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Re: Miller v. Miller
C.A. No. 2140-VCN
Date Submitted: October 29, 2007

Dear Counsel:

Two brothers, Plaintiff Gary D. Miller ("Gary") and Defendant Gordon P. Miller ("Port"), with their respective children, each own half of Nominal Defendant Moosilauke Merriwood Incorporated ("MMI"), a Delaware corporation. They have been unable to agree on the future of the enterprise for some time and Gary, claiming that they are deadlocked, has brought this action under 8 *Del. C.* § 226 seeking the appointment of a custodian for MMI, with the expectation that the corporation will be dissolved. Before the Court is Gary's Motion for Judgment

on the Pleadings. For reasons briefly set forth below, the motion will be denied, at least for the time being, pending trial during which the Court will be able to gain a firmer understanding of whether its discretion should be exercised to appoint a custodian and, if one is appointed, how the scope of the custodian's authority should be defined.

Gary and Port inherited MMI from their father and are its only directors.[1] MMI owns two camps, Camp Moosilauke and Camp Merriwood, and adjacent lands in New Hampshire. Gary operates Camp Merriwood, a girls' camp; Port operates Camp Moosilauke, a boys' camp. Although owned by MMI, the camps are treated as separate and largely independent profit centers by the brothers. Both camps are profitable.

No new directors, despite several efforts, have been elected for more than five years because of the deadlock between the brothers. In essence, both Gary and Port can exercise "negative control" over MMI. The principal disputes between Gary and Port can be attributed to: (1) a perceived inequitable allocation

[1] Certain intervening corporate events, including the transfer of a few shares of MMI to their children, have been omitted because they are not material to the disposition of the pending motion.

of corporate assets between the two camps; and (2) Gary is said to want to develop MMI's property for single-family homes, an effort which may entail a greater financial return but which would frustrate their father's goal that the camps be operated indefinitely. The shareholders are deadlocked over these (and other, perhaps less pressing) issues.

Gary has moved, under Court of Chancery Rule 12(c), for judgment on the pleadings. Although such a motion may only be granted "when there are no material issues of fact and the movant is entitled to judgment as a matter of law,"[2] the Court, "in its discretion, may defer ruling on the motion until trial."[3]

Although the Complaint seeks relief under both 8 *Del. C.* § 226(a)(1) and 8 *Del. C.* § 226(a)(2), Gary's motion is limited to § 226(a)(1) which authorizes the Court to appoint a custodian for a corporation if "[a]t any meeting held for the election of directors the stockholders are so divided that they have failed to elect successors to directors whose terms have expired or would have expired upon

[2] *McMillan v. Intercargo Corp.*, 768 A.2d 492, 499 (Del. Ch. 2000).
[3] *Kahn v. Roberts*, 1994 WL 70118, at *1 (Del. Ch. Feb. 24, 1994); *see also Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) ("The Court maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application." (quotation omitted)).

qualification of their successors[.]" Gary points out that the parties' pleadings confirm, without any debate, that the stockholders have been unable to elect successor directors and that there are important issues about MMI's future upon which the brothers are unable to agree. He also reasonably asserts that limping toward perpetuity in that condition is not desirable. Finally, he notes that imminent harm is not required for the appointment of a custodian[4] and that a custodian may be appointed for a profitable enterprise.[5]

Although this all suggests that the appointment of a custodian may be appropriate and perhaps necessary, that judicial action, nevertheless, requires the exercise of the Court's discretion.[6] The exercise of discretion, especially within the context of a family dispute of this nature, is best performed with a full understanding of the circumstances that have led to the division between the brothers, an understanding that is difficult to glean from pages of sterile pleadings. Moreover, if a custodian is appointed, the Court's ability to frame properly the role

[4] *Giuricich v. Emtrol Corp.*, 449 A.2d 232 (Del. 1982).
[5] *See Bentas v. Haseotes*, 769 A.2d 70 (Del. Ch. 2000).
[6] *See id.* at 77.

for that custodian is likely to be significantly enhanced by having heard and considered the evidence.

Accordingly, the Plaintiff's Motion for Judgment on the Pleadings is denied, without prejudice, pending trial of the merits of the brothers' dispute.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K