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Re: Miller v. Miller, et al.
C.A. No. 2140-VCN
Date Submitted: May 29, 2008

Dear Counsel:

Plaintiff Gary D. Miller ("Gary") seeks the appointment of a custodian, under 8 *Del. C.* § 226, for Moosilauke Merriwood Incorporated ("MMI" or the "Company"), a Delaware corporation. Gary and his brother, Defendant Gordon P. Miller ("Port"), together with their respective children, each owns 50% of the stock of MMI. Gary and Port continue to serve as holdover directors of the Company because the stockholders have been unable to elect directors for several years. No material adverse consequences have befallen MMI because of this impasse, but the

successful future operation of MMI has been placed in doubt by this untenable, on a long-term basis, corporate governance arrangement. This post-trial letter opinion sets forth the Court's findings of fact and conclusions of law.

## I. BACKGROUND

MMI owns approximately 200 acres of land in Orford, New Hampshire and operates two camps—Camp Moosilauke, a camp for boys, and Camp Merriwood, a camp for girls. Camp Moosilauke first began operation more than 100 years ago. In 1938, Gordon F. Miller ("Gordon"), the father of Gary and Port, took over its operation. In 1949, the venture expanded by developing Camp Merriwood on adjacent lands.

By 1972, Gordon had acquired control of the 200 acres now owned by MMI.[1] Both Gary and Port grew up helping their parents operate the camps. They were campers and counselors. By 1961, Gary had assumed responsibility for operating Camp Merriwood. Shortly thereafter, Port, the older by three years, began to operate Camp Moosilauke.[2]

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[1] This acquisition required several steps over many years. At one point, both camps leased land from Prettyman, Inc. In 1968, Gordon acquired a 50% stake in Prettyman, Inc. In 1972, he acquired the remainder. MMI was created to hold 100% of the stock of Prettyman, Inc. In 1988, Prettyman, Inc. was merged into MMI. Pretrial Stip. ¶ II.8; Joint Exhibit ("JX") 157.

[2] Both Gary and Port had other significant jobs while they ran the camps over the years.

Gordon, in 1998, gave all of his stock in MMI, except for one share, to Gary and Port, in equal amounts. The single remaining share was transferred to his attorney, Louis Kurrelmeyer, who served as the "decider" when the brothers were unable to agree until his death in December 2001, when his share was repurchased and retired by MMI, in accordance with an earlier agreement.[3] Thus, by 2001, Gary and Port each held 50% of the stock of MMI.[4] Both Gary and Port have children who are actively involved in running their father's respective camps. They, too, have been campers and counselors and, even though they live some distance away during the school year, they return and assist with the operation of the camps. Indeed, grandchildren now are campers.

Although MMI owns both camps, Gary, with his family, operates Camp Merriwood, and Port, with his family, operates Camp Moosilauke. They are largely independent profit centers and operate separately. Each is quite profitable.[5]

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[3] During the last few years of Mr. Kurrelmeyer's life, when his health interfered with his role at MMI, his wife served as the conciliator between the brothers.

[4] Each has transferred shares to his children. Each holds the proxy to vote those shares. Thus, for convenience, both Gary and Port will be treated as each holding 50% of the Company's stock.

[5] Annual profits (paid to the brothers and their families as "non-cabin staff wages") from each camp approximate $250,000. *E.g.*, JX 119.

As early as 1995, Gary and Port began to discuss the division of MMI. They had several concerns that have varied in importance with time. For example, they recognize that a viable, long-term solution might involve a division of the property. Thus, they have considered a physical division of the property to allow for each camp to operate independently on its own land. The topography has frustrated all efforts to carve up the real estate.[6] The area suitable for camping activities—residential, eating, sports fields, and aquatic activities—lies to the westerly end of the property. Camp Merriwood suffers from less area and fewer sports fields.[7] Unfortunately, most of the readily developable land has been used; the balance of the tract is rugged hillside—used for hiking and other nature-based activities—but not conducive to the sports activities critical to both camps. In addition, even if the undeveloped land could feasibly be improved, Camp Merriwood is separated from that land by Camp Moosilauke. Various plans have been floated. They may be viewed as starting points in the negotiation process, but they have never progressed very far. The implementation of the more interesting plans appears to require significant capital investment. In short, although the Court is reluctant to

[6] *See generally* JX 125 (map of MMI property).
[7] Gary is concerned that Camp Merriwood's inability to develop additional sports facilities will, over time, leave it at a disadvantage to its competitors.

rule out the possibility that the tract could be divided in such a way as to accommodate fairly the needs of both camps, that outcome seems unlikely.[8]

There are also concerns about potential liability for injury to campers. As the venture is structured, a significant event at one camp could threaten the financial viability of the other camp as well. In addition, Gary worries about the Merriwood campers because the access road to Camp Moosilauke runs through Camp Merriwood. His campers must cross this road to get to the sports fields. He perceives the risk that campers might forget to look before they cross the access road. Yet, the camp has operated over several decades and no such event, fortunately, has occurred. That, of course, does not preclude the possibility, but it does not appear to be an unreasonable risk.[9]

Another source of contention is whether the property (or the as yet undeveloped portion of it) should be subdivided for sale as residential lots. The lots, carved out of pristine wooded hills and overlooking Upper Baker Pond,

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[8] Another challenge in dividing the property is whether a division could be achieved without a taxable event. *E.g.*, JX 143, 153, 154, 155. Opinions have differed and it is beyond the scope of this letter opinion to contemplate the tax law questions. It suffices to note that a division, even if topographically feasible, would, nonetheless, confront substantial obstacles.

[9] There is no evidence of excessive speed; there is no evidence that additional signage, for example, would not address bulk of the concerns.

presumably could be quite valuable. Port has a strong commitment to the vision of his parents and the continued operation of the camps. That includes maintaining the uplands in their natural state. Subdividing all or a significant portion of the property would undoubtedly frustrate his deeply-held values.

At one time there was some apprehension that Port's children would be willing to commit to the continued operation of Camp Merriwood. At least for now, that no longer seems to be a source of concern.

As it became clear that a division of the property satisfactory to both brothers could not be negotiated, their positions hardened—eventually to the point where neither would vote for the other's directors. It has been more than five years since directors were elected.[10] Gary and Port continue to hold over as MMI's only two directors, thereby preserving an even split between directors, a split consistent with the equal ownership interests.

## II. CONTENTIONS

Gary seeks the appointment of a custodian, most likely to orchestrate the division or liquidation of MMI. Alternatively, Gary asserts that a custodian is

[10] This Court, in 2007, ordered that a stockholders meeting be held in accordance with 8 *Del. C.* § 211. Nothing productive resulted from that effort. Indeed, it further confirmed the undisputed stockholder deadlock.

necessary to break the deadlock between the brothers, both as directors and as shareholders, in order to maintain the orderly and proper administration of the venture. Port, on the other hand, sees neither need nor purpose for a custodian.

## III. ANALYSIS

Gary has invoked 8 *Del. C.* § 226(a) in his effort to obtain a custodian for the Company. That section provides, in pertinent part:

> (a) The Court of Chancery, upon application of any stockholder, may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of and for any corporation when:
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> > (1) At 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 qualification of their successors; or
> >
> > (2) The business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division.[11]

The Court, thus, may appoint a custodian for MMI if the stockholders are unable to elect directors or if the divided board—a problem which the shareholders cannot fix—results in the corporation's suffering or being threatened with

[11] MMI is not insolvent.

irreparable harm. Importantly, the statute imposes irreparable harm as a precondition to the Court's exercise of its discretion only if the division involves the ability of the directors to manage the corporation. No such irreparable injury prerequisite, however, must first be satisfied before the Court may appoint a custodian because of a deadlock between the stockholders.

A. *Custodian Because of Director Deadlock under 8* Del. C. *226(a)(2)*

Gary contends that there are disagreements with his brother in their capacity as directors of MMI which, because the board is deadlocked,[12] have caused or threatened the corporation with irreparable harm. The Court, however, finds that the business of MMI is neither suffering nor threatened with irreparable harm because of the division between the brothers. The business of the corporation—the camps—operates reasonably well. Each camp is profitable and the camps serve as separate profit centers for each of the brothers and allow for a reasonable division of income between. There are disparities between the camps in terms of playing fields and other facilities readily available to them, but, with only few and minimal exceptions, the camp managers have been able to work through any scheduling or utilization problems that may have arisen. Gary points to a few specific concerns:

[12] The board deadlock is one that the stockholders are unable to resolve.

whether the traffic to Camp Moosilauke through Camp Merriwood presents a risk to the campers; whether the disagreement between the directors impedes the daily and efficient operation of the camps.

Although the Court is loathe to minimize safety concerns, Gary arguments are, at most, speculative. Campers should know how to look for traffic before crossing a road; there is no reason to believe that signage or other traffic control strategies will not suffice. The camps might be enhanced if a different means of access were established, but the inability of the brothers as directors to agree on a new access does not support a finding that irreparable harm is present or threatened. Furthermore, although there have been some minor disagreements regarding camp operation, including the sharing of resources, those problems, in general, have been reasonably and promptly resolved. This amounts, at most, to an inconvenience; it does not approach irreparable harm.

In sum, Gary has failed to prove that the Court has the discretion under 8 *Del. C.* § 226(a)(2) to appoint a custodian for MMI.

B. *Custodian Because of Stockholder Deadlock in the Election of Directors Under 8* Del. C. *§ 226(a)(1).*

It is undisputed that it has been several years and several stockholders' meetings since the stockholders of MMI have been able to elect directors. This inability to elect directors is directly attributable to the equal holding of MMI stock by Gary and his family and Port and his family. All efforts to elect new directors have failed because of this deadlock. No showing that harm has occurred, or is likely to occur, is necessary in order to qualify for the appointment of a custodian under 8 *Del. C.* § 226(a)(1):

> The language of § 226(a)(1) is clear and unambiguous. A custodian may be appointed by the Court of Chancery when "[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 qualification of their successors . . . ." The language of § 226(a)(1) contains no other condition or exception, expressed or implied. Specifically, § 226(a)(1) requires no additional showing such as irreparable harm to the stockholder or the corporation. It is impermissible judicial legislation to engraft any such prerequisite upon § 226(a)(1).
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> The Plaintiffs have made an undisputed showing of utter disagreement between the two 50% stockholder factions on a number of serious

> issues. There is no indication that the shareholder-deadlock will be resolved in the foreseeable future, absent judicial intervention.[13]

In short, Gary has clearly demonstrated that the limited statutory prerequisite for the appointment of a custodian has been satisfied.[14]

C. *The Court's Exercise of Discretion*

The decision to appoint a custodian under 8 *Del. C.* § 226(a)(1) following stockholder deadlock in the selection of the corporation's directors is committed to the Court's discretion. There is no right to the appointment of a custodian under these circumstances.[15] That begs the question: what guides the Court's exercise of discretion? If a corporation is suffering real, palpable harm currently, or even is likely to suffer some material, identifiable harm in the near term, then appointment of a custodian should readily follow. Yet real, palpable immediate harm is not an

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[13] *Giuricich v. Emtrol Corp.*, 449 A.2d 237, 238-240 (Del. 1982) (alternations in original). *See also Bentas v. Haseotes*, 769 A.2d 70, 77-78 (Del. Ch. 2000); DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, §8.09[b] at 8-181-185 (2009).

[14] Port challenges Gary's efforts to obtain a custodian for MMI by asserting as something of a collection of affirmative defenses that the deadlock or inability to elect directors was "contrived." Port also asserts that some of Gary's "creative" solutions to their impasse were inherently unworkable. These contentions amount to variation on a theme of lack of good faith. The Court, with the benefit of trial, is satisfied that both Port and Gary have acted in good faith. They simply have fundamental and deeply-held, but irreconcilable, views about MMI's future.

[15] Significantly, the Court "may" appoint a custodian if the conditions of 8 *Del. C.* § 226 are satisfied; it is not mandatory.

essential precondition. On the other hand, if there is no current useful purpose in appointing a guardian or if there is no harm or foreseeable risk to avoid, then there may be little to induce the exercise of discretion in favor of appointment of a custodian. Unless a useful and proper role for a custodian can be found, the Court would, in substance, simply be exercising its authority for the sake of exercising its authority if it appointed a custodian without a concrete purpose or goal. Thus, the role of the custodian (i.e., how could the custodian help the circumstances of the corporation or protect stockholders from injustice) may appropriately inform the discretionary judgment of whether to appoint that custodian. If a custodian is appointed, then her powers should be tailored as narrowly as possible because judicially-supervised interference with the ordinary operation of a corporation should be kept to a minimum.

In short, in this instance, the Court has two practical options: (1) decline to appoint a custodian because the benefits of such an appointment would be minimal or (2) appoint a custodian with authority limited to resolving operational disagreements that Gordon and Port are unable to resolve and to facilitate an exploration of alternative means for resolving their deadlock—essentially a mediator in residence. Although a custodian may act out of necessity as a mediator

of competing corporate interests, the appointment of a custodian for that sole purpose would seem unnecessary. Mediation works because both sides are committed to its success. If Gary and Port both want to try to mediate their impasse, then they are perfectly capable of engaging in such an effort outside the scope of a § 226 action.

That leaves the reason why Gary brought this action in the first place. He wants to go on his way. This can be achieved by liquidating the company, selling the real estate, or dividing the real estate between the brothers. Port, on the other hand, is content to leave things the way they are. His resistance to change does not appear to be driven primarily by financial considerations. Instead, family tradition and a love of the camp seem to motivate him. The mere existence of an even stockholder split does not, by itself, authorize dissolution of the corporation or the sale of its only asset through the appointment of a custodian under 8 *Del. C.* § 226, at least without more.[16] Thus, appointment of a custodian with carefully tailored authority is not likely to meet Gary's immediate objectives.[17]

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[16] *See* 8 *Del. C.* § 226(b) (A custodian appointed under § 226 does not have authority to liquidate the corporation "except when the Court shall otherwise order and except in [circumstances not present here].").

[17] Although the Court expresses no formal view on the matter, it seems unlikely, after the extensive efforts of the parties, that a practicable and fair means for dividing the real estate can

Yet, one can easily envision circumstances in which the presence of a custodian would be beneficial, even necessary. For example, if one of the brothers became unable to serve as a director, fundamental failure of the equal power sharing arrangement would result. A custodian to satisfy core requirements or to assure that all interests are represented could perform a necessary function. In addition, although no irreparable operational disagreements have arisen, a custodian, serving much the same function as Mr. Kurrelmeyer, could resolve in deadlocks.[18]

Thus, the following factors primarily inform the Court's judgment: (1) it has the discretion to appoint a custodian under 8 *Del. C.* § 226; (2) the Company is not suffering, nor likely to suffer irreparable or serious harm without a custodian; (3) appointment of a custodian is not a desirable default for every corporation where the shares are equally divided between groups that have serious differences; (4) under the circumstances of this case, the interests of the Company and the brothers would be served by a custodian who could continue to pursue alternatives

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be devised. That leaves a sale of the real estate to a third party, a Dutch auction between the brothers that may well be the most equitable means of resolving the impasse, or a continuation of the current arrangement with the hope that the inevitable generational transfer will allow for the development of an innovative and creative solution.

[18] That the father conferred the power upon Mr. Kurrelmeyer to resolve disagreements between his sons over the management of the Company is not without significance in this matter.

for disentanglement of the brothers' interests in the Company; who could be available to break material deadlocks at the board level (or the operational level), and who would serve to maintain the balance of power if one of the directors should be unable to serve.[19]

In sum, the Court is satisfied that appointment of a custodian of relatively limited authority is appropriate. The Court is also satisfied that the appointment should be for a limited duration in order to allow for an assessment of the usefulness of the custodian based on actual experience.

## IV. CONCLUSION

Accordingly, the Court will appoint a custodian with the following authority:[20] (1) to break material deadlocks between directors; (2) to resolve

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[19] In *Giuricich*, 449 A.2d at 240, the appointment of a custodian was recognized as a remedy for "injustices." Of course, a showing of "injustice" is not a statutory condition on the Court's authority to appoint a custodian. Instead, the notion of remedying in "injustice" informs the Court's discretion, first, whether to appoint a custodian and, second, in establishing the scope of such custodian's authority. Deadlock, itself, is not an injustice. The consequences of that deadlock for the stockholders and the enterprise must be assessed. In this instance, the somewhat limited scope of injustice influences the scope of the authority to be conferred on the custodian. Unfortunately, there is no formula to employ; a case-by-case evaluation of the factual context is necessary. The "injustice" here, to the extent that one must be explicitly identified, may be found in the untenable corporate governance arrangement into the future coupled with the fundamental disparity between the resources (i.e., physical facilities) available to the two camps.

[20] The custodian or any party may, for good cause, petition for revision of the scope of the custodian's authority.

operational deadlocks between the two camps; (3) to participate with the power of a director in the event one of the directors is unable to serve, with such action duly to reflect the interest of the director for whom the custodian is substituting; and (4) to seek to resolve the impasse over the future of the Company.[21] Unless extended by further order of the Court, the authority conferred on the custodian will expire two years from the date of appointment.

Counsel are requested to confer and to submit a form of order to implement this letter opinion. They may, of course, jointly propose a scope of authority different from the one prescribed in this letter opinion. Counsel are also requested to confer as to the selection of the custodian.[22]

Very truly yours,

***/s/ John W. Noble***

JWN/cap
cc: Register in Chancery-K

[21] The custodian may consider various options, but no authority is conferred upon the custodian, to sell or divide the Company's real property.

[22] Obviously, it is best if the custodian is someone acceptable to both sides, knows the real estate values and opportunities in the area of the camps, and has some understanding and familiarity with the operation of camps. The parties and their counsel should also recognize the risk that, if they are unable jointly to propose a custodian, the Court may simply appoint some lawyer.