**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO**
**DIVISION OF DOMESTIC RELATIONS**

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| JANE A KURALY,<br>Plaintiff, | : | Case No.: 11DR-08-3044 |
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| | : | JUDGE KIM A. BROWNE |
| vs. | : | Magistrate Marcie Webber |
| | : | |
| RICHARD M KURALY,<br>Defendant. | : | |

## JUDGMENT ENTRY-DECREE OF DIVORCE

This matter comes before the Court on November 19, and December 6, 13, 14, 2012, January 3, March 6, 7, 8, 12, and 13, 2013 upon the Complaint filed by Plaintiff on August 4, 2011 and upon the Answer and Counterclaim filed by Defendant on September 15, 2011. Plaintiff appears duly represented by Attorneys Debra J. DeSanto and David J. McNichols, and Defendant appears duly represented by Attorneys Gerald J. Babbitt and C. Gustav Dahlberg.

## JURISDICTION

The Court finds that the parties were married in Ontario, Canada on December 17, 1988, and they have 4 children born as issue of this marriage; however, only one of those children remains an unemancipated minor: *to wit,* Nicholas Richard, whose date of birth is December 16, 1999 (nearly 14 years old). Plaintiff is not expecting a child at present. At the time of filing, the parties had been residents of the State of Ohio for at least 6 months and residents of Franklin County for at least 90 days prior to the filing of the Complaint. Further, they have lived separate and apart for a period in excess of 30 days. Neither party is active in a bankruptcy proceeding. Likewise, neither party is active in the United States Armed Forces. Therefore, the Court has jurisdiction over the subject matter and over the parties to the action.

## GROUNDS

The parties stipulate that they are incompatible and have lived separate/apart without cohabitation for greater than 12 months. It is therefore **ORDERED** that Plaintiff is granted an absolute divorce from Defendant, and Defendant is granted an absolute divorce from Plaintiff. The marriage contract heretofore existing between Plaintiff and Defendant is hereby terminated, and both parties are released from the obligations of the same.

## DURATION

The Court finds that the duration of the marriage is from the date of the marriage, December 17, 1988, to the last date of trial, March 13, 2013. Pursuant to ORC §3105.171(A)(2)(a), the termination date of the marriage is the final hearing date. Accordingly, the duration of the parties' marriage is 24 years and nearly 3 months.

## BACKGROUND

The parties agree that October 14, 2011 is the date they permanently separated. Plaintiff's present residence (leasehold) address is 7518 Chancery Drive, Dublin OH 43016. Similarly, Defendant's present residence (leasehold) address is 7545 Doolin Drive Dublin, Ohio 43016. Plaintiff is currently employed by Dostal and Kirk, an insurance and finance agency, earning $34,000 per *annum*; Defendant is self-employed through a business known as *Money Mailer of Greater Columbus – North, LLC*.

The Magistrate's Order was issued by Magistrate Marcie Webber on October 27, 2011. In her Order, the Magistrate ruled that both parties are designated the temporary residential parent and legal custodian of their remaining minor child. Plaintiff is designated the residential parent for school placement purposes so long as she remains in her current (i.e. Dublin City) school district. Defendant was granted parenting time pursuant to Local Rule 27, plus any additional time upon which the parties may agree. In the event the parties are unable to agree, the Magistrate granted Defendant additional parenting time every Thursday after school until Monday morning whereupon Defendant is ordered to transport the child to school.

Further, Defendant was granted parenting time on all weekends that coincide with the child's hockey-related activities. Also, both parties were ordered to attend the parenting seminar pursuant to local rule. Finally, Defendant was ordered to pay child support to Plaintiff in the amount of $830.64 per month plus processing charge (effective November 1, 2011). Defendant was ordered to maintain all present levels of medical and hospitalization insurance for the benefit of the child, Plaintiff and Defendant. Plaintiff and Defendant were ordered to share any extraordinary uncovered medical, dental and other health care expenses for the child on a 20% (Plaintiff) – 80% (Defendant) basis.

As to financial issues between the parties, the Magistrate initially passed on the issue of temporary spousal support and/or expense monies. Both parties were ordered to pay their own individual debts and living expenses, and Plaintiff was ordered to pay for the child's clothing and school-related expenses. In addition to the items above-referenced, Defendant was ordered to pay the vehicle insurance for the parties' vehicles, the mobile phones for the parties' and the child (if applicable), his business expenses and all expenses related to the child's extracurricular activities, including hockey. Said Order was made retroactively effective to October 27, 2011.

On March 20, 2012, Magistrate Webber issued a second Magistrate's Order altering her initial financial order and requiring Defendant to pay child support to Plaintiff in the amount of $580.11 per month, plus processing charge and pay spousal support to Plaintiff in the amount of $250 per month, plus processing charge (effective January 1, 2012). Finally, Defendant was ordered to pay Plaintiff $1,000 as and for attorney fees.

## MARITAL PROPERTY

### MARITAL RESIDENCE

The parties formerly owned a marital residence located at 5464 Satterton Circle, Dublin Ohio 43016. Defendant, in his closing statement accurately and succinctly writes, "The parties sold their marital residence on Satterton Circle by agreement in October 2011. Each party received $25,000 from the sale proceeds to do with as they wished, as an early distribution of marital property.

The remainder of such proceeds is being held in escrow by the parties' attorneys, with each attorney depositing fifty percent (50%) of such proceeds in their respective trust accounts. As of October 14, 2011, each attorney was in possession of $53,208 of such proceeds. By agreed entry on December 14, 2012, [Plaintiff] was awarded $7,750 from her attorney's share of such proceeds as an additional early distribution of marital property. Thus, a total of $98,666 remains undistributed in trust. There is no question that as the house was a marital asset, so too are the resulting sale proceeds. Neither party advanced separate property claims regarding the same." PL EX 16. The Court agrees and, taking the totality of the parties' circumstances into account, has equitably divided the remaining proceeds as reflected in the Allocation Chart at page 27 of this Decree.

<u>MOTOR VEHICLES</u>

Plaintiff principally owns/operates a leased 2013 Volkswagen Jetta which she obtained in October of 2012; as a lease, this vehicle has no marital value. PL EX 39. Defendant sold the parties' 2003 Yukon Denali (which was titled solely in his name) on/about November 23, 2011 for $4,500; those funds were distributed equally to each party pursuant to the written agreement filed with the Court on/about December 14, 2012. Initially, Plaintiff testifies that she had no knowledge the Denali was being sold; she vehemently disagreed that she instructed Defendant to sell the vehicle. However, Defendant was able to supply the Court with an October 29, 2011 email (which Plaintiff authenticated) establishing her consent and specific "authorization" to sell the vehicle. Additionally, Defendant demonstrates that Plaintiff actually delivered the vehicle/keys to him to effectuate the sale. DEF EX D. Plaintiff explains that she first expressed a desire to sell the vehicle but Defendant, the sole title-holder, refused to consent so she had no choice but to allow Defendant to sell the Denali. As both concede they did, in fact, obtain the desired value for the vehicle – the Court finds that the actual logistics of the transaction are rather insignificant.

At the start of this proceeding, Defendant related that he owned/operated a 2003 BMW 530i, which he valued at $2,575. He testified that the BMW has over 185,000 miles and that he has not recently invested any money in the vehicle, except for routine oil changes. DEF EX E. Plaintiff, on the other hand, suggests the Court value the vehicle at $3,500. The Court finds that Defendant is in a better position to know the details of his vehicle given his sole responsibility for its custody, care and maintenance; for these reasons, the Court accepts Defendant's proposed value of $2,575.

Defendant formerly owned/operated a 2000 Jeep Grand Cherokee which he indicates that he traded, during the pendency of the case, for a Kia lease for the parties' adult son Sean. PL EX 13. Defendant testifies that he received $2,000 for the vehicle, which was applied to the lease. Now, Defendant indicates that he drives the Kia and the parties' adult son Christopher drives the above-referenced BMW. He disputes Plaintiff's contention that he violated the Court's temporary restraining order as, again, he proffers emails from Plaintiff consenting to the transaction. PL EX 55. The Court finds that the lease has no marital value. As neither party has an ownership interest in the leased vehicles s/he currently operates, neither shall be allocated as marital property. Regardless of which adult child is now driving the vehicle, the parties maintain a marital interest in the 2003 BMW 530i which is allocated at Chart at page 27 of this Decree.

MONEY MAILER OF GREATER COLUMBUS NORTH, LLC

The parties vehemently disagree about the marital value of Defendant's marital business entity, Money Mailer of Greater Columbus – North, LLC. Both parties retained forensic valuation experts to present their perspective positions for the Court's consideration.

**Plaintiff's Business Valuation**

On March 6, 2013, Plaintiff proffers the testimony of her forensic expert, Mr. William Ditty, CPA, of Ditty Financial Forensics,[1] who testifies that he was retained to value Defendant's business, Money Mailer, LLC, and to determine a value thereof. The effective date of his valuation is December 31, 2011, and the valuation report was issued in October of 2012. PL EX 44.

Mr. Ditty identifies Money Mailer as a top-ranked franchise operation according to Entrepreneur Magazine in terms of the potential profitability. It is uncontested that Defendant is the sole owner of the business. Mr. Ditty testifies that Defendant commenced his business in 2008, and in the years leading up to 2011, he had on average 80 to 100 mailers per period in roughly 8 mailings per year (approximately 1 every 6 weeks). Per his Schedules C, Defendant has posted losses every year, though his *gross* revenue and the number of mailers have shown a steady increase. Mr. Ditty recalls that Defendant's highest sales occurred on December 31, 2011 when he generated approximately $197,000.

With respect to the financial data contained on Defendant's Schedules C for the years 2008 through 2011, Mr. Ditty relays that oftentimes it is appropriate and advisable to perform a detailed forensic analysis with respect to information that is provided from a sole proprietor since the owner is in complete control of the operation of the business and the owner is incentivized to minimize net income as much as possible for tax purposes (i.e., *legally* avoid the payment taxes by maximizing deductions). However, here, Mr. Ditty explains that because of the size and scope of this analysis, he performed no such analysis. Mr. Ditty testifies that he accepted Defendant's business figures as he reported the same to the IRS and as he received the numbers from Defendant.

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[1] Mr. Ditty earned a bachelor's degree from The Ohio State University and a master's degree in administration from Central Michigan University; he is a certified public accountant, a personal financial specialist, a certified valuation analyst, a certified forensic financial analyst and a certified financial divorce analyst. This Court has previously qualified Mr. Ditty as an expert in similar domestic matters. His curriculum vitae and full list of licenses and qualifications is found at Plaintiff's Exhibit 43.

Mr. Ditty further explains that, in addition to Defendant's income tax returns, he also reviewed the Money Mailer franchise agreement and the scenarios or performance forecasts[2] which Defendant generated to establish what the business would look like financially if a particular threshold of activity had been achieved.

As a backdrop for his testimony, Mr. Ditty explains that IRS Revenue Ruling 59-60 is the starting point from which all fair market valuations of a business derive as it defines a fair market valuation. It is the reference source upon which financial professionals rely – along with numerous other publications, textbooks and seminars. He goes on to testify that there are 3 accepted valuation approaches within the valuation community; they are: (1) the asset approach (i.e., utilizing the difference between the fair market value of the assets and the fair market value of liabilities to value the business), (2) the market approach (i.e., a database comparison public and private sales of businesses that are comparable to the subject being valued) and (3) the income approach.

Mr. Ditty explains that the asset approach is pertinent to family limited partnerships and other business forms that do not generate much income – the real value stems from the tangible assets that these types of businesses own and operate. Mr. Ditty indicates that this approach is inapplicable to Money Mailer as it possesses no heavy, tangible assets. With respect to Money Mailer, Mr. Ditty opines that the hypothetical buyer would be interested in the cash flow s/he they could derive from Money Mailer, not its assets. Likewise, Mr. Ditty explains that the market approach is inapplicable to Money Mailer as he was unable to find any Central Ohio business entity in known databases that was even remotely comparable to Money Mailer for valuation purposes. Finally, Mr. Ditty testifies that he utilized the income approach; the approach that suggests that the true value of the business can be derived from the income that a hypothetical buyer can expect to generate from it. He further explains that the income approach can be broken down further into 2 methods: the capitalization of returns and the discounting of future returns (DCF) – the method upon which Mr. Ditty relied.

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[2] Defendant's sworn Second Supplemental Affidavit filed February 22, 2012. DEF EX QQ.

Mr. Ditty explains that he prefers the discounting of future returns method because the capitalization of returns method looks at historical numbers to arrive at value, and it is a "shortcut" method. He opines that it is always preferable to use discounted future returns because a buyer is buying what the business can generate for him/her or what the business can actually do *on a prospective basis*, as opposed to what it has historically done. Mr. Ditty explains in detail the assumptions he made in utilizing the DCF. Specifically, he applied 6.4% to the increasing revenue stream in his projections to account for Schedule C costs that were not included in Defendant's projections; he factored in a (new) part-time employee (and the associated tax costs) in determining the value of his business; he deducted income and self-employment taxes as he presumed that Defendant would continue to file as a Schedule C business entity and he presumed that the business would still need a transition period and may continue to lose money for the next 2 years (even if it continued to issue 80 to 100 mailers per period).

Mr. Ditty explains that the value and projected growth estimates he determined for Money Mailer are generous given the facts that (1) Defendant's own scenarios or performance forecasts reflect 125 mailers (which is about 25 above his actual average) for the next 2 years and 150 mailers for the last two years and (2) over the course of the past 4 years (i.e., 2008-2012), Defendant has built Money Mailer from zero to 80-100 mailers per period. So clearly, using comparable effort, Mr. Ditty reasonably anticipates that Defendant is capable of increasing the number of mailers per period by 50 over the next 5 years. In fact this sentiment is shared by *Defendant's own* vocation expert, Dr. Richard P. Oestreich. At page 4 of his report, Dr. Oestreich writes, *"the upside of [Defendant's] staying in his current business is very good. Both real growth and six-figure income are likely in his near future, given some effort and time."* DEF EX X.

Mr. Ditty shares with the Court that Defendant now objects to the Court's reliance upon his sworn Second Supplemental Affidavit filed February 22, 2012 (as known as Defendant's "scenarios or performance forecasts"). DEF EX QQ. According to Mr. Ditty, Defendant discouraged the use of this document as unattainable given the present circumstances of his life.[3] Mr. Ditty testifies that Defendant now believes his scenarios are unattainable because he presupposes that he (Defendant) will remain distracted from his work by his state of "perpetual divorce", which is simply not the case. Mr. Ditty expresses an expert opinion that, given upon Defendant's work ethic and passion for Money Mailer, once this grinding episode is behind him, his scenarios are, in fact, attainable over the next 6 years. PL EX 44, Tab F. Anticipating Defendant's objection to his consideration of past performance as a reflection of potential future performance, Mr. Ditty opines that, especially when a business owner is undergoing a significant, but *temporary* change (such as more than 18 months of contested litigation), to look at only the capitalization of returns is akin to driving a vehicle by looking only through the rear view mirror.

Lastly, Mr. Ditty opines that, based upon his training, education and experience; his review of the materials and the interviews he conducted, the value of Money Mailer of Greater Columbus – North, LLC is roughly $76,000. Mr. Ditty believes this value is appropriate given the approximate $50,000 price Defendant paid for the business *(without any mailers)* in 2008. Mr. Ditty further explains that he performed a "sanity check" on his valuation to ensure that his number makes sense and is reasonable in the grand scheme of things. His perspective reflects the following observations: first, if an individual purchases a business for approximately $50,000 and invests significant time/effort into it, it is illogical (especially now that such business has active ongoing customers) that s/he would sell it for less than her/his original investment.

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[3] Defendant takes great exception to his own scenarios or performance forecasts being used "against him". Mr. Ditty explains that he found Defendant's reflections to be very credible because they were numbers that Defendant crunched on his own, without the duress of trying to impress a court one way or the other. Mr. Ditty found Defendant's projections to be reflective of his contractual relationship with the business and grounded in the fact that Defendant increased his business from 0 to 80-100 per period in the course of only 4 years. Therefore, Mr. Ditty rightly opines that expecting Defendant to add 50 more mailers per period *over the next 6 years* without any expectation of growth for the first couple of those years constitutes an "extraordinarily appropriate valuation".

Second, a hypothetical buyer could either spend $50,000 to obtain a *new* Money Mailer franchise with five zones and absolutely no business at all or pay $26,000 to Defendant more for a business that already has 80-100 mailers ongoing. Hence, to him his figure for the value of Money Mailer of Greater Columbus – North, LLC makes perfect sense. Third, Defendant's 2008 gross receipts for Money Mailer were $14,868; gross receipts rose to $134,436 in 2009; gross receipts rose further to $169,645 in 2010 and rose again to $197,854 in 2011. PL EX 44, Tab C. Finally, Mr. Ditty acknowledges that, in each of these years, the net income number was reduced by virtue of the fact that Defendant also incurred expenses[4] which were subtracted from his gross receipts.

Next, Mr. Ditty turns his attention to Defendant's valuation of Money Mailer of Greater Columbus – North, LLC as conducted by Courtney Sparks White. DEF EX M. Mr. Ditty presumes (and Ms. Sparks White corroborates) that the 2 experts both relied upon the same information in arriving at their drastically different conclusions. The main difference in their respective reports, as identified by Mr. Ditty, is that Ms. Sparks White chose to look at the historical numbers and historical performance of Money Mailer in determining the value of this business. Again, Mr. Ditty explains that he elected to proceed with the discounted future returns method because the professional literature is fairly clear that with a pending change in circumstances, looking at past performance is not appropriate. He adds that Revenue Ruling 59-60 in particular is very aggressive about just averaging past numbers in order to come up with a future value and also cites a 10th District Appellate Court decision in *Heller v. Heller*. PL EX 44, p. 30.[5]

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[4] Again, Mr. Ditty testifies that, for the purposes of his valuation of Defendant's business, he did not question any of Defendant's expense numbers; he accepted these as presented by Defendant – without determining whether Defendant was also running personal expenses through the business as business expenses/deductions. Likewise, Defendant concedes that his self-prepared 2010 and 2011 profit and loss statements for Money Mailer have never been audited or reviewed by a CPA or other financial professional. PL EX 26.
Mr. Ditty clarifies that he did not include depreciation expense because such is noncash expenditure, and he was specifically reviewing cash flow.

[5] Defendant heavily criticizes Mr. Ditty's interpretation of the *Heller* case, specifically at paragraph 18, which Mr. Ditty's distinguishes from the instant case on the basis that the court (in that particular paragraph) refers to business entities with shareholders as opposed to entities such as Money Mailer which are organized as sole proprietorships.

Mr. Ditty argues that there exists a reasonable assumption that Defendant's business will, in fact, continue to grow. It is for this reason that Mr. Ditty disagrees with the income numbers Ms. Sparks White utilized in her valuation.

Defendant offers a number of criticisms of Mr. Ditty's valuation. First, Defendant focuses upon an initial report of Mr. Ditty's (clearly marked *"DRAFT"*) dated October 2012 in which he actually attempted to use the capitalization of earnings method, or the previously described "rear view mirror" method, and arrived at a figure of $104,000 as a preliminary value of Defendant's business. DEF EX PP. Mr. Ditty testifies that it was not his intention that either counsel include his *draft* report in their respective trial notebooks. He further explains that in light of additional research, he concluded that he needed to revise his report and did so. TR RT of March 6, 2013, p. 50, lines 11-12.[6] Second, Defendant takes issue with Mr. Ditty's reference to the statement that "Money Mailer has been "ranked #1 for advertising services by *Entrepreneur Magazine*" for 5 of the past 6 years as reflected in PL EX 44, Tab A. Mr. Ditty readily acknowledges that this statement is an advertisement by Money Mailer to sell franchises and clarifies that the statement did not numerically impact his valuation. Mr. Ditty further recognizes that while the "#1 franchise" boast is simply a marketing tactic, this country's laws prohibiting blatantly misleading and/or fraudulent advertising claims give him a certain level of assurance that there exists a basis for the claim.

Also, he explains that he used the claim to ascertain whether Defendant had "hitched his wagon to a falling star" and whether this business was a viable one. Mr. Ditty is adamant that he did not rely upon *Entrepreneur Magazine*'s claim to quantify the value of Defendant's business. The Court also finds it interesting that Defendant's own expert mentions this same irrelevant "sales pitch" in describing her methodology in arriving at her valuation[7].

[6] Plaintiff would point out that the ***only*** report submitted by Defendant for the Court's consideration during these proceedings is marked "DRAFT". DEF EX M.
[7] See DEF EX M, p. 30 at "Name Recognition".

Mr. Ditty also emphasizes that even Defendant's expert cited as positive attributes the facts that (1) the Money Mailer franchise has been in existence for over 32 years and (2) Defendant owns the use and exclusive right to the north central area and there are no other Money Mailer franchises in Central Ohio.

Third, Defendant also questions the source for Mr. Ditty's conclusion that "Money Mailer is a viable entity with a superior ranked franchise operation." PL EX 44, p. 2. Mr. Ditty explains that part of his research included speaking with brokers that buy and sell businesses in the merger and acquisition community while he attempted to obtain market data to explore using the market approach to value Money Mailer. Defendant spends a great deal of trial time trying to shake Mr. Ditty from his position given the business' yearly losses – his attempts, however, overlook the obvious question: if this Money Mailer franchise is such a zero-dollar *dog* of an investment, why would Defendant spend this degree of time and effort fighting to retain it in contested divorce litigation as his *sole* source of income?

Next, Defendant attacks Mr. Ditty's valuation on the basis that it does not take into consideration the fact that Defendant's customers are not under contract and have no legal obligation to remain as his customers. Quite lucidly, Mr. Ditty explains that, "yes customers can leave. That's true of any business. If we were to assume a perpetual flight of all customers in all businesses, my profession would not be needed because all businesses would be worthless." RT TR of March 6, 2013, p. 83, line 3 – p. 84, line 6.

Finally, Defendant also disagrees with Mr. Ditty's failure to provide a salary for Defendant. PL EX 44, p. 34, Tab F. Mr. Ditty reasons that in all business circumstances of a self-employed individual, the sole proprietor's salary is the profit that the business makes especially when dealing with a Schedule C entity. Defendant asks Mr. Ditty to reconcile the teachings of business luminary Shannon Pratt who writes that it is error to fail to allow for owner's compensation. Defendant argues that Revenue Ruling 68-609 clearly states and the valuation profession agrees that there should be deducted from the earnings of the business a reasonable amount for the services performed by the owner or partners engaged in the business.

Mr. Ditty infers that Defendant is reading that passage out of context and insists that a Schedule C as a sole proprietorship is treated differently for the purposes of determining value than a partnership or a corporate entity.

Specifically, the Court asked Mr. Ditty at what time is it reasonable and prudent to terminate a start-up venture (which also serves the owner's sole source of income) when it loses money year after year. Mr. Ditty replies that it largely depends on how deep the owner's pockets are. If the owner has a real burning interest in the business, believes it has potential and has deep enough pockets, it may be many, many years that s/he permits the loses to continue. However, he opines that the rule of thumb is, if the owner must borrow vast sums of money and/or liquidate assets, it becomes highly questionable how far down the tube s/he goes before s/he is financially ruined. He further relates that "typically if [the owners] have either borrowed a third of their original net worth or they have liquidated anywhere from a third to a half of their cash retirement holdings, I would say at that point, you are done. It's not so much time as it is affordability." RT TR of March 6, 2013, p. 112, lines 7-13.

**Defendant's Business Valuation**

On March 7, 2013, Defendant calls his forensic expert, Courtney Sparks White. She has been employed with her firm, Clarus Partners, LLC for the past 3 years. She is a business evaluator and forensic accountant. She indicates that she graduated from Vanderbilt University with a degree in mathematics and financial economics, a juris doctorate degree from Capital University Law School (2009) and a Master's of Law in Taxation from Capital University law school (2010). She indicates that she is an accredited Evaluation Analyst by the National Association of Certified Valuators and Analysts (NACVA), and an accredited Senior Appraiser by the American Society of Appraisers. Her curriculum vita is presented for the Court's review within Defendant's Exhibit M.

Still, Plaintiff emphasizes that Ms. Sparks White is not a CPA, nor a personal financial specialist, nor a certified valuation analyst. Plaintiff further implores the Court to consider that Ms. Sparks White is not certified in Financial Forensics (CFF), nor is she a Certified Forensic Financial Analyst (CFFA), nor is she a Certified Divorce Financial Analyst (CDFA). Furthermore, she concedes that, prior to the instant hearing, she has never been qualified in Franklin County. Taking Plaintiff's complaints regarding Ms. Sparks White's qualifications as an expert well into consideration – the Court concluded that Defendant was entitled to a full and fair opportunity to present his entire case regarding this hotly dispute marital asset.

To that end, Ms. Sparks White indicates that she was retained in late October 2012 to perform a business valuation of Money Mailer of Greater Columbus – North, LLC. She indicates that she used Mr. Ditty's draft and final reports to develop an engagement letter and document requests. Unlike Mr. Ditty, she indicates that she spent a minimum of an hour in the personal interview with her client, Defendant. She opines that the client interview is a crucial part of any business evaluation as it is very difficult to perform a valuation in a vacuum relying solely upon documents. Ms. Sparks White stresses that the importance of understanding the business owner and his/her perspective on the business including its present and past performance.

Similar to Mr. Ditty's process, Ms. Sparks White considered all 3 of the major approaches to ascertaining value. Ultimately, she too focused on the hypothetical buyer of this business and attempts to identify his/her needs and wants. Ms. Sparks White testifies that, in her expert opinion, the typical buyer is looking at cash flow and the dollars that can be earned. In her valuation, she attempted to speculate those cash flows into the future, hence her decision to utilize the income approach. She agrees with Mr. Ditty's conclusions that there existed insufficient business assets to employ the asset approach and insufficient comparable transactions in applicable valuation databases (in the entire Midwest region of the country) to employ the market approach.

Of the 2 different ways to utilize the income approach – the capitalization of earnings method and the discounted cash flow method – Ms. Sparks White testifies that both methods look at the same theory of establishing future projected earnings; however, the capitalization of earnings method looks at historical results whereas the discounted cash flow analysis assumes changes going forward and discounts those dollars back to present value. She disagrees with Mr. Ditty's "driving a car looking in the rear view mirror" analogy, arguing that her method can make some sense if the owner has some credible idea where the business is going. This is where the Court finds Mr. Ditty's perspective more compelling and reliable – as the Court has personally observed Defendant's position on the direction of Money Mailer's financial future change drastically to suit his immediate needs.

Ms. Sparks White considered heavily the fact that Money Mailer has no long-term contracts or other "things that we can base those future projections on"; therefore, she concluded that it would have been very difficult for her to utilize a discounted cash flow analysis in this valuation. Instead, she testifies that looking at the historical earnings is the more appropriate way to value this business. Ms. Sparks White testifies that she could not use the discounted future cash basis to valuate Money Mailer because she had too many questions about the origin and foundation of Defendant's Exhibit QQ, the scenarios or performance forecasts created by Defendant for the Court, and Defendant only has one long-term contract (for a duration of less than 12 months). She appears very concerned that the vast majority of Defendant's customers had signed loose, month-to-month contracts.

In her report, Ms. Sparks White arrives at 2 different values for Defendant's business. DEF EX M. The first value of $40,500, she explains, assumes cash flows without owner's compensation, meaning no owner nor any employees being paid out of the profits of the business, and the second value of $0 is based upon a salary of $10,200 a year for the owner operator or any other employee which would essentially pay out all the cash flows of the business leaving nothing to capitalize. Ms. Sparks White explains that when she examined the cash flows of the business, $10,200 was basically the breakeven point, the point at which the cash flow would become negative.

Not surprisingly, Ms. Sparks White opines that if she were providing Defendant advice about what he should do with this business, she would inform Defendant against continuing to lose money and drawing funds from elsewhere to keep this business going. Ms. Sparks White concedes that her inquiry of Defendant did not address his efforts at making the franchise profitable.

Further, Ms. Sparks White disagrees with Mr. Ditty's interpretation of the *Heller* case. She argues that, at page 29 of the decision, the court describes that both experts utilized the capitalization of earnings method and later in the decision, the 10th District Court of Appeals notes that the income method or capitalization of earnings method is the most widely used but that this method relies on the discounted cash flow model which is not quite the right evaluation method here. Ms. Sparks White relays that the 10th District Court also addressed the issue of reasonable compensation for owner operators, and her reading of the case substantiates that it makes no difference whatsoever in valuation theory whether the business is operating as a partnership, sub chapter S or a C corporation.

Moreover, Ms. Sparks White points out that Defendant would suffer penalties until June 2018 pursuant to his franchise agreement should he elect to rely upon her advice and cease operations. As of December 31, 2011, Defendant would be forced to pay $11,000-$13,500 to corporate Money Mailer if he chose to cease operating the business. As an additional consideration, she notes that any perspective buyer would have to be approved by corporate Money Mailer, pay a $7,500 transfer fee and undergo the training that Defendant paid for at the time that he bought the franchise – unless the buyer was an existing Money Mailer franchise holder who had already undergone the training.

Again, Plaintiff stresses that Defendant generated $14,868 in gross receipts in 2008; and by 2011, his gross receipts had climbed to $197,854 (based solely on the increased number of mailers). Even Ms. Sparks White concedes that this increase represents a fairly significant achievement. Like Mr. Ditty, Ms. Sparks White elected not to examine or verify as legitimate the business expenses Defendant claimed in arriving at his negative income flow since the business' inception.

Hence, Ms. Sparks White also concedes that it is possible that Defendant is running personal expenses through the entity to intentionally lower his tax basis – and the entity's value. Also similar to Mr. Ditty, Ms. Sparks White spoke solely with Defendant – neither expert conducted any sort of interviews or investigation with individuals at the corporate level or with other Money Mailer franchise operators in comparable geographic areas to compare Defendant's expenses or methods of operation. What is not in dispute is that, until 2011 *(ironically, the year the instant action was filed)*, Defendant steadily increased the number of individual mailings each year he has been operating this business.

Regarding Defendant's scenarios or performance forecasts[8], Ms. Sparks White readily acknowledges that Defendant voluntarily created these documents and presented them to the Court in the form of a sworn affidavit. Still, she maintains that, by the time she was retained to prepare her report for trial, Defendant presented them to her as "'what if' statements". Ms. Sparks White is far less ready to acknowledge that Mr. Ditty's valuation method is preferred:

> Q. And in fact, pursuant to Shannon Pratt [who the witness has previously described as the "GodFather" of business valuation], the preferred method of valuing a business is that of the method used by Mr. Ditty, correct?
> A. When using the income approach.
> Q. I'm asking you is the preferred method pursuant to Shannon Pratt is the method used by Mr. Ditty?
> A. It can be. RT TR of March 7, 2013, p. -117, line 19 – p. -116, line 2.

Again, very reluctantly, Ms. Sparks White agrees that *Heller* identifies the income method or the capitalization of earnings method is the most widely used method to compute the value of a business.

On March 8, 2013, contrary to Plaintiff's own testimony, Defendant maintains that his wife did not object to his purchasing the Money Mailer franchise. He indicates that he thought she liked the idea of having a business and never really voiced an opinion that his idea was a bad one. Still he concedes that her preference was his being a traditional "W-2" employee, not a business owner.

[8] Defendant's sworn Second Supplemental Affidavit filed February 22, 2012. DEF EX QQ.

Ultimately, he indicates that he determined to purchase the franchise in June 2008 for the sum of $54,000 – which represents $37,500 franchise and $16,500 for training and start-up materials. Defendant contends that both he and Plaintiff signed the original franchise agreement; however, the franchise agreement presented for the Court's consideration is the restructured, updated version signed on February 10, 2011 – nearly 3 years after Defendant's purchase of the franchise – *not the original franchise agreeme*nt. DEF EX RR. In any event, the updated agreement describes Defendant's five-zone territory as the north side of Columbus, Dublin, Powell, Worthington, Lewis Center and Westerville. In each zone, he mails flyers and discounts from a variety of local businesses. He describes soliciting his customers via telemarketing and "feet on the street". He explains that the function of his profitability really is the number of ads he can generate as his cost structure is essentially fixed at $14,000 in processing costs per mailing. He elaborates that, on average, each ad costs an additional hundred dollars to cover the expense of the paper, printing and artwork. After that, Defendant derives the full revenue. In terms of competition and other factors impacting his profitability, Defendant cites only options available to customers via the internet.

Defendant explains that it would not make good fiscal sense to spend funds purchasing additional zones in the Columbus area, because he would also incur another $14,000 of overhead per zone in addition to a $7,500 franchise fee for each area. He reasons that it would be more profitable to increase his activity within his existing zones. Apparently there exists no hard restriction on Defendant's right to utilize the services of another, less expensive printer in some instances – something he has not widely elected to do at this point. Likewise, he attempts to explain that the scenarios or performance forecasts he referenced in his Affidavit to the Court (DEF EX QQ) were only his attempt to convey to the Magistrate how many ads he would have to sell, based on the existing cost structure, to achieve the imputed annual income of $80,000. He testifies that he created the spreadsheets using templates he received through his franchising arrangement. Defendant further argues that, despite his best efforts, he was unable to meet his stated goals.

In fact, between February of 2012 and the time of trial, Defendant indicates that the number of ads he sends with each mailer has actually *decreased* from 93 to 85. Still, Defendant testifies as follows:

> Q. Can you tell me what benefit Jane Kuraly has received from Money Mailer?
> A. Everything that was made from Money Mailer went into our family bank accounts.
> Q. What was made?
> A. It's not a lot, but whatever it was.
> Q. And you would also admit that every year from the time you started Money Mailer to the present day, your gross receipts have increased, correct?
> A. Correct. RT TR of March 12, 2013, p. 50, line 21 – p. 51, line 7.

After unilaterally raiding marital resources and creating vast amounts of "marital debt" by borrowing of money from relatives via promissory notes to keep this business entity viable – when pressed for his plan for this business, Defendant simply indicates that he is "at a crossroads". He concedes that in his 5 years in business he has not made any money. He testifies without actually answering the question, "I have to either shut it down[9] or sell it or see some hope of a turnaround where I can at least meet my bills and obligations. I'm at that point now." RT TR of March 8, 2013, p. -112, lines 10-13.

Finally, at the suggestion of his attorney, Defendant proffers the following "fair" resolution: allow him to continue operating the franchise for one year while attempting to locate a buyer. If after this one year period, he is still unable to turn a profit (i.e., there's nothing to give Plaintiff half of) and is still unable to produce a willing buyer, then he would be willing to pay Plaintiff 50% of whatever this Court deems the fair market value of his Money Mailer franchise. RT TR of March 8, 2013, p. -97, line 14 – p.-94, line 8.

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[9] According to Defendant alone, by closing the franchise he would incur a penalty of "about $11,000".

**Conclusion**

For many reasons, the Court finds the valuation performed by Mr. Ditty to be the most compelling. The Court certainly takes into consideration Ms. Sparks White's recitation of the number of "negative factors" which she believes clearly outweigh the positives of owning such a venture. RT TR of March 7, 2013, p. 154, line 19 – p. 155, line 13.

However, Defendant's own testimony and behavior supports a finding that the business has value – a value in excess of the purchase price. Moreover, the Court concludes that Mr. Ditty's experience, investigation, analysis and testimony are superior to that of Ms. Sparks White. Ultimately, Plaintiff's expert valued the business at $76,000 and Defendant's expert valued the business at $0 (assuming Defendant pays himself a minimum of $10,200 per year). The Court finds Defendant's valuation defies logic in the face of Defendant's expressed intention and desire to continue operating this alleged money-pit of a franchise in lieu of seeking other *(even minimum wage)* employment. Consequently, for the reasons set forth herein, the Court hereby assigns the value of $76,000 to Defendant's business.

PERSONALTY AND HOUSEHOLD GOODS/FURNISHINGS

The parties agree that they were advised by the Court that they are statutorily entitled to have each piece of their property valued for the purposes of equal distribution pursuant to ORC §3105.171(B),(C). On the record, the parties waived the Court conducting said valuation, and they agree that their current distribution of property is, while if not precisely equal, in fact equitable and in accord with their agreement. Accordingly, each party shall continue to hold those items in her/her respective possession free and clear from any claims of the other.

FINACIAL/RETIREMENT ACCOUNTS

Both parties agree that they own the following accounts:

- Plaintiff owns a Chase checking account (#6297) which is valued at $740 by joint stipulation.

- Plaintiff owns a Chase savings account (#1733) which is valued at $152 by joint stipulation.
- Defendant owns a Huntington National Bank checking account (#2763) which is valued at $8,003 by joint stipulation)
- Defendant owns a Huntington National Bank savings account (#5675) which is valued at $10,380 as of October 25, 2012. See DEF EX A. Defendant asserts this is his separate property as it contained only his $25,000 distribution from the proceeds of the former marital residence.
  Plaintiff has proffered no compelling evidence to the contrary, and the Court agrees with Defendant's position as to this account. Defendant testifies that he ultimately closed this account because it only had $89 left in it.
- Defendant owns a Royal Bank of Canada (RBC) checking account (#4162). PL EX 20. Defendant testifies that this account became account #8329 after his bank changed hands, and Defendant was issued a new account number. See statement for the period February 7, 2012 to March 6, 2012 which reflects an end balance of $540.42. Defendant owns a RBC checking account (#8329) which is valued at $20 as of November 6, 2012 by joint stipulation. DEF EX K. Defendant testifies that this account only contains his father's money and should not be considered a marital asset. Again, as Plaintiff has proffered no compelling evidence to the contrary, the Court agrees with Defendant's position as to this account.
- Defendant owns a Charles Schwab One account (#9842) which is valued at $997 as October 31, 2012. DEF EX L. Defendant concedes this account contains only marital funds. However, Plaintiff demonstrates that, at the beginning of this divorce in August 2011, this account boasted a balance of $70,540 and by the time of the trial, the account had been reduced to $1,049.15 or less – according to Defendant's creation of a margin account and the calls which were executed against it. PL EX 22.
- Defendant owns a Merrill Lynch Master BBA account (#9D36) which is valued at $321 as of October 31, 2012. DEF EX W. Defendant concedes this is account contains only marital funds.
- Defendant owns a Merrill Lynch IRA "as known as the 401(k)" (#8R43), which had a value of $147,569 as of October 31, 2012 (stipulation). Defendant concedes this account contains only marital funds.

The Court hereby **ORDERS** that each party shall retain the accounts allocated to his or her in the Allocation Chart at page 27, free and clear of any claim of the other. Additionally, Defendant owns a Prudential term life insurance policy which has no cash value. Defendant may retain this policy as his own, free and clear of any claim of Plaintiff. Finally, *if necessary,* the retaining party is hereby **ORDERED** to remove the name of the other party from any financial account or financial obligation related thereto within 30 days of journalization of this Decree of Divorce.

WEDGEWOOD COUNTRY CLUB MEMBERSHIP

On March 7, 2013, Plaintiff testifies that the parties' social membership at the Wedgewood Country Club is now on "hold" status. She indicates that they previously belonged to the Niagara Falls Country Club. Plaintiff indicates that she does not wish to continue the membership and that she has no objection to Defendant canceling the membership at Wedgewood Country Club. She indicates that, over the last five years, the parties' children (in particular, their youngest son Nicholas) have enjoyed the Club's pool, but she and Defendant only rarely take advantage of the membership.

The following day, Defendant argues that Plaintiff's testimony regarding her use of the membership "is not true" and proffers the Wedgewood statements from April, May June, July, August and September of 2011 in support of his position that there exists "three to four to $600 a month [bar tabs reflected] on there, and I didn't go there, and my kids don't order martinis at the pool bar." RT TR of March 8, 2013, p. 192, line 24 – p. 193, line 5.

> Q. Well when she [Plaintiff] was spending $300-700 at the pool bar at with the Martinis who paid for that?
> A. I did.
> Q. Did she pony up a check to pay, you know, for the Martinis that she was buying at Wedgewood?
> A. Never.

Consistent with much of Defendant's self-serving and unsupported testimony, an inspection of the proffered statements reveal no such transactions and no such expenses for liquor – *poolside or elsewhere*. PL EX 54.

CANCUN, MEXICO TIMESHARE

Plaintiff indicates that the parties purchased a timeshare in Cancun Mexico at a cost of $14,906 in April of 2004. PL EX 19. She indicates that she cannot afford to actually use the biannual week or pay the $1,000 per year maintenance fee. Both parties agree that the last time anyone used the property was in 2008 and that they should cooperate to immediately list and sell their interest in this timeshare.

Accordingly, the Court agrees and hereby orders Plaintiff to take the initiative to ensure that the timeshare is immediately listed and sold. The parties shall equally divide any profit or deficit realized from the resulting sale.

## MARITAL DEBT

Plaintiff and Defendant are in dispute over several debts which Defendant claims are marital in nature: the first is a May 26, 2009 loan from his younger brother Peter Kuraly of Suwanee, GA. On March 8, 2013, Defendant proffers the testimony of Peter to authenticate the May 26, 2009 variable rate promissory note he executed with Defendant in the amount of $80,000. PL EX 34, DEF EX Q.

Peter indicates that no amortization schedule was attached and no principal payments were required until December 31, 2010, when the note was to be paid in full. Peter testifies that he borrowed against a $100,000 equity line of credit (ELOC) secured by his home to offer Defendant a lower interest rate than his former lender. At present, Peter is making the interest payments on this debt against his ELOC. Defendant testifies that he started making quarterly interest payments to Peter in August of 2009 but ceased due to funds being limited. Peter indicates that he created a spreadsheet to track Defendant's payments thus far. *Id.* at p. 3.

Plaintiff's problem with the Court assigning this debt to the marital balance sheet is twofold: (1) she claims that she knew nothing of the loan (for which Defendant alone promised) and (2) Defendant claims that the loan was necessary to keep his allegedly zero-dollar value business afloat. Interestingly, Peter testifies that he first spoke to his wife about extending such a significant loan to Defendant – whereas Defendant accepted and signed for this obligation without Plaintiff's co-signature. Very credibly, Plaintiff testifies that – throughout this marriage – it was made clear to her that it was not her place to question Defendant's financial dealings.

Although Defendant disputes Plaintiff's contentions and claims that he provided "full disclosure" to Plaintiff at every juncture – his actions certainly belie that testimony. Defendant unapologetically testifies that he deposited the $80,000 into "our" Schwab account which was clearly held in his name alone for the expressed reason of maintaining control over all transactions. RT TR of March 8, 2013, p. 70, lines 9-16; p. 84, lines 18-24.

On March 12, 2013, Defendant concedes that he has made no real effort to repay the loan to Peter during the pendency of this case aside from considering further withdrawals from the Merrill Lynch IRA (account #8R43) despite the fact that both parties were advanced $25,000 each from the proceeds of the marital residence. Peter acknowledges that Plaintiff is neither a party nor a signatory to the May 26, 2009 promissory note. He further notes that Plaintiff never signed the December 1, 2010 extension to the original promissory note.[10]

Furthermore, Peter confirms that Plaintiff was never involved in the original discussions regarding this note, but he opines that Plaintiff was aware of the fact that he loaned this $80,000, plus interest, to Defendant as she verbally thanked him in passing while the family visited Ann Arbor Michigan to watch the parties' children's hockey events in November of 2010. Specifically, Peter recalls Plaintiff simply saying, "thank you for providing funds." Unfortunately, the Court finds that this alleged statement by Plaintiff is hardly probative evidence of her acquiescence to Defendant's unilateral business dealings with members of his immediate family.

The second disputed "marital" debt is an August 14, 2010 loan which Defendant secured from his father, Matthew Kuraly in the amount of $8,250. Again, Defendant and Matthew Kuraly alone executed the promissory note as evidence of the same. PL EX 33, DEF EX R.

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[10] DEF EX VV was properly objected to and excluded from evidence as neither Defendant nor his brother ever produced an actual signed version of the same – in original or copy form.

Defendant indicates that he did speak with Plaintiff prior to executing this note, and he testifies that he used the funds to buy their 16-year-old son a $3,500-4,000 vehicle. Defendant testifies that he did not agree that Christopher needed a vehicle to drive to high school when the family resided only two miles away and resided on the school's bus route; however, he does acknowledges that he used *a portion* of these funds to purchase Christopher's vehicle. He further acknowledges that, pursuant to the terms and conditions of the note, any funds which are not repaid will be deducted from any inheritance that he may receive from his father's estate.

Plaintiff's quarrel is that Defendant desires this Court to make her 50% responsible for a loan which she argues (1) again – Defendant obligated himself without her co-signature, knowledge or consent and (2) Defendant himself is under no legal obligation to repay the funds. She points out that it is unfair to require her to contribute to this "marital" debt from her allocation of marital property whereas Defendant has the option to simply elect to have his portion repaid via his eventual inheritance – if at all.

The third disputed "marital" debt is a January 31, 2011 loan which Defendant secured from his father, Matthew Kuraly in the amount of $25,500. Yet again, Defendant and Matthew Kuraly (his father) alone executed the promissory note as evidence of the same. PL EX 35, DEF EX S. Defendant explains that the $25,500 (less Canadian-US exchange rate) was deposited into his individual RBC checking account and then transferred into the parties' joint Huntington Bank checking account in a series of 5 transactions over a couple of weeks for "household use and expenses".

This second note between Defendant and his father is handwritten by Defendant, and again Plaintiff testifies that she had no knowledge of the loan nor did she consent to being bound by Defendant's note to his father. She clarifies that Defendant informed her of the note's existence after the fact and contends that the amount of these loans (from his father) and the reasons Defendant took them were never revealed to her. Plaintiff credibly argues that she *never* would have consented to these loans because she wanted Defendant to get a job – not invest in the Money Mailer franchise. Defendant concedes that he makes no regular payments to his father, and these notes do not call for the payment of interest.

On March 12, 2012, Attorney DeSanto asks Defendant to describe specifically the benefit Plaintiff derived from these borrowed monies: Defendant responded "family living expenses". Defendant, during this line of questioning, readily admits that Plaintiff was not present at the time that he and his father signed these notes nor was she present at the time the money was transferred from his father's Royal Bank of Canada (RBC) account to his individual RBC checking account. Defendant simply maintains that he and Plaintiff did, in fact, have a discussion about his borrowing prior to his signing the notes.

Contrary to Plaintiff's testimony, Defendant contends that the parties discussed money openly. He explains that the purpose of the second loan (from his father) was necessitated by the fact that he was running short on funds due to the facts that the parties' investments had not recovered, and he was still unable to generate enough income from the Money Mailer business to pay their expenses. Defendant contends that Plaintiff never objected in any way to his borrowing money from his parents.

This Court has consistently found it patently unfair to permit one spouse to arbitrarily create, control and/or secret debt from the other – then attempt to force the other to assist in the retirement of the same. Here, the issue largely turns on credibility since Plaintiff says she was never involved in pre-loan discussions or permitted to have input or question Defendant's fiscal decisions and Defendant argues the direct opposite. Taking the parties' testimony in totality on the wide variety of issues addressed during the course of this 10-day trial, the Court finds Plaintiff to be more credible. This Court has been offered insufficient evidence to support the need for Defendant to unilaterally plunge this family into debt to meet the "familial" obligations he alone identified and addressed. Additionally, Plaintiff's testimony (and actually Defendant's, too) regarding her express and unwavering preference for Defendant to seek traditional ("W-2") employment as opposed to venturing into entrepreneurship coupled with Defendant's testimony about these borrowed funds being initially deposited into his individual account(s) and later transferred into joint account(s) according to *his* design and purposes substantiates Plaintiff's version of this family's fiscal story.

Accordingly, the Court finds it is equitable for Defendant alone to bear the burden of retiring these debts to Peter and Matthew Kuraly, and orders that he shall hold Plaintiff harmless thereon. For these same reasons, the Court finds that Plaintiff's Chase credit card (#8916) is her debt alone. Plaintiff concedes that Defendant never used the card and did not know of its existence (prior to discovery) as she opened the account after the date of the parties' permanent separation. She further concedes that she did not confer with Defendant prior to making purchases therewith. Lastly, she did not present any credible or detailed evidence to establish the marital purpose of her expenditures thereon. Consequently, the Court finds that this debt is her separate debt and orders that she shall hold Defendant harmless thereon.

| **ALLOCATION OF MARITAL ASSETS** | | | |
|---|---|---|---|
| **ASSET** | **VALUE** | **PLAINTIFF** | **DEFENDANT** |
| 5464 Satterton Circle, Dublin Ohio 43016 (proceeds) | $98,666 | $54,092 | $44,574 |
| Money Mailer of Greater Columbus – North, LLC | $76,000 | $0 | $76,000 |
| Defendant's Charles Schwab One account (#9842) | $70,540 | $0 | $70,540 |
| Plaintiff's Chase Bank checking account (#6297) | $740 | $740 | $0 |
| Plaintiff's Chase Bank savings account (#1733) | $152 | $152 | $0 |
| Defendant's Huntington National Bank checking account (#2763) | $8,003 | $0 | $8,003 |
| Defendant's a RBC checking account (#4162) | $540 | $0 | $540 |
| Defendant's Merrill Lynch Master BBA account (#9D36) | $321 | $0 | $321 |
| Defendant's Merrill Lynch IRA account (#8R43) | $147,569 | $147,569 | $0 |
| Defendant's 2003 BMW 530i | $2,575 | $0 | $2,575 |
| Cancun Mexico Timeshare | TBD | 50% | 50% |
| Wedgewood Country Club | $0 | $0 | $0 |
| Prudential life insurance policy | $0 | $0 | $0 |
| **GRAND TOTAL** | **$405,106** | **$202,553** | **$202,553** |
| **MARITAL LIABILITIES** | | | |
| **DEBT** | **AMOUNT** | **PLAINTIFF** | **DEFENDANT** |
| **GRAND TOTAL** | **$0** | **$0** | **$0** |

| **FINAL ACCOUNTING** | | | |
|---|---|---|---|
| **PLAINTIFF** | | **DEFENDANT** | |
| Total Assets | $202,553 | Total Assets | $202,553 |
| Total Liabilities | $0 | Total Liabilities | $0 |
| **TOTAL NET DISTRIBUTION** | **$202,553** | **TOTAL NET DISTRIBUTION** | **$202,553** |

In addition to the obligations set forth above, each party shall assume, pay and hold the other party harmless on any personal obligations incurred by the party not herein specifically addressed.

## PARENTING ISSUES

### ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBLITIES

The parties have agreed to a Plan of Shared Parenting to govern the care and custody of their remaining minor child, *to wit,* Nicholas Richard, whose date of birth is December 16, 1999 (nearly 14 years old).

### CHILD SUPPORT

Plaintiff's current income is $34,000 per annum. PL EX 49, EX 50. Defendant alleges that, despite his best efforts, he has been unable to generate income through his business franchise, Money Mailer of Greater Columbus – North, LLC. The Court's opinion of Defendant's *efforts* aside, there can be no doubt that Defendant has historically been the primarily breadwinner for this family – and a successful one at that. Similar to the Magistrate's findings, this Court determines that Defendant has an *initial* annual earning capacity of $80,000.[11] Consequently, the Court hereby orders Defendant to pay child support in the amount of $599.89 per month, plus processing charge.

After duly considering the factors and criteria set forth in section ORC §3119.23 and the testimony and evidence presented at trial, the Court hereby finds that the amount calculated pursuant to the basic child support schedule and the applicable worksheet, is indeed just, appropriate and in service of the best interest of the minor child. See attached Child Support Computation Summary Worksheet.

[11] See the Court's "Incomes/Earning Abilities" section at pages 29-32 of this Decree.

HEALTH INSURANCE

The parties agree that Plaintiff shall maintain health insurance coverage for the minor child. Pursuant to ORC §3119.01, the parties shall equally pay the first $100.00 of the reasonable and ordinary uninsured and unreimbursed medical expenses for the minor children. Any extraordinary medical expenses (defined as those exceeding the first $100.00) including co-payments and/or deductibles shall be divided between the parties with Plaintiff paying 30% of such expenses and Defendant paying 70% of such expenses.

## SPOUSAL SUPPORT

Plaintiff seeks an order of spousal support from Defendant in the amount of $1,500 per month on an indefinite basis. Her express theory is based upon her desire to lead the same type of lifestyle that she led during the period of cohabitation with Defendant. She concedes that she believes it is fair and equitable for the Court to retain jurisdiction to modify amount and duration of any spousal support award. She concedes that Defendant has voluntarily paid spousal support pursuant to the Magistrate's order – *albeit* via the liquidation of his share of a marital retirement account. Conversely, Defendant suggests the Court award no amount of spousal support contending that he has no present ability to satisfy such an order.

Pursuant to ORC §3105.18(C)(1), in determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the Court shall consider all 14 of the following statutory factors:

*Incomes/Earning Abilities*

Plaintiff testifies that her marital work history commenced in 1988 with her employment as a personnel manager for a law firm in downtown Toronto, Canada (i.e., "Weir & Foulds") for approximately two years. Contrary to Defendant's assertion that she earned in excess of $80,000 per annum in this capacity, Plaintiff recalls her annual salary was roughly $48,000 (in the late 1980's).

After her stint at Weir & Foulds, Plaintiff indicates that she worked for a hotel, the Pillar and Post in Niagara Falls, Canada where she earned approximately $26-28,000 per annum. Subsequent to this employment, Plaintiff indicates that she became a homemaker pursuant to a joint decision of the parties following the birth of their first child. She recalls that the parties mutually agreed to end her employment outside the home because Defendant traveled extensively Monday through Friday throughout the area of Michigan, Pennsylvania and New York. Plaintiff recollects that she was away from the work force for a period of 20 years, and although she earned a degree in psychology, she testifies that she has never used that degree in the workforce.

At some point in the 1990's, Plaintiff explains that she ventured back into the workforce with a couple of part-time jobs, the first being Designs to the Nth Degree. In this capacity, she worked roughly 25-30 hours per week (while raising the couple's 3 children) and earned what she describes as a "minimal income" for roughly 2 years in this start-up venture without benefits of any sort. Next, Plaintiff indicates that she and a friend (i.e., Kim Ceckitti) started a small business refurbishing old furniture pieces and reselling them through the antique mall in Powell, Ohio. Plaintiff indicates that she commenced this venture in 2006 as a hobby. For her work, she never received a regular or consistent paycheck – but she estimates that her sales averaged about $1,000 per month. She testifies that she ceased her venture, because after she filed for divorce, she needed to find full-time employment with a full benefits package.

Very ambitiously, Plaintiff testifies that she purchased a computer and retained the services of a career advisor, who assisted her in developing a resume after her 20-year hiatus from full-time work outside the home. PL EX 3. Her career advisor guided her job search, and by October 24, 2011, Plaintiff testifies that she landed a position with Dostal and Kirk Insurance & Financial Services as an office manager. Plaintiff presents her hiring agreement as evidence of her $34,000 annual salary and benefit package (which does not include participation in the company's 401k or bonus plan at this time). PL EX 2. Plaintiff further proffers her 2012 Form W-2 and 1099 (related to her health savings account) for the Court's consideration. PL EX 47, EX 48.

As it relates to Defendant's income and earning ability, the parties stipulate to the report of vocational evaluation expert Dr. Richard P. Oestreich, PhD, CRC. DEF EX X. In his report[12], Dr. Oestreich recites Defendant's history of work from the parties' date of marriage through the present:

- from 1984-1997 Defendant worked for MeasureRex (in the Niagra Falls/New York state area) starting his employment at $30,000 per year and ending this employment at $170,000;
- from 1997-1998 Defendant worked for Honeywell (in the Columbus, Ohio area) earning "mid to high $100,000s" at the time he voluntarily left this employment;
- from 1998-1999 Defendant worked for Sterling Commerce (in the Columbus, Ohio area) earning "mid to high $100,000s" at the time he involuntarily separated from this employment;
- from 1999-2003 Defendant worked for DataStream Systems (based in Greenville, South Carolina with the ability to work from home) earning "mid $100,000s to the high $100,000s" at the time he involuntarily separated from this employment;
- from 2003-2007 Defendant worked for Eschelon Corporation (in San Jose, California) earning "mid to high $200,000s" at the time he involuntarily separated from this employment.

In his January 21, 2012 report, Dr. Oestreich opined that, "Given some time and effort, the following appears to be a plan that he can achieve and that is a fair estimate of his earning capability [as a franchise owner]. This witness would place his current earning potential as follows: $40,000 in 2012, $60,000 in 2013, $80,000 in 2014 and [s]ix figures in subsequent years." DEF EX X, pp. 4-5. In further support of her contentions about Defendant's earning ability, Plaintiff directs this Court to review Defendant's January 6, 2011 Social Security Statement at the "Your Earnings Record" section which confirms that, for the 3 years immediately prior to Defendant commencing the Money Mailer franchise, Defendant's "taxed medicare earnings" in 2005 amounted to $279,642, in 2006 amounted to $286,214 and in 2007 amounted to $849,852[13] for a 2005-2007 average of $271,903 per year. PL EX 9, p. 3.

[12] See pages 2-3.
[13] Defendant rightly clarifies that this figure includes about $600,000 in taxable Echelon stock options which he liquidated in 2007.

Defendant provided for the Court this same recitation of his work history he provided to Dr. Oestreich; however, during the trial he elected to focus on the relative degrees of stress and unhappiness he endured with the frequent travel required of him to earn these historical incomes. Regarding the disposition of his employment with these various firms, he clarifies that MeasureRex was acquired by Honeywell; he resigned from his Honeywell position to avoid relocation out of state; and he was downsized from Sterling Commerce, Data Stream and Echelon. Defendant emphasizes that, by age 47, his having been downsized three times made him feel "down".

He describes having taken a "hit" to his confidence, self-esteem and self-worth, and he indicates that his employment woes and lack of "emotional support" from his wife caused him to be treated for depression. Then, after taking the prescription "medication for a couple years … [he] realized [he] just had to work through it on [his] own and recover"[14] – a assertion which became cloudier and cloudier as the trial progressed.[15]

For her part, Plaintiff reiterates that she never wanted Defendant to start his own franchise and that the family's finances have tremendously and unnecessarily suffered as a direct result of Defendant's selfish decision-making. And contrary to Defendant's version of his troubled psyche, she indicates that she is personally unaware of any medical limitations that would have affected Defendant's ability to work productively during the period of time the parties resided together. Further, she offers that even during times when Defendant did travel a great deal for his work – there were regular opportunities for him to work from home, to see the children daily and attend their extracurricular activities/school functions.

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[14] RT TR of March 8, 2013, p. 66, lines 4-13.

[15] On March 8, 2013, Defendant ultimately acknowledges that he *did* tell Mr. Ditty during the business valuation interview that he "had a medical issue" impacting his work but he did not feel comfortable disclosing the details of the condition "to a person that I'm talking to the first time." RT TR of March 8, 2013, p. -115, lines 12-19. Later, on March 12, 2013, Defendant admits that he had been previously diagnosed with/medicated for depression. He acknowledges that troubles with his oldest son (not solely his work) contributed to his depression. March 12, 2013, p. 10, line 10 – p. 11, line 5.

Most persuasively, Dr. Oestreich, *Defendant's own vocational expert,* referred to Defendant as a "natural and skilled sales person by trade and by inclination." DEF EX X, p. 4. The Court agrees with the expert opinions of Dr. Oestreich and Mr. Ditty and with the findings of Magistrate Webber – Defendant should be able to earn roughly $80,000 by 2014 in his present franchise with the application of some *genuine effort* as this nearly two-year long divorce proceeding has offered Defendant every incentive to sandbag his earning potential via the Money Mailer franchise. In the alternative, Defendant should consider returning to his former vocation where he earned an average of $271,903 per year. Whether Defendant elects to continue in his operation of the Money Mailer franchise or return to his former vocation is, of course, within his own discretion.

*Ages, Physical/Mental/Emotional Conditions*

Plaintiff indicates that she is age 52. She testifies that she has suffered from anxiety attacks all her life; she is seen/treated by Dr. Carol Greco on an annual basis and takes the prescription antidepressant Luvox for her ailment. Defendant indicates that he is age 53, and aside from a "sore" arm/shoulder related to a surgical procedure he underwent following a hockey-playing incident, he has no major health concerns.

*Retirement Benefits*

Plaintiff complains of Defendant's squandering of their various marital assets in his attempts to prop up his Money Mailer franchise and avoid obtaining more traditional employment in his historical field of sales. The parties stipulate that their Merrill Lynch IRA (#8R43), had a value of $147,569 as of October 31, 2012. That value has been equitably divided by the Court in its Allocation Chart at page 27 of this Decree.

*Duration the Marriage*

The Court finds that this is a union of long duration (more than 24 years), from December 17, 1988 until March 13, 2013 pursuant to ORC §3105.171(A)(2)(a).

*Propriety of Seeking Outside Employment*

At present, both parties are gainfully employed. Therefore, this factor is not applicable to the facts at hand.

*Standard of Living During the Marriage*

Regarding the parties standard of living during the marriage, Plaintiff relays that the couple belonged to 2 different country clubs: the Niagara Falls Country Club and the Wedgewood Country Club. She describes her former lifestyle as upper middle class as opposed to her present lifestyle which she describes as "poor". Plaintiff relates that the parties lived in a nice house in a nice neighborhood and really never wanted for anything.

As to the family finances in general, Plaintiff testifies that while she and Defendant cohabitated, he paid the family's bills and physically prepared the checks related to the same. Plaintiff contends that she had only limited access to the checkbooks associated with the accounts holding marital funds and that Defendant managed all aspects of the household finances – she indicates that she was never permitted to shop alone; she contends that Defendant always accompanied her shopping, and the couple only purchased those items/in those quantities that *Defendant* determined were appropriate. She indicates that she bore absolutely no financial responsibilities. Plaintiff recalls that her personal expenses and any extras were paid from her approximate $1,000 per month allowance.

Since the date of their separation and maintaining her own household, Plaintiff indicates that she had been forced to make all kinds of changes – for instance, she presently leases (as opposed to owns) a residence at 7518 Chancery Drive, Dublin OH 43016 at a cost of $1,245 per month. PL EX 38. And unlike Defendant, she is financially unable to continue to travel with her son who plays on a travel hockey team. She testifies that she has been forced to cut back on all facets of her life; whereas, she has seen no indication that Defendant has cut back on any aspect of his lifestyle. Plaintiff observes that Defendant seems to be able to travel *extensively* with son Nicholas without restriction on his life lifestyle.

With the $25,000 advance she received from the sale of their marital residence, Plaintiff complains that she was forced to secure housing, purchase a washer and dryer, a couch, retain legal counsel and hire forensic expert Mr. William Ditty and vocational expert Dr. Bruce S. Growick, PhD. She indicates that, of these funds, she only has $152 remaining. PL EX 11. Plaintiff indicates that, from that $25,000 sum, she also gave money to the parties' two emancipated children who are attending college.

A review of Plaintiff's Chase Bank checking acct (#6297) reflects her post-separation budgetary limitations and spending. She has been receiving periodic assistance from her parents (i.e., a December 16, 2011 gift of $2,000, an April 4, 2012 gift of $2,000, and an October 10, 2012 gift of $1,000).

On a monthly basis, she electronically pays her monthly expenses: roughly $146 to AEP for her electric service, $1,245 for her leased residence, $15 for her renter's insurance, $74 for her vehicle insurance, $500 for her Chase credit card payment, $156 for her Verizon cell phone, $29 for gas service and $100 for a storage fee. PL EX 11. Additionally, Plaintiff claims moving expenses, dental and orthodontia expenses for the parties' 13-year-old son, other utility payments such as cable, internet and water services and various day-to-day expenses. PL EX 40. Plaintiff contends that her modest budget (which includes expenses for Nicholas' food, clothing and school expenses/lunches) places her in a negative income situation in excess of $2,000 each month; therefore, she has been forced to rely upon her credit cards to make ends meet and to attend some of her son's hockey events. PL EX 37, EX 27.

Defendant vigorously disagrees with Plaintiff's post-separation observations of his lifestyle. He points out that he resides in a two-bedroom apartment, which costs $1,250 per month, in the same apartment complex as Plaintiff; he notes that the only difference between their respective layouts is that Plaintiff enjoys an upgraded fireplace. He bemoans the fact that he no longer has use of a dedicated home office and is forced to operate his franchise from the dining room table.

He further emphasizes that he drives a 10-year old vehicle[16] and that he has spent all of his financial resources. He argues that his only source of entertainment consists of taking son Nicholas to his hockey events – he does acknowledge that he attends more than 50% of these events. He proffers a budget for the Court's consideration as well. DEF EX LL.

Defendant further contends that, as a self-employed individual, he cannot afford to provide himself with a health insurance package comparable to that provided to Plaintiff through her employer, Dostal and Kirk Insurance & Financial Services. PL EX 49. Defendant further complains that he is still bound by the Magistrate's Order in this case, which requires him to provide her health insurance at a cost of more than $540 per month, while Plaintiff was never court-ordered required to add him as a beneficiary to her employer-funded health plan.

*Parties' Education*

Plaintiff testifies that she earned, in 1982, a bachelor's of art degree in psychology from Saint Mary's University in Halifax, Nova Scotia, Canada. She indicates that she has never utilized this degree in her career. Defendant, on the other hand, testifies that he graduated from high school in Canada in 1979 and attended Miami University in Ohio. He testifies that he graduated in December of 1983 with a bachelor's of science degree in pulp and paper science engineering – a degree not terribly relevant to his current field either. Nonetheless, both parties are, in fact, degree-holders.

*Assets and Liabilities*

The parties have no marital liabilities. Defendant has created quite a financial mess with respect to his unilateral borrowing from members of his family – but has failed to prove that these debts should be regarded as marital in nature. The parties' marital assets have been equalized in the Allocation Chart at page 27 of this Decree.

[16] Again, at times Defendant has testified that the parties' adult son operates this older BMW vehicle and that he has been reduced to driving a leased Kia.

*Tax Consequences*

Any amount Defendant pays to Plaintiff as and for spousal support shall be excluded as income for him for tax purposes. Likewise, Plaintiff shall pay income tax on any sums she is paid by Defendant. Additionally, the Court hereby takes judicial notice of the published Internal Revenue Service Tax Rate Schedules for divorced, single individuals who may also qualify as head of household.

*Conclusion*

With respect to the factors: *Contributions to Education, Training, or Earning Ability, Time/Expense Necessary to Acquire Education, Training, or Job Experience, Lost Income Capacity Resulting from Marital Responsibilities and Any Other Relevant and Equitable Factor(s)* – Plaintiff failed to proffer any testimony or evidence relative to these issues citing only her "need" for support.

In sum, the Court agrees that there exists sufficient support in the record for an award of spousal support. The parties enjoyed a relatively long-term, upper middle class standard of living during their marriage, and Plaintiff continues to have a markedly lower income and earning capacity than does Defendant. Further, this Court doubts that Plaintiff will ever attain the level of experience necessary to earn a comparable income to that of Defendant in his pre-Money Mailer years. Although Defendant contends that he has also struggled financially since the initiation of this divorce, this situation is both normal and temporary as each party is just recently creating and/or maintaining his/her separate household, all the while paying attorneys and/or experts for assistance through this type of contested litigation.

The Court declines to order *permanent* spousal support in this case as the parties are relatively young, healthy and formally educated. Furthermore, Plaintiff displayed remarkable prowess in securing employment after being away from the workplace for an extended period of time, and the Court has achieved an equitable distribution of the parties' remaining assets. In fact, Plaintiff benefits from a larger share of the remaining liquid assets.

Therefore, having thoughtfully weighed the testimony and evidence presented in this case regarding the statutory factors set forth in ORC §3105.18(C)(1), the Court finds Plaintiff's request for spousal support to be meritorious. Until ***January 1, 2014,*** Defendant shall continue paying Plaintiff ***$250 per month*** in spousal support as ordered by the Magistrate in her temporary order. ***Effective January 1, 2014***, the Court hereby orders Defendant to pay Plaintiff the increased amount of ***$750 per month*** in spousal support for a period of 2 years. Thereafter, and in keeping with this Court's findings that Defendant is capable of earning six figures within the franchise or in excess of $250,000 per year seeking employment outside the franchise, Defendant shall pay Plaintiff the further increased amount of ***$1,500 per month*** in spousal support for the next 10 years.

Pursuant to ORC §3121.441, Defendant may pay his spousal support directly to Plaintiff via check, money order or any other form that establishes a clear record of payment. Should Plaintiff establish to the Court's satisfaction, that Defendant routinely pays said award in an untimely and/or inconsistent manner, the Court shall direct Defendant to pay this obligation via the Franklin County Child Support Enforcement Agency. This spousal support obligation shall commence immediately upon the journalization of this Judgment Entry Decree of Divorce and shall terminate upon the death of either party, remarriage of Plaintiff, the cohabitation of Plaintiff with an unrelated adult male or the expiration of the court-specified duration. Finally, this Court ***shall retain*** the jurisdiction to further modify its award of spousal support in this matter.

## REQUIRED NOTICES

**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 AGENCY OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT OR AGENCY, WHICHEVER ISSUED THE SUPPORT ORDER. 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 ISSUED BY A COURT AND YOU WILLFULLY FAIL TO GIVE THE REQUIRED NOTICES, YOU**

**MAY BE FOUND IN CONTEMPT OF COURT AND BE SUBJECTED TO FINES UP TO $1000 AND IMPRISONMENT FOR NOT MORE THAN 90 DAYS.**

IF YOU ARE AN OBLIGOR AND YOU FAIL TO GIVE THE REQUIRED NOTICES, 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.

(B) All orders for support shall include the following provisions:
Pursuant to R.C.3119.30(A), the obligor and obligee are liable for the health care of the children who are not covered by private health insurance or cash medical support as calculated in accordance with section 3119.022 or 3119.023 of the Revised Code, as applicable.

If the obligor is ordered to pay cash medical support under this support order, the obligor shall begin payment of any cash medical support on the first day of the month immediately following the month in which private health insurance coverage is unavailable or terminates and shall cease payment on the last day of the month immediately preceding the month in which private health insurance coverage begins or resumes. During the period when cash medical support is required to be paid, the obligor or obligee must immediately inform the child support enforcement agency that health insurance coverage for the children has become available.

The amount of cash medical support paid by the obligor shall be paid during any period after the court or child support enforcement agency issues or modifies the order in which the children are not covered by private health insurance.

Any cash medical support paid pursuant to R.C. 3119.30 (C) shall be paid by the obligor to either the obligee if the children are not Medicaid recipients, or to the office of child support to defray the cost of Medicaid expenditures if the children are Medicaid recipients. The child support enforcement agency administering the court or administrative order shall amend the amount of monthly child support obligation to reflect the amount paid when private health insurance is not provided, as calculated in the current order pursuant to section 3119.022 or 3119.023 of the Revised Code, as applicable.

The child support enforcement agency shall give the obligor notice in accordance with Chapter 3121. of the Revised Code and provide the obligor an opportunity to be heard if the obligor believes there is a mistake of fact regarding the availability of private health insurance at a reasonable cost as determined under division (B) of this section.

The residential parent or the person who otherwise has custody of a child for whom a support order is issued is also ordered to immediately notify, and the obligor under a support order may notify, the Franklin County Child Support Enforcement Agency of any reason for which the support order should terminate, including but not limited to, the child's attainment of the age of majority if the child no longer attends an accredited high school on a full-time basis and the child support order requires support to continue past the age of majority only if the child continuously attends such a high school after attaining that age; the child ceasing to attend an accredited high school on a full-time basis after attaining the age of majority, if the child support order requires support to continue past the age of majority only if the child continuously attends such a high school after attaining that age; or the death, marriage, emancipation, enlistment in the armed services, deportation, or change of legal custody of the child.

All support under this order shall be withheld or deducted from the income or assets of the obligor pursuant to a withholding or deduction notice or appropriate order issued in accordance with chapters 3119., 3121., 3123., and 3125. of the Revised Code or a withdrawal directive issued pursuant to sections 3123.24 to 3123.38 of the Revised Code and shall be forwarded to the obligee in accordance with chapters 3119., 3121., 3123., and 3125. of the Revised Code.

Regardless of the frequency or amount of support payments to be made under the order, the Franklin County Child Support Enforcement Agency shall administer it on a monthly basis in accordance with sections 3121.51 to 3121.54 of the Revised Code.

Payments under the order are to be made in a manner ordered by the court or agency, and if the payments are to be made other than on a monthly basis, the required monthly administration by the agency does not affect the frequency or the amount of the support payments to be made under the order.

All such decrees and orders shall also contain language requiring the notices required by this rule to be sent to the Franklin County Child Support Enforcement Agency, 80 East Fulton, Columbus, Ohio 43215.

(C) All Divorce Decrees, Dissolution Decrees, Legal Separation Decrees and any other order which contains an order for support of a spouse that is to be paid directly to the recipient spouse shall contain the following language: Spousal support shall be paid directly to the recipient spouse and shall be made by check, money order, or in another form that establishes a clear record of payment.

(D) All Divorce Decrees, Dissolution Decrees, Legal Separation Decrees, Shared Parenting Decrees, and any other order allocating parental rights shall include the following notices:

**RELOCATION NOTICE**: Pursuant to Ohio Revised Code Section 3109.051(G), the parties hereto are hereby notified as follows:

IF THE RESIDENTIAL PARENT INTENDS TO MOVE TO A RESIDENCE OTHER THAN THE RESIDENCE SPECIFIED IN THE PARENTING TIME ORDER OR DECREE OF THE COURT, THE RESIDENTIAL PARENT SHALL FILE A NOTICE OF INTENT TO RELOCATE WITH THIS COURT, ADDRESSED TO THE ATTENTION OF THE RELOCATION OFFICER. UNLESS OTHERWISE ORDERED PURSUANT TO O.R.C. SECTIONS 3109.051(G)(2), (3), AND (4), A COPY OF SUCH NOTICE SHALL BE MAILED BY THE COURT TO THE PARENT WHO IS NOT THE RESIDENTIAL PARENT. UPON RECEIPT OF THE NOTICE, THE COURT, ON ITS OWN MOTION OR THE MOTION OF EITHER PARTY, MAY SCHEDULE A HEARING WITH NOTICE TO BOTH PARTIES TO DETERMINE WHETHER IT IS IN THE BEST INTEREST OF THE CHILD TO REVISE THE PARENTING TIME SCHEDULE.

**RECORDS ACCESS NOTICE**: Pursuant to Ohio Revised Code Sections 3109.051(H) and 3319.321(B)(5)(a) the parties hereto are hereby notified as follows:

EXCEPTING AS SPECIFICALLY MODIFIED OR OTHERWISE LIMITED BY COURT ORDER, AND SUBJECT TO O.R.C. SECTIONS 3125.16 AND 3319.321(F), THE PARENT WHO IS NOT THE RESIDENTIAL PARENT, IS ENTITLED TO ACCESS TO ANY RECORD THAT IS RELATED TO THE CHILD, UNDER THE SAME TERMS AND CONDITIONS AS THE RESIDENTIAL PARENT, AND TO WHICH SAID RESIDENTIAL PARENT IS LEGALLY PROVIDED ACCESS. ANY KEEPER OF A RECORD WHO KNOWINGLY FAILS TO COMPLY WITH THIS ORDER IS IN CONTEMPT OF COURT.

**DAY CARE CENTER ACCESS NOTICE**: Pursuant to Ohio Revised Code Section 3109.051(I), the parties hereto are hereby notified as follows:

EXCEPTING AS SPECIFICALLY MODIFIED OR OTHERWISE LIMITED BY COURT ORDER, AND IN ACCORDANCE WITH O.R.C. SECTION 5104.011, THE PARENT WHO IS NOT THE RESIDENTIAL PARENT, IS ENTITLED TO ACCESS TO ANY DAY CARE CENTER THAT IS OR WILL BE ATTENDED BY THE CHILD WITH WHOM PARENTING TIME IS GRANTED, TO THE SAME EXTENT THAT THE RESIDENTIAL PARENT, IS GRANTED ACCESS TO THE CENTER.

**SCHOOL ACTIVITIES NOTICE**: Pursuant to Ohio Revised Code Section 3109.051(J), the parties hereto are hereby notified as follows:

EXCEPTING AS SPECIFICALLY MODIFIED OR OTHERWISE LIMITED BY COURT ORDER, AND SUBJECT TO O.R.C. SECTION 3319.321(F), THE PARENT WHO IS NOT THE RESIDENTIAL PARENT, IS ENTITLED TO ACCESS, UNDER THE SAME TERMS AND CONDITIONS AS THE RESIDENTIAL PARENT, TO ANY STUDENT ACTIVITY THAT IS RELATED TO THE CHILD AND TO WHICH THE RESIDENTIAL PARENT OF THE CHILD LEGALLY IS PROVIDED ACCESS. ANY SCHOOL EMPLOYEE OR OFFICIAL WHO KNOWINGLY FAILS TO COMPLY WITH THIS ORDER IS IN CONTEMPT OF COURT.

(E) This Court has promulgated forms to meet the requirements of the Ohio Revised Code and United States Code regarding entries and notices which must accompany any order for support. Complainants and/or movants for child support orders shall complete and submit proposed worksheets, child support orders, notices and instructions for service as required by Section 3121.03 prior to adjournment of the hearing wherein an order for support is entered.

## CHILD SUPPORT, CASH MEDICAL SUPPORT & PRIVATE HEALTH INSURANCE

**Both parties** have accessible private health insurance available to them at a reasonable cost through a group policy, contract or plan offered by their employer or through any other group policy, contract or plan otherwise available to them. If dual coverage is available to both the obligor and obligee, the dual coverage would provide for coordination of medical benefits without unnecessary duplication of coverage.

Effective as of the date of the child support order, **both parties are** designated as the health insurance obligor and shall provide private health insurance for the benefit of the minor child for so long as the duty to support exists or until further order of the court.

Pursuant to ORC §3119.30(A), both parents are liable for the health care of the children who are not covered by private health insurance or cash medical support as calculated in accordance with section 3119.022 or 3119.023 of the Revised Code, as applicable.

**During any time on or after the effective date of this order that** private health insurance is in effect**, the following orders shall apply:**

1. Effective **upon the date of journalization of the Decree**, **Father** shall pay child support of **$599.89**, per month, plus processing charge, pursuant to the child support worksheet.

2. **Mother** shall pay **30%** and **Father** shall pay **70%** of all extraordinary medical and other health care expenses for the child, which are defined as uncovered medical and other health care expenses exceeding $100 per child per calendar year.

**During any time on or after the effective date of this order that** private health insurance is not in effect**, the following orders shall apply:**

1. **Father** shall pay child support of **$666.24** per month, plus processing charge, and **$93.67** per month for the child, for a total of **$759.91** in cash medical support, plus processing charge, pursuant to the child support worksheet.

2. **Mother** shall pay **30%** and **Father** shall pay **70%** of all extraordinary medical and other health care expenses for the child, which are defined as all medical and other

health care expenses exceeding the amount paid by the obligor for cash medical support per calendar year.

IT IS FURTHER ORDERED:

If the obligor is ordered to pay cash medical support under this support order, the obligor shall begin payment of any cash medical support on the first day of the month immediately following the month in which private health insurance coverage is unavailable or terminates and shall cease payment on the last day of the month immediately preceding the month in which private health insurance coverage begins or resumes. During the period when cash medical support is required to be paid, the obligor or obligee must immediately inform the child support enforcement agency that health insurance coverage for the children has become available.

The amount of cash medical support paid by the obligor shall be paid during any period after the court or child support enforcement agency issues or modifies the order in which the children are not covered by private health insurance. Any cash medical support paid pursuant to ORC §3119.30(C) shall be paid by the obligor to either the obligee if the children are not Medicaid recipients, or to the office of child support to defray the cost of Medicaid expenditures if the children are Medicaid recipients. The child support enforcement agency administering the court or administrative order shall amend the amount of monthly child support obligation to reflect the amount paid when private health insurance is not provided, as calculated in the current order pursuant to section 3119.022 or 3119.023 of the Revised Code, as applicable.

The child support enforcement agency shall give the obligor notice in accordance with Chapter 3121. of the Revised Code and provide the obligor an opportunity to be heard if the obligor believes there is a mistake of fact regarding the availability of private health insurance at a reasonable cost as determined under division (B) of this section.

## DISTRIBUTIVE AWARD

Plaintiff argues that Defendant has committed financial misconduct sufficient for award pursuant to ORC §3105.171(D)-(F). Through her review of withdrawals as reflected on the account statements from the Merrill Lynch IRA account (#29D36), she points out that on August 31, 2011 the balance in this account amounted to $228,289.76; the instant Complaint was filed on August 4, 2011. Defendant readily acknowledges a number of sizable withdrawals commencing on the following day – starting with a $10,000 withdrawal on August 5, 2011. PL EX 21. Each time, Defendant transferred funds, at least initially, into an account over which he exercised sole control.

In contrast, Defendant contends that his early withdrawals were undertaken at times admittedly after the divorce was filed, but before he recalls being served with the initial restraining order. Regarding those transfers which took place after the restraining order was filed, Defendant points to a joint October 21, 2011 modification of the initial temporary restraining order which permitted the limited use of the funds from the Merrill Lynch IRA account.

Specifically, the parties' agreement reads, "Defendant in this matter, is hereby partially released to allow Defendant to make periodic and ongoing withdrawals from his Merrill Lynch account in order to satisfy the parties ongoing living expenses as needed." Defendant readily acknowledges that he routinely transferred vast sums of money from the Merrill Lynch IRA account and from the Money Mailer Huntington National Bank account (#3690) into his individual Huntington National Bank savings and checking accounts (#5675 and #2763). With a straight face, he initially testified that he read that modification to permit him to satisfy *any* of his budgetary shortfalls – familial, personal or business. Later, Defendant concedes that his use of Merrill Lynch IRA funds to pay his Chase Bank and Discover credit cards was inappropriate as these were, in fact, business expenses directly related to the Money Mailer franchise. Likewise, he later acknowledged that his use of Merrill Lynch IRA funds to pay his American Express and Delta SkyMiles credit cards was inappropriate as the payments charged on behalf of Babbitt and Weis (his attorneys) and Clarius Partners LLC (his forensic accountant) were clearly personal in nature – and likely problematic even in light of the modification. PL EX 20, EX 21, EX 23, EX 25, EX 28, EX 30. Even so, Defendant essentially argues "no harm – no foul".

Quite pragmatically, Defendant's position is that the trial time Plaintiff expended identifying for the Court each and every transaction Defendant conducted post-filing was *ridiculous* – specifically, he remarked that Plaintiff's financial misconduct argument was a "complete waste of time and waste of resources and attorneys fees". Defendant's position is seated in the fact that he never expended more than 50% (his marital share) of the Merrill Lynch IRA account.

Defendant emphasizes that Plaintiff, herself, acknowledges that the account balance in the IRA was $228,289.76 on August 31, 2011 – one half of this amount equates to $114,144.88. By the time of trial, the parties *stipulated* that the balance in this account amounted to $147,569. Hence, it is rather immaterial whether Defendant violated the temporary restraining order or misused the funds for personal or business expenses or even excluded Plaintiff from access thereto.

Instead, Plaintiff refers the Court to the fact that, in October of 2012 as the parties neared trial, Defendant was suddenly able to pay all of his personal and business expenses (including expenses related to the Money Mailer franchise) without resort to withdrawals from the IRA. RT TR of December 14, 2012, p. 47, line 5 – p. 48, line 4. Plaintiff suggests that this calls into question his need to undertake the withdrawals and solicit funds from his family members in the first instance. Plaintiff further argues that the modification required Defendant to "provide account of all such funds removed from the account including any and all supporting documentation", which she contends was not always done in a complete and timely manner. PL EX 25.

In an effort to explain his many unilateral financial maneuvers, Defendant launches into a rather lengthy bit of testimony regarding Plaintiff's reckless spending and his need to take control of the household's financial reins. He alleges there were "continuous up and down battles" over finances which were baffling to him as he "made good money through [his] whole life [and] we basically had nothing to show for it other than the equity in our home." He contends that he "dealt with bills being hidden and not knowing what [he] was going to be hit with, and just trying to make ends meet [was a ] continuous, a constant argument … trying to get … our financial discipline under control." RT TR of March 8, 2013, p. 67, lines 2-15. When specifically asked whether Plaintiff had any access to these marital funds, Defendant relies, *"Not at all of them. You know, some of the investment accounts we had to maintain, you know, some control as far as making transactions, but all the money that we spent was in, you know, probably two checking accounts that were in both of our names."* RT TR of March 8, 2013, p. 70, lines 1-16.

In support of her contention that she is owed a distributive award, Plaintiff cites three relevant actions:

- Since August of 2011, Defendant engaged in a pattern and practice of liquidating funds from a marital Merrill Lynch IRA account held in his name alone (totaling $79,728 in 2011 alone) which created a federal income tax liability for the parties in 2011.

- In 2007, Defendant (in 2 separate transactions) liquidated $300,000 (i.e., a total of $600,000) in marital, taxable Echelon stock options, the proceeds of which he deposited into his individual Charles Schwab One account (#9842) – which then he discretionally transferred funds into Huntington checking accounts "as needed".

- In 2008, Defendant created a margin account against the Charles Schwab One account leveraging the remaining Echelon stock options – again for the alleged purpose of funding the Money Mailer franchise. Despite Defendant's "no harm – no foul" position, this is particularly upsetting to Plaintiff because in September and October of 2011, Charles Schwab executed sales of the parties' remaining Echelon stock options to satisfy the margin. Defendant concedes that he never provided the firm a copy of temporary restraining order in this case. Ultimately the margin account was closed as the loan was satisfied and the stock value dropped. Most importantly, at the beginning of this divorce in August 2011, there was $70,540 in the Charles Schwab One account and by the time of the trial, the account had been reduced to the sum of $997. DEF EX L, PL EX 22.

With regard to all of these financial matters, Defendant contends that "there was full disclosure" as evidenced by Plaintiff's penchant for asking him the daily stock price and her having full access to the mail. He testifies, *"if I was stressed out for a day or down … [she would] say, you know, what's wrong? [And he would respond] we got another margin call, you know."* RT TR of March 8, 2013, p. 61, lines 3-16; p. 76, lines 5-12; p. 78, lines 7-15.

Plaintiff very credibly testifies that she was intentionally kept in the dark by Defendant about the family finances and knew better than to question Defendant's financial decisions. She asserts that this lack of knowledge extends to the parties' income tax returns – which, beginning with the 2011 joint federal income tax return (PL EX 4), she did not personally sign nor did she authorize accountant Dan Watkins to electronically file on her behalf. PL EX 5.

Plaintiff argues this return too was accomplished without her actual consent or knowledge. She would further note that, on Line 13 "Capital Gain or Loss" of this 2011 return, she has no knowledge of any sale of any stock in the year 2011 nor does she claim receipt of any benefit from the alleged stock sale. She further emphasizes that on Line 15 of this same return, "IRA Distributions" whereon Defendant has claimed $79,728 she was completely unaware of any such transactions. Notably, Plaintiff points out that there is no indication of her income on this 2011 tax return as Defendant never sought the same from her – she testifies that she was never given the opportunity to review and/or consent to the return prior to its being filed. Accordingly, she feels that she should not be held responsible for the payment or reimbursement to Defendant of any tax liability associated with the return as it relates to Defendant's withdrawals from the marital Merrill Lynch IRA as Defendant readily concedes that Plaintiff did not personally receive ½ of the funds that he liquidated.

Defendant, on the other hand, admits that the parties' 2011 joint federal income tax return (PL EX 4) was prepared by Mr. Watkins using information he alone supplied. Regarding the $11,555 in capital gains or losses, found at Line 13 of the parties' 2011 income tax return, Defendant acknowledges that neither party actually received any cash funds. Regarding the $79,728 in IRA distributions, found at Line 15 of the parties' 2011 income tax return, Defendant identifies these as "family distributions" from the parties' joint assets – again he concedes that these monies were not actually shared with Plaintiff; still he argues that she indirectly benefited from the same as he paid "family expenses" with the disputed funds he unilaterally liquidated and controlled. Accordingly, he argues that because Plaintiff has taken no steps to amend this return, she should be jointly liable for the $9,689 he paid to state and federal taxing agencies, especially since he is willing to hold Plaintiff harmless for the tax liability created by the withdrawals he made from the IRA in 2012. DEF EX BB.

The relevant statute, ORC §3105.171(E)(1), (2) and (4) provides the Court discretion to make a distributive award to facilitate, effectuate, or supplement a division of marital property. The statute further provides that "the court may make a distributive award in lieu of a division of marital property in order to achieve equity between the spouses, if the court determines that a division of the marital property in kind or in money would be impractical or burdensome."

In situations where the Court finds that "a spouse has engaged in financial misconduct, including, but not limited to, the dissipation… of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property." Here, the Court finds there is no need to take this extraordinary measure even though Defendant dissipated the remaining value of the Echelon stock options through his mismanagement of the Schwab margin account. Defendant disingenuously testified on March 12, 2013 that the reason he sought the loan from his brother Peter was for the express purpose of protecting this marital asset – which he failed to do. RT TR of March 12, 2013, p. 21, line 6 – p. 22, line 14.

Hence, Plaintiff's recourse in this matter is for the Court to (1) hold Defendant solely responsible for repayment of the loan to his brother and (2) reflect the Charles Schwab One account balance at the date of filing on the marital balance sheet – which the Court has done. Moreover, the Court has already equally divided the parties' marital assets and found no legitimate marital liabilities exist. Lastly, the Court finds it equitable to decline Defendant's request for an order of reimbursement for ½ of the 2011 income tax liability as he alone created the false return. Accordingly, the Court finds that to order a distributive award on Plaintiff's behalf would be unfair given these circumstances.

**ATTORNEY'S FEES AND COURT COSTS**

Pursuant to ORC §3105.73(A), in an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, the Court may award all or part of reasonable attorney's fees and litigation expenses to either party if the Court finds the award equitable.

In determining whether an award is equitable, the Court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors it deems appropriate.

Parties' Marital Assets and Income

As previously determined by this Court, the marital assets have been equitably divided at page 27 of this Decree. Incomes in this case were hotly debated; however, in the end, the Court finds that Defendant's income (and other access to marital funds pending litigation) *greatly* exceeded that of Plaintiff.

Award of Temporary Spousal Support

On March 20, 2012, Magistrate Webber issued a second Magistrate's Order altering her initial financial order and requiring Defendant to pay Plaintiff spousal support in the amount of $250 per month (plus processing charge) effective January 1, 2012. Defendant was also ordered to pay Plaintiff $1,000 as and for attorney fees – which the parties stipulate he paid.

Conduct of the Parties

Both parties cite the other's conduct in support for fees. Plaintiff argues that she was forced to engage her attorney in order to obtain a fair distribution of a Bank of America check in the amount of $3,364.16 issued to both parties on November 8, 2011. PL EX 17. She further alleges that Defendant fraudulently negotiated the check and deposited it into an account bearing his name only. This, she submits cost her additional fees.

Furthermore, in her closing statement, Plaintiff writes, "that Defendant made Plaintiff sell her wedding ring to secure an attorney in this matter." She further argues that Defendant's failure to propose *any* value for the franchise necessitated Plaintiff to retain a financial expert in accordance with Ohio law.

Plaintiff indicates that she has been billed for $23,603.50 in attorney fees through her final date of testimony in this case – not including the approximate $10,000 he owes her financial expert, William Ditty. PL EX 46. Plaintiff indicates that she has only paid the firm of DeSanto & McNichols $4,500 to date via the proceeds of her wedding ring and the Magistrate's Order.

In his closing statement, Defendant writes, "the evidence submitted to the Court demonstrated that Rick incurred attorney's fees totaling $40,301.58 through the end of the trial herein. The parties stipulated to the reasonableness of such fees. [Defendant] testified that a substantial amount of the fees incurred herein resulted from having to defend against allegations that ultimately were neither supported nor supportable." These unsupported allegations consisted of Plaintiff's claimed that Defendant could earn $80,000 per year. Defendant alleges that he was "forced to hire Dr. Oestreich to conduct his own vocational evaluation in order to demonstrate that this was not the case." Ultimately, the Court agreed with Dr. Oestreich that Defendant can and should be earning $80,000 per year by 2014.

Defendant further cites, as evidence of Plaintiff's poor conduct, her arguments that Defendant "violated this Court's restraining orders regarding the sale of the 2003 Yukon Denali, despite the documentary evidence demonstrating that [Plaintiff] herself had authorized the sale." And as previously noted, Defendant feels that Plaintiff wasted a great deal of the trial arguing that Defendant's use of his half of the Merrill Lynch IRA was improper. He further notes that she failed to raise this argument prior to the commencement of the trial. Accordingly, Defendant submits that there should be no award of attorney fees in this case.

<u>Other Relevant Factor(s)</u>

Neither party cited any such factors for the Court's consideration.

Conclusion

After thoroughly weighing all the statutory factors and the totality of circumstances in this case, the Court finds that it is equitable for Defendant to contribute to the attorney/expert fees and court costs incurred by Plaintiff in association with this litigation. Hence, Defendant is hereby ordered to pay $10,000 directly to the firm of DeSanto & McNichols within 90 days of the journalization of this Decree.

## PRIOR NAME

Plaintiff indicates at trial that she does not wish the Court to restore her to any previous/former name.

## GENERAL

The parties shall execute all documents, writings and instruments and do all other things necessary to carry this Decree into full force and effect. In the event such documents are not duly executed, the Court authorizes any public official to accept a certified copy of this Decree in lieu of the actual document necessary or required to carry this Decree into full force and effect.

**IT IS SO ORDERED!**

____________________________
JUDGE KIM A. BROWNE

*Copies to:*

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PRAECIPE: TO THE CLERK OF COURTS: Pursuant to Civil Rule 58(B), you are hereby instructed to serve upon all parties not in default for failure to appear, notice of the judgment and its date of entry upon the journal.

Franklin County Court of Common Pleas

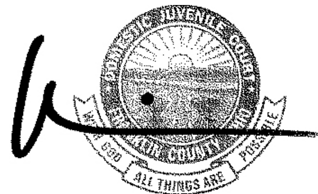
**Date:** 07-11-2013

**Case Title:** JANE A KURALY -VS- RICHARD M KURALY

**Case Number:** 11DR003044

**Type:** DIVORCE DECREE

Kim A. Browne, Judge



Kim A. Browne

Court Disposition

Case Number: 11DR003044

Case Style: JANE A KURALY -VS- RICHARD M KURALY

Case Terminated: 05 - Judge: Default, Uncontested, Dissolution

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11DR0030442012-11-1899970000
   Document Title: 11-18-2012-MOTION FOR CONTEMPT
   Disposition: MOTION IS MOOT

2. Motion CMS Document Id: 11DR0030442012-10-1799980000
   Document Title: 10-17-2012-MOTION TO INTERVIEW CHILD
   Disposition: MOTION IS MOOT

3. Motion CMS Document Id: 11DR0030442011-10-1499980000
   Document Title: 10-14-2011-MOTION FOR PARTIAL RELEASE OF TEMPORARY RESTRAINING ORDER
   Disposition: MOTION IS MOOT

4. Motion CMS Document Id: 11DR0030442011-10-0499980000
   Document Title: 10-04-2011-MOTION FOR PARTIAL RELEASE OF TEMPORARY RESTRAINING ORDER
   Disposition: MOTION IS MOOT

5. Motion CMS Document Id: 11DR0030442011-09-1599840000
   Document Title: 09-15-2011-MOTION FOR TEMPORARY RESTRAINING ORDER
   Disposition: MOTION IS MOOT

6. Motion CMS Document Id: 11DR0030442011-08-0499810000
   Document Title: 08-04-2011-MOTION FOR TEMPORARY RESTRAINING ORDER
   Disposition: MOTION IS MOOT

7. Motion CMS Document Id: 11DR0030442011-08-0499820000
   Document Title: 08-04-2011-MOTION FOR DESIGNATION OF PROCESS SERVER
   Disposition: MOTION IS MOOT