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Administration of Partnership Estates in Washington: Probate Code v Uniform Partnership Act

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Commencing with this issue, there will be several changes in the Washington Law Review.

Hereafter, the State Bar Association material will appear only in the November issue, which will be devoted primarily to the Association.

The months of publication are changed to February, May, August and November, in order to facilitate the work of the Student Editorial Board.

At considerable expense, the general format of the Law Review is being changed so that it will be more attractive in appearance and more readable. We hope that this change will meet with your approval.—EDITOR.

COMMENT

ADMINISTRATION OF PARTNERSHIP ESTATES IN WASHINGTON: PROBATE CODE V UNIFORM PARTNERSHIP ACT

JOHN MCSHERRY, JR.

Were a contest to arise today in Washington between a surviving partner and the administrator or executor of his deceased partner's estate, as to which has the right to administer the partnership estate (assuming the

surviving partner has not complied with the requirements of the Probate Code[1]), each contestant could invoke statutes which apparently support his claim and exclude the other's. The administrator would turn to the Probate Code; the surviving partner, to the Uniform Partnership Act. Our court would then be faced with the task of deciding which should control.

I.

Following are the provisions of the Washington Probate Code which deal with administration of partnership estates and uphold the administrator's contention.[2]

REM. REV. STAT. § 1458: The executor or administrator of the estate of a deceased person who was a member of a co-partnership, shall include in the inventory, in a separate schedule, the whole of the property of such co-partnership; and the appraisers shall estimate the value thereof and also the value of such deceased person's individual interest in the partnership property.

The whole of the partnership property shall be administered by such executor or administrator, unless the surviving partner shall within five days from the filing of the inventory, or such further time as the court may allow, apply for the administration thereof. If he so apply, he shall be entitled to administer the partnership property if the court find him to be qualified. If letters of administration be issued to such partner, he shall give such bond as the court may require. He shall be denominated the administrator of the partnership and shall give notice to the partnership creditors as general administrators are required to give and shall settle the partnership estate in the same manner as is or shall be provided for the settlement of estates of deceased persons except he shall account to the general executor or administrator for the interest of the deceased in the partnership property.

REM. REV. STAT. § 1460: The court shall have authority, in instances where it is deemed advisable, to authorize the administrator of the partnership property to continue to operate any going business pending the settlement of the partnership estate or the purchase by the surviving partner of the interest of the deceased partner.

REM. REV. STAT. § 1461: In case the surviving partner is not appointed administrator of the partnership property, the administration thereof shall devolve upon the executor or administrator and the court shall have power to require the surviving partner to deliver the partnership property and evidences thereof to the administrator or executor.

II.

The following provisions of the Uniform Partnership Act, as adopted by Washington,[3] expressly or impliedly confer upon the surviving partner an almost unqualified authority to wind up the partnership affairs:

[1] *See* REM. REV. STAT. § 1458 *infra.*

[2] Wash. Laws 1917, c. 156, §§ 88, 90, 91. Comment (1925) 1 WASH. L. REV. 57.

[3] Wash. Laws 1945, c. 137.

Section 31. Dissolution is caused: (4) By the death of any partner.[4]

Section 37. Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs: *Provided*, however, That any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.[5]

Section 33. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership [6]

Section 35. (1) After dissolution a partner can bind the partnership

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution; [7]

Section 25. (2) (d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.[8]

Section 42. When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership: Provided, That the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section as provided by section 41 (8) of this act.[9]

Section 38. (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. .[10]

Section 43. The right to an account of his interest shall accure to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.[11]

[4] REM. REV. STAT. (1945 Supp.) § 9975-70.
[5] *Id.* § 9975-76.
[6] *Id.* § 9975-72.
[7] *Id.* § 9975-74.
[8] *Id.* § 9975-64.
[9] *Id.* § 9975-81.
[10] *Id.* § 9975-77.
[11] *Id.* § 9975-82.

III.

The earlier probate provisions seem obviously inconsistent with the later provisions of the Partnership Act: Under the Probate Code the administrator of the deceased partner's estate shall include in his inventory the whole partnership property, and an appraiser shall determine the deceased partner's interest therein;[12] while under the Partnership Act the deceased partner's estate has an interest only in the surplus remaining after the partnership debts are paid and the partnership affairs wound up[13]—indeed, by the act, title to the partnership property vests in the surviving partner, who can use it only to wind up the partnership affairs,[14] or carry on its business with the consent of the administrator of the deceased partner's estate.[15] The latter, under the Probate Code, shall administer the whole partnership property unless the surviving partner apply within 5 days after the administrator files his inventory;[16] and the surviving partner's application will be allowed only if he meets the qualifications of an administrator, such as residence and giving of bond.[17] Further, the acts of a surviving partner under the Probate Code are subject to the supervision of the probate court and to the procedures required by the Probate Code in the administration of estates. The Partnership Act, however, gives the surviving partner an almost unqualified right to wind up the partnership affairs. It contains, for example, no suggestion that non-residence will disqualify the surviving partner. It requires no bond or other form of security It does not provide for court supervision except to permit the legal representative "upon cause shown" to seek and obtain winding up by the court.[18] This particular provision of the Partnership Act in and of itself clearly shows that court supervision of the winding up process is reserved for exceptional cases and doubtless refers to supervision by a general court of equity rather than the probate court acting under the Probate Code.

Taken collectively, the various inconsistencies illustrate the conflict between the earlier and later statutory provisions. They seem irreconcilable. As such,

[12] REM. REV. STAT. § 1458.

[13] REM. REV. STAT. (1945 Supp.) §§ 9975-77, -81. Note (1930) 9 NEB. L. BULL. 211.

[14] REM. REV. STAT. (1945 Supp.) § 9975-64.

[15] *Id.* § 9975-80. *Accord:* Froess v. Froess, 284 Pa. 369, 131 Atl. 276 (1925), noted (1926) 74 U. OF PA. L. REV. 512. That such consent will be assumed by the court where the business is continued by the surviving partner, New York Life Ins. Co. v. Hageman, 80 F (2d) 446 (C. C. A. 7th, 1935)

[16] REM. REV. STAT. § 1458.

[17] *Id.* §§ 1457, 1458.

[18] *Id.* (1945 Supp.) § 9975-76.

it would appear that the earlier probate statutes have been impliedly repealed by the Partnership Act. Let us consider the question of implied repeal.

IV

The Uniform Partnership Act states that it "shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it."[19] Adoption of the spirit as well as the letter of the Act would seem to require deference to this avowed purpose to secure uniformity of law. Only by modifying prior laws to conform to the Act can its purpose be effected.

The Act provides that "all acts or parts of acts inconsistent with this act are hereby repealed."[20] This does not, however, constitute a direct repeal of conflicting acts;[21] such repeal must be worked, if at all, by implication.

Repeals of statutes by implication are not favored in the law, and a later act does not so repeal an earlier one unless (1) the later act embraces the entire subject matter of the earlier legislation, is complete in itself, and evidences an intent to supersede the prior enactment, or (2) the two enactments are so clearly inconsistent and repugnant that they cannot, by fair and reasonable construction, be reconciled and both given effect.[22]

It is the policy of our court that where different statutes embody provisions relating to the same subject-matter, they should be harmonized so as to maintain the integrity of both, whenever possible.[23] There will be no repeal by implication unless from the later act can be gathered a legislative intent to repeal the earlier act.[24] The Partnership Act is comprehensive in scope; but this, by itself, does not manifest a legislative intent that the Act be exclusive or supersede prior legislation.[25] In seeking to find this legislative intent, one might argue that the legislature overlooked the prior legislation, and that subsequent passage of an apparently inconsistent enactment in itself betokens a legislative intent to supersede the earlier statute which had been

[19] *Id.* § 9975-43.

[20] Wash. Laws. 1945, c. 137, § 44; P. P. C. (1945 Supp.) § 768-11; this statute is referred to in an editor's note to REM. REV. STAT. (1945 Supp.) § 9975-40.

[21] State v. Cross, 22 Wn.(2d) 402, 156 P.(2d) 416 (1945)

[22] Abel v. Diking and Drainage Imp. Dist. No. 4 of Grays Harbor County, 19 Wn.(2d) 356, 142 P.(2d) 1017 (1943); O'Neil v. Crampton, 18 Wn.(2d) 579, 140 P.(2d) 308 (1943).

[23] State v. Cross, 22 Wn.(2d) 402, 156 P.(2d) 416 (1945); *In re* Sanford, 10 Wn.(2d) 686, 118 P.(2d) 179 (1941); certiorari denied, Sanford v. Board of Prison Terms and Paroles of State of Washington, 315 U.S. 820, 86 L. ed. 1217, 62 Sup. Ct. 917 (1942); Buell v. McGee, 9 Wn.(2d) 84, 113 P.(2d) 522 (1941)

[24] State *ex rel.* Shepard v. Super. Court, 60 Wash. 370, 111 Pac. 233, 140 Am. St. Rep. 925 (1910)

[25] *In re* Sanford, *supra* note 21.

overlooked. But this position is difficult to maintain in view of the ruling that, in legislating upon a subject, the legislature is presumed to be familiar not only with the previous legislation relating thereto, but also with the court decisions, if any, construing such former enactments.[26] Yet the court has also adopted the view that

"An intention will not be ascribed to the lawmaking power to establish conflicting and hostile systems upon the same subject, or to leave in force provisions of law by which the later will of the legislature may be thwarted and overthrown."[27]

Our court has ruled that where a later enactment deprived port commissioners of a part of their power to fix rates which had been granted them by an earlier act, the two acts were irreconcilable.[28] In another situation the court declared:

"It thus appears that, in the act of 1917, the public service commission is given the power to fix the prices of the service outside of the city, and in the act of 1933, the city is given the power to fix the rates for the service. The price of the service and the rates for the service must necessarily mean the same thing. Both are the measure of compensation which the city shall receive. It follows that there is an irreconcilable conflict between the two acts, and the later act, that of 1933, prevails."[29]

From these decisions it appears that the later Partnership Act is irreconcilable with and therefore impliedly repeals the earlier probate provisions; for, as was pointed out *supra,* the Partnership Act grants wide powers of administration to the surviving partner, while the earlier provisions, if given effect, would substantially derogate from those powers.

Only one case treating of this identical question has been brought to the writer's attention. Since it seems to contradict directly the conclusion herein, it merits analysis.

V

Alaska adopted the Uniform Partnership Act in 1917[30] without expressly repealing earlier probate provisions[31] almost identical in substance to the

[26] *In re* Levy, 23 Wn.(2d) 607, 161 P (2d) 651 (1945)

[27] Quoted with approval from 1 LEWIS' SUTHERLAND STATUTORY CONSTRUCTION (2d ed.) 473, § 249 in State *ex rel.* Johnston v. Gregory, 191 Wash. 691, 695, 72 P (2d) 308 (1937)

[28] State *ex rel.* Port of Seattle v. Dept. P S., 1 Wn.(2d) 102, 95 P.(2d) 1007 (1939)

[29] State *ex rel.* West Side Imp. Club v. Dept. P S., 186 Wash. 378, 383, 58 P (2d) 350 (1936)

[30] Laws Alaska 1917, c. 69; COMP. LAWS ALASKA 1933, §§ 2729 to 2800.

[31] COMP. LAWS ALASKA 1913, §§ 1622 to 1628, now COMP. LAWS ALASKA 1933, §§ 4378 to 4384.

Washington probate provisions discussed *supra*. *Davis v. Hutchinson*[32] raised the question whether, under the Alaska laws, a surviving partner had authority to administer the partnership affairs as survivor for purpose of winding up the partnership, without previous court authorization. Three judges of the Circuit Court of Appeals heard this case. The decision opens with the opinion of Judge Wilbur, which consumes nearly five pages. In this opinion the point is made that repeals by implication are not generally favored and that the effect of this rule is reinforced by the further fact that the power of the Alaska legislature to repeal the probate code provisions was gravely in doubt. The territorial legislature of Alaska is limited in its authority by the act of Congress from which the legislature secures its authority, and which provides that

"All the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; "[33]

In this state of affairs, Judge Wilbur rested his decision on the circumstance that the acts of the surviving partner which were called into question occurred before any probate proceedings in the estate of the deceased partner had been initiated, and held that during this period, at least, no essential inconsistency existed between the two acts. He thus took the position that the right of the surviving partner to wind up the affairs of the firm under the Uniform Partnership Act exists by virtue of that act at least until a personal representative has been named in probate and has filed an inventory. By this deft ratiocination Judge Wilbur avoided deciding the ultimate problem of implied repeal:

"We have not specifically dealt with the question as to whether or not the assets of partnership after the taking out of letters of administration by the surviving partner must be administered in accordance with the general law affecting probate under the Compiled Laws of Alaska, or whether under such circumstances the surviving partner has complete discretion to deal with the affairs of the partnership subject only to the duty of applying the assets to the indebtedness and turning over to the representatives of the deceased partner his proportion of the balance. *We need not decide this question in this case. It is manifest that there is a conflict between the Uniform Partnership Law, which gives the surviving partner complete and entire discretion to wind up the affairs of the partnership, and the Compiled Laws of Alaska, which subordinate that discretion to the probate law and to the judgment of the probate court in case the administrator of the deceased partner inventories the partnership property as an asset of his estate;* "[34] (Italics added.)

[32] 36 F.(2d) 309 (C. C. A. 9th, 1929)

[33] 37 STAT. 512, § 3, 48 U. S. C. A. § 23.

[34] Davis v. Hutchinson, 36 F.(2d) 309, 314 (C. C. A. 9th, 1929)

The most remarkable aspect of the case lies in the fact that the *majority* view as to the basis for the decision is expressed in the *concurring* opinion.[35] Two of the three judges sitting on the court—Judges Dietrich and Louderback —concurred in the result as follows:

"I think that the Uniform Partnership Law irreconcilably conflicts with the Compiled Statutes of Alaska. Each is complete in itself, and exclusive respecting the management or administration of partnership property upon the death of one of the partners. If, therefore, the Uniform Partnership Act is valid, it necessarily operates to repeal the Compiled Statutes pro tanto. "[36]

Thus the court in fact ruled there had been a repeal by implication, but, by the manner of rendition, avoided the complications arising from such a holding.

Since the Washington legislature unquestionably has the power to repeal or alter the provisions of the Probate Code, the courts of this state would not be faced by the peculiar considerations presented to the Circuit Court of Appeals in *Davis v. Hutchinson,* where the power of the Alaska legislature to repeal the earlier act was doubtful.

VI.

It is submitted that Washington could benefit from the example set by Oregon—an example which demonstrates that the most satisfactory solution to this problem lies with the legislature, not the courts.

Oregon adopted the Uniform Partnership Act in 1939[37] without repealing earlier probate statutes[38] almost identical in substance to the Washington probate statutes herein discussed. In the editor's notes to each of these Oregon probate statutes he observed that the statute was possibly repealed by implication by the Uniform Partnership Act. The undesirability of this uncertitude in the law was recognized in Oregon, and express repeal of the Probate Code sections followed to end the confusion:

"If no careful check is made of the statutes upon the enactment of new legislation, inconsistencies are bound to arise. Just when a statute conflicts with another statute is not always easy to determine. But, if there is any doubt whatsoever, all statutes involved should be redrafted; lawsuits arise out of the doubtful cases as well as out of the cases of clear conflict. If the statutes are in conflict, the problem of implied repeal is presented—a problem which could be avoided by proper revision at the time the new statute is enacted.

[35] Appreciative acknowledgment is made to Prof. J. Gordon Gose of the University of Washington Law School faculty, who pointed out this odd feature of the case.

[36] Davis v. Hutchinson, 36 F (2d) 309, 314 (C. C. A. 9th, 1929)

[37] Ore. Laws 1939, c. 550, O. C. L. A. §§ 79-101 to 79-615.

[38] O. C. L. A. §§ 19-50 to 19-507.

"The code commissioner has been successful in obtaining the removal of a few of the conflicting provisions in the Oregon code. *The glaring conflict between the Uniform Partnership Act and the provisions of Chapter 5, pertaining to the administration of partnership estates,* was finally removed in the 1943 session of the legislature by the repeal of the conflicting provisions in Chapter 5.[39] The code commissioner's first attempt in 1941 to resolve the conflict had failed when the repealer bill died in the Revision of Laws Committee of the Senate."[40] (Italics added)

Although the Uniform Partnership Act is broad in scope, the Oregon legislature did not believe that its provisions were sufficiently complete to delineate and regulate satisfactorily the surviving partner's powers in winding up the partnership affairs. Hence, when repealing the conflicting provisions of the Probate Code, the legislature substituted therefor the following provisions to supplement the Partnership Act:[41]

Section 1. Within 30 days after the death of a partner the surviving partner shall file a verified inventory of the assets of the partnership in the probate court in which letters testamentary or of administration are issued on the estate of the decedent or, if not letters are issued, in the probate court of the county of which the decedent was a resident at the time of his death. The inventory shall state the value of the assets as shown by the books of the partnership and a list of the liabilities of the partnership. If letters testamentary or of administration have issued on the estate of the decedent, the surviving partner shall cause the assets of the partnership to be appraised in like manner as the individual property of a deceased person, which appraisal shall include the value of the assets of the partnership and a list of the liabilities. The appraisers appointed by the court to appraise the separate property of the deceased partner shall appraise the partnership property, and the surviving partner shall file the inventory and appraisal with the court in which the estate of the deceased partner is being administered.

Section 2. The surviving partner may continue in possession of the partnership estate, pay its debts, and settle its business, and shall account to the executor or the administrator of the decedent and shall pay over such balances as may, from time to time, be payable to him. Upon the verified petition of the executor or administrator, or on its own motion, the probate court, whenever it appears necessary, may order the surviving partner to account to said court.

Section 3. If the surviving partner commits waste, or if it appears to the probate court that it is for the best interest of the estate of the decedent, such court may order the surviving partner to give security for the faithful settlement

[39] The author's footnote states: "Secs. 19-501 to 19-507 of the Probate Code provided for the administration of partnership estates. The Uniform Partnership Act. (Secs. 79-101 to 79-615) provided an entirely different method of administering such estates. Secs. 19-501 to 19-507 were repealed by Ore. Laws 1943, c. 426."

[40] O'Connell, *Need for Statutory Revision in Oregon* (1944) 23 ORE. L. REV. 93, 107.

[41] Ore. Laws 1943, c. 426. *Cf.* ILL. PROBATE CODE, c. 3, §§ 340 to 343; note (1940) I. B. J. 24; *In re* Monahan's Estate, 319 Ill. App. 247, 48 N. E.(2d) 725 (1943)

of the partnership affairs and the payment to the executor or administrator of any amount due the estate.

Section 4. If the surviving partner fails or refuses to file the inventory, list of liabilities or appraisal, or if it appears proper to order the surviving partner to account to the probate court or to file a bond, said court shall order a citation to issue requiring the surviving partner to appear and show cause why he has not filed an inventory, list of liabilities or appraisal or why he should not account to the court or file a bond. The citation shall be served not less than ten days before the return day designated therein. If the surviving partner neglects or refuses to file an inventory, list of liabilities or appraisal, or fails to account to the court or to file a bond, after he has been directed to do so, he may be punished for a contempt or the court may commit him to jail until he complies with the order of the court. Where the surviving partner fails to file a bond after being ordered to do so by the court, the court may also appoint a receiver of the partnership estate with like powers and duties of receivers in equity, and order the costs and expenses of the proceedings to be paid out of the partnership estate or out of the estate of the decedent, or by the surviving partner personally, or partly by each of the parties.

This supplementary act augments the Partnership Act and at the same time appears to harmonize with the spirit and substance of the latter's provisions. It might well serve as a prototype for our Washington legislature, should that body repeal our earlier statutes[42] regarding the administration of partnership estates.

VII.

In summary· Our Probate Code provisions with regard to winding up partnership estates obviously conflict with the provisions of the Uniform Partnership Act dealing with the same subject. In view of the general policy of the law which opposes repeals by implication, it is, of course, impossible to state with absolute certainty that the supreme court of this state will hold that such a repeal has been worked by the Partnership Act. Nevertheless, when all of the factors are considered, the two acts appear to be so fundamentally irreconcilable as to call for a holding of repeal by implication when the question is submitted to the court.

The most satisfactory solution to the problem would spring from legislative enactment, however, rather than judicial construction.

[42] A survey of statutes of our various states and Alaska revealed that, since the Oregon action described, only Washington and Alaska now have statutes of this particular type along with the Uniform Partnership Act. Alaska probably still retains these early probate statutes for the reason stated in section V of this comment, as explaining the decision in Davis v. Hutchinson—*i.e.*, the limitation on the power of the territorial legislature.