

IN THE OHIO SUPREME COURT

CASE NO. 07-1788

BARBARA MOSER

Plaintiff-Appellee

v.

TERRANCE L. MOSER, et. al.

Defendants-Appellants

APPEAL FROM THE PORTAGE COUNTY COURT OF APPEALS
ELEVENTH JUDICIAL DISTRICT
COURT OF APPEALS CASE NO. 2006 PA 00047

**PLAINTIFF-APPELLEE'S
MEMORANDUM IN OPPOSITION TO JURISDICTION**

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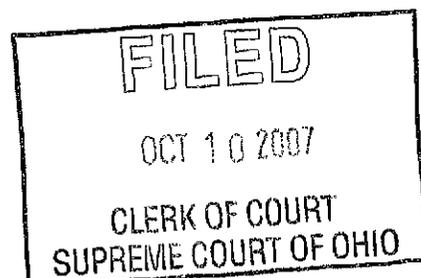


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STATEMENT REGARDING LACK OF PUBLIC OR GREAT GENERAL INTEREST

This case is not of public or great general interest because it was decided upon the unique facts of the case. If the factual findings of the trial court which were affirmed by the Court of Appeals are accepted, then those factual findings compel the result reached below under long-standing principles of law. Even if the Court were to accept jurisdiction, the Court would not be able to reach the Proposition of Law set forth because of the factual findings including a finding that the Moser Family Limited Partnership was a mere *alter ego* of Terrance Moser, the finding that the Partnership Agreement permitted *dist* and the doctrine of invited error.

STATEMENT OF THE CASE AND FACTS

The trial court found and the Court of Appeals affirmed that the Moser Family Limited Partnership (MFLP) was owned 50% by Terrance Moser (Husband) and 50% by Barbara Moser (Wife). Husband's claim that the children were limited partners of the MFLP was rejected by the trial court applying basic principles of gift law which Husband has not challenged in this appeal.

The trial court also found that Husband had operated the MFLP as his personal *alter ego*. The trial court made the following finding:

"The continued loans, personal guarantees, and pledging of personal assets as a means of promoting the business of the MFLP shows Husband has continued to treat the assets owned by the MFLP and its related LLCs and

partnerships as his own personal assets. Plaintiff's Exhibit 54 reveals hundreds of thousands of dollars in loans back and forth between entities of differing ownerships. Many of these entries were marked "CF" reflecting "cash flow". Thus when one entity needed cash and another entity had it, there would be a transfer of cash to cover the needs without regard to separate ownership or fiduciary requirements. This is part of a pattern of moving funds to meet needs of the moment without regard to legitimate partnership purposes. Interest on these loans were only paid at the sole discretion of Husband. Husband was asked to explain several transactions involving more than \$50,000 and was unable to recall their purpose or function. Based upon his examination of the books and records of the MFLP, Mike Zeleznik expressed the opinion that these entities were being operated as the alter ego of Husband without any apparent regard to fiduciary restraints. Based upon the evidence before the Court, the Court finds this testimony to be credible and correct."

This finding was supported by the testimony and exhibits in the record and affirmed by the Court of Appeals.

Attorney Rasnick testified that he had a discussion about ownership of gifted assets with Husband which would typically include a statement: "This is off your balance sheet; you can't use these assets to acquire loans; these are not your assets anymore." Yet the evidence showed and the trial court found that Husband continued to list the full 100% value of the assets of the MFLP as his personal assets on his financial statements and continued to treat them as his personal assets rather than partnership assets.

After the trial court ruled that no interests in the MFLP had been effectively conveyed to the children, a ruling which was

affirmed by the Court of Appeals and is not challenged herein, the trial court asked the parties for a written brief addressing the proposed distribution of marital assets. Husband asked to be awarded all of the following:

- A. Moser Construction Companies (except for the Warehouse, lot, and Infiniti)
- B. Comsot Properties, Ltd.
- C. Moser Family Limited Partnership
Less 11 Terracove Residential Lots*
Less Terracove Commercial Parcel*
Less 50% N/R of Clover Pointe III
Less 50% N/R of K M Land
Less 50% N/R of Rootstown Ind.

*Debt to Portage Community Bank of \$320,250 to be paid from sales proceeds of \$719,048.

- D. 4367 Clover Drive
- E. Husband's Portage Community Bank Checking
- F. 1100 Shares of Portage Community Bank
- G. 1995 Mercedes Benz
- H. 2 1978 Lincoln Mark V
- I. Fishing Boat
- J. Power Boat
- K. Husband's Moser Profit Sharing Plan
- L. Husband's Westfield Life Insurance (CSV)

With respect to the MFLP assets, Husband proposed that Wife receive the Terracove residential and commercial lots. The trial court adopted this request. Husband proposed that Wife receive a 50% interest in the Notes Receivable from Clover Pointe III, K M

Land, and Rootstown Industrial Park. Instead the trial court awarded Wife 100% interest in the KM Land and Rootstown Industrial Park Notes Receivable and awarded Husband 100% of the Clover Pointe III note receivable.

Having disregarded the partnership entity throughout the course of his management of that entity and having proposed to the trial court that the MFLP assets be divided in almost precisely the manner which was ultimately adopted, Husband is now arguing that the partnership entity was inviolate and that the trial court erred in following his proposed distribution of marital property.

ARGUMENT ON PROPOSITION OF LAW

Appellant's 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.

The trial court found:

"This 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."

In addition to the normal partnership rights contained within the MFLP partnership agreement such as the right to dissolve the partnership or to amend its terms (Section 13, p. 9 and Section

16.1, p. 10), this particular partnership grants broad powers to Husband as the sole General Partner. Paragraph 8.2(14) of the MFLP Partnership Agreement grants to Husband as the general partner the power to "quitclaim, release or abandon any Partnership assets with or without consideration." Thus the trial court's equitable jurisdiction over the parties allowed it to order the parties to do that which the MFLP Partnership Agreement permitted them to do.

Petitioner cites several general partnership cases in support of his Proposition of Law, yet these cases rely upon R.C. § 1775.24 which provides in relevant part:

"(2) 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."

In this case the trial court found that the only two partners of the MFLP were and are Husband and Wife. Thus in assigning rights in specific partnership property, the trial court did not violate R.C. §1775.24, because the partnership property assigned to Husband assigned the rights of all the partners in that property. Similarly, that portion of the partnership property assigned to the Wife assigned the rights of all of the partners to that property. The trial court had jurisdiction over all of the necessary parties to make such a division and order.

To the extent that Husband after treating the MFLP assets as his personal assets for years is now trying to assert the rights

of a putative creditor, he lacks standing to make such a challenge. To the extent that Husband is seeking to base his objections upon the rights of the children, he is barred by the factual findings of the trial court that the children never obtained those rights. To the extent that Husband is seeking to enforce his own rights as the general partner, Husband is subject to the equitable jurisdiction of the trial court to make an equitable distribution of marital property.

The Domestic Relations Court has broad equitable powers. R.C. 3105.011. Larson v. Larson (Oct. 13, 2000), Portage App. No. 2000-P-0023, unreported. See also, Gorby v. Gorby (1988), Greene App. No. 87CA57, unreported. As a court of equity, a domestic relations court can order a party to exercise legal rights in order to fashion an equitable property division. For instance, a domestic relations court may order a party to exercise their authority to terminate a revocable trust so that marital assets can be reached and divided by the domestic relations court. Slutzker v. Slutzker (Dec. 5, 1994), Stark App. No. 1994 CA 00108, unreported.

The Court of Appeals held:

"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); Morph. v. Morph., 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").

"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.

"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 owing 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).

"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.

"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."¹

Finally, the argument of the Husband is barred by the doctrine of invited error. The State ex. rel. Downs v. Panioto (2006), 107 Ohio St. 3d 347; 2006 Ohio 8, ¶ 32. State ex rel. Ohio Dep't of Mental Health v. Nadel (2003), 98 Ohio St. 3d 405, 2003 Ohio 1632, P22. State ex rel. Kline v. Carroll, (2002), 96 Ohio St.3d 404, 2002 Ohio 4849, P27 ("Under [the invited-error] doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the court to make").

Terracove consisted of individual lots held within the MFLP. The Court of Appeals wrote:

¹ Since the Court of Appeals decision, Husband has exercised his power as "general partner" to kick the Wife out as a limited partner. Husband is now therefore the sole partner in the MFLP and he is asserting that Wife is owed no additional compensation because she has already received her share in the divorce decree.

"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."

As noted above, Husband also advocated in the trial court that notes receivable held by the MFLP from third parties should be distributed to Wife. The notes awarded to Wife also were assets which were of completed developments and were not assets owned in conjunction with other partners.

In Hoyt v. Hoyt (1990), 53 Ohio St.3d 177, 182-183, this Court wrote:

"[W]e recommend that trial courts, when circumstances permit, should strive to resolve the issues between the parties so as to disassociate the parties from one another or at least minimize their economic partnership. Certainly, some circumstances may warrant joint ownership after a divorce and situations may evolve where joint decisions must be made. In these matters, trial courts must exercise their fullest discretion. But, realistically, due to the nature of divorce, the circumstances usually are not conducive to joint decisionmaking by the parties. Therefore, some effort should be made to disentangle the parties' economic affairs."

Husband would like this court to continue to exercise his powers over the MFLP not for the protection of legitimate

partnership interests, but to preserve post-divorce his unfettered control over assets which must be distributed to Wife in order to effectuate a fair and equitable division.

The distribution of "assets" rather than cash was necessitated in large part because during the pendency of the divorce and in arguable violation of the trial court's injunction, Husband as general partner of the MFLP "loaned" out large cash amounts to his friends and partners in other businesses and has exercised his powers as general partner of the MFLP to refuse to collect either the principal or interest from these loans. The suggestion that the Court must leave Husband in control of Wife's assets continuing the operations of the MFLP until the affairs of that partnership could be wound up, is equivalent to a suggestion that the fox should be left in charge of the henhouse. The trial court's decision regarding the distribution of marital assets was not an abuse of discretion and well supported by its factual findings and application of applicable law.

CONCLUSION

The decision of the Court of Appeals was based upon the factual findings of the trial court. Because the result in this case turns upon the particular facts of the case and the language of the Partnership Agreement, there is no public or great general interest in the outcome. This Court therefore should decline to

accept jurisdiction.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Appellee's Memorandum in Opposition to Jurisdiction was served by U.S. mail on:

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