

NO. A08-788

State of Minnesota  
 In Court of Appeals

Carroll A. Britton Family Trust dated March 9, 2000; Bonnie L. Kail Irrevocable Trust dated June 25, 1992; Harold B. Kail individually, and as trustee for the Carroll A. Britton Family Trust dated March 9, 2000, and as trustee for the Bonnie L. Kail Irrevocable Trust dated June 25, 1992; and Does No. 1 – 10,

*Appellants,*

v.

Glenwood Investment Properties, L.L.C., and Alicia Garatoni,

*Respondents,*

Pierce Serrin and Carol Ann Serrin, husband and wife,

*Defendants.*

**RESPONDENTS GLENWOOD INVESTMENT PROPERTIES, L.L.C.,  
 AND ALICIA GARATONI'S BRIEF, APPENDIX AND ADDENDUM**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE ISSUES

- I. Does the Court of Appeals lack jurisdiction to consider Appellants' first issue relating to whether Respondents had a sufficient interest in the property to support a partition action when Appellants failed to appeal the issue within 30 days of the December 3, 2007 Order on Partition and Judgment pursuant to the Minnesota partition statute?**

**List of Apposite Cases and Statutes:**

Minn. Stat. §558.04  
Minn. Stat. §558.215  
Minn. R. Civ. App. P. 126.02  
*Ullman v. Lutz*, 55 N.W.2d 57 (Minn. 1952)

- II. Assuming *arguendo* that this Court had jurisdiction to consider Appellants' first issue, did the district court properly determine that Respondents had a sufficient interest in the property to support a partition action?**

**District court ruling:**

In its December 3, 2007 Order on Partition and Judgment, the district court determined that Respondents could obtain partition and appointed three referees to make the partition pursuant to Section 558.04 of the Minnesota partition statute.

**List of Apposite Cases and Statutes:**

Minn. Stat. §558.01  
Minn. Stat. §558.04  
*Searles v. Searles*, 420 N.W.2d 581 (Minn. 1988)  
*County of Blue Earth v. Turtle*, 593 N.W.2d 258 (Minn. Ct. App. 1999)

- III. Did the district court abuse its discretion when it employed equitable principles in accordance with Minnesota law and ordered a division of property that took into account all of the parties' respective rights and interests in this case?**

**District court ruling:**

In its April 17, 2008 Order for Partition and Judgment, the district court determined that the partition recommended by the referees equitably divided the parties' property interests and entered judgment to make the partition in that manner.

**List of Apposite Cases and Statutes:**

*Swogger v. Taylor*, 68 N.W.2d 376 (Minn. 1955)

*Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977)

*Anderson v. Anderson*, 560 N.W.2d 729 (Minn. Ct. App. 1997)

**STATEMENT OF THE CASE**

In March 2006, Alicia Garatoni and her wholly-owned limited liability company, Glenwood Investment Properties, L.L.C.<sup>1</sup>, purchased an undivided one-half interest in six parcels of commercial real estate located in Glenwood, Minnesota. Alicia Garatoni purchased her undivided one-half interest in the property from two trusts -- the Carroll A. Britton Family Trust dated March 9, 2000 ("the Britton Trust") and the Bonnie L. Kail Irrevocable Trust dated June 25, 1992 ("the Kail Trust"). Harold B. Kail is the trustee of both of the trusts.<sup>2</sup>

From the inception of the business relationship, Kail failed to meet his share of financial obligations for the properties and caused other difficulties with the operation of the co-owned properties. The business relationship between Garatoni and Kail continued to deteriorate. On June 21, 2007, Garatoni commenced an action in Pope County District Court seeking a partition of her property interest in the co-owned properties from the

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<sup>1</sup> Throughout this brief, respondents Glenwood Investment Properties, L.L.C. and Alicia Garatoni will be collectively referred to as "Garatoni" unless otherwise noted.

<sup>2</sup> Throughout this brief, appellants Harold B. Kail, the Carroll A. Britton Family Trust dated March 9, 2000 and the Bonnie L. Kail Irrevocable Trust dated June 25, 1992 will be collectively referred to as "Kail" unless otherwise noted.

property interest of Kail.<sup>3</sup> The Honorable Jon Stafsholt presided over several motion hearings in the district court.

Garatoni brought a motion for partition pursuant to Minn. Stat. §558.04 asking the district court to appoint three referees to partition the property as provided in the partition statute. The district court granted the motion finding that partition was appropriate in this case. On December 3, 2007, the district court entered its Order on Partition and Judgment and appointed three referees in accordance with Minn. Stat. §558.04 to make the partition. (A-48-56.)<sup>4</sup> Kail has never appealed from that Order and Judgment as provided in Minn. Stat. §558.215.

The court-appointed referees diligently performed their work and, in a detailed report, made recommendations to the district court for an equitable division of the co-owned property. (A-22-26.) The district court confirmed the referees' report pursuant to Minn. Stat. §558.07 and issued an Order for Partition and Judgment on April 17, 2008. (A-27-38.) In its Order for Partition and Judgment, the district court employed its equitable powers in accordance with Minnesota law and determined that the partition equitably divided the parties' property interests. (A-38.)

On May 1, 2008, Kail filed a Notice of Appeal from the Order for Partition and Judgment dated April 17, 2008. (A-39.) Kail's appeal was made pursuant to Minn. Stat.

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<sup>3</sup> Garatoni also brought claims for dissolution of partnership and defamation against Kail. The defamation claim has been dismissed to facilitate resolution of this case and the dissolution of partnership claim remains at the district court awaiting resolution of final accounting issues.

<sup>4</sup> Citations to Appellants' Appendix will be referred to as (A-\_\_) and citations to Respondents' Appendix will be referred to as (R-\_\_).

§558.215 allowing for appeals from any order or interlocutory judgment entered pursuant to Minn. Stat. §558.07.

### STATEMENT OF THE FACTS

#### **I. THE PARTIES.**

Alicia Garatoni is an individual residing in Hennepin County, Minnesota who acquired an undivided one-half interest in certain commercial properties located in Glenwood, Minnesota. (A-30.) Glenwood Investment Properties, L.L.C. is a Minnesota limited liability company that is owned solely by Alicia Garatoni. (A-31.)

Harold B. Kail is an individual residing in Hennepin County, Minnesota and is the trustee for two trusts, the Britton Trust and the Kail Trust. (A-50.) The beneficiaries of the trusts are Carroll Britton (Kail's wife) and Bonnie Kail (Kail's mother). The Britton Trust and the Kail Trust sold undivided one-half interests in the properties to Garatoni. (A-30.)

In addition, Pierce and Carol Ann Serrin are husband and wife and reside in Pope County, Minnesota.<sup>5</sup> The Serrins were named in this action solely because they are vendors on a contract for deed with the Britton Trust in connection with one of the parcels of property that was the subject of the partition action in the district court. (R-3.) It is Garatoni's understanding that the Serrins do not intend to participate in this appeal.

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<sup>5</sup> Throughout this brief, Pierce and Carol Ann Serrin will be collectively referred to as "the Serrins" unless otherwise noted.

**II. GARATONI ACQUIRED AN UNDIVIDED ONE-HALF INTEREST IN THE PROPERTIES.**

On March 27, 2006, Garatoni acquired an undivided one-half interest in six parcels of commercial real estate located in Glenwood, Minnesota. (A-30.) Prior to Garatoni's purchase of the properties, the properties were owned by the Britton Trust and the Kail Trust and after Garatoni's purchase, the trusts retained an undivided one-half interest in the properties. Kail is the trustee for both the Britton Trust and the Kail Trust. (A-30, 50.)

The property purchased from the Britton Trust has been referred to as Parcel A and consists of five properties with the street addresses of 223 East Minnesota and 12, 14, 16 and 18 West Minnesota. (A-30.) These properties have been referred to by the district court respectively as the Auto Garage, the Bare Lot and the Store Fronts. (A-32.) Garatoni's undivided one-half interest in the properties was acquired on a contract for deed. (A-7-11.) The Britton Trust acquired its interest in one of the properties, the Auto Garage at 223 East Minnesota, from the Serrins through a contract for deed on March 3, 2004. (A-1-6, 30.) Garatoni acquired her undivided one-half interest in the property subject to the Serrin contract for deed. (A-7.) Pursuant to the contract for deed between Garatoni and the Britton Trust, the Britton Trust was responsible for continuing to make the payments on the Serrin contract for deed but frequently failed to make those payments. (A-7, 50-51.)

In addition, the property purchased from the Kail Trust has been referred to as Parcel B and consists of one property with the street address of 12 East Minnesota. (A-

30.) The property has been referred to by the district court as the Thompson Building. (A-32.) The property includes six apartments located over a large, office/retail space. Garatoni's undivided one-half interest in the property was acquired on a contract for deed. (A-15-19.)

Subsequently on May 17, 2006, without any objection by Kail, Garatoni conveyed all of her right, title, and interest in all of the properties to a limited liability company, Glenwood Investment Properties. (A-12-14, 20-21.)

In their Answers to the Complaint, Kail, the Britton Trust and the Kail Trust admitted that Garatoni owned an undivided one-half interest in the properties. (A-29.) Specifically, the Britton Trust and the Kail Trust alleged that they believed that Garatoni's assertion of ownership of an undivided one-half interest in the properties was correct. (A-29; R-1, 14.) In addition, paragraph 2 of the Complaint alleged that Garatoni acquired an undivided one-half interest in the property on March 27, 2006 pursuant to two contracts for deed. (R-2.) The Britton Trust and the Kail Trust stated that they believed that the paragraph was correct (R-14) and Kail admitted the allegation (R-10). Likewise, paragraph 6 of Garatoni's Complaint states that Kail has acted as a trustee and representative of the trusts "with respect to the Glenwood Property at all times prior to and since Garatoni's acquisition of an undivided one-half (1/2) ownership interest in those parcels." (R-3.) The Britton Trust, the Kail Trust and Kail all admitted the allegations in that paragraph. (R-10, 14.) That is, at the district court, Garatoni's ownership interest in the properties was not contested by Kail and the district court made findings to that effect. (A-29, 50.)

After the purchase of her undivided one-half interest, Garatoni began making payments on the contracts for deed. (A-31.) At times when Kail failed to make payments for the trusts' share of expenses on the properties, Kail told Garatoni to offset those expenses against the contract for deed payments. (*Id.*) Garatoni provided an explanation for all such offsets to the district court. (*See* 10/24/07 Mem. in Support of Plaintiffs' Motion for Partition at 5; 10/24/07 Garatoni Affidavit, Exs. E, F.) Through January 2008, Garatoni paid Kail a total of \$230,519 on the contracts for deed, with \$151,801 of that amount in principal payments and \$78,718 in interest during a 21-month period. (*See* 4/4/08 Boraas Affidavit, Ex. A; A-33.)

**III. KAIL TOOK NUMEROUS ACTIONS THAT WERE DETRIMENTAL TO THE PROPERTIES AND GARATONI'S OWNERSHIP INTEREST.**

Throughout the time that Garatoni was a co-owner of the properties, Kail took numerous actions that were detrimental to the properties and Garatoni's ownership interests -- eventually necessitating the appointment of a receiver by the district court to financially manage the properties. (A-41-45; *see also* 8/13/07 Mem. in Support of Plaintiffs' Motion for Appointment of a Receiver, or, alternatively, for Payment of Funds into the Court; 8/13/07 Garatoni Affidavit.) As the district court found, "the relationship between the parties deteriorated." (A-31.)

For instance, prior to the appointment of the receiver, Kail unilaterally confiscated the rent for the properties in July and August 2007 but failed to pay the appropriate expenses of the properties during that time. (A-42.) In addition, Kail repeatedly failed to make payments owed to the Serrins on their contract for deed. (A-50-51; *see also*

8/10/07 Serrin Aff. ¶¶ 3-4; Ex. A.) Because Garatoni ownership of an undivided one-half interest in that property was subject to the Serrin contract for deed, Garatoni's property interest was jeopardized by Kail's non-payment. (A-7.)

In addition, the district court found that Garatoni had "presented evidence that Defendants Kail and the Trusts have made inconsistent payments for expenses, insurance and contract for deed payments on these properties, often resulting in Plaintiffs' paying these expenses to prevent additional charges and/or other penalties." (A-42.) The district court also noted that Garatoni had submitted information regarding Kail's finances which indicated an "extensive history of returned checks and overdrafts over the last year." (A-42.) Garatoni presented evidence at the district court demonstrating various instances in which Kail had failed to make payments forcing Garatoni to cover those expenses.

(10/24/07 Garatoni Affidavit ¶¶14, 15.) On one occasion, Kail's failure to pay an insurance premium for a property that he owned separately caused the insurance company to send notice of cancellation of the policy. (*Id.* ¶16.) The policy covered both Kail's separately-owned property and one of the co-owned properties, and accordingly, the notice of cancellation adversely affected Garatoni's property interest. (*Id.*) Even after the receiver was appointed by the district court, Kail continued to fail to meet the financial obligations of the properties. In October 2007, Kail failed to pay his half of the property taxes owing on the properties, resulting in a penalty assessed against the co-owned properties. (*Id.* ¶20.)

Garatoni also presented evidence showing that Kail's business reputation was damaging to her ownership interest in the properties. Kail's actions and business

reputation caused two tenants to vacate the co-owned properties and made it difficult to rent the properties. (See 10/24/07 Garatoni Affidavit ¶¶11, 17.)

After taking numerous actions that were detrimental to Garatoni's ownership interest in the properties, Kail attempted to deprive Garatoni of her ownership interest by serving two Notices of Cancellation of the contracts for deed. (See A-31-32; 10/24/07 Garatoni Affidavit Exs. G, H.) The Notices stated that Garatoni had failed to make the July and August 2007 payments on the contracts for deed. Garatoni disputed the validity of the Notices of Cancellation and submitted numerous objections to the Notices. (*Id.* Ex. I.) Kail, on the other hand, did not make any showing of default by Garatoni.<sup>6</sup> In the August 30, 2007 Order Appointing Receiver, the Court stayed the Notices of Cancellation on the contracts for deed during the litigation. (A-45.) Kail, however, persisted in attempting to eliminate Garatoni's ownership interest in the properties by moving to vacate the stay on the Notices of Cancellation. In the December 3, 2007 Order for Partition, the district court denied Kail's motion to vacate the Notices of Cancellation. (A-56.)

**IV. THE DISTRICT COURT GRANTED GARATONI'S MOTION FOR PARTITION AND ISSUED ITS ORDER ON PARTITION AND JUDGMENT.**

Given the difficulties caused by Kail's actions, in October 2007, Garatoni brought a motion for partition of the properties that she co-owned with Kail to allow for

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<sup>6</sup> To the contrary, Kail contended in his August 20, 2007 affidavit that he never received a check from Garatoni for the July 2007 payment. After the district court appointed a receiver and stayed the Notices of Cancellation on the contracts for deed, Kail endorsed Garatoni's July 2007 check and negotiated it on September 11, 2007. (See 10/24/07 Garatoni Affidavit Ex. F at 175.)

separation of the parties' ownership interests pursuant to Minn. Stat. §558.04. Kail did not file a written response to the motion for partition with the district court.

On December 3, 2007, the district court filed its Order on Partition and Judgment granting Garatoni's motion. (A-48-56.) The district court found that "Given the state of the parties' business relationship and the detriment to the administration and value of the properties as a result, a partition is necessary in this matter." (A-54.) Pursuant to the Minn. Stat. §558.04, the district court appointed three well-qualified referees -- Michael Swartz, a real estate appraiser; Nan Haggerty, an attorney; and William Ogdahl, a former realtor/current Glenwood City Commissioner. (A-54-55.) The district court also provided guidance for the referees based upon the language of the partition statute. (A-55-56.)

V. **THE REFEREES PERFORMED THEIR DUTIES AND ISSUED A REPORT RECOMMENDING AN EQUITABLE DIVISION OF THE PROPERTY.**

The court-appointed referees diligently performed their duties, including inspecting the properties and obtaining appraisals for each of the properties.<sup>7</sup> (See Referee Report, dated February 1, 2008 (A-22-26) with attached appraisals filed with the district court.) After performing this work, the referees found that partition in kind was feasible and submitted a detailed report to the district court recommending a division of the property according to the respective rights and interests of the parties.

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<sup>7</sup> Kail has never argued that the referees did not perform their duties in accordance with Minnesota law. Accordingly, Garatoni will not further address the responsibilities of the referees in this brief.

In the referees' report, they made fact findings relating to the parties' co-ownership of the properties and the current appraised market values for the Auto Garage, the Bare Lot and Store Fronts and the Thompson Building. (A-23-24.) In addition, the referees stated: "After extensive discussion and review of documents, including appraisals, the referees came to consensus that partition in kind was feasible and would not prejudice the owners of the properties." (A-24.) The referees also stated that partition could be "accomplished in a fair and equitable manner." (A-26.)

In their Report, the referees detailed how they determined Garatoni's monetary proportion of the property. (A-24-25.) Specifically, the referees divided the amount of principal that Garatoni had paid for an undivided one-half interest in the properties<sup>8</sup> by the total original amount of the two contracts for deed. (A-25.) By doing so, the referees determined that Garatoni had paid 22% of the original contract amount for an undivided one-half interest, or 11% of the original contract amount for a full interest in the properties. (A-25.) The referees then multiplied Garatoni's 11% interest by the total current market value of the properties to determine that Garatoni's share of the \$420,000 total current market value was \$46,200. (A-25.) In other words, the referees found that Garatoni had paid 11% of the original contract amount and, therefore, awarded her 11% of the equity of the properties at current market values.

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<sup>8</sup> Prior to the issuance of the report, the receiver requested information from the parties regarding the outstanding balances of the contracts for deed. At a meeting on January 14, 2008, the parties agreed that the outstanding balance on the Serrin contract for deed was \$82,597.34 and the outstanding balance on the two contracts for deed between Garatoni and Kail was \$541,448.48. (A-32-33.)

After determining the monetary proportion of the property to which Garatoni was entitled, the referees made their recommendations for a division of the property that they "found to be most equitable." (A-24.) The referees awarded Garatoni the auto garage (including the assumption of the Serrin contract for deed) and the majority of the vacant lot. (A-26.) The referees awarded Kail the remaining portion of the vacant lot, along with the other four parcels of property and a cash payment by Garatoni to equalize the partition. (A-26.) Specifically, the referees made the following recommendations:

- 1) Plaintiffs be awarded possession and ownership of the Auto Garage located at 223 East Minnesota Ave Glenwood, Minnesota, subject to Plaintiffs' assumption of the existing Serrin contract for deed.
- 2) Plaintiffs be awarded possession and ownership of the West 50 feet of Bare Lot located at 18 West Minnesota Ave Glenwood, Minnesota, described as Lot 3 except the East 16 feet of Block 21 Original Plat of the City of Glenwood.
- 3) Plaintiffs shall pay Defendants cash offset of \$3,701.50.
- 4) Defendants be awarded possession and ownership of the Store Fronts located at 12, 14 and 16 West Minnesota Ave Glenwood, Minnesota and the remaining 5 feet of Bare Lot, described as East 16 feet of Lot 3 and Lot 2, Block 21 Original Plat of the City of Glenwood.
- 5) Defendants be awarded possession and ownership of The Thompson Building located at 12 E. Minnesota Ave Glenwood, Minnesota described as the East 44' of Lot 4, Block 24 Original Plat of the City of Glenwood.
- 6) CD #1 and CD #2 between the parties are cancelled.

In submitting their Report, the referees stated that they "attempted at all times to respect the original contract agreements that the parties made with one another, as well as look for a just future arrangement that reflected functionality and value to the parties." (A-26.) In so doing, the referees recommended an "equitable split" based on "current

appraised market values and actual dollars paid into the original contract agreements.”

*(Id.)*

**VI. THE PARTIES SUBMITTED THEIR OBJECTIONS AND ARGUMENTS RELATING TO THE REFEREES' REPORT TO THE DISTRICT COURT.**

The district court gave the parties an opportunity to submit written objections and arguments relating to the referees' report. Kail submitted objections with a memorandum on March 28, 2008. Kail asserted three objections to the referee report: (1) the report recommended the cancellation of the two contracts for deed between Garatoni and the trusts; (2) the report assigned the Serrin contract for deed to Garatoni; and (3) the report transferred all property awarded to Garatoni only from the Britton Trust. Significantly, Kail did not object to whether Garatoni had the requisite title sufficient to support a partition action.

On April 4, 2008, Garatoni submitted a Memorandum in Support of Confirming the Referees' Report. In the memorandum, Garatoni addressed Kail's objections to the referees' report and set forth the applicable law.

**VII. THE DISTRICT COURT ADOPTED THE REFEREES' FINDINGS, CONFIRMED THE REFEREES' REPORT AND ENTERED JUDGMENT ON THE PARTITION.**

On April 17, 2008, the district court filed its Order for Partition and Judgment, along with a ten-page memorandum setting forth the pertinent facts and law. (A-27-38.)

In its Order and Judgment, the district court found:

The court adopts the referees' findings of the current value of the properties and finds their determination of the percentage of property owned by Plaintiffs to be reasonable. In making their determination of Plaintiffs'

ownership, the referees used the amount of principal paid by the plaintiffs on the contract for deed.

(A-35-36.) The district court concluded: "Upon finding the partition equitably divides the parties' property interests, the court confirms the Referee Partition Report and orders the parties to draft the appropriate documents to effect the property division outlined in the Referee Partition Report." (A-38.)

On May 7, 2008, Kail filed his Notice of Appeal with this Court from the April 17, 2008 judgment confirming the Referee Partition Report pursuant to Minnesota Statute 558.07. (A-39.) Kail filed his appeal pursuant to the authority of the appeal provision of the Minnesota partition statute, Minn. Stat. §558.215. (*See* Statement of the Case of Appellant, dated May 1, 2008.) In contrast, no appeal was ever taken on the district court's December 3, 2007 Order on Partition and Judgment.

### **LEGAL ARGUMENT**

**I. THE COURT DOES NOT HAVE JURISDICTION TO CONSIDER KAIL'S FIRST ISSUE ON APPEAL RELATING TO WHETHER GARATONI HAD A SUFFICIENT INTEREST IN THE PROPERTY TO SUPPORT A PARTITION ACTION.**

Kail's first issue on appeal is whether Garatoni's interest in the properties is sufficient to support partition action. This Court does not have jurisdiction to consider that issue, however, because Kail did not timely appeal from the district court's December 3, 2007 Order and Judgment allowing partition.

In November 2007, Garatoni brought a motion for partition pursuant to Minn. Stat. §558.04. Specifically, the statute provides:

Except as provided in section 558.05, the title to the property and the rights of the parties shall be established by evidence or by the written stipulation of the parties to be affected thereby; and thereupon, in a proper case, the court shall render judgment that partition be made accordingly, and shall appoint three disinterested and judicious citizens of the county as referees to make partition and set off the shares of the several persons interested as determined by the judgment.

Minn. Stat. §558.04. In its Order on Partition, dated December 3, 2007, the district court granted Garatoni's motion for partition and appointed three referees to make the partition, in accordance with Minn. Stat. §558.04. (A-48-56.) The district court also entered judgment on December 3, 2007. (A-56.)

The Minnesota partition statute contains a specific section governing appeals from various partition orders and interlocutory judgments. *See* Minn. Stat. §558.215. The appeal section provides:

Any party to any partition proceedings may appeal from any order or interlocutory judgment made and entered pursuant to section 558.04, 558.07, 558.14, or 558.21, to the court of appeals *within 30 days* after the making and filing of the order or interlocutory judgment. Any appeal shall be taken as in other civil cases.

Minn. Stat. §558.215 (emphasis added). The district court's Order on Partition and Judgment dated December 3, 2007 was an order and interlocutory judgment made and entered pursuant to section 558.04. Accordingly, Kail had the right to appeal within 30 days after the filing of the order and judgment -- or by January 2, 2008.

Kail, however, did not appeal from the December 3, 2007 Order on Partition and Judgment by January 2, 2008. In addition, Kail's current appeal does not even purport to

appeal from the December 3, 2007 Order for Partition and Judgment.<sup>9</sup> Kail's Notice of Appeal states that it is appealing from "a judgment of the court entered on the 17th day of April, 2008 confirming the Referee Partition Report pursuant to Minnesota Statute 558.07." (A-39.) Thus, Kail never appealed from the December 3, 2007 Order and Judgment determining that partition was appropriate in this case and only appealed from the subsequent Order and Judgment determining the manner in which the property should be divided between the parties.

The appeal provision of the Minnesota partition statute plainly states that a party cannot seek appellate review of a partition order if an appeal is not brought within 30 days:

*All matters determined by any order or interlocutory judgment shall be conclusive and binding upon all parties to the proceedings and shall never be subject to review by the court unless appealed from as provided herein.*

Minn. Stat. §558.215 (emphasis added). The 30-day appeal limit was designed to expedite partition proceedings "through securing a final determination of the validity of certain preliminary steps before entering upon a completion of the entire partition process." *Gelin v. Hollister*, 24 N.W.2d 496, 500 (Minn. 1946).<sup>10</sup> When enacting

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<sup>9</sup> Even if Kail had included the December 3, 2007 Order and Judgment in his Notice of Appeal for the current appeal, it would have been untimely because it was not brought within 30 days of the filing of the December 3, 2007 Order and Judgment. Minn. Stat. §558.215.

<sup>10</sup> While *Gelin* states that there should be a liberal interpretation of the limitation on the time to bring an appeal, there is nothing in *Gelin* or subsequent cases that suggests that the Court can waive or otherwise dispense with the 30-day appeal deadline created by the legislature. To the contrary, the Court cannot extend the time for filing a notice of appeal. See Minn. R. Civ. App. P. 126.02.

Section 558.215, the legislature used clear language that prohibits review by the court unless an appeal is taken in accordance with the statute.

Kail had the right to appeal within 30 days from the December 3, 2007 Order for Partition and Judgment but did not do so. Kail never filed a notice of appeal in connection with the December 3, 2007 Order and Judgment. *See* Minn. R. Civ. App. P. 103.01 (appeal is made by filing a notice of appeal with clerk of appellate courts and serving adverse parties within the appeal period). When Kail failed to appeal the December 3, 2007 Order and Judgment, that Order and Judgment became "conclusive and binding" on the parties. Minn. Stat. §558.215; *see also Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765 (Minn. 2005) (judgment or appealable order becomes final if a timely appeal is not taken).

The notice of appeal is jurisdictional and a party's failure to comply with the requirements of filing and service of a notice of appeal deprives the Court of Appeals of jurisdiction. *See In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3 (Minn. 2003); *Hansing v. McGroarty*, 433 N.W.2d 441, 442 (Minn. Ct. App. 1988) (notice of appeal must be served and filed to vest jurisdiction in the Court of Appeals). Moreover, an appellate court cannot extend the time for filing the notice of appeal or the time prescribed by law for securing review of an order of a court, except as specifically authorized by law. Minn. R. Civ. App. P. 126.02. The Minnesota Supreme Court has specifically refused to allow a "good cause" exception for missing appeal deadlines and has stated that "it is an exceptional case that merits such a departure from the rules that we have recognized as jurisdictional . . . ." *In re Welfare of J.R., Jr.*, 655 N.W.2d at 4-5 (dismissing appeal for

lack of jurisdiction in juvenile protection case where notice of appeal was timely filed within 30-day deadline but was not served on the guardian ad litem until 14 days after deadline). There are no exceptional circumstances in this case that warrant departure from the rules.

With no timely appeal, the Court lacks jurisdiction to consider the issue of whether a partition action could be maintained because the December 3, 2007 Order for Partition and Judgment "shall never be subject to review" by this Court. Minn. Stat. §558.215; *Ullman v. Lutz*, 55 N.W.2d 57, 59 (Minn. 1952) (dismissing appeal of partition for lack of jurisdiction where notice of appeal not filed with district court). Accordingly, Kail's first appeal issue relating to whether Garatoni had a sufficient interest in the property to support a partition action should be dismissed because it is not the proper subject of this appeal and the Court does not have jurisdiction to consider the issue.

**II. ASSUMING ARGUENDO THAT THIS COURT HAD JURISDICTION TO CONSIDER KAIL'S FIRST APPEAL ISSUE, THE DISTRICT COURT PROPERLY GRANTED GARATONI'S MOTION FOR PARTITION.**

**A. Standard of Review.**

On an appeal from a partition, findings made by the referees and adopted by the district court are considered findings made by the district court. *Levorsen v. Freeman*, 2005 WL 2277307, \*2 (Minn. Ct. App. Sept. 20, 2005). The district court's findings of fact shall not be set aside unless clearly erroneous. *Id.*, *Anderson v. Anderson*, 560 N.W.2d 729, 730 (Minn. Ct. App. 1997). Where the material facts are not in dispute, the Court of Appeals need not defer to the district court's interpretation of the law. *Levorsen*, 2005 WL 2277307 at \*2. In cases involving equitable relief such as partition, the

standard of review is whether the district court abused its discretion. *First Trust Co. of St. Paul v. Holt*, 411 N.W.2d 564, 565 (Minn. Ct. App. 1987) (partition is governed by equity and courts apply equity with discretion); *Hansing v. Carlson*, 2005 WL 2429843, \*5 (Minn. Ct. App. Oct. 4, 2005); *Schluter v. Schluter*, 1993 WL 515812, \*2 (Minn. Ct. App. Dec. 14, 1993) (affirming Judge Stafsholt's partition decision); *City of Cloquet v. Cloquet Sand and Gravel, Inc.*, 251 N.W.2d 642, 644 (Minn. 1977) (discussing equitable claim of nuisance).

Kail argues for the standard of review applied to pure legal issues. (Appellants' Br. at 14 -15.) Kail does not include any discussion of the standard of review for the other issues on appeal and fails to cite any partition cases relating to the standard of review -- with good reason. While Kail's first issue likely involves a pure legal issue -- whether Garatoni had a sufficient interest in the property to support a partition action -- the actual issues on appeal are not governed by that standard of review.<sup>11</sup> The district court adopted the factual findings of the referees based upon the value of the properties and the percentage of ownership of the parties. Those findings will not be disturbed unless they are clearly erroneous. *See Anderson*, 560 N.W.2d at 730. The remaining issues on appeal relate to the district court's utilization of equitable principles to fashion a partition that meets the requirements of this particular case and will not be disturbed unless the district court abused its discretion. *See First Trust Co. of St. Paul v. Holt*, 411

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<sup>11</sup> The standard of review for Kail's first appeal issue is irrelevant because this Court does not have jurisdiction to hear an appeal of that issue. (See Legal Argument, Section I.)

N.W.2d 564, 565; *City of Cloquet*, 251 N.W.2d at 644. The district court did not abuse its discretion in confirming the equitable partition of property in this case.

**B. Garatoni Had A Sufficient Interest In the Property To Support A Partition Action.**

Even if this Court had jurisdiction to consider Kail's first issue relating to whether a partition action can be maintained, there is no basis for reversing the district court. The district court properly found that Garatoni had the right to obtain partition of the property in this case. The partition statute provides:

When two or more persons are interested, as joint tenants or as tenants in common, in real property in which one or more of them have an estate of inheritance or for life or for years, an action may be brought by one or more of such persons against the others for partition thereof according to the respective rights and interests of the parties interested therein, or for a sale of such property, or a part thereof, if it appears that a partition cannot be had without great prejudice to the owners.

Minn. Stat. §558.01. In its December 3 Order on Partition, the district court recognized that common ownership for purposes of partition "may be based on either legal or equitable title." (A-53 at ¶2.) In so finding, the district court properly relied upon *Searles v. Searles*, 420 N.W.2d 581, 583 (Minn. 1988). In *Searles*, the Minnesota Supreme Court determined that an ex-wife's ownership claim in property acquired by her ex-husband during the marriage was sufficient to support a partition action. *Id.* The *Searles* court noted that in partition actions, "the court determines the rights and interests of the parties in the property to be partitioned." *Id.* The *Searles* court also found that common ownership for purposes of the partition statute may be based on either *legal or equitable title*. *Id.* (emphasis added); see also *County of Blue Earth v. Turtle*, 593

N.W.2d 258, 260 (Minn. Ct. App. 1999) (common ownership for purposes of partition action "may be based on either legal or equitable title").<sup>12</sup>

As acknowledged by Kail, it is also established Minnesota law that "a contract for deed works an equitable conversion of the real property conveyed." *Steirnagle v. County of Waseca*, 511 N.W.2d 4, 5 (Minn. 1994) (finding contract for deed vendor who lived on property was not "owner" of property for purposes of homestead classification because vendee obtained equitable title and right to full possession). The principle of equitable conversion means that the contract for deed vendee (here, Garatoni), upon paying part of the purchase price, obtains equitable title and is entitled to full possession and full enjoyment of the property. *Id.*; see also *Petition of S.R.A., Inc.*, 18 N.W.2d 442, 449-50 (Minn. 1945), *aff'd*, *S.R.A. v. Minnesota*, 327 U.S. 558 (1946). The equitable title wholly vests in the contract for deed vendee and can only be divested for failure to comply with the contract terms. *Id.* See also *Demmaj v. Elasky*, 2006 WL 163441, \*4 (Minn. Ct. App. Jan. 24, 2006) (finding that contract for deed vendee's equitable title was no longer vested because vendee defaulted on contract for deed and did not cure default after receiving notice of cancellation). The equitable conversion also means that the contract for deed vendor (here, Kail) retains bare legal title as a security interest for the payments. *Id.*

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<sup>12</sup> The district court's findings are consistent with Kail's position taken in the district court. In Kail's Answers, he admitted that Garatoni owned an undivided one-half interest in the properties. (A-29, 50; R-1, 2, 3, 10, 14.) Until this appeal, Kail never argued that Garatoni was not a tenant in common or a joint tenant with Kail.

Thus, four conclusions necessarily follow pursuant to Minnesota law: (1) upon partial payment by Garatoni on the contracts for deed, equitable title in the property vested with Garatoni; (2) Garatoni's equitable title was never divested because she complied with the terms of the contracts for deed up to the date of partition; (3) equitable title is sufficient to support a partition action; and accordingly (4) Garatoni had a sufficient interest in the property to support a partition action.

In an attempt to avoid this unmistakable conclusion, Kail relies heavily on the *Tollefson* case -- a case not cited to the district court. *Tollefson Development, Inc. v. McCarthy*, 668 N.W.2d 701 (Minn. Ct. App. 2003). Regardless, Kail's reliance on *Tollefson* is misplaced because it involves a contingent purchase agreement and not a contract for deed. The *Tollefson* case involved a purchase agreement to sell an interest in real property. 668 N.W.2d at 702. Pursuant to the purchase agreement, there were nine prerequisites to the closing of the sale of the property. *Id.* At the time of the partition action, the nine contingencies had not been satisfied. *Id.* at 705. The *Tollefson* court stated that the issue it was deciding was "whether the equitable interest appellant obtained *from executing a purchase agreement* vested appellant with a mature, choate interest that will support a partition action." *Id.* at 705 (emphasis added). In making its determination, the Court placed significant weight on the fact that any title that the appellant had was contingent:

In light of the inherent uncertainty created by the unmet contingencies that could preclude enforcement of the purchase agreement between appellant and James McCarthy, even appellant's future entitlement to obtain legal title remains unresolved.

*Id.* at 706. Accordingly, the Court concluded that "the inchoate, unvested and contingent features of appellant's equitable interest in the property preclude a legally sufficient basis for partition." *Id.*

After a lengthy discussion of the distinguishable facts and holding of *Tollefson*, Kail attempts, to no avail, to benefit from the holding of *Tollefson* by coining a phrase and referring to the contracts for deed in the present case as "unfulfilled contracts for deed." Indeed, Kail's new term does not appear in case law discussing contracts for deed. Westlaw searches performed for the term did not find any case in Minnesota or the entire country that has referenced an "unfulfilled contract for deed." Regardless, there is nothing in *Tollefson* to suggest that the Court intended to create a broad rule of law that applies outside the context of that case and contingent purchase agreements.

Moreover, the facts of *Tollefson* make it distinguishable from the present case. The purchase agreement in *Tollefson*, with its nine unsatisfied contingencies, is not comparable to the contracts for deed in this case. There is no indication from the *Tollefson* case that the appellant made any payment whatsoever on the purchase agreement and merely indicates that the appellant obtained its interest "from executing a purchase agreement." *Id.* at 705. Here, Garatoni did far more than execute the contract for deed. Garatoni has paid Kail \$230,519 on the contracts for deed and co-owned the properties for a period of 21 months. (*See* 4/4/08 Boraas Affidavit, Ex. A.) Garatoni did not default on the contracts for deed. (A-31-32.) While Kail attempted to cancel the contracts for deed, the notices of cancellation were stayed by the district court during the litigation. (A-31-32, 45, 52, 56.) Garatoni satisfied her obligations on the contracts for

deed up to the date of partition and retained equitable title to the property at all relevant times. As such, Garatoni, unlike the appellant in *Tollefson*, had sufficient equitable title to support a partition action. For all of these reasons, Kail's heavy reliance on *Tollefson* and his attempts to draw parallels to this case should be rejected.

Likewise, Kail's reliance upon the *Chandler* case decided by Illinois Court of Appeals -- and also not cited to the district court -- is misplaced. First, *Chandler* is based upon Illinois law. *Chandler v. Chandler*, 381 N.E.2d 37 (Ill. Ct. App. 1978). Moreover, the issue in *Chandler* was whether two co-vendees on two contracts for deed were entitled to partition the property between the two co-vendees. *Id.* at 38. The partition was not between the vendee and the vendor as in this case. In any event, even if *Chandler* were on point with the present case, the dissent in *Chandler* aligns with Minnesota law and seems to be the better reasoned view.<sup>13</sup> The dissent noted that partition was appropriate for holders of equitable title and legal title. *Id.* at 40. The dissent also noted that the policy of partition--to permit the settlement of controversies between joint owners--would serve the general interest of resolving rather than continuing disputes and, for that reason, division of the interests of the co-vendees should be allowed. *Id.* at 41.

In addition, Kail's unsupported policy arguments relating to allowing partition actions when there is a contract for deed on the property should be rejected. First, Kail relies upon *In re Butler*, 552 N.W.2d 226 (Minn. 1996) -- again, not cited in the district

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<sup>13</sup> Indeed, no courts have relied upon *Chandler* for its holding since its issuance 30 years ago.

court. The *Butler* case is not a partition case. *Butler* merely discusses the general law relating to contracts for deed. *Id.* at 229-30. Kail cites *Butler* for the broad equitable principle that a vendor retains a security interest in the property because "a person having obtained the estate of another should not be allowed to keep it without paying the purchase price." *Id.* at 229. In this case, however, the equitable principle is not violated because Garatoni is not keeping the estate (or her undivided one-half) without paying the purchase price. Instead, in the partition, Garatoni received only that portion of the estate for which she made principal payments, amounting to 11 percent.

Next, Kail makes a policy argument relating to values of property that is grossly overstated. The situation in this case in which a vendee on a contract for deed seeks partition of the property prior to completing payments on the contract for deed only would arise when the contract for deed relates to a sale of only a portion of the property, leaving the vendee and the vendor of the contract for deed as co-owners. In the more typical situation in which property is sold on a contract for deed, the entire property is sold to the vendee and a partition action would not arise because there is no co-ownership. In any event, in the limited number of cases in which this situation potentially would arise, Kail's policy arguments relating to the manipulation of market values would need to be balanced against the policy of partition action to provide co-owners of property with the ability to separate their interests. The ability to separate co-ownership is important in this case where the record demonstrates that Kail was a difficult business partner. (*See* A-31, 42, 50-51; 10/24/07 Mem. in Support of Plaintiffs' Motion for Partition at 6-8.)

For all of these reasons, even if the Court had jurisdiction to consider Kail's first issue on appeal, Garatoni had a sufficient interest in the property to support a partition action in accordance with Minnesota law. Therefore, the district court properly determined that partition was appropriate in this case.

**III. THE DISTRICT COURT PROPERLY ORDERED AN EQUITABLE DIVISION OF PROPERTY THAT TAKES INTO ACCOUNT ALL OF THE PARTIES' RESPECTIVE RIGHTS AND INTERESTS.**

The district court found that "the partition equitably divides the parties' property interests" and, accordingly, confirmed the Referee Partition Report. (A-38.) Kail raises three issues on appeal in connection with the manner in which the district court divided the property. Kail argues: (1) that the two contracts for deed between Garatoni and the trusts should not have been cancelled to accomplish the partition; (2) that the Serrin contract for deed should not have been assigned to Garatoni to accomplish the partition; and (3) that the assets transferred to Garatoni should not have all been transferred from the Britton Trust. While Kail's arguments will each be addressed below, there are two significant issues that apply to all of Kail's appeal issues. First, Kail's arguments wholly ignore the established function of equity in partition actions; and, second, Kail's arguments wholly ignore the purpose for allowing partition actions.

**A. Courts Use Equitable Principles When Deciding Partition Actions.**

Kail ignores the broad equitable powers that courts are given in partition actions. Given that the origins of the partition action sound in equity, Minnesota courts recognize that equitable principles play a significant role in the application of the partition statute. *Swogger v. Taylor*, 68 N.W.2d 376, 382 (Minn. 1955); *see also Anderson v. Anderson*,

560 N.W.2d 729, 730 (Minn. Ct. App. 1997) (while a partition action is statutory, the court is guided by principles of equity in its decisions). Indeed, as stated by the Minnesota Supreme Court: "Equitable principles are applicable to supplement the partition statutes." *Carlson v. Olson*, 256 N.W.2d 249, 255 (Minn. 1977).

"Partition proceedings are governed by equitable principles, and a court may generally effect the plan most advantageous under the facts of the particular case."

*Schluter*, 1993 WL 515812 at \*2. Indeed, the Minnesota Supreme Court has stated:

Although the statutory, ss 558.01 to 558.32, partition procedure must be followed, we conclude, in accord with the prevailing view, that once the court has taken jurisdiction of the individual case, its equitable determinations therein are not restricted to the specific situations and the methods or plans of partition enumerated in the partition act, but it may *exercise its general equitable powers and resort to the most advantageous plans which the nature of the particular case admits in effecting*, without great prejudice to any of the owners, a partition of one or more tracts, whether such partition be accomplished by a division in kind, by sale, or by any practical combination of both methods.

*Swogger*, 68 N.W.2d at 383 (emphasis added). "The statute does not restrict equity's normal functions as an aid to complete justice." *Carlson*, 256 N.W.2d at 255; *see also Swogger*, 68 N.W.2d at 382 (noting that equity functions as a supplement to the rest of the law where its remedies are inadequate to do complete justice). Thus, courts exercise their equitable powers to structure partitions that are appropriate in the circumstances of each case. *Id.*

The partition statute also takes into account these equitable considerations in its provisions that direct the referees to divide the property to the parties according to their respective rights. In its December 3 Order on Partition, the district court directed the

referees to conduct the partition as set forth in Minn. Stat. §558.06. (A-55 at ¶10.) As stated in the Order and in §558.06:

When partition is made, the referees shall divide the property, and allot the several portions thereof to the respective parties, quantity and quality relatively considered, *according to their respective rights*, designating the several portions by proper landmarks, and may employ a surveyor, with necessary assistants, to aid them. They shall make a report of their proceedings, specifying the manner of executing the trust, and describing the property and the share allotted to each party, with a particular description thereof.

Minn. Stat. §558.06 (emphasis added). In a partition action, “the court must determine the rights and interests of all parties to the action in the property to be partitioned, whether such interests consist of liens, taxes paid, advances, or improvements made.”

*Kauffman v. Eckhardt*, 263 N.W. 610, 611 (Minn. 1935). In addition, the statute provides that the referees can recommend a set off by one party to the other to monetarily compensate for the loss of that property and "*make the partition just and equal.*" Minn. Stat. §558.12 (emphasis added).

In this case both the referees and the district court determined that the partition plan equitably divided the parties' property interests in this case. (A-26, 38.) When reviewing a party's objections to the referees' report, the party objecting to the report has the burden to prove that the report was erroneous, unequal and unjust. *Levorsen*, 2005 WL 2277307 at \*5 (determining that district court's findings and referees' report reflect an effort to fairly partition the property). Here, the district court appropriately noted that standard of review and adopted the referees' findings on partition in its April 17, 2008 Order for Partition and Judgment. (A-35.) By ignoring the broad power vested in the

district court to fashion a partition that was advantageous given the nature of this particular case, Kail disregards a significant portion of Minnesota law relating to partition actions. The district court did not abuse its discretion by confirming an equitable division of the property.

**B. Partition Actions Allow Co-Owners Of Property To Sever Their Relationship And Prevent Future Disputes.**

In addition, Kail's arguments on appeal wholly ignore the purpose for allowing partition actions. Partition allows co-owners of property to seek separation of their ownership interests to avoid future disputes. *See Schmit v. Klumpyan*, 663 N.W.2d 331, 339 (Wis. Ct. App. 2003) (purpose of partition to resolve disputes over property held by multiple parties); *McMillan v. Follansbee*, 93 P.3d 809, 812 (Or. Ct. App. 2004) (purpose of partition to allow co-owners to sever their relationship to prevent strife and disagreement). For instance, in *Kellogg v. Dearborn Information Serv., LLC*, 119 P.3d 20, 21 (Mont. 2005) referees imposed servitudes on partitioned property in the form of "no build" zones because, at least in part, the restrictions would "alleviate future discord" between the parties.

There is a long, documented list of problems between Garatoni and Kail in the record, including Kail's failure to meet his financial obligations with respect to the properties and the damaging impact of Kail's business reputation in the local community. (*See Statement of Facts, Section III, supra.*) Indeed, the record supports the district court's finding that "the relationship between the parties deteriorated." (A-31.) Here, the contracts for deed necessarily had to be considered when recommending a partition of the

property otherwise a complete separation of these parties' interests would not have been possible. As such, the district court did not abuse its discretion by determining all of the parties' rights in the partition, including the rights in the contracts for deed, to completely separate the parties and avoid future problems.

C. **The District Court Properly Employed Its Equitable Powers When It Confirmed The Partition And Cancelled Two Contracts For Deed Between The Parties.**

The district court did not abuse its discretion when it confirmed the partition and cancelled two contracts for deed between Garatoni and Kail to reach an equitable separation of the parties' interests. The district court adopted the referees' findings of the current value of the properties and also found the referees' determination of the percentage of property owned by Garatoni to be reasonable. (A-35.) In addition, the district court found:

While under this partition proposal Defendant Trusts would not receive the benefit of continued interest and principal payments on the contracts for deed, Plaintiffs also lose the benefits associated with owning an undivided one-half interest in the entire property. Plaintiffs were awarded a mere eleven percent of the property, a proportionate amount given the status of the contracts for deed. The court can find no great prejudice to either party in this partition.

(A-36.)

Kail cites no legal authority for his argument that contracts for deed cannot be cancelled to effectuate a partition. "This court will not consider assignments of error based on mere assertion and unsupported by argument or authority." *Levorsen*, 2005 WL 2277307 at \*4. Given his failure to cite any law stating that the district court did not have

the equitable power to cancel contracts for deed in a partition, this Court should reject Kail's unsupported arguments.

To the contrary, the law supports the district court's equitable partition that included cancellation of the contracts for deed between Garatoni and Kail. The role of equity in partition actions is undisputable. (*See* Legal Argument, Section III.A., *supra*.) Indeed, the court's broad discretion in fashioning equitable remedies has long been recognized. "It is traditional and characteristic of equity that it possesses the flexibility and expansiveness to invent new remedies or modify old ones to meet the requirements of every case and to satisfy the needs of a progressive social condition." *City of Cloquet v. Cloquet Sand and Gravel, Inc.*, 251 N.W.2d 642, 644 (Minn. 1977) (quoting *Beliveau v. Beliveau*, 14 N.W.2d 360, 366 (Minn. 1944)). Indeed, courts routinely employ equitable principles and remedies that affect or alter the contractual rights of parties in other contexts. *See Beck v. Spindler*, 99 N.W.2d 684, 685 (Minn. 1959) (equitable remedy of rescission); *Theros v. Phillips*, 256 N.W.2d 852, 857 (Minn. 1977) (discussing equitable remedy of reformation). In addition, Minnesota courts have recognized that partitions can be ordered even when there are mortgages or liens on the property. *See Kauffman*, 263 N.W. at 611-12 ("Where partition in kind is otherwise proper, whether or not the lands are subject to mortgages or other liens is no objection to a partition in kind.")

Here, the district court fashioned a division of property that was fair and met the requirements of this particular case. *See Levorsen*, 2005 WL 2277307 at \*2 (affirming partition based upon a monetary division in which the value of the entire property was

determined and the parties were allotted their monetary proportion). Garatoni had paid 11% of the principal amount on the contracts for deed and, in turn, was awarded 11% of the equity of the properties at current market values. For this 11% interest, Garatoni paid Kail a total of \$230,519, consisting of \$151,801 in principal payments and \$78,718 in interest during a 21-month period (*see* 4/4/08 Boraas Affidavit, Ex. A; A-33), will pay \$3,701.50 for the award of the Bare Lot, and will assume \$82,597.34 in debt with the Serrin contract for deed. As stated by the district court, Garatoni also loses the benefits associated with owning an undivided one-half interest in the entire property. (A-36.) On the other hand, Kail received 89% of the current value of the property, \$3,701.50 as a cash offset for the Bare Lot, relief from the debt to the Serrins in the amount of \$82,597.34, and \$230,519 paid on the contracts for deed. The end result is a fair one for all the parties.

While Kail raises several arguments with respect to the contracts for deed in this appeal, none of these arguments have merit. First, Kail's argument relating to whether Garatoni has an adequate remedy at law is a new argument raised on appeal.<sup>14</sup> The defense of an adequate remedy of law is an affirmative defense that Kail should have pled in the district court. *See Excel Homes of Minnesota, Inc. v. Ivy Ridge Home Builders, Inc.*, 2001 WL 506782, \*5 (Minn. Ct. App. May 15, 2001). Kail failed to plead an adequate remedy at law as an affirmative defense and did not raise the issue at any time at the district court. Kail cannot raise the affirmative defense for the first time on

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<sup>14</sup> Kail's argument is not fully articulated in his brief (nor supported by legal citation) but it appears that Kail intends to argue that Garatoni cannot seek partition -- an equitable remedy -- because she has some unspecified other remedy at law. (Appellants' Br. at 18.)

appeal. *See Thompson v. Kromhout*, 413 N.W.2d 884, 885 (Minn. Ct. App. 1987) (refusing to consider lack of mutuality defense on appeal when it was not raised as a defense in the district court).

In addition, Kail's argument relating to the trust's ability to elect the remedy of specific performance or statutory cancellation of the contracts for deed is misplaced. Kail cites non-partition cases for the general proposition that a party can seek specific performance of a contract for deed or seek to cancel a contract for deed upon default. Here, however, Garatoni did not default on the contracts for deed. While Kail served Notices of Cancellation on the contracts for deed, Garatoni disputed that there was a default warranting the Notice of Cancellation. The district court specifically stayed the Notices of Cancellation during the litigation and stated that the receiver would manage the payments on the contracts for deed. (A-45.) The receiver subsequently worked through the issues on the contracts for deed payments with the parties and arrived at the amounts of the outstanding balances on the contracts for deed. (A-33.) Kail never disputed the receiver's finding of the amount of the outstanding balance on the two contracts for deed with Garatoni. Simply put, because Kail never had a right to cancel the contracts for deed, his discussion of the law on that issue is inapplicable.

Kail also argues that Garatoni is seeking partition because the property values have declined. There is no evidence in the record to support the argument that Garatoni sought partition for this reason. To the contrary, the record shows that Garatoni believed that property values had increased at the time of filing her Complaint with the district court. (*See* Complaint ¶¶ 16, 20.) Moreover, there is ample evidence in the record to

establish that the partition action was brought because it was extremely difficult to do business with Kail as a co-owner and, as a result of numerous actions by Kail, Garatoni decided to sever her co-ownership with a partition action. (See 10/24/07 Mem. in Support of Plaintiffs' Motion for Partition at pp. 6-8; 10/24/07 Garatoni Affidavit.)

Likewise, Kail's remaining arguments are completely inapplicable to the circumstances of this case. Kail argues that partition requires co-tenancy and that the vendor/vendee relationship on a contract for deed is not a co-tenancy. (Appellants' Br. at 18-19.) Here, Garatoni and Kail were not just vendors/vendees on a contract for deed -- they remained co-tenants at all relevant times prior to partition because both parties owned an undivided one-half interest in the properties. Kail also relies upon *Roberts v. Wallace*, 111 N.W. 289 (Minn. 1907) for the proposition that there can be no partition when the parties contract to not partition. (Appellants' Br. at 19.) There is, however, no such contract provision in this case. While Kail could have chosen to include language in the contracts for deed barring partition of the properties until the contracts for deed were fully paid, he did not do so. Accordingly, there is no basis for Kail's arguments. The district court did not abuse its discretion when it cancelled the contracts for deed between Garatoni and Kail to effect an equitable division of the properties.

**D. The District Court Properly Employed Its Equitable Powers When It Confirmed The Partition And Assigned the Serrin Contract for Deed To Garatoni.**

Like the cancelling of the contracts for deed between Garatoni and Kail, the district court also properly employed its equitable powers when it assigned the Serrin contract for deed to Garatoni in connection with awarding the property associated with

the Serrin contract for deed to Garatoni. Minnesota law allows parties to assign their interest in a contract for deed unless the parties expressly include a provision in the contract for deed prohibiting assignment. *See Thompson v. Kromhout*, 413 N.W.2d at 884-85. Here, the contract for deed between the Serrins and the Britton Trust did not prohibit assignment, and in fact, contemplated assignment upon notice to the non-assigning party. (*See* A-4.)

The district court, using its equitable powers to fashion a partition of this property, ordered the assignment of the Serrin contract for deed to Garatoni because Garatoni was awarded the property (the Auto Garage) that was subject to the Serrin contract for deed. In making the assignment, the district court noted: "An award of the 223 East Minnesota Avenue property [the Auto Garage] would necessitate the assignment of the contract for deed between Defendant Britton Trust and Defendants Serrin to Plaintiffs." (A-36.) Moreover, the Serrins did not object to the assignment. (A-34, 36; Appellants' Br. at 19.) There is nothing in the law or the Serrin contract for deed that prevents the district court from ordering that assignment.

In connection with the assignment of the Serrin contract to Garatoni, the district court properly relied upon two cases for the point that appellate courts have recognized shifting of liens and mortgages to the portion of the property allotted to a party -- *Kauffman and Hunt v. Meeker County Abstract and Loan Co.*, 160 N.W. 496 (Minn. 1916). (A-36.) Kail attempts to narrow these cases and argue that the shifting of liens cannot occur here because Garatoni is a "third party stranger to the chain of title." Garatoni, however, is not a stranger in the chain of title -- her contract for deed with the

Britton Trust specifically references that it is subject to the Serrin contract for deed. (A-7.) Accordingly, Garatoni took her undivided one-half interest in the property subject to the Serrin contract for deed with the Britton Trust.

Moreover, there is nothing in either *Kauffman* or *Hunt* that limits a district court's ability to fashion a partition in equity by transferring an obligation from one party to another. The cases stand for the proposition that when there is a lien on an undivided interest, the lien is charged to the shares of the respective parties. *See also* Minn. Stat. §558.09. Here, the district court did precisely that -- it charged the Serrin contract for deed to Garatoni's interest in the division of the property because Garatoni was awarded the Auto Garage property that was subject to the Serrin contract for deed. This is an equitable result and one permitted by Minnesota law. *See* Minn. Stat. §558.06; *Kauffman*, 263 N.W. at 611-612; *Swogger*, 68 N.W.2d at 383. Accordingly, the district court did not abuse its discretion when it assigned the Serrin contract for deed to Garatoni to effect the most advantageous plan for partition in this case.

**E. The District Court Properly Employed Its Equitable Powers When It Confirmed The Partition And Transferred Assets From The Britton Trust To Garatoni.**

Kail's final issue on appeal relates to the fact that the property awarded to Garatoni in the partition was transferred from the Britton Trust only, and not from the Kail Trust. The district court determined that the transfer of property from the Britton Trust did not prejudice the trusts and explained its reasoning:

Examination of the property and the contracts for deed reveals the contract for deed with the Kail Trust consisted of a single property, which constituted over one-half of the total value of the properties. This asset is a

single building consisting of apartments and a storefront and is impossible to divide, leaving the only recourse for a partition in kind in the properties contained in the Britton Trust. Although the partition takes assets from the Britton Trust, the partition also relieves the trust of its obligations under the contract for deed with Defendants Serrin. *The court can find no great prejudice in this partition on this basis.*

(A-36 (emphasis added).)

The district court did not abuse its discretion in determining that there was no prejudice in transferring to the assets from the Britton Trust and not from the Kail Trust. Partition is to be accomplished by equitable means, and given the value of the sole asset held by the Kail Trust, the district court recognized that it was not possible to divide that asset between the parties. Accordingly, the district court used its equitable powers to fashion a partition that worked in this particular case. *See Swogger*, 68 N.W.2d at 383; *Carlson*, 256 N.W.2d at 255.

Moreover, this issue can be appropriately and readily handled as an accounting issue for the trusts by Kail. Kail serves as trustee of both the Britton Trust (his wife) and the Kail Trust (his mother). The Auto Garage and the Bare Lot that were awarded to Garatoni in partition were properties held by the Britton Trust. The referees valued those properties at \$135,250 (\$105,000 for the Auto Garage and \$30,250 for the Bare Lot). The Britton Trust was the party to the Serrin contract for deed and will be relieved of \$82,597.34 in debt with the assignment of the Serrin contract for deed to Garatoni, leaving \$52,652.66 to be accounted for by Kail. Since purchasing her interest in the properties, Garatoni has paid Kail a total of \$230,519 on the contracts for deed. (*See 4/4/08 Boraas Affidavit, Ex. A.*) The referees also recommended a cash payment by

Garatoni in the amount of \$3,701.50 in connection with her award of the Bare Lot. There are ample payments that can be applied by Kail, as trustee for both trusts, to the Britton Trust to account for the value of the properties that will be transferred to Garatoni. Indeed, the amounts already received by Kail from Garatoni on the contracts for deed in interest alone exceed the value of the property transferred from the Britton Trust, after taking into account the debt relief. As such, there is no basis for Kail's argument that the interest of the Kail Trust was advanced over the interest of the Britton Trust. The district court did not abuse its discretion when it found that assigning the Serrin contract for deed to Garatoni did not prejudice the parties and confirmed the referees' report on this issue.

### CONCLUSION

This case was carefully considered by an experienced district court judge who, as required by Minnesota law, examined the facts and the law and made detailed findings in his orders. Specifically, the district court ordered that partition was appropriate in this case when it granted Garatoni's motion for partition on December 3, 2007 and entered judgment. Kail failed to appeal from the December 3, 2007 Order for Partition and Judgment, and accordingly, cannot obtain appellate review of his first designated appeal issue relating to whether Garatoni had a sufficient interest in the properties to support a partition action.

In addition, the district court also considered the facts, law and all of the parties' equitable interests when it confirmed the referees' division of the property that effected the most advantageous plan for this particular case, as required by Minnesota law. Based

upon the foregoing reasons, Garatoni respectfully requests that the Court affirm the district court's Order for Partition and Judgment, dated April 17, 2008, in all respects.

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Dated: July 9, 2008

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3 for a brief produced with a proportional font. The length of this brief is 10,921 words. This brief was prepared using Microsoft Word 2003.

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