motion in Limine, Defendant testified that she had never seen the trust. *LIM-T 37:22.*

[3] Martha's father had established five other trusts, in none of which was Martha named a beneficiary. She was disinherited by her father. *See LIM-T P. 22:8, 10, 14.*

pgs. 82-90. Martha understood that the funds (up to $475,000) was an investment in exchange for 400 shares of MPLLC. *LIM-T p. 36:24, 25 to p. 37:1,2.* There exists no writing that would determine what was required of Martha once Martha's stepmother passed away. However, the original Agreement did state that after Anne's death, and after Jeff caused each beneficiary to receive one fourth of the preferred shares in MPLLC, any remainder beneficiary had the right to require Martha to purchase the shares for one fourth of the total amount invested in MPLLC.

During the course of the marriage, the parties received income from the rentals of SPC. *See LIM-T p. 32:23*. At the time of the purchase of the camps, there were four buildings on the property. The parties built an extension off one of the cabins, one was moved across the road for storage (*See TT 26:20*), one was renovated, and the fourth was doubled in size (*See TT 27:8)*. The parties also put in a new driveway (*See TT 25.8)*, septic, and electrical services. A new dock was purchased and installed (*See TT 23:18, 20).* In 2010, a house was constructed that became the primary residence for the couple. *See TT 28:2-22* and *Supplemental Report of Referee, Appendix 36 and LIM-T p. 33:5-8.*

During the time that MPLLC owned the camps, Tom was providing guide services through his separate business, Pakesso Guide Service, and working at the camps. *See LIM-T p. 34:10; TT p. 201: 21-25; 202: 1-4.* Tom received no salary

from the camps. *See LIM-T p. 55:9* and *TT 30:9-11.* The bank account for the business of Magalloway Publishing utilized the monikers of New Hampshire Outdoor Gazette, DBA Sturtevant Pond Camps, and Pakesso Guide Service. *See LIM-T p. 47: 14-24.* And *TT 40:14* and *TT 56:4.* All of Tom's guide wages went into this account. The parties used this account for business expenses as well as personal write-offs. *See LIM-T p. 49:2.* While some checks were written to Tom purportedly as a salary, none of those funds were retained by him personally and those checks were reinvested into the camps.

During the course of the operation of the camps, Tom worked exclusively at the camps and was the primary contact. *See LIM-T p. 58:12* and *TT 23:8, 9.* Throughout the marriage, Martha maintained full-time employment off-site in New Hampshire and Vermont. Tom played a larger role in the operations and physical improvements of the camp. *See Appendix pgs. 36-55 [Supplemental Report of Referee and Appendix pgs. 68-72 [Order on Motion in Limine].*

During the years when Martha's stepmother was alive, MPLLC paid an annual dividend to the Trust out of the MPLLC bank account. In 2016, Martha's stepmother passed away. On September 21, 2016, Jefferson Vanderwolk, as Trustee for the 1988 Trust transferred "all right, title, and interests in the 400 Class B shares owned by Jeff as trustee hitherto…" *See Appendix p. 91 [Purchase and Sale Agreement].* Martha understood that she was "buying the B shares" for $4.00,

a cash transaction that was actually executed. *See Appendix p. 36[Supplemental Report of Referee]*.

The parties continued to operate the camps up through the time when Tom filed for divorce. During the pendency of the divorce, Martha unilaterally listed the real estate for sale through a licensed real estate broker. There was apparently no viable interest in sale of the camps as a business, and the property was eventually sold as a real estate transaction, albeit with numerous items of personal property included by Martha in the sale.

Proceeds from the sale of the camps remain in a trust account held by counsel. In addition to the substantial sum from the sale of the real estate, the parties own significant personal property and individual bank accounts, into which both parties contributed funds. Plaintiff owns pre-marital real estate which was rented by third parties during the marriage. Rent from this property was subsumed into the business and personal accounts of the parties. Defendant owns pre-marital real estate for which marital funds were used for substantial improvements and for which a mortgage was paid off during the marriage. Additionally, Martha has numerous retirement accounts in just her name.

Both the referee and the Court found a marital component included in these accounts.

III. ISSUES FOR APPEAL

A. **The Court abused its discretion executing the requirements of M.R.Civ.P. Rule 53 as it pertains to the referee process**.

B. The Court improperly morphed the original investment by the 1988 Trust to MPLLC from a binding, contractual agreement to a monetary "gift" from the individual members of the 1988 Trust to Martha personally.

C. The Court failed to properly categorize the property[4] of MPLLC as a marital asset.

D. **The Court committed clear error when it incorrectly determined that the Court has no jurisdiction over the LLC and then proceeded to inexplicably value its shares.**

E. The Court failed to identify the marital component of the Vermont property and award an equitable share to Plaintiff.

F. The Court failed to properly assess and improperly divided the investment accounts of the parties.

G. The division of personal property with no concomitant balancing by an award of spousal support was manifestly unjust.

[4] While Plaintiff provided testimony of his pre-marital contributions to the corporation, this amount is not ripe for argument.

IV. ARGUMENT

A. **The Court abused its discretion executing the requirements of M.R.Civ.P. Rule 53 as it pertains to the referee process**.

Maine Rules of Civil Procedure Rule 53 governs the referee process. Here, after a lengthy delay in the litigation with no end in sight, the parties agreed to privately retain the services of a Referee. After three days of testimony over the course of six weeks, exchange of documents and objections, the Referee issued a final Supplemental Report on February 9, 2023, almost three years after the initial divorce filing. Rule 53(e)(1) requires the Referee to file the report with the clerk of the court, together with original exhibits and transcripts. The Rule further requires the clerk to "forthwith mail to all parties notice of the filing."[5] This notice was not done. *See ROA.* In *Brown v. Habrle*, 908 A.2d 640, the Law Court vacated a divorce judgment when the court clerk failed to provide this notice. Here, the Court presumed the parties received the report, as each party filed timely objections. In isolation, this oversight of due process may be found to be harmless.

Filing objections with the court does not necessarily provide an opportunity for a new trial; rather, it is a means for a party to identify errors, for the court to correct those errors if so persuaded, and potentially for the parties to avoid the need for appellate review. Any objections must be supported by legal argument with

[5] No evidence exists that the Clerk filed this Notice to the parties.

citations and precise references to the record. This step was also not done. *See Order on Parties' Objections to Referee, Appendix p. 56.* Here, while objections were filed, neither party followed proper motion practice of M.R.Civ. P. 7(b), and the Court further noted that the objections lacked specific record references.

In *Estate of O'Donnell* (2024 ME 20), the Court rejected objections that were not sufficiently specific and failed to state how or why the referee's conclusions were contrary to the law. The *O'Donnell* court detailed the requirement that a party's objections "must be supported by legal argument with citations and precise references to the record." Here the Court, in an attempt to push this case to a conclusion, side-stepped the parameters required by the referee process.

Rule 53 further states that the referee's conclusions of law and finding of fact are subject to the right of the parties to object to the acceptance of the report. If no waiver, the parties have ten (10) days to object to the report by serving said objections on the other party. The parties then may apply by motion to the Court for action upon the report and objections thereto.

Rule 53 states that in nonjury actions, the court "shall adopt the referee's findings of fact unless [they are] clearly erroneous," after hearing, the court "may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." M.R. Civ. P. 53(e)(2). *Gorman v. Gorman,* 10 A.3d 703 (Me. 2010).

Here, the Court received the objections of the parties, and issued a decision on those objections. The Court then issued an order saying a hearing was required, but then limited the hearing for the sole purpose to admit the exhibits included in the Referee Report, to the exclusion of other objections or evidence related to the Court's ruling on the objections.[6] *See Appendix p. 81.* Plaintiff specifically sought at the final "hearing" to provide a response to the Court's decision on the objections, and was denied. *See Appendix p. 123 [PC-T 3:16-18; 4:4, 5:8; 6:5].*

The Court's Order on the Parties' Objections to the Referee's Report included a radical shift from prior court orders relating to the ownership interest in MPLLC and the causative effect of the transfer of shares from the 1988 Trust. Specifically:

a. Sustaining Martha's objection to the Referee's finding that her interest in MPLLC became marital;
b. The transfer of Class B shares back to Martha was a gift, valued at $118,740 per Class B share.[7]

The net effect of these rulings effectively ignored the facts of Plaintiff's marital contributions to the operation of the camps. The Court did find that the camps were purchased through an "investment by the "Defendant's siblings" into

[6] This Order allowed the parties to object to this "procedural order," but did not provide the opportunity for the parties to object to the substantive decision of the Court relating to the parties' objections to the Referee report.
[7] The Court created this "value" based on MPLLC having 100 Class A shares (belonging to Martha) and 400 Class B shares (belonging to each of the four siblings). The Court's purported valuation assesses a one-fifth value to each set of 100 shares of the proceeds from the sale of the real estate.

Class B shares of MPLLC. The investment required specific performance of contractual conditions, conditions with which the parties complied. No monetary value was attributed to the Class B – or the Class A shares. Ever. The written Agreement requiring specific performance and regular payments to the Trust was never expressly terminated. However, the transfer of the Class B shares to Martha did, in theory, obviate her obligations to provide an annual financial contribution and/or consult with the 1988 Trust regarding certain operations of the camp.

M.R.Civ.P. 53(e)(2) requires the court to adopt the referee's findings of fact unless clearly erroneous. "Except as otherwise provided in this paragraph (2), the court *after hearing* may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instruction." *Id.* Here, the parties did waive oral argument regarding the Court's review of their respective objections, and requested the Court to issue a decision on their written objections to the Referee's report. However, the parties did not specifically waive a hearing after the Court issued its decision on those written objections which included new findings of fact. The *Gorman* court, cited above, also details the required process. If a party asserts an error in the referee's findings, the party must identify the error and present it to the Court. *Gorman at 705.* Once the Court has addressed the issue, only then may the party seek appellate review.

In *Daniel v. McCoy*, 2023 ME 17, the Law Court vacated a judgment of the District Court after the Court issued a final judgment that contained a finding that was not supported by competent evidence. In addressing post-judgment motions, the *Daniel* court did grant one of the motions, and "made twelve additional findings, which were based on its own review of the record…" While the *Daniel* decision involved certain restrictive parameters of a magistrate's decision, the *Daniel* court stated that "[w]hat the reviewing court cannot do is make its own additional findings without further hearing. Factfinding 'is not an action that could be taken by a reviewing judge, who can only consider the record as presented to the judicial officer who presided at the underlying hearing.'" *Daniel* citing *Kline v. Burdin*, 170 A.3d 282. The *McCoy* court further opined that the amendment, clarification, or creation of factual findings can only be accomplished by the judicial officer who issued the findings in the first place. *Id.*

In *Savage v. Renaud,* 58A.2d 724 (Me. 1991)(fn 2), the Law Court detailed responsibilities of the Court and the parties regarding the referee process, stating "[u]nder Rule 53, a party who fails to object to the referee's report within 10 days 'after being served with notice of the filing of the report' waives appellate review of the findings contained in that report." In *Savage*, as no notice of the filing of the referee's report with the court was entered on the docket sheet or mailed to the

Savages *by the clerk* [emphasis added], as provided by M.R.Civ.P. 53(e)(1), …the court set aside the first judgment on that ground."

The failure of the Clerk to file the proper notice, combined with the Court issuing a decision on the parties' insufficient written objections to the referee report, and the failure of the Court to provide an opportunity at hearing to address substantive issues on those written objections to the Referee report, exceeded the narrow parameters of Rule 53, and was an abuse of process and obvious error.

B. The Court improperly morphed the original investment by the 1988 Trust to MPLLC from a binding, contractual agreement to a monetary "gift" from the individual members of the 1988 Trust to benefit Martha personally.

The infusion of cash from the Trust was spent on the purchase of and improvements to real estate. As consideration for said infusion, MPLLC awarded shares to the Trust, and imposed conditions of performance and annual payments. The original Agreement between Martha, in her individual capacity, and the Trust anticipated that at some point, the stepmother would die, and the shares would be divided evenly between Martha's four siblings, the remainder beneficiaries. The Agreement specifies that a Remainder Beneficiary *shall have the right* [emphasis added] to *require* [emphasis added] to purchase his or her shares. No evidence exists that the investment funds were intended to be a gift.

The eventual transfer of the shares to Martha had the net effect of removing the future conditions of performance and annual payments, and had no cash value. In fact, Martha testified that the LLC agreement that turned the Class B share over to her was in fact a purchase. *See TT 354:17-25* and *TT 355:1-5.* It was not a loan forgiveness. Martha further testified that she was in fact buying the Class B shares from her siblings and therefore also buying the dividend. *See TT 355:12-13*.

In its final judgment, the Court issued a finding that essentially imputed the *intent* of the Trust was to provide the investment funds for the purchase of the camps, an investment that would eventually be forgiven. No material evidence exists that that was the plan. In fact, even if the Court could objectively support a finding of such an intent, then the Court must also opine that the initial investment was for the benefit of Tom and Martha, as co-owners and operators of Sturtevant Pond Camps. Martha's brother, when addressing the terms of the investment, stated "…*they* [emphasis added] would pay 2 percent rate of interest…" *See TT 256:20.*

In *Burrow v. Burrow*, 100 A.3d 1104, the husband argued that the court abused its discretion when it set apart a sum to the wife construed to be a gift. The *Burrows* court reviewed the trial court's finding for clear error, and stated that "[they] do not assume that the trial court made all the findings necessary to support its judgment." *Burrow* citing *Jarvis v. Jarvis,* 832 A.2d 775. The findings are

reviewed for sufficiency and as a matter of law, to support the result and if they are supported by the record. The *Burrow* court further opined that "[t]he court's 'explicit findings must be based on the evidence in the record and must be sufficient to support the result and to inform the parties and any reviewing court of the factual and legal basis for the trial court's decision.'" *Burrow* citing *Douglas v. Douglas*, 43 A.3d 965 (Me. 2012).

Here, there is no evidence to support the Court's conclusion that the initial investment was a gift. Had that been the intent, then the parties would presumably not felt obligated to honor the contractual terms of an annual return on the investment. Additionally, if the Court is allowed to infer in after-the-fact intent, then the Court should additionally inquire into the demonstrated intent of the parties as co-owners and operators of the camps.

Martha's stated intent, under oath, establishes that she and Tom worked together to plan the business venture, purchase the real estate, improve the property, pool the bulk of their resources into the business account, and – up until the filing of the divorce action – operate a co-owners of the camps. In fact, when asked why she never put Tom's name on the LLC (*See TT 351: 23-25)*, her only answer was "Because I didn't."

Therefore, if the Court seeks to look behind the written contracts to impute an intent that materially changes the terms of the written contracts, then the Court

should also determine the original *intent* of the parties when they embarked on this joint venture. The intent of the parties was clear – it was their retirement plan. When questioned about the purchase of the camps, and the plan for the use of the funds generated by the camps, Martha answered "[f]or us to – it was our retirement plan." *TT 295:18.*

C. The Court failed to properly categorize the property[8] of MPLLC as a marital asset.

The Court found that Martha's premarital interest in the value of MPLLC at the time of the marriage was $3,575.62. However, any property acquired after the marriage is presumptively marital property. After the marriage, Martha entered into a business agreement with an investor for an "arm's length" transaction to accept money to purchase real estate in return for relinquishing her sole autonomy in the operation of MPLLC. Martha became obligated to provide a return on the investment equivalent to a certain percentage of return. The daily operation of the camps, the concomitant improvements to the camps, and the construction of the marital home, inextricably intertwined the parties and their resources to firmly establish Sturtevant Pond Camps as a marital asset.

[8] While Plaintiff provided testimony of his pre-marital contributions to the corporation, this amount is not ripe for argument.

19-A M.R.S.A. §953 requires the Court to first set apart to each spouse that spouse's nonmarital property and then divide the marital property in proportions it considers just after considering all relevant factors. Section §953(3) states that for property acquired subsequent to marriage, "[a]ll property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property regardless of whether title is held individually or by the spouses in some for of coownership such as joint tenancy, tenancy in common, tenancy by the entirety or community property."

Property acquired prior the marriage is presumptively non-marital. Property acquired after the marriage is presumptively marital, subject to certain conditions. Primarily, property acquired by gift, bequest, or descent, or property acquired in exchange for property acquired prior to the marriage or by gift, bequest, or descent can be determined to be non-marital.

Plaintiff must concede that the original formation of MPLLC occurred prior to the marriage. However, the re-formation of MPLLC to become a sporting camp venture, the subsequent establishment of Class A and Class B shares in MPLLC, the purchase of real estate, and the establishment of the business known as Sturtevant Pond Camps all occurred after the marriage and are therefore presumptively marital. To further solidify this principle, the comingling of Tom's premarital guide business with financial resources used for business and personal

purposes further militate to a finding that the entire operation – and assets – are marital.

In *Copolla v. Copolla*, 938 A.2d 786, both parties appealed the court's ruling regarding the marital v. non-marital apportionment of property. In *Copolla*, the husband had pre-marital property which he sold during the marriage and purchased other [School Street] property. The court determined that one-third of the property was non-marital, and the remaining two-thirds were marital. The husband argued that the property should be wholly non-marital. The wife argued that as the School Street property was acquired after the marriage, the transmutation rule applies and the property should be wholly marital. The *Copolla* court stated that "[t]he transmutation rule provides that nonmarital property may be transformed into marital property when the spouse with a pre-existing non-marital interest exercises an objectively manifested intent to transform the property into marital property." *Copolla* at 791. The Law Court affirmed the decision of the trial court regarding the mixed character of the asset.

Here, the primary asset of the parties lies in the funds remaining from the sale of the real estate. The purchase and operation of the camps were wholly a joint venture, capitalizing on Tom's vast experience as a guide and his dedication to the daily operation and improvement of the property. When Martha describes their efforts, she describes it as a joint venture … "we had all the renovations done." *TT*

*292:18. "*We were doing so much renovation." *TT 294:17.* "…we had already made the transfer with Jeff." *TT 294:25.* It was their retirement plan. *TT 295:18.* This asset should be found to be wholly marital.

D. The Court committed clear error when it incorrectly determined that the Court has no jurisdiction over the LLC and then proceeded to inexplicably value its shares.

First, the Court's idea that the Court does not have jurisdiction over the LLC is a fallacy. The *Coppola* court assigned a marital component to property held in the name of an LLC prior to and after the marriage. In fact, because the parties made mortgage payments on the prior acquired property, and on the School Street property, the property had both a marital and a non-marital component.

While the Court may not have the authority to order a sale of property owned by a corporate asset, or direct that the corporation be dissolved, the Court does have jurisdiction of a party's membership interests and could equitably divide that interest. "To be clear, although it lacked jurisdiction to dissolve [the LLC], the court had jurisdiction over the marital personal property owned by the parties, which included their respective fifty percent membership interests in [the LLC]. The court could have set aside some or all of the membership interest of either party to the other, or it could have left each party with a fifty percent interest." *Littell v. Bridges,* 293 A.3d 445, 449 (2023 ME 29).

Further, the Court detailed an exhaustive summary of the language of the MPLLC membership agreements, and then attempted to apply 31 M.R.S. §1601 guidance which governs application of assets in winding up limited liability company's activities. MPLLC was not "winding up." MPLLC exists today.

The Court then spent considerable effort to attempt to value Martha's interest in the LLC. The Court set the premarital interest at $3,575.62. After the marriage, the LLC was repurposed, shares were established, and investments were made. In 2016, upon the death of the stepmother, there was not a debt of $475,000. There was an ongoing obligation to pay a percentage of proceeds from the operation of the camps. The value of MPLLC was the value of the real estate and the money in the business bank account less any debt obligation. Upon the death of the stepmother, without terminating the contractual agreement to pay certain annual proceeds, the 1988 Trust abdicated its role as a Class B shareholder.

The Court's conclusion that the shares are each one fifth to Martha and each of her four siblings has no literal or statutory basis. It appears that the Court simply chose to divide the 500 shares of MPLLC, with no explanation/verification of valuation of shares in respect to total value of the corporation, and assigned a equal share to Martha and each individual sibling associated with the 1988 Trust. Even if the siblings were found – by clear evidence in the record – to have gifted the original investment to Martha, then Martha should be found to have gifted her

share to Tom, who reasonably relied on this financial arrangement by not taking a salary, contributing his Pakesso income,[9] and not protecting his own financial security through maintenance of separate financial accounts.

The value of MPLLC remained as the value of the real estate and the money in the bank account, until such time as the real estate was sold. The proceeds from the sale remain in a trust account, and are subject to equitable division.

In *Graban v. Bamford*, 2017 Me. Unpub. LEXIS 55, the Law Court affirmed a lower court ruling that an automobile dealership established by the wife in 1985 was marital property for equitable distribution purposes. The *Graban* Court, citing *Coppola v. Coppola,* 938 A.2d 786 (Me. 2007), stated that there was ample evidence to support the court's finding that [the business], although originally nonmarital property, became marital property upon [the wife's] "***objectively manifested intent to transform the property into marital property***." The *Graban* court found that because the real property from which [the business] was operated was found to be an asset of [the business], the court did not err in considering the value of that property when dividing [the business'] value between the parties.

E. The Court failed to identify the marital component of the Vermont property and award an equitable share to Plaintiff.

[9] In addition to the Pakesso guide income, Tom contributed his monthly Social Security and his non-marital rent payments to the marital estate.

The Referee, as the factfinder, took evidence on this issue and issued a finding that the property was partially marital, Martha testified that at the time of the marriage, she owed a debt on the Vermont property. *See TT 299:20*. That debt was paid off during the marriage. The Court then overruled the Referee's findings, without a hearing, that a portion of the value of Martha's Vermont property was marital. The Court, in its decision on the objections to the referee report and in its final divorce judgment, determined that the property was presumptively nonmarital and awarded the entire asset to Martha.

In *Tibbetts v. Tibbetts*, 406 A.2d 70, 77 (Me. 1979), the Law Court adopted the dynamic definition of acquisition, meaning that a property is determined to be acquired as it is paid for. In situations where a spouse obtains title to real property before the marriage, but mortgage payments are made during the marriage, the property will include both marital and nonmarital components. When property continues to be acquired during the marriage, the presumption that the property is marital applies. In order to overcome the presumption, the person claiming a non-marital interest has the burden of showing what portion was nonmarital. *Williams v. Williams,* 645 A.2d 1118 (Me. 1994).

The Court then went to great lengths to lambaste the parties for not presenting additional evidence, stating that the property was "not the same" as it was at the beginning of the marriage. While neither party objects to that particular statement,

there was ample evidence presented to the Referee that the mortgage was paid off, and improvements were made to the property with comingled marital funds, contributions that clearly establish a marital component. Again, rather than unilaterally changing the findings of the Referee, the Court should have remanded this issue or, at the very least, allowed for presentation of evidence to the Court as a factfinder.

F. The Court failed to properly assess and improperly divided the investment accounts of the parties.

Defendant held and controlled four investment accounts. The Referee found that the Ameriprise Financial Brokerage Account and the American Funds Roth IRA were Martha's non-marital property. Although this finding was objected to by Plaintiff, the Court concurred and, without a hearing, awarded those accounts to Martha. The Court also awarded the Norwich University DC Plan, valued at $36,042.15, to Martha.

The Court also adopted, without hearing although objected to, the Referee's findings regarding the TIAA-CREF account.[10] The Court noted that that as of March 31, 2022, the value of the Union Institute and University 403(b) DC Plan was $220,003.94, and included a non-marital component of $83,299.15 to be "set aside" to Martha, and the balance of $136,704 was marital subject to division. The

[10] This investment account includes numerous subparts.

Court then determined that the traditional IRA, valued at $43,002.27 was marital property. The Court then took the total of what it determined to be the marital equity as of *March 31,* 2022, and divided the amount in equal proportions. An award of $89,854 was assigned to Plaintiff.

This specific valuation and award of a "sum certain" unfairly prejudices Plaintiff, and deprives him of his marital share to be awarded from this divorce action.

In *Ausitn v. Austin,* 748 A.2d 996 (2000 ME 61) , the wife appealed the Court's award of cash value instead of distributing shares of those funds to her. In *Austin,* the court awarded one-half of the account and directed submission of a Qualified Domestic Relations Order (QDRO). The parties addressed this post-judgment issue in the Superior Court which confirmed that "[a]lthough the divorce court recited the balance in the account as of the date of the hearing, the award was not one-half of that balance but one-half of the account." *Austin* at 999. The Court then substituted a new order that stated "[g]iven the vagaries of the stock market, this court concludes that the value of the account to be distributed should have been determined as of the *date of the divorce* [emphasis added] and the defendant should have received one-half of this amount." *Id.* The *Austin* court clearly found that the lower court erred in "fixing the date of valuation as the date of the decree, rather than the date of the actual division of the asset. Gains or losses in the account's

value subsequent to the divorce belong to the parties in proportion to their share in the fund." The *Austin* court further opined that the underlying court's order deprived the wife of her share of the fund's growth subsequent to the date of the decree.

Here, the parties are two years beyond the date of the valuation suggested by the Court, with no final divorce decree yet in place. The Court should have taken judicial notice of the fluidity of investment accounts such as these. In *Warner v. Warner,* 807 A.2d 607 (Me. 2002), the court assessed the investment portfolios of the husband, and completed an intricate analysis of the increase in value and effects of market appreciation. The Court in this case did no such analysis, and failed to recognize the impact of market forces. In assessing the *Austin* holding, the court indicated that the future returns on the investments were uncertain, and adjustments should be taken into account in determining income potential of the parties, specifically in the spousal support award. The *Warner* court dated "[w]e take judicial notice of the fact that stock values are dramatically lower today than the were six months ago. Recent history demonstrates the potential for unforeseen events to dramatically and adversely affect stock values." *Warner* at 624.

As in *Austin,* the Court must remand this issue to establish the value of the account as of the date of distribution.

H. The division of personal property with no concomitant balancing by an

award of spousal support was manifestly unjust.

The Court's disparate award of property was manifestly unjust to Plaintiff, and resulted in tremendously disparate positions that left Plaintiff a pauper and Defendant a millionaire.

The division of marital property must be in proportions that are just. A just distribution is not synonymous with an equal distribution; rather the division must be fair and just considering all of the circumstances of the parties. *Daniel v. McCoy*, 290 A.3d 103 (2023 ME 17). To make a just determination, the court must consider all relevant factors, including:

A. The contribution of each spouse to the acquisition of the marital property, including contribution of a spouse as homemaker;

B. The value of the property set apart to each spouse;

C. The economic circumstances of each spouse at the time the division of property became effective, including the desirability of awarding the family home or the right to live in the home for reasonable periods to the spouse having custody of the children; and

D. Economic abuse by a spouse.

19-A M.R.S.A. §953.

The Court correctly noted that both parties contributed to the acquisition of the marital assets in substantially equal ways, with the two largest marital assets

being the LLC and Martha's retirement accounts. The Court noted Tom's significant labor to the operation of the camps, the money from his guide service, and rent from his rental property, all of which was comingled with the LLC's resources and the parties other resources.

However, when applying section 953(1), the Court need not specifically enumerate its findings on each listed factor, as long as it is apparent the Court has considered those factors. The Court assigned total assets to Plaintiff of $236,860 and assets to Defendant of $1,022,283, with no apportioned award of attorney fees, referee fees, and only a nominal award of $1/year in spousal support. Defendant is left with no marital residence, and no income aside from his limited social security and rental income.

Additionally, the information upon which the Court based its award was stale. The Court used information from 2022 concerning valuation of assets, rather than establishing true value as of the date of the divorce (or at best, final divorce hearing).

In *Bolduc v. Bolduc*, 301 A.3d 771 (2023 ME 54), the Court vacated the lower court's valuation of real estate, as the lower court had used a valuation based on the parties' separation, and not the later value more close to the divorce. The *Bolduc* court reiterated the three-step process to be followed in equitably distributing marital property to: (1) distinguish marital from non-

marital property; (2) set apart nonmarital property; and (3) divide marital property in such proportion as the court deems just. *Id.*

The Court is required to distinguish marital versus nonmarital property, then set apart the nonmarital property. Aside from the purported errors in assignment of marital value to the assets listed above, the Court essentially accomplished this mandate. However, the Court failed in its duty to divide the marital property in such proportion as the Court deems just. The Court determined that Martha has ten times as much marital property as Tom. In fact, her nonmarital estate was three times the *entire* marital estate. Absent an explanation for such a lopsided award, or an accommodation through the award of significant spousal support and apportionment of legal and referee fees, no reasonable fact-finder could find that award to be just.

As an additional consideration, the data provided in the financial statements as well as the exhibits provided to the Referee are out of date, and could have – and should have - been updated had the Court granted the required hearing to the parties. Clearly, after four years, the personal property such as vehicles would suffer from depreciation, while the investment accounts, presuming that the parties have continued to respect the preliminary injunction, would have increased significantly in value.

The Court failed to consider the requisite statutory factors of this insufficient award, and therefore it was an abuse of discretion and erroneous as there are insufficient findings in the judgment.

V. CONCLUSION/RELIEF SOUGHT

The Court exerted considerable time and effort to hobble together a final decision on this long-standing, contentious, and convoluted divorce proceeding. While some of the now four-year delay can be attributed to the impacts of COVID on court scheduling, there is no excuse for this exorbitant delay that has kept these parties hanging with no resolution. They did not get their day in Court. While remand will necessarily impose further delay, in the interests of justice it must be done.

Appellant hereby requests remand to the lower court for hearing, at a minimum, on the specific issues of:

a. Determination of the marital component of the financial assets of MPLLC;
b. Equitable award of the proceeds of the sale of the real estate associated with the sale of Sturtevant Pond Camps;
c. Reconsideration and determination of the marital value of the Vermont property;
d. Determination of marital component of financial accounts based on updated financial records;

e. Reconsideration of values assigned to tangible personal property and apportionment thereof.

Respectfully submitted,

Dated: May 21, 2024

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VI. CERTIFICATE OF SERVICE

I certify that I have caused the following copies to be submitted to the following individuals as noted:

Maine Supreme Judicial Court (HAND DELIVERY)
205 Newbury Street Room 139
Porland, ME 04101
Ten (10) paper copies of Appellant's Brief
Eight (8) paper copies of Appendix
One (1) native copy of Appellant's Brief emailed to:
lawcourt.clerk@courts.maine.gov

Sarah C. Mitchell, Esq. (FIRST CLASS MAIL)
Skelton, Taintor & Abbott
500 Canal Street
Lewiston ME 04240
Two (2) paper copies of Appellant's Brief
One (1) paper copy of Appendix
One (1) native copy of Appellants Brief emailed to:
smitchell@sta-law.com

Dated: _____

_____
Sarah L. Glynn, Esq.
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