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Partnerships

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PARTNERSHIPS

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DURING the Survey period, few partnership cases were reported, and only one that the author found to be worth reporting. Likewise, none of the statutory changes made by the last Texas Legislature during this period was significant enough to mention. Perhaps next year will be more bountiful.

Welder v. Green.[1] The important partnership case decided during this Survey period demonstrates some key implications of being a partner in a partnership at will. A general partnership is "at will" if it has no term and is not organized for a particular undertaking.[2] The principal consequence of an at-will partnership is that, after dissolution, each partner, unless the partners have agreed otherwise, may force a liquidation and distribution of the assets that remain after liabilities are paid.[3]

Welder and Green were partners (without a written partnership agreement) in a public accounting partnership for less than five years, until Green dissolved it.[4] The dissolution came on the heels of Welder's objections to Green's questionable "characterization" of $55,000 in fees from a client as trust management fees due to Green personally, and not to the partnership.[5] The essential facts of this case are: (1) Green was an existing partner in a partnership that Welder joined;[6] (2) Green assigned client relationships to himself or Welder for handling;[7] (3) Green received what he characterized as "trust management fees" from a firm cli-

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1. 985 S.W.2d 170 (Tex. App.—Corpus Christi, 1998, pet. denied).

2. TEX. REV. CIV. STAT. ANN. art. 6132b, § 31(1)(b) (Vernon 1970). The Texas Uniform Partnership Act ("TUPA") states that dissolution is caused: (1) without violation of the agreement between the partners, (b) By the express will of any partner when no definite term or particular undertaking is specified. *Id.* Although the Texas Revised Partnership Act ("TRPA") became effective January 1, 1994, it did not become applicable to preexisting partnerships, like the one here, until January 1, 1999. *See* TEX. REV. CIV. STAT. ANN. art. 6132b-11.03, (Vernon Supp. 2000). The result in this case would have been the same, however, under TRPA section 8.01(a) or (g). *See* TEX. REV. CIV. STAT. ANN. art. 61326-8.01(a), (g) (Vernon Supp. 2000).

3. *See* TEX. REV. CIV. STAT. ANN. art. 61326 § 38(1) (Vernon 1970) ("When dissolution is caused in any way, except in contravention of the partnership agreement, each partner . . . 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.").

4. *See Welder*, 985 S.W.2d at 173.

5. *See id.*

6. *See id.*

7. *See id.*

ent, which Welder challenged as misappropriation of firm revenues;[8] (4) prompted by the challenge, Green suggested dissolution, to which he and Welder and their attorneys agreed;[9] (5) after the dissolution, Welder took $80,000 worth of business with him, but left behind several clients for whom he had held responsibility for the firm;[10] and (6) Welder asserted that Green "cherry picked" the better clients for himself, a result of Green's having previously assigned them to himself to handle for the firm.[11] All of this, Welder asserted, added up to fraud and breach of the fiduciary duty owed between partners.[12] The jury agreed, and awarded Welder substantial damages for fraud and breach of fiduciary duty, and monetary awards for his share of partnership goodwill and other partnership assets.[13] While the trial court agreed with Welder that there was some evidence that Green had breached his fiduciary duty by re-characterizing the trust management fees as his personal income, it found no evidence of damages.[14] The trial court rendered a judgment n.o.v. on that issue and on Welder's fraud and fiduciary breach claims.[15]

Although *Welder* is not a startling or novel case, it does contain a few nuggets of instruction on the rules governing dissolution of a partnership at will and, specifically, professional partnerships. Welder lost because he failed to submit any evidence to support all but one of his claims.[16] Primarily, this case reinforces that: (1) absent a partnership agreement provision to the contrary,[17] any partner has the absolute right to dissolve the partnership at any time; and (2) "goodwill" is typically not a partnership asset in a professional partnership—for goodwill to be considered an asset to be divided on dissolution requires a showing that it exists independently of the skills of the professionals.[18] It is the rare professional service firm that has that sort of *institutional* goodwill. When dissolution is proper—and in a partnership at will where any partner may dissolve at any time, it would be hard to effect an improper dissolution—working hard to attract the old firm's clients is not, of itself, improper or actionable. Former partners who end up on the short end of that process have to show damages that result from tortious activity and not just from the dis-

8. *See id.* at 173.
9. *See id.* at 176.
10. *See id.* at 177.
11. *See id.*
12. *See id.* at 173.
13. *See id.* at 174.
14. *See id.* at 175. Green had neutralized that issue by giving Welder one-half of the fee less than a month after Green's purported usurpation. *See id.* at 176.
15. *See id.* at 174.
16. Welder was not required to demonstrate very much, either. The standards in reviewing a no evidence point are high—if "more than a scintilla of evidence supports the jury finding," then all other evidence is disregarded. *See id.* at 174 (citing Garcia v. Insurance Co. of Pa., 751 S.W.2d 857, 858 (Tex. 1998)).
17. The appellate court mistakenly suggested that the contrary agreement must be contained in a *written* partnership agreement. Oral partnership agreements are enforceable; their existence is just harder to prove.
18. *See id.* at 178.

solution and winding up process.[19] Simply stated, Welder and Green apparently got the better ones.[20]

19. *See id.* at 177. The court specifically held that "self-gain as a motive in declaring a dissolution, without more, does not constitute bad faith or a breach of fiduciary duty." *Id.* When a partnership is properly dissolved and if there is no agreement on how to divide former business relationships and employees, there is very much an open competition/may-the-best-person-win situation. Here, Green had some built-in advantages and came out ahead.

20. One certainly could imagine a few changes to the facts that might change the result (e.g. dishonest, bad faith conduct leading up to the dissolution, calculated to result in a partners' ending up with more than "her share" of firm assets), but that was not this case.