UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 02-20613
	)	
E. KENNETH KOOS and	)	Chapter 7
BRENDA H. KOOS,	)	
Debtors.	)	
	)	Adversary Proceeding No. 03-1356
MARY ANN RABIN	)	
CHAPTER 7 TRUSTEE,	)	
Plaintiff,	)	Judge Arthur I. Harris
	)	
v.	)	
	)	
E. KENNETH KOOS,	)	
BRENDA H. KOOS,	)	
E. KENNETH KOOS as	)	
GUARDIAN FOR SARAH KOOS,	)	
A MINOR, and	)	
OHIO STATE PAGING, INC.,	)	
Defendants.	)	

MEMORANDUM OF OPINION

The plaintiff Mary Ann Rabin, Chapter 7 trustee, filed this adversary proceeding seeking a determination that $147,000 in proceeds from an Ohio corporation named Ohio State Paging, Inc., be found to be property of the bankruptcy estate. The debtors assert that the proceeds belong to their minor daughter, Sarah Koos, pursuant to a gift of shares they made to her in August 1995. The matter is before the Court on the motions for summary judgment filed by the trustee (Docket #19) and the debtor, E. Kenneth Koos, as guardian for his daughter, Sarah Koos (Docket #23). For the reasons that follow,

both motions for summary judgment are denied, and an amended scheduling order will be issued setting this matter for trial.

PROCEDURAL BACKGROUND

On September 23, 2002, the debtors, E. Kenneth Koos and Brenda H. Koos, filed a petition under Chapter 13 of the Bankruptcy Code. On May 16, 2003, the Court granted the Chapter 13 trustee's motion to convert this case to a Chapter 7 proceeding (Main Case Docket #71), and Mary Ann Rabin was appointed trustee to administer the Chapter 7 estate. The trustee discovered that the debtors were record owners of five shares of stock in an Ohio corporation named Ohio State Paging, Inc., and that all stockholders were potential beneficiaries of a proposed settlement. The debtors' share of that settlement was approximately $147,000, assuming the debtors were the true owners of the five shares when they filed their bankruptcy petition on September 23, 2002.

On September 12, 2003, Rabin filed this adversary proceeding seeking a determination that the $147,000 in settlement proceeds from Ohio State Paging be found to be property of the bankruptcy estate. Rabin named as defendants the debtors; E. Kenneth Koos, as guardian for his daughter, Sarah Koos, a minor; and Ohio State Paging. In their answer, the debtors responded that they have not owned the stock since August 1995, when they transferred their interest in the

corporation to their daughter, Sarah Koos, by way of a gift under the Ohio Uniform Gift to Minors Act (Docket #5). In a separate answer, E. Kenneth Koos, as guardian for his daughter, similarly asserted that the shares are owned by Sarah Koos under a custodianship established August 19, 1995 (Docket #10).

On January 9, 2004, the Court granted the trustee's motion for an order authorizing her to take possession of the funds held by Ohio State Paging, pending further order of the Court (Docket #17). Pursuant to that order, the trustee has placed the funds in an interest-bearing account, pending a ruling from this Court as to the proper owner of the funds, and Ohio State Paging has been eliminated from any further involvement in this proceeding. *Id.*

The trustee and E. Kenneth Koos, as guardian for Sarah Koos, have now filed motions for summary judgment, including briefing and related materials. The trial, initially scheduled for April 19, 2004, has been postponed pending a ruling on the motions for summary judgment.

UNDISPUTED FACTS

For purposes of the parties' summary judgment motions, the following facts are not in dispute.

Purchase of Shares by Kooses and Purported Transfer to Their Daughter in 1995

Ohio State Paging, Inc. (Ohio State Paging), a closely held Ohio corporation with twelve shareholders, was incorporated in July 1993. Ohio State Paging was an S corporation as that term is used in the Internal Revenue Code. Burke Declaration at ¶1 (Docket #19). Beginning in 1993, Kenneth and Brenda Koos jointly owned five shares of stock in Ohio State Paging. Burke Declaration at ¶4; E. Kenneth Koos Affidavit at ¶2 (Docket #19).

On August 19, 1995, the debtors signed a document purporting to transfer their five shares of Ohio State Paging stock to Brenda H. Koos, as custodian for Sarah Koos, their minor daughter. E. Kenneth Koos Affidavit at ¶¶ 3-8 and Exhibit A; Brenda Koos Affidavit at ¶¶ 3-8 (Docket #19); Amended Exhibit A (Docket #24). The debtors have submitted affidavits from their daughter and Diana Stradcutter, the witness to the transfer, asserting that the transfer did indeed occur on August 19, 1995, and was made for the future college expenses of the daughter. Amended Exhibits B and C (Docket #24). *See also* Affidavits of E. Kenneth Koos and Brenda H. Koos, Exhibit 1, attached to trustee's motion (Docket #19).

Transfer Restrictions under Ohio State Paging's Articles of Incorporation and Absence of Notice by Kooses of Purported Transfer of Shares in 1995

Article IV of Ohio State Paging's articles of incorporation contains a restriction on transfer of shares and provides, in part:

> No shareholder shall transfer (by sale, pledge, hypothecation, disposition, *gift*, involuntary transfer, assignment or operation of law) any of his shares in the Corporation without first delivering a notice in writing by mail or otherwise to the Secretary of the Corporation stating the price, terms, and conditions of such proposed sale, transfer, etc., the number of shares to be sold or transferred, etc., and his contention to sell or transfer, etc. such shares. Within 14 days thereafter, the Corporation shall have the prior right to purchase such shares so offered at the price and on the terms and conditions stated in the notice. If the Corporation has failed to purchase the shares at the expiration of the 30 day period, the shareholder desiring to sell, transfer, etc. such shares shall not be obligated to accept any such offer from the Corporation and may dispose of all of the shares referred to in his notice within five (5) days thereafter to the person specified in the notice; provided, however, he may not sell or transfer such shares at a lower price or on terms more favorable to the purchaser or transferee than those specified in the written notice to the Secretary of the Corporation.

Trustee Exhibit 2 (Docket #19) (emphasis added).

The articles of incorporation and stock subscription agreement were circulated to all shareholders including the debtors. Burke Declaration at ¶5. The articles of incorporation were registered with the Secretary of State of Ohio. *See* trustee Exhibit 2 (Docket #19).

James F. Burke, Jr., the corporate secretary of Ohio State Paging, never received a notice of the debtors' intent to transfer the Ohio State Paging shares to

their daughter. Nor were Ohio State Paging shareholders ever asked to waive the anti-alienation provision to permit the transfer of Ohio State Paging shares from the debtors to their daughter. Burke Declaration at ¶¶ 7-8 (Docket #19). Throughout the existence of Ohio State Paging, Burke always believed the shareholders of record to be the debtors, not their minor daughter and not Brenda Koos, as custodian for Sarah Koos, as indicated in the document, dated August 19, 1995, purporting to transfer the shares as a gift. Burke Declaration at ¶8. No notice for Ohio State Paging shareholders has ever been sent to the debtors' minor daughter or to "Brenda Koos, as custodian for Sarah Koos." *Id.*

Central Ohio Cellular, Inc.

The debtors were also shareholders in Central Ohio Cellular, Inc., a sister corporation to Ohio State Paging. Central Ohio Cellular's shareholders were identical to Ohio State Paging's shareholders. Central Ohio Cellular's articles of incorporation contained similar restrictive provisions regarding stock transfers. Burke Declaration at ¶6. In March of 1995, the debtors refused to waive the stock transfer restrictions when several shareholders of Central Ohio Cellular wanted to sell their stock. The debtors also blocked a proposal to elect to close the books of the corporation for the relevant tax year, to accomplish tax planning goals of the selling shareholders. Burke Declaration at ¶7.

Later Actions by the Kooses Inconsistent with the Purported 1995 Transfer

The debtors' income tax returns for 1995 through 2002 indicate that they are the owners of the five shares of Ohio State Paging stock. Similarly, for the years 1995 through 2002, the Schedule K-1 form "Shareholder's Share of Income, Credits, Deductions, etc." prepared for shareholders of Ohio State Paging, were issued only in the name of the debtor, E. Kenneth Koos. For each year from 1995 through 2002, the debtors reported on their federal income tax return the losses from Ohio State Paging reported on the Schedule K-1 forms. Neither the tax returns nor Schedule K-1 forms indicate that the shares were held by Brenda H. Koos, as custodian for Sarah Koos. *See* Rabin Declaration at ¶¶ 9-10, and trustee Exhibits 3-2 through 3-9 and 4-2 through 4-9 (Docket #19). On May 25, 2000, E. Kenneth Koos wrote to the treasurer of Ohio State Paging. The body of the letter, signed by E. Kenneth Koos, states:

> In the past, as shareholders, we have received financial statements. To date we have not received any 1998 or 1999 financial statements. Please send to the address above.

Trustee Exhibit 5 (Docket #19). The letter fails to indicate that a transfer of the five shares occurred in 1995 or that the debtors are no longer shareholders in Ohio State Paging. *Id.*

Dissolution of Corporation and Turnover of Settlement Proceeds to Trustee Pending a Ruling from this Court as to the Proper Owner of the Funds

In 2003, the Chapter 7 trustee discovered that the debtors were record owners of five shares of stock in an Ohio corporation named Ohio State Paging, Inc., and that all stockholders were potential beneficiaries of a proposed settlement. The debtors' share of that settlement was approximately $147,000, assuming the debtors were the true owners of the five shares as of the petition date. Rabin Declaration at ¶¶ 3-4.

Ohio State Paging was dissolved on August 14, 2003. Burke Declaration at ¶1. Pursuant to an order dated January 9, 2004, the Court granted the trustee's motion for an order authorizing her to take possession of the funds held by Ohio State Paging, pending further order of the Court (Docket #17). Pursuant to that order, the trustee has placed the funds in an interest-bearing account, pending a ruling from this Court as to the proper owner of the funds

DISCUSSION

The Court has jurisdiction in this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E) and (O).

Summary Judgment Standard

The standards for a court to award summary judgment are contained in Fed. R. Civ. P. 56(c), as made applicable to bankruptcy adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. According to Civil Rule 56(c), a court shall render summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The party moving the court for summary judgment bears the burden of showing that "there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law." *Jones v. Union County*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party meets that burden, the nonmoving party "must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997).[1] *See*, *e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The mere

[1] Although E. Kenneth Koos takes exception to the trustee's submission of declarations under penalty of perjury instead of affidavits, pursuant to 28 U.S.C. § 1746, such declarations have the same force and effect in federal court as affidavits. *See*, *e.g.*, *Williams v. Browman*, 981 F.2d 901 (6th Cir. 1992).

existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff"). In determining the existence or nonexistence of a material fact, a court will view the evidence in a light most favorable to the nonmoving party. *See Tennessee Department of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996).

"The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other." *Taft Broadcasting Co. v. United States,* 929 F.2d 240, 248 (6th Cir. 1991). "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id. Accord In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 735 (6th Cir. 2001), and cases cited therein.

Issues Presented

In her motion for summary judgment, the trustee asserts that the proceeds from the Ohio State Paging settlement are property of the bankruptcy estate for two independent reasons: (1) because the Kooses' purported transfer of shares to their daughter in 1995 is void as a matter of law as contrary to transfer restrictions contained in the articles of incorporation; and (2) because the Kooses lacked the

requisite donative intent to make a true gift in 1995. E. Kenneth Koos, in his cross-motion for summary judgment, essentially asserts the opposite arguments – *i.e.*, that the transfer restrictions do not void the 1995 transfer, and that the Kooses had the requisite donative intent to make a true gift in 1995. The Court will address these two issues separately below.

Before addressing these two issues, the Court will briefly address three threshold questions:

1. What law governs?
2. Who has the burden of proof?
3. What is the standard of proof?

What Law Governs?

"Although the issue of what property is properly included in the debtor's bankruptcy estate raises a federal question, it is well-settled that a debtor's property rights are created and defined by state law." *In re Fordu*, 201 F.3d 693, 700 (6th Cir. 1999) (citations omitted). The Court must therefore look to Ohio law to determine what interest, if any, the debtors had in Ohio State Paging at the time they filed their bankruptcy petition. *See* 11 U.S.C. § 541(a)(1); *In re Newpower*, 233 F.3d 922, 928 (6th Cir. 2000).

When applying state law, "a federal court must apply the law of the state's highest court." *See Garden City Osteopathic Hospital v. HBE Corp*., 55 F.3d 1126, 1130 (6th Cir. 1995) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)). If the state's highest court has not decided the applicable law, then the federal court must ascertain the state law from "all relevant data." 55 F.3d at 1130 (quoting *Bailey v. V & O Press Co.*, 770 F.2d 601, 604 (6th Cir. 1985)). Relevant data include "intermediate appellate decisions, which may not be disregarded 'unless [we are] convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Lawler v. Fireman's Fund Ins. Co.*, 322 F.3d 900, 903 (6th Cir. 2003)(quoting *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1485 (6th Cir. 1985)). "[R]elevant data also include the state's supreme court *dicta*, restatements of law, law review commentaries, and the majority rule among other states." 55 F.3d at 1130 (citing *Angelotta v. American Broadcasting Corp.*, 820 F.2d 806, 807 (6th Cir. 1987)).

Who Has the Burden of Proof?

Typically, the party seeking turnover bears the burden of proving that property in question is or is not property of the estate. *See In re Alofs Manufacturing Co.,* 209 B.R. 83, 89-90 (Bankr. W.D. Mich. 1997) ("It is well established that the burden of proof is on the party seeking turnover of property of

the estate[.]"). When this adversary proceeding was commenced, the property in question – *i.e.*, the proceeds of settlement – was in the possession of Ohio State Paging. Now, however, the proceeds are being held by the trustee as custodian until the Court determines the proper owner. A potentially important question, therefore, is: Which party bears the burden of proof? Must the trustee prove that the proceeds are property of the estate? Or, must E. Kenneth Koos, as guardian for his minor daughter, prove that the proceeds being held by the trustee are not property of the debtors' estate?

For purposes of these summary judgment motions, the Court will presume that the trustee has the burden of demonstrating that the proceeds are property of the debtors' estate. Nevertheless, should the trustee wish to provide the Court with appropriate legal authority, particularly case law involving situations where the trustee has become custodian of the property in question, the Court will revisit this issue at trial. On the other hand, the question of who bears the burden of proof is only likely to be important if the standard of proof turns out to be clear and convincing or if the evidence concerning ownership is evenly divided.

What Is the Standard of Proof?

There is a split in authority as to the standard of proof required in an action under § 542 for turnover of property of the estate. *See Alofs Manufacturing,* 209 B.R. at 91 (discussing split of authority). Some courts maintain that the standard is clear and convincing evidence, following Supreme Court precedent that predates the enactment of the 1978 Bankruptcy Code. *See*, *e.g.*, *In re Bostic*, 170 B.R. 270, 274 (Bankr. N.D. Ohio 1994). Other courts maintain that the standard is a preponderance of the evidence, applying the rationale behind the Supreme Court's decision in *Grogan v. Garner*, 498 U.S. 279 (1991). *See*, *e.g.*, *In re Patton*, 200 B.R. 172, 173-75 (Bankr. N.D. Ohio 1996).

The Court believes that a preponderance of evidence is the proper standard under § 542. As Judge Gregg explained in *Alofs*, the preponderance of evidence standard results in a roughly equal allocation of the risk of error between litigants, is the standard generally used in civil actions between private litigants, and is consistent with more recent Supreme Court precedent. *See* 209 B.R. at 90-91. Nevertheless, should either party provide the Court with compelling argument that such a standard of proof is incorrect, the Court will revisit this issue at trial. For purposes of the pending summary judgment motions, however, the Court finds that questions of material fact exist, regardless whether the trustee's standard of proof

is clear and convincing evidence or merely a preponderance of the evidence.

I. Is the Kooses' Purported Transfer of Shares to Their Daughter Void as a Matter of Law as Contrary to the Transfer Restrictions Contained in the Articles of Incorporation?

The trustee's first argument is that the Kooses' purported transfer of shares to their daughter is void as a matter of law as contrary to the transfer restrictions contained in Ohio State Paging's articles of incorporation. For purposes of summary judgment, it appears that the Kooses failed to comply with the notification requirements for the transfers of shares, including gifts, contained in the articles of incorporation. Nevertheless, it is unclear to the Court what consequences flow from this failure. More precisely, does this failure make the purported transfer of shares void as a matter of law, or merely voidable?

If the purported transfer is void as a matter of law, then the shares are property of the bankruptcy estate, and the trustee is entitled to summary judgment. On the other hand, if the purported transfer is simply voidable, presumably by the corporation, another shareholder, or someone standing in the shoes of the corporation or another shareholder, then the trustee is not entitled to summary judgment. This is because neither the corporation nor another shareholder has sought to void the transfer. Nor has the trustee asserted a cause of action in this adversary proceeding based upon her avoidance powers, such as an action to avoid

a transfer under Section 544(b)(1).

In determining whether the purported transfer is void as a matter of law, this Court is guided by the law of Ohio, because Ohio State Paging was an Ohio corporation, as well as the precise language of the articles of incorporation.

Although the trustee correctly points to Ohio statutory law and case law as permitting restrictions on the alienation or transfer of corporate stock, none of the statutes or cases cited by the trustee stands for the proposition that transfer restrictions are void as a matter of law, as opposed to merely being voidable. *See*, *e.g.*, *In re Jandel*, 19 B.R. 415, 419-20 (Bankr. S.D. Ohio 1982) (noting that Ohio has by statute adopted the common law rule approving proper restrictions on the alienation or transfer of corporate stock). In *Jandel*, however, the bankruptcy court never addressed the void versus voidable issue. The court simply agreed with the minority shareholders and upheld the transfer restrictions on the debtors' stock, thereby giving the minority shareholders a right to match the first and best offer for the purchase of the debtors' stock. 19 B.R. at 420-21. *See also Lehtinen v. Drs. Lehtinen, Mervart & West, Inc.*, 99 Ohio St.3d 69, 74, 788 N.E.2d 1079, 1084 (Ohio 2003) (acknowledging general validity of restrictions on *voluntary* transfers of shares of stock, as opposed to transfers *by operation of law*); *Maurer v. Haines City Mobile Park & Sales, Inc.,* 2002 Ohio App. LEXIS 1461 (Ohio

App. 6th Dist., 2002), (upholding transfer restriction contained in articles of incorporation of closely-held Florida corporation); *Crow v. Crow,* 1987 Ohio App. LEXIS 6112 (Ohio App. 12th Dist., 1987)(domestic relations court could not circumvent stock transfer restrictions by awarding stock held by husband to wife in property division; instead, domestic relations court was ordered to award *value* of stock to wife rather than *actual* stock).

Nor has the Court been able to find any case law in support of the trustee's position, although the Court has found one case to be particularly instructive. In *In re Hill*, 981 F.2d 1474 (5th Cir. 1993), the Fifth Circuit dealt with a Chapter 7 trustee's attempt to invalidate a debtor's prepetition pledge of stock as contrary to transfer restrictions contained in the company's articles of incorporation. Although the court applied Louisiana law, because the company was a Louisiana corporation, the issues in the *Hill* case have much in common with the issues in the Kooses' case.

In 1988, Hill owed over $700,000 to a bank, which insisted that Hill furnish additional collateral. In June 1988, Hill pledged 25 shares of a closely-held corporation to the bank. The stock certificates indicated that no stock may be transferred or encumbered in any fashion without prior compliance with the requirements set forth in the company's articles of incorporation. The articles of

incorporation, in turn, gave the remaining shareholders 30 days to purchase at book value the shares sought to be transferred or encumbered. In November 1989, the bank wrote to the corporation, indicating its intention to sell the pledged stock. The president of the corporation responded by formally repudiating the validity of Hill's earlier pledge of stock to the bank. Two weeks later, Hill filed a petition under Chapter 7 of the Bankruptcy Code. The Chapter 7 trustee then filed an adversary proceeding against the bank, seeking to have Hill's pledge of shares declared null and void. The bankruptcy court held that the pledge of stock did not come within the literal language of the specific transfer restrictions contained in the articles of incorporation. The district court affirmed. On further appeal, the Fifth Circuit reversed, ruling that the "pledge" of stock fell within the term "hypothecate" contained in the articles of incorporation. The Fifth Circuit therefore concluded "that such stock must be included among the unencumbered assets of the estate, free of any secured position of the Bank." 981 F.2d at 1488.

The Fifth Circuit briefly discussed the issue of whether the pledge of stock was void or merely voidable. The Fifth Circuit assumed, without deciding, that a transfer or encumbrance in violation of such a stock restriction is not an absolute nullity. 981 F.2d at 1480. The court noted in *dicta*: "after all, [such restriction] may be waived or ratified by the corporation or the other shareholders." *Id.* For

purposes of its ruling, however, all the court needed to determine was that the trustee had derivative standing to bring the adversary proceeding under 11 U.S.C. § 544(b)(1). The Fifth Circuit affirmed the bankruptcy court's standing analysis. *See* 981 F.2d at 1479. As the Fifth Circuit explained:

> The [bankruptcy] court reasoned that even though "[t]he Trustee has no independent power of avoidance, but may act only upon the right of one unsecured creditor holding an allowable claim, against whom the transfer or obligation was invalid under state law," the claim of John Pico–an unsecured creditor and stockholder in [the corporation] who is entitled to claim the benefit of the transfer restriction–supplies the necessary derivative standing.

981 F.2d at 1478.

The Fifth Circuit's analysis in *Hill* suggests that transfer restrictions, including those contained in Ohio State Paging's articles of incorporation, are merely voidable, not void, particularly because the corporation and other shareholders may waive, acquiesce in, ratify, or otherwise act (or fail to act) in such a manner as to abrogate their right to attack the purported transfer. *See* 981 F.2d at 1480. It is therefore incumbent upon the trustee, using his or her avoidance powers and any derivative standing, to act timely to annul the subject transaction.

In the present case, however, the Chapter 7 trustee does not assert an avoidance action under Section 544. Nor is it clear that there is an unsecured

creditor to give her derivative standing as was the case in *Hill*, where one of the shareholders was an unsecured creditor. *See* 981 F.2d at 1478. For purposes of the trustee's motion for summary judgment, it is sufficient to note that the trustee is not asserting any avoidance powers. Therefore, unless the transfer restriction makes the Kooses' purported transfer void as a matter of law, the trustee's first argument for summary judgment must fail.

Nor has the trustee cited any language in Ohio State Paging's articles of incorporation to suggest that a transfer in violation of the articles of incorporation is void as a matter of law. For example, the articles of incorporation essentially provide other shareholders with a right of first refusal; however, there is nothing to indicate a purchase price that other shareholders would pay if the transfer of shares being requested is to be done as a gift. Nor is it clear how such a right of first refusal would be exercised now that the corporation has been dissolved, or how the corporation or other shareholders would be harmed by allowing the purported transfer of shares to the custodian of Sarah Koos, given the dissolution of the corporation and the liquidation of the settlement proceeds.

Based upon the case law discussed above, the Court believes that the Kooses' noncompliance with the transfer restrictions in Ohio State Paging's articles of incorporation makes the purported transfer of shares to their daughter

merely voidable, not void as a matter of law. Therefore, the trustee's first argument in favor of summary judgment is denied. Nevertheless, should the trustee provide the Court with a compelling argument that the Court's analysis is incorrect, the Court will revisit this issue at trial.

E. Kenneth Koos also argues that the restriction on stock transfer is not enforceable against his daughter, as transferee, under Ohio Rev. Code § 1701.25(B), because the transfer restriction was not printed on certificated shares. The reliance here on § 1701.25(B) is misplaced as this provision addresses only notice for certificated shares. Here it is undisputed that no certificates of stock were ever issued. Moreover, a complete reading of § 1701.25(B) provides that a restriction on transfer of *uncertificated* stock is effective when there has been compliance with Ohio Revised Code § 1308.11. And here, it appears there has been compliance with § 1308.11 in that the debtors, as the registered owners of the Ohio State Paging stock, were notified of the transfer restrictions when they received the articles of incorporation at the time the stock was issued in 1993. Ohio Revised Code § 1308.11(2); Burke Declaration at ¶5.

II. Is the Kooses' Purported Transfer of Shares to Their Daughter Invalid Because the Kooses Lacked the Requisite Donative Intent?

The trustee also argues that the purported stock transfer is invalid because the debtors lacked donative intent, a necessary element to make a gift irrevocable. E. Kenneth Koos, as guardian for his daughter, responds that the gift is valid because the debtors had the required donative intent.

Ohio's version of the Uniform Gifts to Minors Act provides a clearly defined method of making a gift of securities to a minor.[2] A transfer made in compliance with the Act "is irrevocable and conveys to the minor indefeasibly vested legal title to the security." Ohio Rev. Code § 1339.33(A). *See Wolk v. Wolk,* 2001 Ohio App. LEXIS 4540, p.6 (Ohio App. 7th Dist. 2001).

Ohio Rev. Code § 1339.32 provides the form of transfer necessary to use in order to comply with the Act.[3] The form for a transfer of an unregistered security provided in Ohio Rev. Code § 1339.32(A)(2) is substantially similar to the document the debtors executed in August 1995 purporting to transfer their five shares of Ohio State Paging to Brenda H. Koos as custodian for Sarah Koos. *See*

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[2] The Act defines a "minor" as a person who has not attained the age of twenty-one years. Ohio Rev. Code § 1339.31(k).

[3] Ohio Rev. Code § 1339.34(D)(1) provides that the custodian shall deliver the custodial property to the minor on her attaining the age of twenty-one years.

Amended Exhibit A (Docket #24). Thus, it appears the debtors did comply with the procedural requirements of the Act.

In addition to the procedural requirements of the Act, the debtors must also have had the requisite donative intent at the time of the 1995 transfer to make the transfer valid and irrevocable. "Without donative intent, no gift has been made." *Ohio v. Keith,* 81 Ohio App.3d 192, 195 (Ohio App. 9th Dist., 1991) (citations omitted) (holding that opening a bank account in accordance with the Act is prima facie evidence of donative intent). In addition, "[e]xtrinsic evidence may be introduced to demonstrate contrary intent." 81 Ohio App.3d at 195 (despite opening "custodian" bank account for gift of money, custodian's later withdrawal of funds for personal use did not evidence an intention to make an irrevocable gift); *Jaros v. Rody,* 1983 Ohio App. LEXIS 12845, p. 6 (Ohio App. 8th Dist., 1983) (testimony that funds in certificate of deposit were intended for grandmother's funeral expenses and certificate displayed the name of granddaughter only to avoid tax liability was evidence that no donative intent existed for irrevocable gift of funds to granddaughter).

The record currently before the Court contains conflicting evidence on the issue of donative intent. Evidence in support of the debtors' donative intent includes:

- the August 1995 document signed by the debtors and witnessed by Diana Stradcutter; Amended Exhibits A and B (Docket #24);

- the affidavits of the E. Kenneth Koos and Brenda H. Koos; trustee Exhibit 1 (Docket #19); and

- the affidavit of Sarah Koos, Amended Exhibit C (Docket #24).

On the other hand, the trustee has submitted substantial evidence suggesting that, even after the purported transfer, the debtors continued to treat the shares as their own, and not their daughter's:

- the debtors never notified Ohio State Paging of the purported transfer and continued to receive records from the corporation in their name, and not as custodian for their minor daughter, Burke Declaration at ¶8 (Docket #19);

- E. Kenneth Koos wrote to the treasurer of Ohio State Paging in May 2000 requesting that financial records be sent to him as a shareholder, trustee Exhibit 5 (Docket #19); and

- the debtors' continued to claim tax losses from Ohio State Paging on their personal income tax returns, filed under penalty of perjury, from 1995-2002, trustee Exhibits 4-2 through 4-9 (Docket #19).

Given this conflicting evidence, and given the requirement under Rule 56 that a court view the evidence in a light most favorable to the nonmoving party, *see Tennessee Department of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d at 1472, the Court finds that a genuine issue of material fact exists regarding whether the Kooses had the requisite donative intent to effect an irrevocable gift in 1995. Therefore, neither party is entitled to summary judgment on the issue of the

debtors' donative intent.

CONCLUSION

For the foregoing reasons, the motions for summary judgment filed by the trustee (Docket #19) and the debtor, E. Kenneth Koos, as guardian for his daughter, Sarah Koos, a minor (Docket #23), are both denied, and an amended scheduling order will be issued setting this matter for trial.

Arthur I. Harris 07/23/2004
Arthur I. Harris
U.S. Bankruptcy Judge