IN THE SUPREME COURT OF OHIO

07-1788

BARBARA MOSER,	:	Case No. _____
	:	
Plaintiff-Appellee,	:	On Appeal from the Court of Appeals for Portage County, Eleventh Appellate District, Case No. 2006 PA 00047
	:	
v.	:	
	:	
TERRANCE L. MOSER, et al.,	:	
	:	
Defendants-Appellants.	:	

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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TABLE OF CONTENTS

Page

EXPLANATION OF PUBLIC AND GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND THE FACTS 2

ARGUMENT 8

Proposition of Law:

A TRIAL COURT MAY NOT DISTRIBUTE AS MARITAL PROPERTY ASSETS HELD BY A PARTNERSHIP, BUT RATHER MUST EITHER DISTRIBUTE INTERESTS IN THE PARTNERSHIP OR ORDER DISSOLUTION OF THE PARTNERSHIP AND SUBSEQUENTLY DISTRIBUTE THE ASSETS REMAINING FOLLOWING THE WINDING UP OF THE PARTNERSHIP'S AFFAIRS 8

CONCLUSION 14

CERTIFICATE OF SERVICE 15

APPENDIX 1A

Decisions Below:

Moser v. Moser, No. 2006-PA-0047, 2007-Ohio-4109 (Portage App. Aug. 13, 2007) (Opinion) 2A

Moser v. Moser, No. 2006-PA-0047 (Portage App. Aug. 13, 2007) (Judgment entry) 21A

Moser v. Moser, No. 2003 DR 0036 (Portage C.P. Dec. 30, 2004) (Findings of Fact and Conclusions of Law) 22A

Moser v. Moser, No. 2003 DR 0036 (Portage C.P. April 26, 2006) (Judgment Entry) 39A

EXPLANATION OF PUBLIC AND GREAT GENERAL INTEREST

This case involves the treatment of assets owned by a partnership as marital property subject to distribution under Ohio's statutes governing divorce actions. Under Ohio law, domestic relations courts responsible for distributing the parties' assets in divorce proceedings have steadfastly respected various forms of business entities—such as corporations, partnerships, and trusts—in making such distributions. Accordingly, Ohio courts have generally not disregarded or invaded the business form in distributing marital assets. Rather, courts have typically classified the parties' interests in such business entities as marital property subject to division and have included those *interests* in their final distributions. Alternatively, courts have ordered the dissolution of partnership entities and distributed assets remaining after the partnerships affairs are satisfactorily wound up.

The trial court in this case departed from these well-established principles. The parties in this divorce action created a family limited partnership in which the husband was the general partner and the wife and children were limited partners. Both the trial and appellate courts concluded that the parties had, in fact, created a valid limited partnership. Both courts also acknowledged that parties had transferred property to the partnership in exchange for interests in the partnership itself. Accordingly, the partnership, rather the individuals, became the owner of the assets at issue herein—mostly real estate in various stages of development.

Nevertheless, the trial court, without dissolving the limited partnership, and without any regard for the interests of the children as limited partners or for other individuals or entities conducting business with the partnership (including those who also owned interests in certain partnership assets), simply included the partnership's assets as marital property subject to distribution. It then, in fact, distributed those assets to the parties individually, without

dissolving the partnership or even extinguishing the parties' interests in the partnership. Thus, the trial court, affirmed by the Court of Appeals, simply ignored the existence of a valid family limited partnership. It did not order a dissolution of the partnership, did not consider the liquidity of the partnership assets distributed, and did not extinguish or alter the parties' interests in the surviving partnership.

Not only is the Court of Appeals' decision herein contrary to well-established Ohio law, but it also has the potential of disrupting the regular conduct of businesses statewide. If other courts follow the decision and distribute as marital property partnership, or even corporate, assets without regard to the identity of the entity that actually owns those assets, the certainty of all business relationships will be undermined. This Court should, therefore, accept jurisdiction over this case and reverse the decision of the Court of Appeals.

STATEMENT OF THE CASE AND THE FACTS

Barbara L. Moser ("Barb Moser") and Terrance L. Moser ("Terry Moser") were married on October 11, 1980. Two children were born of the marriage, both of whom were, at the time of the trial court's final judgment, over the age of eighteen. By 1996, the Mosers had accumulated assets in excess of $2.1 million. In an effort to avoid future income, estate, and gift liability, the Mosers jointly consulted with an estate planning attorney who recommended the formation of a family limited partnership. Before the trial court, all witnesses agreed that family limited partnerships ("FLPs") are well-accepted and customary estate planning devices which achieve estate tax savings by transferring assets into a limited partnership and then gifting partnership interests to children to take advantage of the annual gift tax exclusion. The strategy is to transfer potentially appreciating assets in the early years of the FLP, while one or both parents retain control of partnership assets. The children are generally limited partners by design

so as to limit control over partnership assets. Any income from partnership assets attributable to the children is taxed at the children's lower income tax bracket. In this manner, partnership assets are leveraged to maximize the transfer of partnership interests to the children to take advantage of both estate and gift tax provisions and income tax bracket differentials.

On December 31, 1996, upon the advice of their attorney, the Mosers executed the Moser Family Limited Partnership ("MFLP") Agreement creating the MFLP as an Ohio limited partnership under R.C. Chapter 1782. The MFLP Agreement was executed by Terry Moser as Trustee of the Terrance L. Moser Trust and by Barb Moser, as Trustee of the Barbara Lyn Moser Trust. Significantly, Barb Moser also executed the MFLP Agreement as *custodian* under the Ohio Transfer To Minors Act for the two Moser children. Because of his business expertise in managing real estate developments and to prevent the children—the ultimate beneficiaries of the MFLP—from gaining control over the MFLP or its assets prior to termination of the MFLP, Terry Moser was named as the general partner with full and exclusive authority over partnership management and operations. Barb Moser and the children were named as limited partners. The initial term of the MFLP began on the date of the agreement and ended on December 31, 2047 unless otherwise terminated as provided by law or the MFLP Agreement.[1]

Each partner's capital account was based on the MFLP books and records and was initially credited with each partner's capital contributions. No "units" were assigned. Instead, each partner's partnership interest was to be based on the relative interests of the partners in the

[1]Section 16 of the MFLP Agreement addressed dissolution of the MFLP. Generally, upon dissolution in accordance with the MFLP terms (no later than 2047), the MFLP was required to follow a procedure for wind-up and termination of the partnership affairs. Partnership debts and liabilities were to be discharged in accordance with the priorities provided by law. Remaining assets would be distributed among the partners in the ratio of their respective partnership interests.

partnership as reflected in the partnership books and records, and no partner had "the right to withdraw or demand the return of his or her Capital Account or capital contribution *except upon dissolution of the Partnership as provided*" in the partnership agreement. (emphasis added).

As all the legal and accounting experts testified, the first step in employing the MFLP as an estate planning vehicle is for the parents to transfer assets to the MFLP. The parents "fund" the partnership and subsequently gift their partnership interests in the MFLP to the children to reflect an increase in the children's capital accounts and a corresponding decrease in the parents' capital accounts. As the MFLP Agreement explicitly provides, each partner had a capital account on the MFLP books and records. Each capital account was initially credited with each partner's respective capital contribution, increased over time by the partner's allocable share of profits and capital transaction gains. Each partner's interest was the relevant interest in undivided partnership assets. No individual partner held any undivided interest in any particular partnership asset. Each partner owned that share of total "Partnership Capital" in proportion to his or her "Partnership Interests." At the time of the trial court's final judgment, the MFLP owned a number of assets, consisting primarily of interests in various real estate developments. Taking into account the MFLP's liabilities—indeed, several of the partnership's assets had a negative value when considering the debt on the properties—the net value of the partnership's assets totaled $1,507,663.[2]

This divorce action was commenced in the Court of Common Pleas for Portage County, Domestic Relations Division, on January 17, 2003 by Barb Moser against Terry Moser. The

[2]Many of the assets recognized by the trial court as MFLP assets were actually partnership interests in other business entities owned jointly by the MFLP and third parties. The individual assets of these business entities were largely real estate properties in various stages of development, liquidity and profitability. The properties were heavily leveraged and subject to significant financing liabilities.

valuation and distribution of assets in the case was complicated by the various business entities, partnerships, and trusts in which the Moser family held interests, individually, jointly or in conjunction with third parties, including the MFLP. On March 19, 2003, Terry Moser and the other Defendants filed a motion for determination that the assets of the MFLP were non-marital assets. On December 30, 2004, the trial court issued its Finding of Facts and Conclusions of Law denying the motion. The trial court concluded, *inter alia,* that the MFLP was a valid and existing limited partnership, that certain properties were, in fact, conveyed to the MFLP after December 31, 1996 by deeds signed by Terry and Barb Moser, and that the MFLP acquired directly, and was 50% owner of, a variety of business entities including JMT Partnership, Clover Pointe Land Development, Ltd., Rootstown Industrial Park LLC, Sandy Lake Properties, LLC, Clover Pointe II and Clover Pointe III. A copy of the trial court's December 30, 2004 Findings of Fact and Conclusions of Law is included in the Appendix hereto.

On April 26, 2006, over three (3) years after the action was filed, the trial court issued its Judgment Entry granting the divorce, awarding spousal support, and distributing the marital assets, including assets held by the MFLP. A copy of the trial court's April 26, 2006 Judgment Entry is included in the Appendix hereto. Having previously determined that the MFLP to be a valid and existing Ohio limited partnership, the trial court proceeded to improperly distribute the partnership's assets as marital assets. The trial court split these individual assets without regard to the partnership agreement or the provisions of R.C. Chapter 1782, without regard to the respective ownership interests of the partners, including the Moser children, without regard to the liquidity of the property distributed or the economic desirability of retaining assets or interests in assets intact, and without regard to the significant adverse income, estate, and gift tax implications of the distribution.

The court awarded Barb Moser the "Terracove Assets," "KM Land Note Receivable," and "Rootstown Industrial Note Receivable"—each of which had a positive value and was relatively liquid—totaling $795,323 in assigned value. The court awarded Terry Moser "all remaining assets" of the MFLP not assigned to Barb Moser, a net value of $712,340. The Court did not address any surviving partnership liabilities corresponding to these remaining assets, including the mortgages on the underlying properties. The trial court did not address the liquidity of these remaining partnership assets. Moreover, the trial court ordered Terry Moser to pay $739,329 "Cash to Wife to equalize Property Division." The "equalization payment" was inextricably tied to the trial court's improper distribution of the MFLP assets.

In sum, (1) although the trial court found the MFLP to be a valid limited partnership, it did not award the parties their respective undivided *partnership* interests, but instead awarded the parties specific assets within the MFLP; (2) the trial court effectively distributed MFLP partnership *assets* without addressing MFLP partnership *liabilities* which would have been payable, in a normal dissolution of a limited partnership, prior to distribution under R.C. 1783.20 through R.C. 1782.37; (3) the trial court awarded Barb Moser identified assets having a *positive* value, but awarded Terry Moser remaining assets of the MFLP, subject to the surviving liabilities of the MFLP—including the MFLP's 50% interest in three limited partnerships, all of which had a *negative* value; (4) the trial court failed to consider relevant factors under R.C. 3105.171(F), including the liquidity of the assets distributed, the economic considerations of splitting the assets of the MFLP as opposed to retaining assets intact, and the tax consequences of the property division; and (5) the trial court did not even specifically require Barb Moser to relinquish her MFLP partnership interests, either as Trustee of her Trust or as custodian for the minor children under the Ohio Transfers To Minors Act.

Appellants Terry Moser, *et al.*, appealed from the trial court's April 26, 2006 Judgment Entry to the Court of Appeals for Portage County, Eleventh Appellate District.[3] On August 13, 2007, the Court of Appeals issued an opinion affirming the trial court's judgment. *Moser v. Moser,* No. 2006-P-0047, 2007-Ohio-4109 (Portage App. Aug. 13, 2007). A copy of the Court of Appeals' Opinion is included in the Appendix hereto. The appellate court agreed that "[t]he Moser Family Limited Partnership was set up with Terrance, as trustee of his revocable trust, as General Partner; Barbara, as trustee of her revocable trust, as a limited partner, and Shannon and Joshua as limited partners, with Barbara as their custodian." *Moser,* 2007-Ohio-4109 at ¶ 4. With regard to the trial court's distribution of MFLP assets as marital assets, the Court of Appeals stated:

> We find these cases [cited by Terry Moser] distinguishable in that they involved interests in partnerships involving third persons and/or non-marital partnership interests. In the present case, the only partners having an interest in partnership property are Terrance and Barbara, the parties to divorce. Moreover, the property at issue was marital before its transference into the partnership.
>
> The cases cited by Terrance cite to the Ohio Uniform Partnership Act, which provides that "[a] partner, subject *** to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess the property for any other purpose without the consent of his partners." R.C. 1775.24(B)(1). The statute also provides that "[a] partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property." R.C. 1775.24(B)(2). Neither of these provisions is violated by the trial court's assignment of specific Moser Family Partnership property in the present case, inasmuch as the court has jurisdiction over the rights of all partners with an interest in the partnership property and may compel the

[3]In addition to Terry Moser, Appellants before the Court of Appeals, and now before this Court, include Moser Construction, Inc., FoamTech, Inc., COMSOT Properties, Ltd., Moser Family Electing Small Business Trust, the Terrance L. Moser Family Trust, the Moser Family Limited Partnership and various business entities in which the partnership held interests, including Rootstown Storage, Rootstown Service, Rootstown Industrial Park LLC, Clover Pointe Land Development, Sandy Lake Properties, LLC, Clover Pointe II, Ltd. and Clover Pointe III, Ltd.

acquiescence of the parties to the assignment.

Moser, 2007-Ohio-4109 at ¶ 42-43 (citations omitted). The Court of Appeals entered judgment on the same day. A copy of the Court of Appeals' Judgment Entry is included in the Appendix hereto. Appellants now seek this Court's review.

ARGUMENT

Proposition of Law:

> **A TRIAL COURT MAY NOT DISTRIBUTE AS MARITAL PROPERTY ASSETS HELD BY A PARTNERSHIP, BUT RATHER MUST EITHER DISTRIBUTE INTERESTS IN THE PARTNERSHIP OR ORDER DISSOLUTION OF THE PARTNERSHIP AND SUBSEQUENTLY DISTRIBUTE THE ASSETS REMAINING FOLLOWING THE WINDING UP OF THE PARTNERSHIP'S AFFAIRS.**

Both the trial court and the Court of Appeals herein completely disregarded the existence of the MFLP. By distributing the MFLP's assets, rather than interests in the partnership, without first ordering that the partnership be dissolved, the trial court ignored well-established Ohio statutory and case law requiring that the partnership form be respected. Accordingly, this Court should accept jurisdiction over this case, reverse the decision of the Court of Appeals, and remand the case to the trial court to distribute the parties' marital property in accordance with Ohio law.

A partner's interest in either a general or limited partnership is personal property. See R.C. 1775.25 ("A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property."); R.C. 1782.39 ("A partnership interest is personal property.").[4] See also *Lawyers Cooperative Publishing Co. v. Muething* (1992), 65 Ohio St.3d 273, 279

[4]R.C. Chapter 1775, which generally governs general partnerships, also applies to limited partnerships formed under R.C. Chapter 1782. R.C. 1775.05(B). See also *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 125, 127.

("*Other comparable interests that have been defined as personal property are* shares of stock in a corporation, R.C. 1701.24(A), and *limited or general partnership interests in a limited partnership, R.C. 1782.39.*") (emphasis added).

Thus, this Court has held that a partner has only certain interests in a partnership:

> Furthermore, all property originally brought into the partnership or subsequently acquired is defined as partnership property. R.C. 1775.07(A). The only property rights vested in a partner are his rights in specific partnership property, his interest in the partnership, and his right to participate in the management. R.C. 1775.23. The partner's interest in the partnership is limited to his share of the profits and surplus. R.C. 1775.25.

Spayd v. Turner, Granzow & Hollenkamp (1985), 19 Ohio St.3d 55, 59. The Court has further held that, pursuant to R.C. Chapter 1782, a limited partner does *not* have an ownership interest in the *real property assets* of a limited partnership. *Lakeside Ave. L.P.*, 85 Ohio St.3d at 127. Under R.C. Chapter 1782, "[t]he partnership still owns the properties *until the partnership's affairs are satisfactorily 'wound up.'* R.C. 1782.44 and 1782.46." *Tessler v. Ayer* (Hamilton App. 1995), 108 Ohio App.3d 47, 53 (emphasis added).

Under Ohio law, there is an important distinction between partnership *interests* and partnership *assets*. "'Partnership interest' means a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets." R.C. 1782.01(L). "It is clear from R.C. 1782.01(L) that 'partnership interest' is not synonymous with 'partnership assets.'" *Conti v. Christoff* (Mahoning App. Oct. 2, 2001), Nos. 99CA84 & 327, 2001-Ohio-3421 at ¶ 47.

Indeed, the Uniform Partnership Act was intended, *inter alia,* to supplant any claim that a divorcing spouse may have to the *assets* of the other spouse's partnership:

> The full text of R.C. 1775.24(A) and (E) demonstrates a clear legislative intention *to put partnership assets outside of the reach of any claim that requires establishment through the individual partner, whether by* assignment, judgment,

> exemption, or *the operation of* probate or *family law*, unless specifically permitted by statute, e.g., R.C. 1775.24(B)(4) and R.C. 1775.27.

Buckman v. Goldblatt (Cuyahoga App. 1974), 39 Ohio App.2d 1, 3 n.6 (emphasis added). See also *Farmers State Bank & Trust Co. v. Mikesell* (Darke App. 1988), 51 Ohio App.3d 69, 76.

Importantly, Ohio courts have held that a trial court in a divorce proceeding may only divide a spouse's *interest* in a partnership, and *not specific assets* belonging to the partnership:

> [A] partner's interest in particular partnership property is that of a tenant in partnership and he or she may possess the property only for partnership purposes. R.C. 1775.24. *As a result, in a divorce proceeding a court cannot make an award of specific partnership property.* 1 Bromberg and Ribstein on Partnership (1994), Section 3.05(g) at 3:86 (and the cases cited therein).

Robinson v. Robinson (Lucas App. Oct. 14, 1994), No. L-94-095, 1994 WL 573803 at *3 (emphasis added) (citations omitted). See also *Gest v. Gest* (Lorain App. Nov. 15, 2000), Nos. 99CA007317, 99CA007331, 2000 WL 1706390 at *2 (citing *Robinson*).

As discussed, the trial court made two fundamental determinations regarding the MFLP: (1) the trial court concluded the MFLP was a valid and existing Ohio limited partnership, see Findings of Fact and Conclusions of Law (Dec. 30, 2004) at 2 ("There is no question that the documents prepared by counsel, signed by the parties, and subsequently filed did, in fact, properly establish a family limited partnership."); and (2) the MFLP was vested with specific partnership assets at the time of the marital property distribution. *Id.* at 9-12, ¶¶ 16, 19-20. Having made these fundamental determinations, the trial court committed prejudicial error by distributing specific partnership assets to the parties under R.C. 3105.171 without regard to the partnership agreement, without regard to the liabilities associated with the assets, and without regard to the provisions of R.C. Chapter 1782.

Once the trial court concluded that the MFLP was a valid and existing Ohio limited partnership, it had essentially two options in determining an equitable division of marital

property under R.C. 3105.171. The trial court could have left the MFLP intact and considered Barb and Terry Moser's undivided partnership interest in the MFLP as marital assets subject to equitable division. Or, the trial court could have exercised its equitable discretion to order dissolution of the MFLP under R.C. 1782.44 through 1782.47 and divide the remaining assets as marital assets in accordance with priority established in R.C. 1782.47. This would have required the trial court to liquidate partnership assets, pay off liabilities, and divide the *remaining* assets. Instead, the trial court awarded specific assets of the MFLP to the parties. The trial court, in its April 26, 2006 Judgment Entry, specifically listed the assets and liabilities of the MFLP and valued the net equity of the partnership at $1,507,663. Judgment Entry (April 26, 2004) at 16, ¶ 19. The trial court then "awarded" Barb Moser specific partnership assets—Terracove ($435,943), KM Land Note ($206,000), and Rootstown Industrial Note Receivable ($153,380)—with a total value of $795,323. The trial court "awarded" Terry Moser all remaining assets of the MFLP not assigned to Barb Moser—a net value of $712,340. *Id.* at 17-18.

In effect, the trial court awarded Barb Moser identifiable assets of positive value but left Terry Moser with remaining MFLP partnership *assets* subject to significant partnership *liabilities* and his personal guarantees. The trial court made no attempt to address these surviving liabilities which would otherwise have been addressed in a liquidation of the partnership by judicial decree under R.C. 1782.47. Indeed, the trial court even failed to explicitly extinguish Barb Moser's partnership interest in the MFLP after awarding her assets belonging to the MFLP. Accordingly, the trial court erred in awarding the parties specific assets within the MFLP rather than recognizing the parties' respective *undivided* partnership interests.[5]

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[5]Because the trial court concluded that the MFLP was a valid and existing limited partnership, this is not a case where one spouse conveys marital assets into a trust, partnership or other entity to conceal or dissipate marital assets as a "sham" or constructive or actual fraudulent

The Court of Appeals attempted to excuse the trial court's error by fashioning an exception to the rule that partnership assets are not to be distributed as marital property: a trial court may ignore the partnership form of business and distribute partnership assets as marital property where the partnership does not involve "third persons and/or non-marital partnership interests." *Moser,* 2007-Ohio-4109 at ¶ 42. This exception simply has no basis in Ohio law. Nothing in Ohio even remotely suggests that the family limited partnership form is entitled to any less respect than any other form of limited partnership.

Moreover, it must be observed that even if such an exception existed, the Court of Appeals incorrectly applied the exception to the MFLP at issue herein. The MFLP did involve third parties, both as limited partners and others as co-owners of many of the partnership's assets. The Court of Appeals itself acknowledged that the Moser children were in fact limited partners in the MFLP. *Moser,* 2007-Ohio-4109 at ¶ 4. Moreover, many of the real estate assets owned by the partnership were, in fact, not owned entirely by the partnership. See *Moser,* 2007-Ohio-4109 at ¶ 9 (listing numerous assets as "50%" owned by the MFLP). Under such circumstances, the Court of Appeals could not countenance the distribution of MFLP assets as marital assets without regard to the interests of the "third parties."

In summary, having concluded that the MFLP was a valid and existing Ohio limited partnership, the trial court was required to treat *whatever* individual assets were acquired by the MFLP as *partnership* assets, not marital assets. Under Ohio law, the assets of a limited partnership are property of the partnership and no individual partner has a claim to ownership interest in the partnership assets. The partner's interest, in accordance with R.C. Chapter 1782

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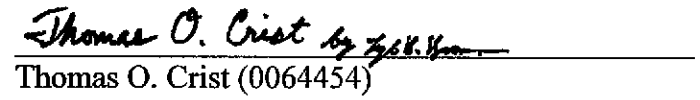
conveyance. See, e.g., *Leathem v. Leathem* (Hancock App.), 94 Ohio App.3d 470 (conveyance of marital assets into a trust was void), *appeal denied* (1994), 70 Ohio St.3d 1454. Indeed, the trial court herein did not so hold.

and the MFLP Agreement, is the partner's respective share of the total partnership capital in proportion to his or her partnership interest. The parties may lay claim only to their *partnership interests and such partnership interests* may be distributed as marital property under R.C. 3105.171. However, neither party, as a partner in a valid and existing limited partnership, may lay claim to the individual partnership assets legitimately acquired by a valid and existing limited partnership. Having concluded that the MFLP was a valid and existing Ohio limited partnership, the courts below erred by treating the individual assets of the partnership as marital property subject to distribution under R.C. 3105.171. Accordingly, the judgment of the Court of Appeals must be reversed.

CONCLUSION

For the foregoing reasons, Appellants respectfully urge this Court to accept jurisdiction over this case, to reverse the Court of Appeals judgment herein, and to remand the case to the trial court with instructions to distribute the parties' marital assets in accordance with Ohio law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum in Support of Jurisdiction was served upon the following by regular U.S. Mail, postage prepaid, this 27th day of September, 2007:

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APPENDIX

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THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

BARBARA MOSER,	:	**OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2006-P-0047**
- vs -	:	
TERRANCE L. MOSER, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Portage County Court of Common Pleas, Domestic Relations Division, Case No. 2003 DR 0036.

Judgment: Affirmed.

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DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Terrance L. Moser, appeals the decision of the Portage County Court of Common Pleas, Domestic Relations Division, terminating his marriage to plaintiff-appellee, Barbara Moser, and dividing the marital estate. For the following reasons, we affirm the decision of the court below.

{¶2} Terrance and Barbara Moser were married on October 11, 1980, in Hamilton, Ohio. Two children were born of the marriage, Shannon and Joshua, both now emancipated. The parties met while students at Miami University. From 1980 to 1990, Barbara worked at the Northeastern Ohio Universities College of Medicine and Akron City Hospital while Terrance established the Moser Construction Company and other land development businesses. After 1990, it was no longer necessary for Barbara to continue working. Thereafter, Barbara primarily worked as a homemaker, although she was also on the payroll of one of Terrance's business ventures, Rootstown Service.

{¶3} By 1996, the Mosers had accumulated assets in excess of two million dollars. In that year, the Mosers met with John Rasnick, an Akron area attorney, for the purpose of estate planning. Rasnick drafted estate plans for Barbara and Terrance consisting of wills, revocable marriage deduction trusts, and powers of attorney. On May 21, 1996, the Mosers signed the revocable trusts which assigned to their respective trusts all items of personal property owned by them.

{¶4} On December 31, 1996, Terrance and Barbara executed a document creating The Moser Family Limited Partnership. A family limited partnership is an estate planning device designed to minimize tax liabilities. The Moser Family Partnership was set up with Terrance, as trustee of his revocable trust, as General Partner; Barbara, as trustee of her revocable trust, as a limited partner, and Shannon and Joshua as limited partners, with Barbara as their custodian. Typically, a family partnership is funded with assets having a high potential for appreciation. Parents will then gift to their children a certain number of units or a percentage interest in the partnership, without tax liability, taking advantage of the gift tax exclusion. At the time the Moser Family Partnership

was created, the annual gift tax exclusion was $10,000. In order to function properly as an estate planning device, the gifts of partnership interest to the children had to be completed, irrevocable gifts. In this way, wealth can be transferred to children during the parents' lifetime, thus avoiding estate taxes, while the parents are able to maintain a certain amount of control of the wealth, by virtue of the general partner's control of the partnership. The Moser Family Partnership, in conjunction with Moser Construction and other business entities, successfully oversaw several land development ventures.

{¶5} On January 17, 2003, Barbara filed a complaint for divorce in the Portage County Court of Common Pleas. In addition to naming Terrance as a defendant, the complaint named Moser Construction, Inc.; Sandy Lake Properties, LLC; Foam Tech, Inc.; Rootstown Storage; Rootstown Service; Clover Pointe Land Development Ltd.; Comsot Properties Ltd.; SM Title Co.; Moser Family Electing Small Business Trust; Moser Family Limited Partnership; Terrance L. Moser Family Trust; Wachovia Securities; Bank One Securities Corporation; and Portage Community Bank. Clover Pointe II, Ltd., and Clover Pointe III, Ltd., were subsequently added as additional party defendants.

{¶6} On March 19, 2003, Terrrance filed a Motion in Limine and/or Motion to Determine that Assets in Moser Family Limited Partnership are Non-Marital. Hearings were held on Terrance's motion between April 2 and May 3, 2004. On December 30, 2004, the trial court denied Terrance's motion, issuing findings of fact and conclusions of law. The court held that it "has jurisdiction over the [Moser Family Limited Partnership] and its partners and the Court may exercise its jurisdiction to order the

general partner to exercise his discretion to modify or terminate the partnership agreement as necessary to effectuate a fair and equitable property division in this case."

{¶7} Between September 19 and 23, 2005, a trial was held on the divorce complaint.

{¶8} On April 26, 2006, the trial court entered judgment granting the parties a divorce and dividing the marital estate. The court determined the total value of the marital estate to be $3,778,764, of which $1,507,663 represented the net value of the Moser Family Partnership.

{¶9} The assets owned by the Moser Family Partnership were itemized as follows:

Cash	4,143
Accounts Receivable	4,064
Note Receivable - Rootstown Industrial Park	153,380
Note Receivable - Clover Pointe III	222,650
Note Receivable - KM Land	206,000
Note Receivable - Maplewood/Duda	53,100
Note Receivable - Steve King	17,401
Note Receivable - Shannon Moser	21,711
Interest in Rootstown Storage (50%)	633,030
Interest in Clover Pointe (50%)	494,199
Interest in Clover Pointe II (50%)	-53,116
Interest in Clover Pointe III (50%)	-396,997
Interest in Rootstown Industrial Park	-24,674
Illiquidity Discount on Investment	-97,866
Terracove (100%)	756,193
Ravenna Lots	6,559
Other Current Assets	308
Total Asset Value	2,000,085

{¶10} The Moser Family Partnership's liabilities were determined to be $492,422 and were itemized as follows:

Accounts Payable	11,838
Notes Payable (total)	475,105

Other Current Liabilities	5,479

{¶11} The Moser Family Partnership's net value of $1,507,663 thus represents the difference between these assets and liabilities.

{¶12} In the trial court's division of assets, Barbara received the following:

1.	Marital Residence Equity	$	169,968
2.	Chase IRS #502263112815		3,317
3.	CD (Withdrawn)		2,650
4.	Bank One Savings		1,243
5.	Bank One Securities		25,564
6.	Wachovia Account		18,991
7.	PERS/STRS		120,582
8.	Terracove Assets		435,943
9.	KM Land Note Receivable		206,000
10.	Rootstown Industrial Note Receivable		153,380
11.	2003 Infiniti 135 Sedan		12,415
	Total Distribution to Barbara	$	1,150,053

{¶13} Of these assets, Terracove Assets, KM Land Note, and Rootstown Industrial are assets of the Moser Family Partnership.

{¶14} In the trial court's division of assets, Terrance received the following:

1.	Moser Construction Company	$	1,474,000
2.	Comsot Properties, Ltd.		20,000
3.	4367 Clover Drive Residence		553
4.	1100 Shares of Portage Community Bank		46,849
5.	1995 Mercedes Benz		16,905
6.	Fishing Boat		1,000
7.	Power Boat		-0-
8.	Husband's Profit Sharing Plan		18,404
9.	Husband's Westfield Life Insurance (CVS)		11,500
10.	Warehouse		95,000
11.	Vacant Lot		45,000
12.	Husband's Social Security Account		186,160
13.	Two 1978 Lincoln Mark Vs		1,000
14.	Residual assets of Moser Family Partnership		712,340
	Total Distribution to Terrance	$	2,628,711

{¶15} The trial court then ordered Terrance to pay Barbara the sum of $739,329 to equalize the property division. Thus, each party received $1,889,382 of the marital estate.

{¶16} Terrance timely appeals and raises the following assignments of error.

{¶17} "[1.] The trial court erred by concluding that the MFLP's assets were marital property and then by dividing those partnership assets between the parties to this divorce action, without regard to the partnership agreement and Ohio partnership law, without any provision for the partnership interests that had been gifted to the children, and without extinguishing the wife's interest in the partnership.

{¶18} "[2.] The trial court erred in its division of marital property by failing to consider all of the relevant factors under R.C. 3105.171(F), resulting in an inequitable and unlawful division."

{¶19} Terrance raises two arguments under the first assignment of error. The first is that the trial court erred by invalidating the gifts of partnership interest to the Moser children. The second is that the trial court erred by treating partnership assets as marital property.

{¶20} "A trial court's characterization of property as either marital or separate that involves factual questions is reviewed under a manifest weight of the evidence standard." *DiNunzio v. DiNunzio*, 11th Dist. No. 2005-L-124, 2006-Ohio-3888, at ¶63 (citation omitted). A trial court's factual findings are entitled to a presumption of correctness and will not be reversed as being against the manifest weight of the evidence if they are supported by competent, credible evidence. *Seasons Coal Co. v.*

Cleveland (1984), 10 Ohio St.3d 77, 80, citing *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, at syllabus.

{¶21} The trial court made the following findings relative to the parties' gifts and transfers of partnership assets. The subscription pages of the Moser Family Limited Partnership agreement were left blank at the time the agreement was signed on December 31, 1996. As any initial assets of the Partnership were marital, Terrance and Barbara were deemed to be equal partners, i.e. fifty percent owners of the partnership shares.

{¶22} On December 31, 1997, Attorney Rasnick forwarded to Terrance a series of Memorandum of Gift letters. In three of these letters, Terrance purports to give to Barbara, as custodian for Joshua, as custodian for Shannon, and as trustee of the Barbara Lyn Moser Trust of May 21, 1996, a "number of limited partnership units *** which is equal in value as of the date of this transfer [December 31, 1997] to $9,900." In two of these letters, Terrance purports to give Barbara, as custodian for Joshua and as custodian for Shannon, "one half of my interest [in JMT Development, Ltd.] which is equal in value as of the date of this transfer to $15,000." These five Gift Memoranda were signed by Terrance and delivered to Rasnick for his files.

{¶23} Also drafted at this time were a series of Memorandum of Gift letters for Barbara. These purport to evidence gifts from Barbara to Barbara, as custodian for Joshua and as custodian for Shannon, of a "number of limited partnership units *** which is equal in value as of the date of this transfer [December 31, 1997] to $9,900."[1]

1. Four Memorandum of Gift letters were prepared for Barbara. Two purport to make gifts of partnership interest "held in my account in the Terrance L. Moser Trust of May 21, 1996"; and two purport to make gifts of partnership interest "held in my account in the Barbara Lyn Moser Trust of May 21, 1996." The

Barbara's letters are unsigned and the court found, based on Barbara's testimony, that she never saw any of the Memorandum of Gift letters.

{¶24} In April 2001, six federal gift tax returns, Form 709, were filed, purportedly memorializing gifts made to the Moser children. The first pair of returns memorialized gifts of partnership units totaling 11.9175% of the ownership in the Moser Family Partnership, valued at $9,996, to Shannon and Joshua from Barbara and Terrance on December 31, 1996. Assuming the validity of the gifts, each child would have had a 23.835% interest in the partnership as of December 31, 1996. The second pair of returns memorialized additional gifts of partnership units totaling 11.9175% of the ownership in the Moser Family Partnership, valued at $9,996, to Shannon and Joshua from Barbara and Terrance on January 1, 1997. Assuming the validity of the gifts, each child would have had a 46.67% interest in the partnership as of January 1, 1997.

{¶25} The remaining pair of gift tax returns memorialized gifts of 12.5% ownership interest in JMT Development, Ltd., valued at $7,272, to Shannon and Joshua from Barbara and Terrance on January 1, 2000. Assuming the validity of the gifts, each child would have had 25% interest in JMT Development.

{¶26} The April 2001 gift tax returns were signed by Terrance and Barbara. The Moser Family Partnership tax return and the returns for individual members of the Moser family, Schedule K-1 (Form 1065), reflected the gifts of partnership interests to the children consistent with the gift tax returns. The court determined that Barbara was not aware of the contents of the Partnership returns. The personal returns, which she

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interests conveyed by Terrance's Memorandum of Gift letters were "held in my account in the Terrance L. Moser Trust of May 21, 1996."

did see and sign, did not reveal a specific percentage of ownership in the Moser Family Partnership.

{¶27} The trial court found that transfers of interest in the Moser Family Partnership to the Moser children did not occur on December 31, 1996, and January 1, 1997, as purported in the federal gift tax returns. Leslie D. Smeach is a certified public accountant who did work for Terrrance. Smeach testified that the valuation of the partnership units allegedly gifted to the Moser children on December 31, 1996, and January 1, 1997, did not occur until April 1997. Prior to this valuation, it would have been impossible to determine the number of partnership units that could be gifted in accordance with the gift tax exclusion.

{¶28} The trial court also found that Terrance operated the Moser Family Partnership and its subsidiary companies as his own personal assets. The court noted the free transfer of funds between business entities that were part of, or associated with, the Moser Family Partnership. For example, although the tax returns indicated the Moser Family Partnership possessed a 50% interest in Rootstown Storage Partnership, Terrance continued to list Rootstown Storage as an asset on his personal financial statements.[2] In April 2000, Terrance received a personal distribution of $55,000 from Rootstown Storage. Subsidiary companies, such as Clover Point and Sandy Lake, were initiated using marital funds, such as loans from Moser Construction or loans personally guaranteed by Terrance, although the Moser Family Partnership owned 50% interests in these ventures. At the hearings, Barbara's expert, Mike Zeleznik, opined that these entities were operated as alter egos of Terrance without apparent regard to fiduciary restraints.

2. The other half of Rootstown Storage is owned by Terrance's father, Robert Moser.

{¶29} In conclusion, the trial court determined that Terrance and Barbara had not made valid, inter vivos gifts of their interests in the Moser Family Partnership to the Moser children. In Barbara's case, the court relied upon her testimony that she did not intend to relinquish ownership interest in the Partnership until her death.

{¶30} In Terrance's case, the court found the intent to make such a gift in the Memoranda of Gifts signed by Terrance on December 31, 1997. However, the court also found that there was no delivery of the Memorandum of Gift letters to the Moser children or to Barbara as their custodian. The court also concluded that Terrance had not relinquished control over his ownership interest in the Partnership in a manner consistent with the intent to make a gift. For similar reasons, the court found that Terrance did not make a valid inter vivos gift of his 50% interest in the JMT Partnership.

{¶31} "The essentials of a valid gift *inter vivios* are (1) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there and (2), in pursuance of such intention, a delivery by the donor to the donee of the subject-matter of the gift to the extent practicable or possible, considering its nature, with relinguishment of ownership, dominion and control over it." *Bolles v. Toledo Trust Co.* (1936), 132 Ohio St. 21, at paragraph one of the syllabus.

{¶32} Terrance disputes the trial court's conclusions that he and Barbara failed to make valid inter vivos gifts of their partnership interests. Terrance relies on the proposition that delivery of a gift may be made "to a third person as trustee for the donee." *Streeper v. Myers* (1937), 132 Ohio St. 322, at paragraph one of the syllabus. "A completed gift is created where the evidence in a particular case shows delivery of property by the donor to a third person for the benefit of the donee, under

circumstances manifesting an intention to vest immediate title in the donee and relinquishment of all dominion and control over the property; and the third person is thereby constituted a trustee for the donee." Id. at paragraph three of the syllabus. Moreover, "[t]he validity of such a gift is not affected by the fact that the donee's enjoyment of the property is postponed until the donor's death." Id. at paragraph four of the syllabus.

{¶33} Thus, Terrance maintains that effective delivery of the gifts could have been accomplished by delivery to Rasnick, as the donor's attorney. *Proctor v. Chute* (Feb. 25, 1994), 4th Dist. No. 93 CA 10, 1994 Ohio App. LEXIS 822, at *15 ("nothing in *Streeper* prohibits a donor's attorney from also serving as a third party trustee for the donee").

{¶34} The legal principles cited by Terrance are valid. However, the fact that delivery of the partnership interests, in the form of the Memoranda of Gifts, ***could*** have been effected by delivery to Rasnick does not mean that this is what, in fact, occurred. "As always, in cases such as this, the difficulty arises on the application of the facts to the legal principle." *Horlocker v. Saunders* (1938), 59 Ohio App. 548, 551.

{¶35} This truth is demonstrated by several of the cases cited by Terrance. In *Lauerman v. Destocki*, (1993), 87 Ohio App.3d 657, the court noted that "[d]elivery may be completed through an agent of the donee even where the donee is without knowledge of the gift." Id. at 665 (citation omitted). In *Lauerman*, the decedent had signed "certain stock certificates" purporting to transfer his interest in a company to employees of the company. Id. at 659. The decedent died shortly thereafter. Id. at 660. The trial court found that, although the decedent had left the certificates with his

attorney for "safekeeping," he never completed the delivery of the certificates. Id. at 667. After noting that it was not permitted to "re-weigh the evidence," the court of appeals affirmed, noting that the decedent did not relinquish control over the certificates in that he never gave instructions to his attorney to deliver them to the donees. Id. at 666-667; *Horlocker*, 59 Ohio App. at 551 (finding a failure of delivery: "the decedent, in sending his friend *** to the bank to obtain the securities, did not constitute him the agent of the donee").

{¶36} In the present case, all five of the Memorandum of Gift letters signed by Terrance provided for gifts to Barbara, alternatively in her capacity as custodian of Shannon, as custodian of Joshua, and as trustee of her own revocable marriage trust. Rather than delivering these Memoranda to Barbara, they were given to Rasnick. Arguably, Rasnick could have served as agent for Barbara or the children. But this is quintessentially a factual determination, complicated in the present circumstances by the fact that Barbara's corresponding Memoranda of Gifts were neither signed nor seen by her. As in the cases cited, we must defer to the trial court's determination. Also *Ardrey v. Ardrey*, 3rd Dist. No. 14-03-41, 2004-Ohio-2471, at ¶17 ("resolution of the issue upon review [, i.e. whether a party intended an inter vivos gift,] comes down to a question of witness credibility").

{¶37} With respect to Barbara's donative intent, Terrance argues that she should be estopped from claiming she did not intend to make gifts of Moser Family Partnership interests because she signed gift tax returns memorializing those gifts. Again, we are faced with conflicting evidence regarding Barbara's intent. The fact that Barbara signed the gift tax returns is no more solely determinative of the issue of her intent than is the

fact that Terrance continued to list Moser Family Partnership assets on his personal financial statements.

{¶38} This court's decision in *Humphrey v. Humphrey*, 11th Dist. No. 2000-A-0092, 2002-Ohio-3121, is illustrative of this point. The husband, in *Humphrey*, owned an insurance agency which he purported to have acquired as a gift from his mother and which he thus claimed as separate property. Id. at ¶15. The trial court held otherwise and the court of appeals affirmed. Id. at ¶28. In so holding, the court considered the gift tax return filed by the mother. The court noted that this return was filed twelve years after the purported gift and was inconsistent with the circumstances surrounding the transfer of the mother's interest in the agency. Id. at ¶27. Similarly in the present case, the gift tax returns were filed several years after the purported gifts. Also, the gift tax returns are at variance with other documents, such as the Memorandum of Gift letters. As the trial court noted, the valuations of the interests purportedly transferred on December 31, 1996, and January 1, 1997, did not take place until after the making of the gifts. While Terrance argues that it is not uncommon to determine value until after a transfer, the basis for these valuations was properties, Terracove and Rootstown Storage, which had not yet been transferred into the Partnership. The evidence regarding whether the gift tax returns reflect actual transfers is thus disputed.

{¶39} The determinative consideration in the present case is that the trial court's conclusions regarding the donative intent of the parties and validity of the gifts are supported by some competent and credible evidence. Accordingly, those conclusions will not be disturbed.

{¶40} Terrance raises a second argument under the first assignment of error. Terrance asserts that, even if parties failed to effect valid gifts, the trial court erred by dividing Partnership assets between Terrance and Barbara. According to Terrance, a trial court in a divorce proceeding may only divide a spouse's interest in a partnership, not specific assets belonging to the partnership. Except for dividing only the parties' interest in the partnership, the trial court's only option was to order the dissolution of the Partnership in accordance with Ohio partnership law and the terms of the Moser Family Partnership, liquidate the assets, pay off liabilities, and divide the remaining assets.

{¶41} Terrance relies on *Robinson v. Robinson* (Oct. 14, 1994), 6th Dist. No. L-94-095, 1994 Ohio App. LEXIS 4602, wherein the court stated: "[A] partner's interest in particular partnership property is that of a tenant in partnership and he or she may possess property only for partnership purposes. R.C. 1775.24. As a result, in a divorce proceeding a court cannot make an award of specific partnership property." Id. at *8; also, *Gest v. Gest* (Nov. 15, 2000), 9th Dist. Nos. 99CA007317 and 99CA007331, 2000 Ohio App. LEXIS 5274, at *7.

{¶42} We find these cases distinguishable in that they involved interests in partnerships involving third persons and/or non-marital partnership interests. *Robinson*, 1994 Ohio App. LEXIS 4602, at *2; *Gest*, 2000 Ohio App. LEXIS 5274, at *7. In the present case, the only partners having an interest in partnership property are Terrance and Barbara, the parties to divorce. Moreover, the property at issue was marital before its transference into the partnership. Cf. *Sedivy v. Sedivy*, 11th Dist. Nos. 2006-G-2687 and 2006-G-2702, 2007-Ohio-2313, at ¶44-46 (finding that husband's business was created and supported with marital assets); *Murph v. Murph*, 2nd Dist. No. 19937, 2004-

Ohio-1312, at ¶36 ("[n]o matter what reasons the parties had for placing their property in a partnership, the fact is that Valerie Arms was marital property before and after the partnership was created").

{¶43} The cases cited by Terrance cite to the Ohio Uniform Partnership Act, which provides that "[a] partner, subject *** to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess the property for any other purpose without the consent of his partners." R.C. 1775.24(B)(1). The statute also provides that "[a] partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property." R.C. 1775.24(B)(2). Neither of these provisions is violated by the trial court's assignment of specific Moser Family Partnership property in the present case, inasmuch as the court has jurisdiction over the rights of all partners with an interest in the partnership property and may compel the acquiescence of the parties to the assignment.

{¶44} Furthermore, Terrance, as general partner, has broad authority under the Moser Family Partnership agreement to alienate partnership assets. The agreement provides the general partner "has the full and exclusive power on the Partnership's behalf *** to manage, control, administer and operate its business and affairs and to do or cause to be done anything he deems necessary or appropriate for the Partnership's business, including (but not limited to) the power and authority to (1) sell real or personal property to any person ***; (2) buy, lease, or otherwise acquire real or personal property to carry on and conduct the Partnership's business; *** (5) assign any debts oweing to the Partnership; *** and (14) quitclaim, release or abandon any Partnership

assets with or without consideration." Ohio's Uniform Partnership Act recognizes that an agreement between the partners may supersede the limitations imposed by the Act. R.C. 1775.24(B)(1).

{¶45} There was considerable testimony from various witnesses at the hearings which likened Terrance's powers under the Moser Family Partnership to those of, in Rasnick's words, "a benevolent dictator." There was also evidence at the hearings that Terrance exercised this power freely. When the marital residence was inadvertently transferred into the Partnership, Terrance transferred it out. When advised to fund Barbara's marital deduction trust before making lifetime conveyances to the children, Terrance conveyed the Sanford property from the Partnership to Barbara's revocable trust. Terrance used Partnership funds to meet the expenses of other businesses owned by him. As noted above, there was considerable "cash flow" between entities existing both within and without the Partnership.

{¶46} Accordingly, the trial court had jurisdiction over the Moser Family Partnership and its partners and could exercise that jurisdiction to order Terrance to assign specific partnership properties so as to effectuate a fair and equitable division of property.

{¶47} The first assignment of error is without merit.

{¶48} In the second assignment of error, Terrance argues that the trial court's division of marital assets is inequitable and that the court failed to consider all of the relevant factors in R.C. 3105.171(F).

{¶49} "A trial court has broad discretion in making divisions of property in domestic cases." *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403,

citing *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319. "A trial court's decision will be upheld absent an abuse of discretion." Id., citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131.

{¶50} "In divorce proceedings, *** the court shall divide the marital and separate property equitably between the spouses." R.C. 3105.171(B). "In making a division of marital property ***, the court shall consider all of the following factors *** (4) The liquidity of the property to be distributed; (5) The economic desirability of retaining intact an asset or an interest in the asset; [and] (6) The tax consequences of the property division upon the respective awards to be made to each spouse." R.C. 3105.171(F).

{¶51} "A trial court's failure to consider the R.C. 3105.171(F) factors when dividing marital property is an abuse of discretion. *** An exhaustive recitation of each factor is unnecessary; however, the trial court must consider any factor relevant to the circumstances presented in the underlying case." *Schriefer v. Schriefer*, 11th Dist. No. 2003-L-040, 2004-Ohio-2206, at ¶12 (citations omitted).

{¶52} Terrance argues the trial court failed to consider the liquidity of the property assigned to him, the fact that much of the real property is still undeveloped and subject to significant mortgage obligations, for which he is personally liable. Terrance also argues the trial court failed to consider the desirability of maintaining the Moser Family Partnership intact until all of its assets could be liquidated in the normal course of business.

{¶53} We begin by noting that, except for two notes receivable and the Terracove properties, the trial court did maintain the assets contained within the Moser Family Partnership intact by awarding them to Terrance. Although maintaining all of the

Partnership assets intact might provide greater economic benefit, it is inherent in any divorce proceeding that assets be divided. As the Supreme Court has recognized in a similar context, the incentive "to preserve *** asset[s] in order that each party can procure the most benefit" must be balanced against the need "to disentangle the parties' economic partnership so as to create a conclusion and finality to their marriage." *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, at paragraph two of the syllabus.

{¶54} In the present case, the trial court recognized that much of the inequity in preserving the Moser Family Partnership was that it allowed Terrance full control, use and enjoyment of the marital assets within the partnership while denying these benefits to Barbara.

{¶55} In his post-trial brief to the trial court, Terrance advocated awarding Barbara an in kind distribution of the Terracove real estate and notes receivable. Terrance noted that Terracove was a finished development and that its property was currently marketed. Terrance also noted that, unlike the other assets within the Moser Family Partnership, the Terracove properties were owned directly by the Partnership and not through a subsidiary or jointly with a third party. Finally, Terrance argued that such a distribution was appropriate because there was very little cash to distribute to the parties and because it allowed both parties to participate in the tax consequences from the sale of assets. The trial court accepted Terrance's reasons for awarding these assets "in kind" to Barbara.

{¶56} The trial court recognized the lack of liquidity in the assets and their encumbered value in other ways. The trial court noted the negative equity in certain assets. The trial court incorporated an "illiquidity discount" into the net value of the

Partnership. The trial court allowed Terrance to pay the $739,329 meant to equalize the property division over a period of fifteen years.

{¶57} Lastly, Terrance argues the trial court failed to consider the estate tax consequences of dismantling the Moser Family Partnership. Although the trial court's distribution essentially subjects Terrance and Barbara's assets to the same estate and inheritance liabilities that existed prior to the creation of the Partnership, this consideration does not render the court's distribution inequitable. The tax consequences of the division of the marital estate are a consideration with respect to the spouses who generated the estate, not the children who are meant to inherit the estate.

{¶58} For the foregoing reasons, the trial court did not abuse its discretion in dividing the marital estate. The second assignment of error is without merit.

{¶59} The decision of the Portage County Court of Common Pleas, Domestic Relations Division, terminating the marriage of Terrance and Barbara and dividing their marital estate, is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

MARY JANE TRAPP, J.,

concur.

STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

FILED
COURT OF APPEALS
AUG 13 2007
LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY OHIO

BARBARA MOSER,

Plaintiff-Appellee,

- vs -

TERRANCE L. MOSER, et al.,

Defendants-Appellants.

JUDGMENT ENTRY

CASE NO. 2006-P-0047

For the reasons stated in the Opinion of this court, the assignments of error are without merit. The order of this court is that the judgment of the Portage County Court of Common Pleas, Domestic Relations Division, is affirmed.

Diane V. Grendell

JUDGE DIANE V. GRENDELL
FOR THE COURT

FILED
COURT OF COMMON PLEAS
DEC 30 2004
DELORES REED, CLERK
PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
RAVENNA, OHIO

STATE OF OHIO)
) SS
PORTAGE COUNTY)

CASE NO. 03 DR 0036

- ooo -

BARBARA MOSER,
PLAINTIFF,

vs.

TERRANCE L. MOSER,
DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- ooo -

This matter came on for hearing before the Court on a Motion to exclude assets of the Moser Family Limited Partnership (MFLP) from distribution as part of the marital estate in the above-captioned matter. The Motion was filed by Counsel for Husband, Attorney Robert J. Paoloni. Wife was represented by Attorney Randal A. Lowry and Attorney Kenneth L. Gibson.

Several hearings were held on Husband's Motion to exclude. The Court heard the testimony of experts appearing for both Husband and Wife. Testimony was also heard from the parties. Exhibits were offered and accepted and written memoranda requested and received from Counsel for the parties.

The evidence presented indicated in the Summer of 1996, Akron Attorney John Rasnick met with Husband and Wife to discuss their need for estate and tax planning. Various documents were subsequently prepared by Attorney Rasnick creating an overall estate plan for the Moser family. The estate plan was prepared in an effort to minimize tax consequences upon death of the parties and the necessary documents were prepared in mid and late 1996. The MFLP was one part of the Moser family estate plan.

There is no question that the documents prepared by Counsel, signed by the parties, and subsequently filed did, in fact, properly establish a family limited partnership. When the MFLP was established in late 1996, Husband and Wife each became owners of fifty percent (50%) of the partnership shares. Husband and Wife were, therefore, equal partners.

Once established, the MFLP made Husband the general partner and Wife was a limited partner. As a general partner, Husband's powers were limitless. He was a general partner "for life," could do what he wished with the MFLP assets, pay himself whenever he elected to do so, even retroactively. In fact, he could, at his whim, eliminate Wife as a limited partner.

There is an agreement that any of the partnership shares currently owned by the parties (the parties' percentage of the MFLP) are assets of the marriage. Given that both Husband and Wife held fifty percent (50%) of the partnership shares at the time of creation, the question before the Court is how many shares, if any, of the MFLP were transferred to the minor children between the creation of the partnership and the filing of the above-captioned case.

The legal activity involved with the implementation of the Moser family estate plan and, in particular, attempts to fund the MFLP and attempts to transfer shares of the MFLP to the Moser's minor children have been considerable and ongoing since the 1996 creation. Attempts to track the MFLP transactions, however, take one through a confusing paper maze of unsigned legal documents, inartfully drawn documents or documents incorrectly prepared, as well as improper deeds of transfer, along with attempts to transfer property not owned by the parties. As examples:

*Gift returns, which reflected gifts as of December 31, 1996, which were not signed until 2000;

*Memoranda of Gifts prepared for Wife's signature, but never presented or signed by Wife;

*Memoranda of Gifts to Wife or children with no evidence of delivery;

*Assets supposedly gifted to the MFLP, but listed by Husband on his personal financial statements;

*Funds received by Husband in a personal capacity and for personal benefit from assets he claimed to have no personal ownership of;

*Documents showing thousands of dollars being loaned back and forth between entities having different ownerships with interest being charged at the whim of Husband;

*Husband's attempt to transfer Rootstown Storage property into THE MFLP, although Husband did not have an ownership interest;

*Transferring the marital residence into the MFLP and then transferring the marital residence out of the MFLP;

*Dates of alleged real estate gifts as reported on gift tax returns, which do not match deed dates;

*Exhibits indicated as attached to tax returns, but which were not attached;

*Property transferred into THE MFLP after the filing of the action for divorce and in disregard of a Restraining Order, etc.

Accordingly, after full consideration of all the evidence and all relevant facts and circumstances, the Court makes the following findings of fact:

1. The parties were married on October 11, 1980. There were two children born issue of the marriage, Joshua and Shannon.

2. Early in 1996, the parties scheduled a meeting with John Rasnick, an Akron area Attorney, for the purpose of estate planning.

3. During these meetings with John Rasnick, various estate planning techniques were discussed, including wills, revocable marital deduction trusts, and family limited partnerships.

4. As of May 21, 1996, John Rasnick had drafted a set of documents entitled "The Estate Plan of Barbara Lyn Moser," which included a revocable marital deduction trust, a new Last Will and Testament, a durable general Power of Attorney, and a durable Power of Attorney for health care. Similar documents were prepared for Husband. These documents were signed in John Rasnick's office on May 21, 1996, along with Assignments, which assigned to each of the parties' revocable trusts all of the tangible items of personal property presently owned by them or thereafter acquired (See Plaintiff's Exhibit 92). John Rasnick and a secretary from his office were the witnesses to those documents.

5. Approximately six months later John Rasnick drafted a partnership agreement for the MFLP. During the intervening six-month period, Wife had no further input into the drafting or terms of the MFLP. Husband talked by telephone with John Rasnick and Attorney Rasnick also worked with third-party accountants.

The initial partners who executed the partnership agreement on December 31, 1996, were:

a. Terry, as Trustee of his revocable trust, as General Partner;

b. Barbara, as Trustee of her revocable trust, as Limited Partner;

c. Barbara, as Custodian for Shannon Moser, as Limited Partner;

d. Barbara, as Custodian for Joshua Moser, as Limited Partner.

6. Prior to the time that Wife signed the MFLP, she had a full opportunity to read the document and to ask any questions regarding the document.

7. When Wife signed the MFLP Agreement on December 31, 1996, she understood that she and Husband would be two equal partners (the children would become partners only upon the death of their parents). It was also her understanding that she and her Husband would have control of the assets until death.

8. Wife understood the MFLP needed to be funded as did the various revocable marital deduction trusts, which had been established.

9. The evidence shows that neither Wife nor Husband gifted to either Shannon Moser or Joshua Moser any inter vivos interest in the MFLP on December 31, 1996, nor on January 1, 1997, as reported on the Federal Gift Tax Returns in April of 2000.

10. The Court finds that the valuation, allegedly the basis of the determination of the percentage of partnership interests conveyed as gifts as of December 31, 1996, and January 1, 1997, and as reported on the Federal Gift Tax Returns filed in April of 2000, was not actually performed until April of 1997 (Defendant's Exhibit H-1, testimony of Les Smeach).

11. The Terracove property, reported on the books of the MFLP on December 31, 1996, and included in the valuation analysis in April, 1997, was not conveyed to the MFLP until December 31, 1997 (Plaintiff's Exhibit 16).

12. The Court finds that the fifty percent (50%) partnership interest of Husband in the Rootstown Storage Partnership was never conveyed to the MFLP. There is no assignment or other document, which would transfer or convey the interest. Still, tax returns reported the MFLP as the partner instead of Husband. Husband, however, still listed Rootstown Storage as an asset on his personal financial statements (Plaintiff's Exhibits 5, 47, 48, 49, 50, 88). He continued to sign documents, including bank mortgage papers, stating he was a partner in that entity (Plaintiff's Exhibit 85).

He continued to receive distributions of profits from the sale of topsoil (testimony of Terry Moser) and received a $55,000 distribution personally in 2000 (Plaintiff's Exhibit 63B, check register of Rootstown Service, testimony of Terry Moser).

13. On December 31, 1997, John Rasnick forwarded to Husband at his business P.O. Box address Memorandum of Gift Letters, including a Memorandum of Gift evidencing a gift of limited partnership units equal to a value of $9,900 by Husband to Wife as custodian for Joshua and a gift in the same amount by Husband to Wife as custodian for Shannon. There were also Memorandum of Gift Letters for Wife to sign transferring the same dollar amount of units from Wife to Wife as custodian for Joshua and Shannon.

14. The Court finds Husband signed the two Memorandum of Gift Letters prepared for his signature on December 31, 1997 (Defendant's Exhibit K). However, the evidence shows that Wife did not see or sign the Memorandum of Gift Letters from John Rasnick. Instead, a new Memorandum of Gift was prepared and signed by Husband on December 31, 1997, conveying from Husband to Wife's revocable marital deduction trust units equaling $9,900 in value as of that date. The Memoranda of Gifts signed by Husband on December 31, 1997, were on their face immediate conveyances and were not delayed until death.

They were effective as of December 31, 1997. They were delivered to Attorney Rasnick for his files and were probably in the possession of Husband as general partner.

15. While there was no evidence relating to the intent of the conveyance of a portion of Husband's interest in the MFLP to Wife's revocable trust, the experts testified it was good estate planning to fund the Wife's marital deduction trust before lifetime conveyances to the children. This was done more directly when the personal residence and the Sanford ``shop'' property were conveyed out of the MFLP into Wife's revocable trust on different dates in the year 2000.

16. As of December 31, 1997, when Husband signed the Memoranda of Gifts to each of the children and to Wife's revocable trust, various assets had been conveyed into the MFLP, including:

*The Terracove development property
*Two parcels of property owned by Rootstown Storage
*The residence of the parties (the Sanford Road property)
*The shop property used by Moser Construction Co.
*The Florida condo owned by JMT
*Numerous lots titled in the name of JMT
*Several lots owned by Terry Moser individually

Deeds conveying these properties into the MFLP were prepared by John Rasnick. Attorney Rasnick's files had copies of the deeds he prepared and prior deeds identifying each of the properties being conveyed.

17. No contemporaneous appraisal of assets transferred into the MFLP on December 31, 1997, was made. However, based upon values expressed in Husband's financial statements (with the same discount percentage used by Les Smeach in his analysis), Mike Zeleznik calculated that the actual number of units conveyed by Husband to the children and to Wife's revocable trust by reason of the Memoranda of Gifts signed by Husband on December 31, 1997, was equal to a 1.6 percent (1.6%) interest in the MFLP.

18. Prior to the execution of the Memoranda of Gifts, the MFLP was owned equally by Wife and Husband as equal fifty percent (50%) partners. Mike Zeleznik testified that if the Court would find that the Memoranda of Gifts executed by Husband on December 31, 1997, were, in fact, valid gifts, there would be a slight change in ownership.

Although various partnership tax returns were filed which showed different percentages, there is no evidence Wife saw those tax returns until shortly before the divorce filing. Nothing shows she ever participated in their preparation or signed the returns. Various K-1 forms were also presented by Husband. Again, there is no evidence Wife actually saw or received the forms until shortly before the divorce filing.

The parties' personal tax returns referred to a K-1 form, but no copy was attached. The personal tax returns, which Wife did see and sign, reflected that the parties owned an interest in the MFLP, but did not show any percentage of ownership. Without the MFLP returns or the K-1 forms, Wife would have been unable to determine the percentage of income claimed from the MFLP on the personal returns of the parties.

19. On January 1, 2000, Husband executed Memoranda of Gifts to Wife as custodian for Joshua and Shannon for their one-half interest in the JMT partnership. There is no evidence of delivery of these Memoranda of Gifts to Wife as custodian of the children nor to the children themselves or of their acceptance of such a gift. While the Memorandum of Gift document conveys a twenty-five percent (25%) interest to each of the children, the actual conduct of the Husband with respect to this alleged gift is inconsistent with the intent stated in the Memorandum of Gift or even in the Gift Tax Returns. Each document reflects an ownership interest in the children. However, the income tax returns and the internal accounting records reflect that one hundred percent (100%) of the JMT Partnership was owned by, controlled by, and eventually sold by the MFLP.

There is no evidence that the one-half interest in the JMT Partnership, allegedly gifted to the children, was ever conveyed into the MFLP.

The MFLP bought the remaining interest in the JMT Partnership from Gerald Moore in June of 2000, with funds borrowed from Rootstown Storage. The MFLP is the equitable owner of this one-half interest of the JMT Partnership.

20. Clover Pointe Land Development, Ltd., Rootstown Industrial Park, LLC, Sandy Lake Properties, LLC, Clover Pointe II, and Clover Pointe III are all partnerships of which THE MFLP was an initial partner. The evidence shows these partnerships were formed for the purpose of using Husband's personal development expertise (along with the expertise of the other principal partners) in promoting developments. These partnerships were formed using marital funds (usually in the form of loans from Moser Construction Co.) and personally guaranteed loans. In sharp contrast to the substantial contributions of marital labor, funds, and pledged assets, the contributions of the MFLP to these ventures were minimal at best ($500 cash). Clover Pointe II and Clover Pointe III were formed with the MFLP as a partner after the filing of this divorce and after a Restraining Order had been issued.

CONCLUSIONS OF LAW

1. The essential elements of a valid inter vivos gift are (a) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there; and (b) in pursuance of such intention, a delivery by the donor to the donee of the subject matter of the gift to the extent practicable or possible, considering its nature, with relinquishment of ownership, dominion and control over it. Bolles v. Toledo Trust Co. (1936), 132 Ohio St. 21, syllabus I.

2. There was no valid inter vivos gift by Wife of her initial fifty percent (50%) ownership interest in the MFLP. She had no intent of conveying her ownership in that entity prior to her death. She did not make a delivery of her ownership interest in the form of delivery of an assignment document to the general partner. Except to the extent which she allowed her spouse to manage the business affairs, she did not relinquish ownership, dominion and control over her partnership interests to her children nor is there any evidence that the children or Wife on behalf of the children accepted any purported gift by Wife to the children. Therefore, as to Wife, the Court concludes that none of the elements of a gift have been established by even a preponderance of the evidence.

3. With respect to the initial fifty percent (50%) interest of Husband in the MFLP, the Court concludes that there is no evidence of a gift in either December of 1996 or January of 1997. However, there is some evidence of an intent to make an inter vivos gift by Husband to Wife as custodian for Joshua, Wife as custodian for Shannon, and Wife as trustee of her revocable trust. The intent to make an immediate gift is expressed in the written Memoranda of Gifts signed on December 31, 1997. Those Memoranda of Gifts were delivered to the Attorney and maintained by the general partner. There is no evidence that the Attorney delivered these Memoranda of Gifts to Wife or the children nor is there any evidence of a delivery of the Memorandum of Gift Letters directly to Wife as custodian for the children or to the children themselves. Finally, as set forth in the findings of fact, there is no evidence Husband has relinquished dominion or control over his ownership interest in the MFLP or that he was acting consistent with holding those assets in a fiduciary capacity. Therefore, the Court concludes that the Memorandum of Gift documents signed by Husband were also not effective as an inter vivos gift to the children of an interest in the MFLP.

4. if Husband intended to make an inter vivos gift to the children of his fifty percent (50%) interest in the JMT Partnership essential elements of a completed gift are lacking. The Memorandum of Gift documents executed to accomplish this function were never delivered to or accepted by the children or their custodian. Further, the unexplained treatment of this partnership and the underlying assets as an asset of the MFLP, when the documents reflect a direct gift to the children, undermines both the element of donative intent and the relinquishment of control and dominion by the donor.

5. The Court has jurisdiction over the MFLP and its partners and the Court may exercise its jurisdiction to order the general partner to exercise his discretion to modify or terminate the partnership agreement as necessary to effectuate a fair and equitable property division in this case. Accordingly, Husband's Motion to exclude the assets of the MFLP is not well-taken and the Motion is hereby DENIED.

Finally, this is a Court of equity. The Court has a responsibility to fashion a division of the marital estate, which is fair and equitable to both Husband and Wife. It is a responsibility taken seriously.

To grant Husband's Motion and to exclude the assets of the MFLP from the marital estate would do manifest injustice to Wife. It would deny Wife any benefit from more than one-half of all the assets accumulated during the marriage. It would permit Husband, however, to use and enjoy the benefits of all these assets throughout his life. The Court cannot imagine a more inequitable result.

IT IS SO ORDERED.

JUDGE JERRY L. HAYES
COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION

cc: R. Lowry, Esq.
K. Gibson, Esq.
R. Paoloni, Esq.

FILED
COURT OF COMMON PLEAS
APR 26 2006
LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY OHIO

IN THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
RAVENNA, OHIO

STATE OF OHIO)
) SS
PORTAGE COUNTY)

CASE NO. 2003 DR 00036

- o0o -

BARBARA MOSER,	)	
PLAINTIFF,	)	
vs.	)	JUDGMENT ENTRY
TERRANCE L. MOSER,	)	
DEFENDANT.	)	

- o0o -

The above-captioned matter came on for hearing on September 19, 2005, and concluded on September 23, 2005, on the Complaint of the Plaintiff and the evidence. The Plaintiff, hereinafter referred to as Wife, was present and represented by Attorney Randal A. Lowry and Attorney Kenneth L. Gibson, and the Defendant, hereinafter referred to as Husband, was present and represented by Attorney Robert J. Paoloni.

The Court found that the parties had been legal residents of the State of Ohio for more than six months and the County of Portage for more than ninety days prior to the filing of the Complaint and that this Court, therefore, has jurisdiction over the parties and this action.

The Court finds that the parties were married on the 11th day of October, 1980, and that two children, Shannon, d.o.b. 1/20/86 and Joshua, d.o.b. 4/22/87, were born as issue of said marriage and are both emancipated.

The Court further finds that the Wife alleges that the parties are incompatible. Evidence of said incompatibility was presented to the Court and was not denied by Husband and, by reason thereof, the parties are entitled to a Decree of Divorce.

It is, therefore, ORDERED, ADJUDGED and DECREED, herein by the Court, that the marriage contract heretofore existing between BARBARA MOSER, Wife, and TERRANCE L. MOSER, Husband, be and the same is hereby DISSOLVED, VACATED AND HELD FOR NAUGHT, and both parties are hereby released from the obligations of said marriage, except as hereinafter set forth.

This is a marriage of 26 years, during which time two children were born to the parties. Wife is a well-educated woman and holds a Bachelor of Science degree from Miami University and a Master's degree from Kent State University. Nevertheless, it was she who put her career on hold so that she might raise the children of the marriage. Husband established the Moser Construction Company with real estate development projects representing a major aspect of the company's many construction activities.

Wife participated in the operation of that business while raising the children and she helped make the construction company successful. The parties enjoyed a far-better-than-average living style and Husband's income, as shown from tax returns for 2001 through 2003, averaged close to $300,000 per annum.

Considering the necessary living expenses of both the Husband and Wife, as submitted in Court filings, and considering the Husband's ability to pay, and the life-style enjoyed by the couple during the marriage, along with all the other factors enumerated in O.R.C. Section 3105.18, it is further ORDERED, ADJUDGED and DECREED that Husband shall pay, as spousal support, the sum of Six Thousand Five Hundred Dollars ($6,500) a month for One Hundred Eight (108) consecutive months or until Wife shall remarry or die.

The Court finds that Husband has paid to Wife for spousal support during the pendency of this action the sum of $165,383. Accordingly, Husband is given credit for twenty (25) months of spousal support payments, leaving a remaining payment obligation of eighty-three (83) months.

Said payments shall be made to Wife by an attachment on an income source or bank account through the Child Support Enforcement Agency and Two Percent (2%) processing charge shall be added. The Husband is responsible for direct payments to CSEA, plus the processing charge, until such time as the attachment on the income source or bank account becomes effective.

It is ordered that the Court retains jurisdiction under R.C. 3105.18 (E)(1) to modify the amount of support to be paid and to modify the terms of support to be paid and the length of support to be paid as provided under R.C. 3105.18 (F) if there has been a change in the circumstances of the parties, including, but not limited to any increase or involuntary decrease in the parties' wages, salaries, bonuses, living or medical expenses. The Court also retains jurisdiction pursuant to a bankruptcy set forth as follows: Pursuant to statute and equitable principles, the Court has divided the parties' marital assets, including pension and retirement rights, ordered the payment of the parties' debts, and awarded spousal support.

The purpose of this decision is to fairly and equitably allocate assets, income, and debts based on the statutory considerations set forth above so that each party is supported based on the parties' earning abilities and other statutory considerations.

If, for any reason, a party does not receive the assets awarded, particularly the payment of the allocated promissory notes or if, for any reason, any assets assigned by this decision should be given bankruptcy relief the Court retains jurisdiction to establish or modify the amount of spousal support, to extend the term of spousal support, or to make any reasonable and necessary award or Order to make the other party financially whole, except that the Court may not modify an award of division of property.

This Order shall take precedence over any other Order herein.

EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE CHILD SUPPORT ENFORCEMENT AGENCY IN WRITING OF HIS OR HER CURRENT MAILING ADDRESS, CURRENT RESIDENCE ADDRESS, CURRENT RESIDENCE TELEPHONE NUMBER, CURRENT DRIVER'S LICENSE NUMBER, AND OF ANY CHANGES IN THAT INFORMATION. EACH PARTY MUST NOTIFY THE CSEA OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT. IF YOU ARE THE OBLIGOR UNDER A CHILD SUPPORT ORDER AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY BE FINED UP TO $50 FOR A FIRST OFFENSE, $100 FOR A SECOND OFFENSE, AND $500 FOR EACH SUBSEQUENT OFFENSE.
IF YOU ARE AN OBLIGOR OR OBLIGEE UNDER ANY SUPPORT ORDER AND YOU WILLFULLY FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY BE FOUND IN CONTEMPT OF COURT AND SUBJECTED TO FINES UP TO $1,000 AND IMPRISONMENT FOR NOT MORE THAN 90 DAYS.

IF YOU ARE AN OBLIGOR AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY NOT RECEIVE NOTICE OF THE FOLLOWING ENFORCEMENT ACTIONS AGAINST YOU:

IMPOSITION OF LIENS AGAINST YOUR PROPERTY; LOSS OF YOUR PROFESSIONAL OR OCCUPATIONAL LICENSE, DRIVER'S LICENSE, OR RECREATIONAL LICENSE; WITHHOLDING FROM YOUR INCOME; ACCESS RESTRICTION AND DEDUCTION FROM YOUR ACCOUNTS IN FINANCIAL INSTITUTIONS; AND ANY OTHER ACTION PERMITTED BY LAW TO OBTAIN MONEY FROM YOU TO SATISFY YOUR SUPPORT OBLIGATION.

A willful failure to comply with Orders regarding employment or income source status or support termination is contempt of Court and will be punished according to law, as may disobedience to any other Order of this Court.

The Court finds that the parties have agreed and stipulated to the following items:

1. Each party will keep the furniture, jewelry and wines currently in their possession and all such items are considered of equal value.

2. The assets of Foamtech, Inc., including items of equipment identified on the Rosen & Associates' appraisal under Items 103-130, are to be sold and the proceeds are to be used to pay the debts of Foamtech, Inc., including reasonable costs of sale paid to unrelated parties. (The Court notes that although the parties agreed to split any remaining balance, the Court has awarded Foamtech, Inc., to Husband as part of Moser Construction Company.)

3. The personal residence of the parties shall be listed for sale with a broker designated by Wife.

4. Wife has received a distribution of $100,000 as an advance on the property division, which is currently a lien on the property.

The following information was submitted to the Court regarding the items left at issue:

Two equipment appraisal reports were submitted to the Court. Testimony regarding the reports was taken during trial. The testimony and report of Joseph Santora of Irontrax was offered by Counsel for Husband and the testimony and report of Sharon Parker of Rosen & Company was submitted by Counsel for Wife. The Rosen & Company appraisal found the equipment to have a fair market value of $1,235,995 (equipment), plus five vehicles with a fair market value of $36,000, plus office equipment with a fair market value of $16,500, for a total of $1,288,495. Ms. Parker testified that the five vehicles had probably diminished in value 10 percent since the time of the appraisal, making the fair market value of the vehicles $32,400, for a total of $1,284,895.

The Irontrax appraisal found the fair market value of the equipment to be $1,024,050. The Irontrax appraisal did not include certain equipment which Rosen & Company appraised at $51,450. The Irontrax appraisal also failed to include certain newly-acquired equipment.

The appraisal was also based on the equipment being sold within 45 - 180 days. The testimony of Mr. Santora was that the appraisal would be higher if a longer period of time was allowed for a sale to take place. The Court notes that no sale is contemplated in the above-captioned case.

The Court acknowledges that the Irontrax appraisal was done at a time closer to trial, but finds that the Rosen & Company appraisal more accurately reflects the value of the Moser Construction equipment and finds that equipment value to be $1,284,895.

The Court next turns to the fair market value of the Moser Construction Company. A full business appraisal was submitted by Robert Turner on behalf of the Husband and an abbreviated business appraisal was submitted by Michael Zeleznik on behalf of Wife. Both experts treated Moser Construction Company; Moser Contractors, LLC.; Foamtech, Inc.; and Rootstown Service as a single consolidated entity for valuation.

Mr. Zeleznik values the Moser Construction Company entities at $1,474,000. Wife argues that is a conservative figure and suggests the true value of Moser Construction Company is $1,639,000.

Mr. Turner, on behalf of Husband, values the Moser Construction Company entities at $949,773. Mr. Turner then adjusts the value of the Moser entities by 15% due to a possible lack of marketability.

His adjusted value for the Moser entities is $807,307. The Court finds, however, the adjustment inappropriate in this case since no sale is contemplated.

The Court also notes that Mr. Turner uses a fixed asset figure of $1,000,000 as provided by Irontrax. The Court, however, found the fixed asset figure to be $1,284,895 as provided by Rosen & Company. Accordingly, the sum of $284,895 should be added to Mr. Turner's value of the entities and the Court, therefore, finds Mr. Turner's appraisal of Moser Construction Company is $1,234,668 or $239,332 less than the Zeleznik appraisal after an adjustment by the Court.

After a full review of both appraisals and since the Court is unable to substitute its own judgment, the Court finds the appraisal of the Moser Construction Company entities as submitted by Mr. Zeleznik of $1,474,000 to be more reflective of the true value and should be adopted as the value of the Moser Construction Company entities.

In the Court's Findings of Fact and Conclusions of Law dated December 30, 2004, the Court determined that all the assets and liabilities of the Moser Family Limited Partnership (MFLP) were marital assets subject to equitable division.

The MFLP contains numerous business entities.

These entities include a 50% ownership interest in Rootstown Storage; Clover Pointe Land Development, Ltd.; Clover Pointe II, Ltd.; Clover Pointe III, Ltd.; and Rootstown Industrial Park, LLC. With the exception of Rootstown Storage, the listed assets are limited liability companies. Rootstown Storage is a partnership between Husband and Husband's father, Robert Moser, with each having a 50% ownership. The MFLP is a 50% owner of the other listed entities with the exception of Terracove real estate development.

The Court finds that the real estate development known as Terracove is the marketing name of the real estate being developed, which is solely owned by the MFLP. The Court finds that fourteen of the original lots within the development remain to be sold and that all nine of the commercial lots remain to be sold. The Court further finds that the fourteen residential lots and the nine commercial lots have an aggregate value of $756,193, according to Mr. Turner, less a debt owed to the Portage Community Bank of $320,250, for a net value of $435,943.

The Court further finds that Rootstown Storage owns mini storage facilities, commercial rentals, and office rentals. It is a partnership and the MFLP owns 50% of Rootstown Storage, while the other 50% is owned by Husband's father, Robert Moser. The Court finds the value of Rootstown Storage is $1,266,060 of which $633,030 is an asset of the MFLP.

The Court further finds that Clover Pointe Land Development, Ltd., is the 100 percent owner of Sandy Lake Properties, LLC. Clover Pointe Land Development, Ltd., is owned 50% by the MFLP and 50% by Prominence Homes, Inc. The Court further finds that Clover Pointe Land Development, Ltd., is valued at $988,398, of which $494,199 is an asset of the MFLP.

The Court further finds that Clover Pointe II, Ltd., is a residential development known as Harp's Mill in Medina, Ohio. The company is owned 50% by the MFLP and 50% by KM Land, LLC. The Court further finds that Clover Pointe II, Ltd., has a negative value of ($106,232) of which 50% or ($53,116) is the responsibility of the MFLP.

The Court further finds that Cover Pointe III, Ltd., owns an office/industrial condominium facility on Route 18 in Medina, Ohio. Development has been difficult and more expensive than anticipated. The company is owned 50% by the MFLP and 50% by KM Land, LLC. The Court finds that Clover Pointe III, Ltd., has a negative value of ($793,993) and that 50% or ($396,997) is the responsibility of the MFLP.

The Court further finds that Rootstown Industrial Park, LLC., is a 153-acre land parcel in Rootstown, Ohio. The project has been available for sale since January, 2001, but has not been sold.

The Court finds that Rootstown Industrial Park, LLC., has a negative value of ($49,348) of which 50% or ($24,674) is the responsibility of the MFLP. The remaining 50% is the responsibility of the Bennet family.

The Court finds that the expert for the Wife valued the ownership interest of Barbara and Terry Moser in the MFLP to be $1,090,000, excluding partnership investments and LLC's. (See Plaintiff's Exhibit No. 7)

The Court further finds that the expert for the Wife separately valued Rootstown Industrial Park and found the interest of Barbara and Terry Moser to be $505,000 and separately valued Rootstown Storage and found the interest of Barbara and Terry Moser to be $608,000. (See Plaintiff's Exhibits No. 2 & 3) The Court further finds that the expert for the Wife found that the total interest of Barbara and Terry Moser in the entities making up the MFLP to be $2,203,000.

The Court further finds that the expert for Husband finds that the interest of Barbara and Terry Moser in the MFLP to be $1,507,663. Husband's expert then uses a 15% downward adjustment for lack of marketability for a rounded MFLP value of $ 1,282,000. The Court finds the downward 15% adjustment inapplicable and inequitable.

The Court acknowledges there is a well-accepted business rationale for using a lack of marketability adjustment. The Court, however, finds the marketability reduction in the above-captioned case inequitable.

As an example, the MFLP has $674,242 in notes receivable. They should be paid in full and are allocated accordingly. However, Mr. Turner adjusts these notes by 15%, reducing the value by $101,182. This represents a substantial undivided equity and a windfall to one of the parties. Accordingly, the Court declines to use the marketability adjustment.

The parties agreed to use the appraisal services of Mr. John Emig and Mr. Emig appraised a warehouse for $95,000, a lot associated with the marital residence for $45,000, and the marital residence at $225,000.

The Court finds that the marital residence was sold for a gross sum of $208,000. From that sum, $100,000 was used to pay a second mortgage at the Portage Community Bank, $21,162.85 to pay the first mortgage at Washington Mutual Bank, and $16,868.98 was used to pay taxes and costs of sale. The net sum of $69,968 was used by Wife and constitutes an early distribution of her portion of the marital estate.

The Court further finds that the $100,000 Portage Community Bank second mortgage represents funds previously awarded to Wife as an early distribution of her portion of the marital estate.

Accordingly, Wife should be credited with an early distributive award of her share of the marital estate in the sum of $169,968 from the sale of the residence.

The Court further finds that Comsot Properties, Ltd., is a company solely owned by Husband. The real estate in the company was appraised by John Emig. After offsetting the debt associated with the company, the Wife's expert valued Comsot Properties, Ltd., (as of June 20, 2005) at $20,000.

In addition to the real estate developments, the Court finds that the MFLP has $674,242 worth of notes receivable due from the various business entities, including two of the LLC investments. Clover Pointe III owes $222,650 to the MFLP in a note receivable; KM Land, LLC., owes $206,000 to the MFLP in a note receivable; and Rootstown Industrial Park owes $153,380 to the MFLP in a note receivable. These represent the three major notes within the MFLP.

The Court finds that there is a Chase Visa credit card debt ($10,849 at the time of trial) and said debt is found to be the responsibility of Wife.

The Court finds that each party has a checking account in his or her name and each party is entitled to their own individual checking account.

The Court finds the following assets of the marriage and also finds values associated with each asset:

1. The marital residence located at 3898 Sanford Road, Rootstown, was an asset of the marriage. It was sold and the net proceeds of $169,968 were awarded to Wife as an advance of her portion of the marital estate.

2. Husband's residence is located at 4367 Clover Drive, Ravenna, with a fair market value of $157,500 and a mortgage of $156,947, leaving marital equity of approximately $553.

3. Eleven hundred shares of Portage Community Bank stock with a value of $42.59 a share and a marital equity of $46,849.

4. A 1995 Mercedes Benz with a fair market value of $16,905.

5. Two 1978 Lincoln Mark V automobiles valued at $500 each, with a total fair market value of $1,000.

6. One fishing boat with a fair market value of $1,000.

7. One power boat with no equity.

8. Moser Construction Company profit sharing of Husband valued at $18,404.

9. Chase IRA # 502263112815 of Wife valued at $3,317.

10. Wife's STRS pension and Wife's OPERS pension with a combined value of $128,341.56 and a marital portion subject to equitable division of $120,582.

11. Husband's Social Security benefit valued at $202,318 and a marital portion subject to equitable division of $186,160.

12. Husband's life insurance cash surrender value at Westfield valued at $11,500.

13. A Wachovia account valued at $18,991 (as of 7/05).

14. Bank One securities valued at $25,564.

15. Bank One Savings of Wife valued at $1,243.

16. Moser Construction companies (includes Moser Construction Company; Foamtech, Inc.; Moser Contractors, LLC.; and Rootstown Service) valued at $1,474,000.

17. Wife's 2003 Infinity 135 Sedan valued at $14,770, minus the lien of $2,355, for a net equity of $12,415.

18. Comsot Properties, Ltd., valued at $20,000.

19. The Moser Family Limited Partnership valued at $1,507,663, with assets as follows:

Cash	4,143
Accounts Receivable	4,064
Note Receivable - Industrial Park	153,380
Note Receivable - Clover Pointe III	222,650
Note Receivable - KM Land	206,000
Note Receivable - Maplewood/Duda	53,100
Note Receivable - Steve King	17,401
Note Receivable - Shannon Moser	21,711
Interest in Rootstown Storage (50%)	633,030
Interest in Clover Pointe (50%)	494,199
Interest in Clover Pointe II (50%)	- 53,116
Interest in Clover Pointe III (50%)	- 396,997
Interest in Rootstown Industrial Park	- 24,674
Illiquidity Discount on Investment	- 97,866
Terracove (100%)	756,193

Ravenna Lots	6,559
Other Current Assets	308
Total Asset Value	2,000,085

Liabilities:

Accounts Payable	11,838
Notes Payable (total)	475,105
Other Current Liabilities	5,479
Total Liabilities	492,422
EQUITY	1,507,663

20. Wife's CD (Withdrawal) of $2,650.

21. Vacant lot valued at $45,000.

22. Warehouse valued at $95,000.

The Court finds the total value of the marital estate is $3,778,764.

It is, therefore, ORDERED, ADJUDGED and DECREED that the assets of the marital estate shall be divided as follows:

To Husband:

1. Moser Construction Company	$1,474,000
2. Comsot Properties, Ltd.	20,000
3. 4367 Clover Drive Residence	553
4. 1100 Shares of Portage Community Bank	46,849
5. 1995 Mercedes Benz	16,905
6. Fishing Boat	1,000
7. Power Boat	-0-
8. Husband's Profit Sharing Plan	18,404
9. Husband's Westfield Life Insurance (CSV)	11,500
10. Warehouse	95,000
11. Vacant Lot	45,000

12. Husband's Social Security Account		186,160
13. (2) 1978 Lincoln Mark V ($500 each)		1,000
14. All assets of MFLP not assigned to Wife		712,340
(MFLP value of $1,507,663, less		
$795,323 to Wife, including the following:		
Terracove assets	$435,943	
KM Land Note	206,000	
Rootstown Industrial	153,380)	
Total Distribution to Husband		$2,628,711
Less cash to Wife		- 739,329
Total		$1,889,382

To Wife:

1. Marital Residence Equity	$ 169,968
2. Chase IRS #502263112815	3,317
3. CD (Withdrawn)	2,650
4. Bank One Savings	1,243
5. Bank One Securities	25,564
6. Wachovia Account	18,991
7. PERS/STRS	120,582
8. Terracove Assets	435,943
9. KM Land Note Receivable	206,000
10. Rootstown Industrial Note Receivable	153,380
11. 2003 Infiniti 135 Sedan	12,415
Total Distribution to Wife	$1,150,053
Cash to Wife to equalize Property Division	$ 739,329
Total	$1,889,382

Accordingly, Husband shall pay to Wife the sum of $739,329 to equalize the property division. Husband shall be permitted to pay in a lump sum or in a payment plan.

Should Husband elect a payment plan, the terms shall be established by the parties. Payments may not, however, exceed a 15-year period and should carry an interest rate of five percent.

It is further ordered that any and all Temporary Orders of the Court shall not merge with the final Divorce Decree.

Each party is hereby ordered to be responsible for their own Attorney fees and costs after forfeiture of Wife's deposit shall be paid by Husband.

IT IS SO ORDERED.

JUDGE JERRY L. HAYES
COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION

cc: K. Gibson, Esq.
R. Lowry, Esq.
R. Paoloni, Esq.

The Clerk is directed to serve upon all parties notice of this judgment and its date of entry upon the journal in accordance with Civ. R. 58(B).

APPROVED
FOR FILING

4-26-06