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# Revised Uniform Partnership Act: Anomalies of a Simplified, Modernized Partnership Law

BY CLAY B. WORTHAM\*

## I. INTRODUCTION

The Revised Uniform Partnership Act (“RUPA”)<sup>1</sup> is the first full revision of partnership law since the Uniform Partnership Act (“UPA”)<sup>2</sup> was promulgated in 1914.<sup>3</sup> This task was completed by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1994, after more than five years of deliberation and has since been adopted by a majority of U.S. jurisdictions.<sup>4</sup>

Kentucky is one of several states considering passage of RUPA in the 2004 legislative session.<sup>5</sup> RUPA’s successful campaign in the state legislatures stems primarily from the fact that for the most part, RUPA combines the time-tested principles of the UPA with the “new” entity

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<sup>1</sup> REVISED UNIF. P’SHIP ACT, 6 U.L.A. 1 (1997) [hereinafter RUPA]. In 1997 NCCUSL amended RUPA to include provisions governing foreign and domestic limited liability partnerships.

<sup>2</sup> UNIF. P’SHIP ACT, 6 U.L.A. 275 (1914) [hereinafter UPA].

<sup>3</sup> ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT 1 (2003).

<sup>4</sup> See *id.* at 531–32 (stating that, as of the end of the 2002–2003 legislative session, thirty-four U.S. jurisdictions including the District of Columbia have adopted RUPA).

<sup>5</sup> H.B. 190, 2004 Gen. Assem., Reg. Sess. (Ky. 2004) <http://www.lrc.state.ky.us/record/04rs/HB190/bill.doc>.

theory of partnership as a separate entity, distinct from the group of partners. As a result, RUPA updates the traditional partnership to better meet the needs of modern business, providing the face-lift needed by the general partnership form to join the recent wholesale make-over of unincorporated business forms.<sup>6</sup>

By NCCUSL's own admission, RUPA, while providing a needed modernization of partnership law, has failed in some respects to produce the uniformity that prevailed under the UPA regime.<sup>7</sup> This lack of uniformity results in part from the fact that a number of jurisdictions have failed to update from the UPA to RUPA.<sup>8</sup> Another contributing factor is the disparity in the language of RUPA promulgated by NCCUSL and the RUPA provisions actually adopted by a particular state legislature.<sup>9</sup>

A lack of uniformity is necessarily accompanied by costs. One such cost is the possibility of a legal malpractice claim arising from an attorney's cursory consideration of variations in partnership law between jurisdictions. For example, potential malpractice liability might arise in the following situation. A partnership is, in the absence of an agreement to the contrary, governed by the law of the jurisdiction in which its chief executive office is located.<sup>10</sup> If a party approaches counsel for advice about starting a partnership, the attorney's counsel necessarily implicates a determination as to which jurisdiction's statutory scheme best matches the needs of the particular client. If counsel advises such a client to establish

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<sup>6</sup> The recent trend in reforming the form and structure of the unincorporated business is exhibited by the passage of the following model acts: UNIF. LTD. P'SHIP ACT, 6A pt. I U.L.A. 1 (2001); REVISED UNIF. P'SHIP ACT 1 (1997); LTD. LIAB. CO. ACT, 6A U.L.A. 553 (1996).

<sup>7</sup> See generally RUPA, 6 U.L.A. 60–274 (1997) (illustrating the variations of RUPA adopted in each jurisdiction).

<sup>8</sup> See HILLMAN ET AL., *supra* note 3, at 531–32.

<sup>9</sup> See Allan W. Vestal, "Assume a Rather Large Boat . . .": *The Mess We Have Made of Partnership Law*, 54 WASH. & LEE L. REV. 487, 518 (1997) (contending that variation in the version of RUPA passed in the various states has caused a breakdown in the once uniform law of partnerships); see also *supra* note 7 and accompanying text.

<sup>10</sup> RUPA § 106(a); HILLMAN ET AL., *supra* note 3, at 60–61. As a side issue, RUPA does not define chief executive office. This awkward rule for identification of choice of law for the partnership is less than desirable in the area of particularity. *Id.* at 60. Authors suggest that the RUPA choice of law default revert to the UPA rule that relies on the jurisdiction's otherwise applicable choice of law principles or the partners' "affirmative choice of law election in the partnership agreement." *Id.*

a partnership in a particular jurisdiction without a partnership agreement setting out choice of law provisions, the client could act on such information expecting counsel to have a thorough understanding of variances in partnership law between jurisdictions. If such a decision later turns out not to be in the best interests of the client, potential liability may result.

Another cost commonly associated with a lack of statutory uniformity is the burden on the court when an issue of first impression in a particular jurisdiction cannot be easily resolved by resorting to a sister jurisdiction's partnership jurisprudence.<sup>11</sup> Some have argued that these costs are outweighed by the eventual development of an efficient partnership form.<sup>12</sup> Essentially, when jurisdictions are permitted to seek the most efficient version of RUPA, the disparity between the actual provisions from state to state serves as a catalyst for arriving at the most efficient partnership default rules.<sup>13</sup>

Notwithstanding these costs, RUPA has improved and simplified partnership law in those states that have adopted it.<sup>14</sup> RUPA's positive attributes stem primarily from the adoption and endorsement of the entity theory of partnership.<sup>15</sup> Defining a partnership as an entity—separate and distinct from the partners both individually and collectively—has added predictability, stability, and simplicity to partnership law. For example, under RUPA, the partnership can own property<sup>16</sup> and sue and be sued in its own name.<sup>17</sup> Generally, under RUPA, an at-will partnership is not automatically dissolved upon the dissociation of a partner but instead is allowed to continue as a going concern.<sup>18</sup> In such a case, the partnership as

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<sup>11</sup> See Thomas R. Hurst, *Will the Revised Uniform Partnership Act (1994) Ever Be Uniformly Adopted?*, 48 FLA. L. REV. 575, 588 (1996). The uniformity among the states under the UPA made case law precedents largely transferable from one jurisdiction to another. With the passage of RUPA, such a system of borrowing a neighboring jurisdiction's interpretations of partnership law became substantially obsolete. *Id.*

<sup>12</sup> See Larry E. Ribstein, *The Evolving Partnership* 26 J. CORP. L. 819, 837–38 (2001) (arguing that competition among different versions of state partnership law will result in an ultimately efficient version of partnership law in the future).

<sup>13</sup> *Id.*

<sup>14</sup> See Richard Spore, *The Revised Uniform Partnership Act in Tennessee*, TENN. B.J. Aug. 2001, at 30, 30.

<sup>15</sup> See RUPA § 201(a); HILLMAN ET AL., *supra* note 3, at 2–3.

<sup>16</sup> RUPA § 203.

<sup>17</sup> *Id.* § 307.

<sup>18</sup> *Id.* § 801, cmt. 1, 4.

an entity may purchase a dissociated partner's interest in the partnership,<sup>19</sup> rather than such interest being purchased by individual partners, or the partnership assets being subject to liquidation at the dissociated partner's demand.

One of the most significant of these entity-driven partnership attributes of RUPA is that an at-will partnership may continue notwithstanding the dissociation of a partner, even in the absence of a continuation agreement.<sup>20</sup> Unlike the UPA, RUPA does not require dissolution and winding up of the partnership when a partner is dissociated due to death, bankruptcy, or incompetence.<sup>21</sup> Moreover, a partner, his heirs, or assignees that are dissociated due to death, bankruptcy, or incapacity cannot compel liquidation of the partnership assets; instead, the partner's interest may be purchased by the partnership.<sup>22</sup> This provision increases the overall efficiency of the traditional at-will partnership form in the absence of a continuation agreement, by allowing a profitable business to continue uninhibited by the exit of a partner.

Notwithstanding the obvious benefits of these provisions, when read in light of RUPA's entity-driven paradigm, they can cause anomalous results in certain circumstances. This Note addresses the inconsistencies produced by the definitional requirements of a partnership under RUPA and by the actual language of RUPA's provisions regarding dissociation, dissolution, and winding up in the event of a partner's dissociation due to death, bankruptcy, or incapacity. The language of these RUPA provisions creates an anomaly when, due to the dissociation of a partner, a sole remaining partner is left able and willing to continue the partnership business as a going concern. A careful examination of the pertinent RUPA provisions leaves open the possibility that a sole remaining partner is not barred from continuing the partnership alone, in seeming contravention of the conceptual notion that a partnership is "an association of two or more persons."<sup>23</sup>

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<sup>19</sup> *Id.* § 701(a); *cf.* ALAN R. BROMBERG & LARRY E. RIBSTEIN, SPECIAL RELEASE ON THE REVISED UNIFORM PARTNERSHIP ACT 90 (1993) [hereinafter BROMBERG & RIBSTEIN, SPECIAL RELEASE] (stating that UPA § 42 allows the withdrawing partner "a right to have the value of his interest paid but does not specify" that the partnership must be the purchaser).

<sup>20</sup> RUPA § 601.

<sup>21</sup> *Id.* § 601(6)(i), (7)(i), (7)(iii); *see also id.* § 601 cmts. 1, 8 ("Under RUPA, unlike the UPA, the dissociation of a partner does not necessarily cause a dissolution and winding up of the business of the partnership."). The RUPA comments compare UPA § 31(4) and RUPA § 601(7)(i).

<sup>22</sup> *Id.* § 701(a), (b).

<sup>23</sup> RUPA §§ 101(6), 202(a).

To varying degrees, both the UPA and RUPA function as default rules that govern general partnerships in the absence of an agreement between the partners to the contrary.<sup>24</sup> In comparison to the UPA, RUPA allows more flexibility for parties to contract out of default provisions with only a few mandatory portions in the statutory scheme.<sup>25</sup> Those parties that choose to opt out of default provisions under either the UPA or RUPA do so by creating a partnership agreement.<sup>26</sup> A continuation agreement is a partnership agreement that provides more specifically for opting out of default provisions with regard to ending the partnership enterprise, by stipulating what is to happen during the disposition of partnership interests and partnership assets when a partner is dissociated or when dissolution occurs.<sup>27</sup> Therefore, only a partnership operating under RUPA's default rules, that is, without a continuation agreement, is subject to the anomaly noted above.

Similarly, RUPA's dissociation/dissolution anomaly affects only at-will partnerships.<sup>28</sup> These partnerships are not established for a particular term or purpose and are typically more informal in nature as an on-going relationship.<sup>29</sup> A different case altogether results with the dissociation of a

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<sup>24</sup> *Creel v. Lilly*, 729 A.2d 385, 397 (Md. 1999) (“[B]oth the UPA and RUPA only apply when there is either no partnership agreement governing the partnership’s affairs, the agreement is silent on a particular point, or the agreement contains provisions contrary to law.”).

<sup>25</sup> See HILLMAN ET AL., *supra* note 3, at 35; see generally RUPA § 103 (identifying RUPA provisions that may not be altered by agreement). RUPA’s general rule of allowing modification of default rules by agreement is an attempt to correct the confusion under the UPA caused by a failure of that statute to delineate which portions of the UPA function as default rules and which are mandatory. HILLMAN ET AL., *supra* note 3, at 35; Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters’ Overview*, 49 BUS. LAW. 1, 2 (1993). “RUPA reflects the policy judgment that, with rare exceptions, partners are permitted to govern relations among themselves by agreement.” *Id.* Under the UPA, “it is not clear which rules are merely default rules and which rules are mandatory rules.” *Id.*

<sup>26</sup> See UPA § 18 (1914); RUPA § 103; *id.* § 101(7) (“‘Partnership agreement’ means the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement.”); HILLMAN ET AL., *supra* note 3, at 2.

<sup>27</sup> See *Creel*, 729 A.2d at 397 (discussing application of and need for a continuation agreement).

<sup>28</sup> RUPA § 101(8) (acknowledging that a partnership may be at-will or term).

<sup>29</sup> *Id.* (“Partnership at-will means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.”).

partner from a term partnership or a partnership created for a specific purpose.<sup>30</sup> For purposes of examining the above-mentioned RUPA dissociation/dissolution anomaly, this Note is concerned exclusively with an at-will partnership not governed by a partnership agreement that provides for matters of dissociation of a partner or dissolution of the partnership.

When a jurisdiction chooses to modernize its partnership law with the adoption of RUPA, the change in entity paradigm arising from such a transition—from a statutory scheme recognizing a partnership solely as a manifestation of the relationship of a group of persons who have formed an association to carry on business activities<sup>31</sup> to a statutory scheme that identifies a partnership as an entity, separate and distinct from the group of partners<sup>32</sup>—must be recognized in the statutory language. The anomaly that would seem to allow a single remaining partner to continue the partnership business alone is illustrative of the impact that such a fundamental shift in organizational structure can cause when not thoroughly considered. The inconsistencies that may arise from this transition from the UPA's aggregate approach<sup>33</sup> to RUPA's entity approach<sup>34</sup> is exemplified by the following hypothetical:

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<sup>30</sup> See *id.* § 602(b)(2), (c) (providing that a partner's dissociation is wrongful if before "the expiration of the term or the completion of the undertaking" giving rise to liability for resulting damages); HILLMAN ET AL., *supra* note 3, at 268–69. Possible consequences of wrongful dissolution are: (1) dissociating partner may be liable for damages; (2) the right to participate in winding up for a partner who dissociates wrongfully may be limited; (3) other partners may withdraw, without themselves dissociating wrongfully, within ninety days of a partner's wrongful dissociation; and (4) wrongful dissociation launches a dissolution and winding up if not halted by a vote of the remaining partners within ninety days. RUPA § 602(b), (c).

<sup>31</sup> UPA § 6 ("A partnership is an association of two or more persons to carry on as co-owners a business for profit.").

<sup>32</sup> RUPA § 201(a) ("A partnership is an entity distinct from its partners."); *id.* § 101(6) ("'Partnership' means an association of two or more persons to carry on as co-owners a business for profit formed under Section 202 . . ."); *id.* § 202(a) ("[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.").

<sup>33</sup> 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 1.03(b) (1998) [hereinafter BROMBERG & RIBSTEIN, ON PARTNERSHIP].

<sup>34</sup> RUPA § 201.

Two partners operate a general at-will partnership without a written partnership agreement. Consequently, their actions are governed by RUPA's default rules of the particular jurisdiction in which the partnership is located.<sup>35</sup> One of the partners is dissociated due to death, bankruptcy, or incapacity, leaving only one remaining partner to run a profitable partnership enterprise.

Under the UPA, automatic dissolution, wind-up, and termination of the partnership ensues following a partner's withdrawal due to death or any other withdrawal not in contravention of a continuation agreement.<sup>36</sup> The remaining partner may purchase the partnership assets from the withdrawing partner,<sup>37</sup> or the withdrawing partner (or the partner's heirs or assignees) may demand liquidation,<sup>38</sup> in which case a profitable business will almost certainly be sold for less than it is worth as a going concern.<sup>39</sup> In any case, the partnership as such ceases to exist because the group of persons whose relationship formed the basis of the partnership no longer exist.<sup>40</sup> If the partnership business is to continue, the partnership must be wound up, terminated, and a new partnership must be formed.<sup>41</sup>

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<sup>35</sup> *Id.* § 106 (“[T]he law of the jurisdiction in which a partnership has its chief executive office governs relations among the partners and between the partners and the partnership.”).

<sup>36</sup> UPA §§ 31, 32.

<sup>37</sup> *Id.* §§ 38(2), 42 (providing for a buy-out of a wrongfully withdrawing partner's interest but only after the partnership is dissolved. At no time under the UPA may a partnership be continued without dissolution following the withdrawal of a partner even when liquidation is avoided).

<sup>38</sup> *Id.* §§ 31, 38; BROMBERG & RIBSTEIN, SPECIAL RELEASE, *supra* note 19, at 106–07. This ability to compel liquidation is “probably an application of the extreme aggregate view of partnership as an association among *particular* parties that necessarily ends when one of the parties wants it to.” As these scholars point out, however, “80 years of the UPA have demonstrated the inappropriateness of the liquidation right, as indicated by the standard practice of drafting around the right and the judicial decisions that have found some way to qualify it.” *Id.*

<sup>39</sup> See *Creel v. Lilly* 729 A.2d 385, 400 (Md. 1999) (citing *Arnold v. Burgess*, 747 P.2d 1315, 1322 (Idaho Ct. App. 1987)) (stating that liquidation usually is an unnecessarily harmful and destructive course of action).

<sup>40</sup> See HILLMAN ET AL., *supra* note 3, at 66. Under the UPA, a partnership is no more than a “conduit for a collection of individuals.” The partnership is not a cohesive whole but instead a collection of individual interests joined together to conduct a common objective. *Id.*

<sup>41</sup> See RUPA § 801 cmt. 1. UPA § 29 calls for dissolution of the partnership every time a partner leaves. If the partnership business is continued it is technically a new partnership. *Id.*



Under RUPA, the partnership is an entity separate and distinct from the partners and need not be dissolved when a partner is dissociated.<sup>42</sup> If a partner is dissociated due to death, bankruptcy or incapacity, only the remaining partner(s) can give notice of withdrawal and cause dissolution of the partnership.<sup>43</sup> In the absence of such action by the remaining partner(s), “the partnership shall cause the dissociated partner’s interest in the partnership to be purchased.”<sup>44</sup> Once the interest is purchased, either by the partnership or another partner, the partner(s) continue the partnership business as a going concern, without dissolution or liquidation,<sup>45</sup> allowing the full value of the partnership enterprise as a going concern to remain intact.

When carried to their logical end, RUPA’s provisions, which would seem to allow a single remaining partner to continue the partnership business uninhibited by dissolution or liquidation,<sup>46</sup> run awry of the conceptual nature of a partnership (an association existing as a result of a group of persons gathered to carry on business activities as a unit). In addition, these provisions also seem to provide for an entity that violates the very definition of partnership as an association of two or more persons.<sup>47</sup>

RUPA’s dissociation/dissolution anomaly can be resolved by answering the question: how should the business enterprise be categorized once a single remaining partner is in exclusive control of the partnership activities and assets? It seems counterintuitive to have a single partner continuing a partnership’s business under a statute that requires “an association of two or more persons,”<sup>48</sup> and yet there is no express prohibition of such action.

There are several solutions to resolve the dissociation/dissolution anomaly. One would be to read RUPA’s definition of partnership according

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<sup>42</sup> *Id.* Dissociation is a new concept not found in the UPA. Dissociation “denote[s] the change in the relationship caused by a partner’s ceasing to be associated in the carrying on of the business.” *Id.*

<sup>43</sup> *Id.* § 801.

<sup>44</sup> *Id.* § 701.

<sup>45</sup> *Id.* § 801(1); see also BROMBERG & RIBSTEIN, SPECIAL RELEASE, *supra* note 19, at 108 (permitting “only a partner who has not dissociated, or who has dissociated by will, to seek liquidation” and providing that “partners who have dissociated in other ways, particularly including a bankrupt partner or the estate of a deceased . . . partner, cannot compel liquidation”).

<sup>46</sup> RUPA § 801.

<sup>47</sup> *Id.* § 202(a).

<sup>48</sup> *Id.* § 101(6).

to its actual language as only requiring two or more persons to *form* a partnership, not to *maintain* it, thus allowing the partnership to continue under the control of a single partner.<sup>49</sup> This concept is consistent with a pure entity theory of partnership.<sup>50</sup> A second solution is that a partnership consisting of only one partner is unlawful under RUPA and as such must be dissolved and wound up because it violates the statutory definition of partnership.<sup>51</sup> Under this view, one must consider how much time should be given a remaining partner to “cure” the illegality of the partnership by bringing in another partner. A third solution—possibly the provision that offers the most compelling resolution of this anomaly—is RUPA Section 302(d). This provision, which deals primarily with partnership property, provides simply that “[i]f a person holds all of the partners’ interests in the partnership, all of the partnership property vests in that person.”<sup>52</sup>

The Official Comment to the section asserts that in such a situation, where only one partner remains, “the partnership no longer exists as a technical matter.”<sup>53</sup> The Comment goes on to state that “a partnership becomes a sole proprietorship by reason of the dissociation of all but one of the partners.”<sup>54</sup> This Comment may certainly be viewed as lending some authority to the position that the partnership must end when the group of partners dwindles to a single remaining partner. The level of authority is questionable, however.<sup>55</sup> Even though a number of states have adopted RUPA Section 302(d) and the Official Comment,<sup>56</sup> it is unclear that this

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<sup>49</sup> *Id.* § 202(a) (“[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.”).

<sup>50</sup> Note, however, that RUPA itself retains some remnants of the aggregate theory of partnership. *See* RUPA § 306(a) (providing for joint and several liability of the partners for obligations of the partnership).

<sup>51</sup> RUPA § 801(4) (providing that a partnership is dissolved and wound up if an event occurs that makes it unlawful for all or substantially all of the business of the partnership to be continued, unless such illegality is cured within ninety days).

<sup>52</sup> *Id.* § 302(d).

<sup>53</sup> *See id.* § 302(d) cmt. 6.

<sup>54</sup> *Id.*

<sup>55</sup> National Conference of Commissions on Uniform State Laws, 1991–92 Reference Book 81 (1991) (“Comments should not be used as a substitute for or to modify any substantive provision in an Act.”).

<sup>56</sup> ALA. CODE § 10-8A-302 cmt. 6 (2003) (“Subsection (d) allows for clear record title, even though the partnership no longer exists as a technical matter. When a partnership becomes a sole proprietorship by reason of the dissociation of all but one of the partners, title vests in the remaining ‘partner’ although there is no ‘transfer’ of the property.”).

precludes a single partner from continuing a partnership in these states because the Official Comment is not the law.<sup>57</sup> Further, the comparatively recent promulgation of RUPA, as compared to the UPA, accounts for the dearth of case law construing this comment.<sup>58</sup> Other states hold that a partnership operated by a single partner is a violation of the underlying principles of partnership. These states require that more partners be added, or the partnership will be dissolved and wound up as under UPA.<sup>59</sup>

This Note begins with a discussion of the automatic dissolution and winding up of an at-will partnership under the UPA which embodies the traditional, aggregate theory of partnership. This is followed by an examination of RUPA and some of the issues that are raised by the heightened prominence given to the entity theory of partnership and its impact in the area of dissociation and dissolution of an at-will partnership. In an attempt to resolve the dissociation/dissolution anomaly, this Note will examine the possible solutions mentioned above in greater depth. The conclusion will suggest the most plausible way in which the anomaly should be resolved.

## II. DISSOLUTION AND WINDING UP UNDER THE UPA

The UPA primarily subscribes to an aggregate theory of partnership.<sup>60</sup> As a result, under the UPA, the partnership entity does not exist independently from the group of individual partners.<sup>61</sup> This view of partnership that permeates most of the UPA is similar to, and has its roots in, the common law, which characterized a partnership as follows:

[T]he members of [partnerships] do not form a collective whole, which is regarded as distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually.<sup>62</sup>

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<sup>57</sup> National Conference of Commissions on Uniform State Laws, *supra* note 55 (“Comments should not be used as a substitute for or to modify any substantive provision in an Act.”).

<sup>58</sup> UNIF. LTD. P’SHIP ACT, 6A Pt. I U.L.A. 1 (2001)

<sup>59</sup> ARIZ. REV. STAT. § 29-1071(7) (2003).

<sup>60</sup> 1 BROMBERG & RIBSTEIN, ON PARTNERSHIP, *supra* note 33, § 1.03(b).

<sup>61</sup> UPA § 7(1) (1914).

<sup>62</sup> NATHANIEL LINDLEY, PARTNERSHIP 61 (Audenried Am. ed. 5th ed. 1891).

The aggregate theory of partnership is very much alive and well in the jurisdictions that have yet to adopt RUPA.<sup>63</sup> One of the clearest examples of this aggregate approach under the UPA is the automatic dissolution of a partnership upon the withdrawal of a partner “since it assumes that the entity does not have a life apart from the individuals associated with it.”<sup>64</sup> When a partner withdraws from an at-will partnership governed by the UPA, automatic dissolution of the partnership results.<sup>65</sup>

Dissolution is described as a “change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.”<sup>66</sup> “[W]inding up, [is] the process of settling partnership affairs after dissolution.”<sup>67</sup> Of course, dissolution of the partnership does not mean instantaneous termination of partnership activities. Instead, after dissolution, the partnership continues in a state of dissolution until winding up of the partnership affairs is complete, at which time the partnership terminates.<sup>68</sup>

The automatic dissolution provisions of the UPA have hampered the general partnership form because the durational instability of an at-will partnership breeds inefficiency when contracting with third parties. The aggregate character of these UPA provisions are likely

based on the assumption that the partnership relationship was induced by the combination of a particular group of people possessing unique

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<sup>63</sup> David A. Pope, *Business Associations*, 54 MERCER L. REV. 151, 163 (2002) (discussing *Chaney v. Burdett*, 560 S.E.2d 21 (Ga. 2002), holding that unless there is a continuation agreement a partnership dissolves upon the death of a partner and continues only until the winding up process is complete); Steve R. Akers, *Grats, Installment Sales to Grantor Trusts*, ALI-ABA Course of Study, 1051 (Aug. 1–3, 2002) (discussing *Shepherd v. Comm’r*, 115 T.C. 376 (2000), *aff’d*, 283 F.3d 1258 (11th Cir. 2002), rejecting the argument that a land transfer was a gift or partnership interest because it pre-dated the existence of the partnership and refused to recognize the existence of a one-person partnership); Robert R. Keatinge et al., *Family Operating Business*, ALI-ABA Course of Study, 167 (Mar. 21, 1996) (discussing *LeFrak v. Comm’r*, 66 T.C.M. 1297 (1993), which rejected the taxpayer’s argument that he had formed a one-person partnership).

<sup>64</sup> 1 BROMBERG & RIBSTEIN, ON PARTNERSHIP, *supra* note 33, § 1.03(c)(6) (citing *Fairway Dev. Co. v. Title Ins. Co. of Minn.*, 621 F. Supp. 120 (N.D. Ohio 1985)).

<sup>65</sup> UPA § 31(4).

<sup>66</sup> *Id.* § 29.

<sup>67</sup> *Id.* cmt.

<sup>68</sup> *Id.* § 30.

qualities. Thus, dissolution upon death, [bankruptcy, or incapacity] is analogous to discharge of further contractual obligations by impossibility due to the death [bankruptcy, or incapacity] of a person whose performance was necessary.<sup>69</sup>

It is possible to continue a profitable partnership under the UPA after the withdrawal of a partner.<sup>70</sup> The partnership may be continued only if the withdrawing partner (or his heirs or assigns) does not demand a liquidation and the remaining partners are able to buy-out the withdrawing partner. However, even when the partnership business is continued under the UPA, the old partnership is dissolved and a new partnership is formed.<sup>71</sup>

In summary, under the UPA, “every partner dissociation results in the dissolution of the partnership, most of which trigger the right [on the part of the withdrawing partner] to demand liquidation of partnership assets and to have the business wound up unless the partnership agreement provides otherwise.”<sup>72</sup> If the partnership business is continued, the old partnership is dissolved and wound up and a new partnership is formed. Such a process is a well established but inefficient use of resources, and the instability and unpredictability of outcomes under the UPA default rules hamper the productivity of this business form.

### III. DISSOCIATION, DISSOLUTION, AND WINDING UP UNDER RUPA

The entity theory of partnership is not a new concept.<sup>73</sup> In fact, the original chief drafter of the UPA, Dean Ames, “would have defined a partnership as ‘a legal person’ in the act.”<sup>74</sup> Professor Fuller opined, after the UPA was in place, that to increase the utility of the traditional

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<sup>69</sup> 2 BROMBERG & RIBSTEIN, ON PARTNERSHIP, *supra* note 33, § 7.05(a)(1) (citations omitted).

<sup>70</sup> UPA §§ 31, 42.

<sup>71</sup> See *Dayton Monetary Assoc. v. Becker*, 710 N.E.2d 1151, 1157 (Ohio Ct. App. 1998); *supra* note 37 and accompanying text.

<sup>72</sup> RUPA § 603 cmt. 1 (discussing UPA § 38).

<sup>73</sup> FRANCIS M. BURDICK, THE LAW OF PARTNERSHIP 83 (3d ed. 1917) (“[T]he British Partnership Act recognizes [a partnership] in Scotland as ‘a legal person distinct from the partners of whom it is composed.’”).

<sup>74</sup> 1 BROMBERG & RIBSTEIN, ON PARTNERSHIP, *supra* note 33, § 1.03(b), at 1:30 (citing the UPA, Second Tentative Draft, § 1.1; William Droper Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane’s Criticism*, 29 HARV. L. REV. 158, 165 (1915)).

partnership form it would be necessary to increase the efficiency and effectiveness of the default rules governing the form.<sup>75</sup> Particularly, he felt that a partnership should share the advantage of a corporation in that it is “unaffected by the death of one or more of its members.”<sup>76</sup> Instead, under the UPA

the death of a partner . . . effect[s] a dissolution of the partnership, and, as a general rule, . . . cause[s] a sudden and enforced liquidation of the business which can rarely be consummated without substantial losses both to the survivor and to the decedent’s estate . . . . The utility of the partnership as a business device will be greatly increased if the unfortunate consequences of a partner’s death can be overcome or substantially minimized.<sup>77</sup>

Thus, before NCCUSL promulgated RUPA, dissolution of a partnership could be an unexpected occurrence and, in the absence of an agreement of continuation, could wreak havoc on the financial affairs of both the partners themselves and partnership creditors. While the financial effects of dissolution are not drastic in every case, dissolution rarely results in the most efficient possible outcome and “may be devastating and can include the destructive liquidation of a valuable business, as well as unnecessary taxes.”<sup>78</sup> The drafters of RUPA were determined to remedy this inefficiency, and in Comment 1 to Section 801 state that under the UPA Section 29

a partnership is dissolved every time a partner leaves. That reflects the aggregate nature of the partnership under the UPA. Even if the business of the partnership is continued by some of the partners, it is technically a new partnership. The dissolution of the old partnership and creation of a new partnership causes many unnecessary problems.

RUPA’s move to the entity theory is driven in part by the need to prevent a technical dissolution or its consequences. Under RUPA, not every partner dissociation causes a dissolution of the partnership. Only certain departures trigger a dissolution. The basic rule is that a partnership

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<sup>75</sup> Warner Fuller, *Partnership Agreements for Continuation of an Enterprise After the Death of a Partner*, 50 YALE L.J. 202 (1940).

<sup>76</sup> *Id.* at 202.

<sup>77</sup> *Id.* at 202–03.

<sup>78</sup> Alan Bromberg, *Partnership Dissolution—Causes, Consequence, and Cures*, 43 TEX. L. REV. 631 (1964).

is dissolved, and its business must be wound up, only upon the occurrence of one of the events listed in section 801. All other dissociations result in a buy-out of the partner's interest under Article 7 and a continuation of the partnership entity and business by the remaining partners.<sup>79</sup>

RUPA, via the entity theory, attempts to remedy the problems encountered under the UPA when dissolution is caused by the unexpected withdrawal of a partner. Under RUPA, the death, bankruptcy, or incapacity of a partner causes automatic *dissociation*<sup>80</sup> rather than dissolution.<sup>81</sup> This technical change allows a partnership to continue intact by providing for the remaining partner(s) to buy-out the dissociated partner's share.<sup>82</sup> When a partner is dissociated from the partnership without resulting in dissolution and winding up—as in the event of death, bankruptcy, or incapacity—the partnership causes “the dissociated partner's interest in the partnership to be purchased for a buy-out price pursuant to” RUPA Section 701(b).<sup>83</sup>

The Comment to Section 601 of RUPA states that “[t]he entity theory of partnership provides a conceptual basis for continuing the firm itself despite a partner's withdrawal from the firm.”<sup>84</sup> Bromberg and Ribstein comment that “[t]his section improves on the UPA by identifying events that cause only cessation of partner status and not necessarily dissolution and winding up.”<sup>85</sup> By allowing mere dissociation of a partner due to death, bankruptcy, or incapacity (as opposed to automatic dissolution of the partnership under the UPA), RUPA provides more at-will partnership stability. This greater stability provides greater predictability of outcomes for interested parties, and aids in more efficient and effective bargaining.

In summary, under RUPA, when a partner is dissociated from an at-will partnership not governed by a continuation agreement, the partner's interest will be purchased by the partnership pursuant to Article 7 unless the remaining partner(s) elect a dissolution and winding-up under Article 8.<sup>86</sup> “Thus, a partner's dissociation will always result in either a buy-out of the dissociated partner's interest or a dissolution and winding up of the business.”<sup>87</sup>

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<sup>79</sup> RUPA § 801 cmt. 1 (1997).

<sup>80</sup> See HILLMAN ET AL., *supra* note 3, at 253. The term dissociation is not defined in RUPA. However, it allows the term dissolution to be used in a more narrow sense to refer to the termination of the partnership.

<sup>81</sup> RUPA § 601.

<sup>82</sup> *Id.* § 701.

<sup>83</sup> *Id.* § 701(a).

<sup>84</sup> *Id.* § 601 cmt. 1.

<sup>85</sup> BROMBERG & RIBSTEIN, SPECIAL RELEASE, *supra* note 19, at 79.

<sup>86</sup> RUPA § 603 cmt. 1.

<sup>87</sup> *Id.*

## IV. RESOLUTION OF THE DISSOCIATION/DISSOLUTION ANOMALY

While the text of RUPA itself provides little express guidance in the resolution of the dissociation/dissolution anomaly, subtle direction can be gleaned through a closer examination of applicable RUPA provisions.

*A. Dissociation and Dissolution of Partnership: RUPA Section 801 and Section 701*

RUPA does not require that an at-will partnership be dissolved or wound up in the case of dissociation of a partner by death, bankruptcy, or incompetence.<sup>88</sup> However, an at-will partnership must be dissolved and wound up upon “an event that makes it unlawful for all or substantially all of the business of the partnership to be continued.”<sup>89</sup> Under RUPA, “[t]he basic rule is that a partnership is dissolved, and its business must be wound up, only upon the occurrence of one of the events listed in Section 801.”<sup>90</sup> All other dissociations result in a buy-out of the partner’s interest under Article 7 and a continuation of the partnership business by the remaining partners.<sup>91</sup> This latter provision applies in the case of partner dissociation by death, bankruptcy, or incapacity.<sup>92</sup>

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<sup>88</sup> *Id.* § 801(1).

<sup>89</sup> *Id.* § 801(4) (“[B]ut a cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this section.”).

<sup>90</sup> *Id.* § 801 cmt. 1; *see also* Letter from Lauris G.L. Rall, Member, ABA Subcommittee on the Proposed Revised Uniform Partnership Act of the ABA Committee on Partnerships and Unincorporated Business Organizations, to Lane Kneedler, Chief Deputy Attorney General of Virginia, 3–4 (Feb. 6, 1992) (on file with author). The drafters had several reasons for avoiding a statutory dissolution right for every dissociating partner as they felt such a right would hinder “the ability of the remaining partners to carry on the business” in several ways. *Id.* at 3. “First, contractual arrangements with suppliers and creditors of the partnership—due on sale, default and termination provisions—may be triggered by dissolution . . . . Secondly, the dissociating partner may be able to force a takeover of the business, completely depriving the remaining partners of any participation therein.” *Id.* “Thirdly, dissolution and winding up the partnership’s business necessarily implies a resolution of all existing partnership liabilities as of the dissolution. Resolution of liabilities may result in forced sales of assets . . . . Or dissolution can result in the withdrawal of partnership assets by one or more partners who contributed the use of those assets.” *Id.* at 4.

<sup>91</sup> RUPA § 801 cmt. 1.

<sup>92</sup> *Id.* §§ 601(6)–(7), 801(1).



When a partner dissociation does not lead to dissolution, RUPA provides for a mandatory buy-out of the dissociated partner's interest, by the partnership or remaining partner(s).<sup>93</sup> The ability of the partnership to buy a dissociated partner's interest is another manifestation of the entity theory of partnership and only contributes to the anomaly that a partnership under RUPA seems to be viable as a continuing business form even when only one partner remains. The plain language of RUPA's provisions governing dissociation, dissolution, and buy-out seem to provide for a partnership that endures notwithstanding the dissociation of all but a single partner.<sup>94</sup>

This seeming oversight on the part of the RUPA drafters is somewhat remarkable given that the primary change to be accomplished by RUPA was to institute the entity theory of partnership, and that the main thrust of the entity theory of partnership was to make it possible for the first time, at least conceptually, for a partnership to endure independently of the partners who formed it.

Several factors may have contributed to the ambiguity in the statutory language that gives rise to the RUPA dissociation/dissolution anomaly. Some individuals involved in the drafting process felt pressure to complete the drafting process so that RUPA could be presented to the state legislatures as soon as possible.<sup>95</sup> Additionally, the provisions governing dissociation, dissolution, and buy-out involved extensive revision and were quite novel in light of prior partnership law. To their credit, the RUPA drafters struggled extensively to arrive at appropriate provisions regarding dissolution<sup>96</sup> and buy-out<sup>97</sup> that would accommodate the new entity-driven partnership form.

For example, an examination of the drafting records of NCCUSL with regard to the drafting of RUPA's provisions governing dissolution, dissociation, and winding-up reveals an extensive debate regarding the valuation of the disassociating partner's interest.<sup>98</sup> It seems that the RUPA

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<sup>93</sup> *Id.* § 701(a).

<sup>94</sup> *Id.* §§ 601, 701(a)–(b), 801.

<sup>95</sup> See Letter from Gerald V. Niesar, Chair, ABA Ad Hoc Subcommittee on RUPA, and John H. Small, Chair, Committee on Partnerships and Unincorporated Business Organizations of the ABA Section of Business Law, to Lane Kneedler, Chief Deputy Attorney General of Virginia (May 30 1991) (on file with author) (“We believe that we have detected a sense of urgency in the Drafting Committee to complete the revision work and get the Revised Act before the states quickly.”).

<sup>96</sup> See *supra* note 78.

<sup>97</sup> Arriving at the current buy-out provisions of RUPA § 701(b) turned out to be an arduous task for the RUPA Drafting Committee. See HILLMAN ET AL., *supra* note 3, at 286–87.

<sup>98</sup> See *id.*

drafters became so concerned with the overwhelming drive for fairness and efficiency that several large gaps were left open in the procedures for carrying on a partnership after the dissociation, and the provisions became quite complex.<sup>99</sup> Eventually, the complexity and unworkability of the system of buy-out valuation then under consideration by the committee was called to their attention, and the scheme was scrapped in favor of the simpler system now found in Section 701.<sup>100</sup>

In addition to drafting pressures, the lack of statutory language addressing the dissociation/dissolution anomaly can be explained in that under the UPA, with its emphasis on the individuals that make up the aggregate of partnership, such an organization as a sole partner partnership would have been considered an impossibility. When considered against the contextual backdrop of the UPA, the lack of a provision expressly disallowing a sole remaining partner the right or ability to continue the partnership alone, as a partnership, is to be expected.

Considering the drafting context surrounding the formation of RUPA Sections 801 and 701, it is possible to see that the full ramifications of the entity-driven partnership and the dissociation/dissolution anomaly simply were not comprehended by the drafting committee. Nonetheless, RUPA's provisions regarding when dissolution and winding up—as opposed to buy-out—are appropriate give no guidance as to the resolution of this anomaly. Express statutory language seems only to affirm the ability of a partnership to continue with only one remaining partner.

#### *B. Definition of Partnership: RUPA Sections 101(6) and 202(b)*

Under the UPA's theory of tenancy of partnership, the partners are inseparable from the partnership. The individual partners are so entwined with the partnership that it is merely a conduit through which the individual partners conduct business,<sup>101</sup> and it was deemed to have failed in the case of one partner's death, bankruptcy, or incapacity.<sup>102</sup> RUPA's express rejection of the concepts of tenancy of partnership and of the aggregate theory of partnership leave those relying on its default rules with little guidance in the face of two conflicting paradigms. On one hand, an association of two or more persons is required at all times under the UPA because a partnership is simply an extension of the parties' relationship

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<sup>99</sup> *Id.*

<sup>100</sup> RUPA § 701 cmt. 2; HILLMAN ET AL., *supra* note 3, at 286–87.

<sup>101</sup> See HILLMAN ET AL., *supra* note 3 and accompanying text.

<sup>102</sup> UPA § 38 (1914).

expressing or implying an intention to do business together for profit. On the other hand, under RUPA, the partnership now stands on its own, separate and distinct from its partners.

RUPA defines a partnership as “an association of two or more persons to carry on as co-owners a business for profit formed under Section 202.”<sup>103</sup> This definition is similar to that of the UPA except that, under RUPA, an entity, separate and distinct from the partners,<sup>104</sup> is formed when the elements of partnership are in place, rather than simply a partnership relationship being formed as a result of an aggregate of persons.<sup>105</sup> Since formation occurs under RUPA when the several elements of partnership are in place and this formation, unlike under the UPA where no entity is formed, includes the beginning of a distinct entity, it is possible that the later removal of a partnership element would likewise have a different effect on the partnership under RUPA than on the partnership as an extension of a relationship under the UPA.

The definitional ambiguity of RUPA Sections 101(6) and 202 is illustrated by the examination of the following two issues. First, under RUPA, consistent with the entity approach to partnership, *formation* of an entity is the key occurrence when the elements of partnership are in place.<sup>106</sup> The Comment to Section 202(b) asserts that “[n]o substantive change in the law is intended” between the UPA and RUPA definitions.<sup>107</sup> Nevertheless, the basic inconsistency between creation of a distinct entity under RUPA and the creation of an aggregate of persons under the UPA causes similar definitional terms to produce divergent results regarding the ability of a partnership to continue notwithstanding a partners withdrawal, depending on whether the jurisdiction’s default rule is the UPA or RUPA.

Under the UPA, the collection of persons that is a partnership must continue as such for the partnership to be *formed* and to *continue*. It is unclear however, that a collection of persons is necessary for anything more than *formation* of the partnership under RUPA. This assertion stems from the fact that under RUPA, there are no apparent definitional requirements as to the continuation of a partnership. This confusion could easily be remedied by amending the partnership definition to require an association

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<sup>103</sup> RUPA § 101(6).

<sup>104</sup> *Id.* § 202(a).

<sup>105</sup> UPA § 6(1) (“A partnership is an association of two or more persons to carry on as co-owners a business for profit. ”).

<sup>106</sup> RUPA § 202(a) (“[T]he association of two or more persons to carry on as co-owners a business for profit *forms* a partnership . . . .” (emphasis added)).

<sup>107</sup> *Id.* § 202 cmt.

of two or more persons for a partnership to *continue* under RUPA. Alternatively, and in the interest of greater efficiency through predictability of outcomes, the definition of partnership under RUPA could be amended to provide that a partnership does not cease to exist when all partners but one have been dissociated. If such an amendment appears contrary to the fundamental conception of partnership, restrictions could be placed on the length of time that a single remaining partner could carry on the business as a partnership or on the scope of business activities that could be conducted. In any case, this is not currently the default language of the statute.

Second, the definition of partnership under both the UPA and RUPA requires an association of partners to *carry on* a partnership enterprise.<sup>108</sup> This requirement would seem to militate against the concept asserted above that multiple partners are required only for *formation* of a partnership and not for *continuation* under RUPA. This observation, rather than leading to a resolution of the anomaly, simply reiterates the need for better definitional language in RUPA Section 202. Such an argument, when viewed in light of RUPA's self-proclaimed entity paradigm, reveals an irreconcilable conflict between the requirement that a partnership under RUPA be an entity separate and distinct from its partners<sup>109</sup> and the requirement that it have an association of persons to carry on partnership activities.<sup>110</sup> Either the partnership stands on its own, separate and distinct from the collection of partners who utilize the partnership to conduct their business, or it does not.

As noted above, part of the problem with allowing a partnership to continue with only one partner is simply the common law conception that a partnership is an aggregate of persons and nothing more.<sup>111</sup> When RUPA is construed according to its express statutory language, not only is it unclear whether the definition requires two or more persons to *continue* a partnership,<sup>112</sup> but it is also unclear whether the definition itself is internally consistent with the entity theory of partnership since a true entity does not rely on any particular number of entities for its existence.<sup>113</sup> Moreover, in some cases under RUPA, a partnership may continue indefinitely without

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<sup>108</sup> *Id.* §§ 101(6), 202(a); UPA § 6.

<sup>109</sup> RUPA § 201.

<sup>110</sup> *Id.* § 101(6).

<sup>111</sup> See BROMBERG & RIBSTEIN, ON PARTNERSHIP, *supra* note 33, § 1.03(b) (focusing on the relationship among or between partners).

<sup>112</sup> RUPA § 202(a).

<sup>113</sup> *Id.* § 201.

two living partners. Under RUPA, a “[p]erson means an individual, . . . estate, trust, . . . or any other legal or commercial entity.”<sup>114</sup> This compels the conclusion that when a partner is dissociated due to death, his estate qualifies as a “person” under RUPA, thereby allowing what is constructively a single remaining partner to carry on the business as a partnership without violating the definition of partnership until the estate of the partner is terminated. As long as this situation lasts, the estate will receive a share of the partnership income, but for practical purposes will likely have no involvement with the actual conduct of the business enterprise.

Furthermore, if the dissociated partner’s interest is placed in trust, it seems clear that the trust also satisfies the requirement of an association of persons and that a single partner can continue the partnership business as long as the dissociated partner’s share is held in trust. Therefore, under RUPA the traditional characteristic of joint control, the perceptions that two heads are better than one and that a partnership is a business relationship between multiple persons in cooperation, seems to be of little significance. A single partner may continue to operate the business in partnership with the dissociated partner’s estate or trust for the period of time that the dissociated partner’s estate is being wound up, and then bring in another partner to satisfy the conceptual, if not factual, definition of partnership under RUPA.

Under RUPA, an event that renders operation of the partnership illegal must be remedied within ninety days or the partnership is dissolved due to illegality.<sup>115</sup> The critical determination for our purposes is whether a single partner in control of the partnership violates RUPA’s definitional requirements so as to make the partnership illegal.<sup>116</sup> A plain reading of RUPA’s definition of “partnership” seems to reveal little, if anything, to indicate whether a single-partner partnership is unlawful. Moreover, RUPA’s language has not resolved whether it is possible to remain internally consistent with the entity theory of partnership and provide that a single partner partnership is unlawful. In the event that a single remaining partner is found to violate the definitional requirement of RUPA, it is clear that such a partner has ninety days to cure the deficiency before partnership status is lost.<sup>117</sup>

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<sup>114</sup> *Id.* § 101(10).

<sup>115</sup> *Id.* § 801(4).

<sup>116</sup> *Id.* §§ 101(6), 202.

<sup>117</sup> *Id.* § 801(4).

The records of the RUPA Drafting Committee shed little illumination as to the definitional requirements of a partnership as a continuing form.<sup>118</sup> The only change made to the definitional language over the course of the RUPA drafting process is a change from the term *creation* of a partnership to the term *formation* of a partnership at the insistence of the ABA.<sup>119</sup>

Thus, the definitional requirements of RUPA do little to resolve the dissociation/dissolution anomaly due to the ambiguity regarding what is required under RUPA to *continue* a partnership once it is formed. While the Official Comments urge that there is no change to the definition of “partnership” between the UPA and RUPA, the fundamental change from an aggregate of persons required to form or continue a partnership under the UPA to the aggregate of persons required to form a partnership *entity* under RUPA makes the Official Comment’s assertion of consistency largely meaningless.

### C. *Property Distribution: RUPA Section 302(d)*

RUPA, Section 302(d) provides that “[i]f a person holds all of the partners’ interests in the partnership, all of the partnership property vests in that person.”<sup>120</sup> The Official Comment goes on to explain that with regard to a single remaining partner, the Section “allows for clear record title, even though the partnership no longer exists as a technical matter. When a partnership becomes a sole proprietorship by reason of the dissociation of all but one of the partners, title vests in the remaining ‘partner’ . . . .”<sup>121</sup>

NCCUSL states that the Official Comments are not to be considered substantive in nature.<sup>122</sup> Even so, the Official Comment may serve to shed light on the committee’s point of view in reference to this issue and may provide some guidance for the resolution of the dissociation/dissolution

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<sup>118</sup> See generally, *Correspondence, in* UNIFORM PARTNERSHIP ACT DRAFTS 1993 (Allan W. Vestal ed., 1995) (discussing technical changes throughout the drafting process but no illumination as to substantive intent of the drafters).

<sup>119</sup> ABA Supplemental Report by the Subcommittee on RUPA, Exhibit A, 1 (Oct. 1993) (“[A]s the default business entity, both the UPA and the RUPA acknowledge that some partnerships are formed [rather than created] inadvertently.”).

<sup>120</sup> RUPA § 302(d).

<sup>121</sup> *Id.* cmt. 6.

<sup>122</sup> National Conference of Commissions on Uniform State Laws, *supra* note 55 (“Comments should not be used as a substitute for or to modify any substantive provision in an Act.”).

anomaly. Here, the drafters assert that when a single “partner” remains alone, the partnership “no longer exists as a technical matter.”<sup>123</sup> The drafters further assert that a partnership becomes a sole proprietorship automatically “by reason of the dissociation of all but one of the partners.”<sup>124</sup>

The text of this Comment seems to be the only guidance given by the RUPA drafters with regard to resolution of the dissociation/dissolution anomaly. While it concerns the disposition of partnership property, and not matters of dissociation and dissolution, it is likely that the principles espoused by the Comment would apply in matters of dissociation and dissolution as well. It must be remembered that even though this Comment provides the only indication as to the promulgator’s suggested resolution of the RUPA dissociation/dissolution anomaly, it is not to be considered an official provision of RUPA. It should not serve as a substitute for clarification of the relevant provisions to resolve the dissociation/dissolution anomaly.

The Comment may serve as a suggested viewpoint regarding how a single-partner partnership should be classified. However, its authority as a statutory comment must be given its appropriate weight. While this does not preclude the use of the Comment as a guide for lawmakers eager to adopt and implement a cohesive and efficient RUPA statutory scheme, lawmakers should consider theoretical issues regarding the entity characteristics of partnership under RUPA as well as practical considerations of stability and efficiency.

*D. Keeping Up with the Joneses: How Legislatures Have Dealt with RUPA’s Dissociation/Dissolution Anomaly*

As noted earlier, a majority of U.S. jurisdictions have adopted RUPA.<sup>125</sup> Of those that have implemented RUPA, a short survey indicates that, in accordance with the Comment to RUPA Section 302(d), most jurisdictions require dissolution of the partnership when only one partner remains. The Code of Alabama makes reference to the Internal Revenue Code and states that

[t]he very essence of a partnership contemplates two or more partners joining together as coproprietors to engage in business and share the

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<sup>123</sup> RUPA § 302(d) cmt. 6.

<sup>124</sup> *Id.*

<sup>125</sup> See HILLMAN ET AL., *supra* note 3, app. B, at 531–32.

profits. Moreover, the regulations state that a partnership's business is no longer carried on by the partners if there is only one remaining partner; consequently, such partnership will terminate.<sup>126</sup>

Alabama also enacted the Comment to RUPA Section 302(d) that describes the single remaining partner as becoming a sole proprietor<sup>127</sup> as a result of the failure of the required "association of two or more persons."<sup>128</sup> Florida and Idaho also provide for automatic conversion to a sole proprietorship when only a single partner remains.<sup>129</sup>

Arizona provides that "a partnership is dissolved, and its business shall be wound up" in the event that:

The expiration of ninety days after a partner's dissociation that results in one or no remaining partner, unless the dissociation was pursuant to § 29-1051, paragraph 6 or 7 and before the expiration, all of the transferees, including transferees of the dissociated partner, and the remaining partner, if any, agree by written consent to continue the business of the partnership and admit that number of partners sufficient to cause the partnership to have at least two partners.<sup>130</sup>

Colorado, Delaware, and Illinois assume dissolution of the partnership, whether or not the partnership property is liquidated, when only one partner remains.<sup>131</sup> In some jurisdictions, a single remaining partner is required to apply for a new license to continue business, implying a dissolution requirement.<sup>132</sup>

Efficiency suggests a statutory scheme similar to the one found in Alabama where "a partnership becomes a sole proprietorship by reason of

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<sup>126</sup> ALA. CODE § 10-12-9 (2003) (internal citations omitted).

<sup>127</sup> *Id.* § 10-8A-302 cmt. 6 (2003) ("Subsection (d) allows for clear record title, even though the partnership no longer exists as a technical matter. When a partnership becomes a sole proprietorship by reason of the dissociation of all but one of the partners, title vests in the remaining partner although there is no transfer of the property.").

<sup>128</sup> RUPA § 202 (1997).

<sup>129</sup> FLA. STAT. ANN. § 620.8302 cmt. 6 (West 2003); IDAHO CODE § 53-3-302 cmt. 6 (Michie 2003).

<sup>130</sup> ARIZ. REV. STAT. ANN. § 29-1071(7) (West 2003).

<sup>131</sup> COLO. REV. STAT. ANN. § 7-60-141 (West 2003); DEL. CODE ANN. tit. 6, § 1539 (2003); 805 ILL. COMP. STAT. ANN. § 205/41 (West 2003). The Illinois statute will be repealed in 2008. *See* 805 ILL. COMP. STAT. § 205/95 (2003).

<sup>132</sup> CAL. BUS. & PROF. CODE § 7076 (West 2003).



the dissociation of all but one of the partners, title vests in the remaining 'partner' although there is no 'transfer' of the property."<sup>133</sup> This statutory regime best protects the value of the business as a going concern and allows creditors to price risk more confidently when the durability of the business entity is assured, while still addressing the conceptual nature of a partnership as having multiple partners.

## V. CONCLUSION

Due to the relatively recent promulgation of RUPA there is little, if any, authority as to the resolution of the dissociation/dissolution anomaly. On one hand, the single partner perhaps should automatically become a sole proprietor as a natural result of a clear violation of the definition of partnership as an "association of two or more persons."<sup>134</sup> On the other hand, the ability of a single partner to continue the partnership as such may be perceived by lawmakers as a natural result of the modernization of partnership law and the entity theory of RUPA.<sup>135</sup> It seems obvious that RUPA's entity regime is beneficial in many ways and that the added stability and predictability that is possible as a result of a partnership, independent and distinct from its partners, provides uniformity, allows for more efficient transactions between partnerships and third parties, allows for better predictability of outcomes and pricing risk, and can save a productive partnership from the devastating effects of dissolution and liquidation upon the sudden death or incapacity of a partner.

One of the primary purposes of RUPA is to increase stability and efficiency of the general partnership form.<sup>136</sup> Definitional requirements of RUPA appear to require the traditional elements of partnership<sup>137</sup> only with regard to formation of the partnership entity and not with regard to continuation of the partnership. Thus, a sole partner operating a partnership seems not to be in violation of the express definition of partnership under RUPA. Following from this, the partnership will not be dissolved as illegal under RUPA Section 801(4) because a sole-partner partnership would seem to be not in violation of the express definitional requirements of RUPA.<sup>138</sup> Furthermore, the fact that the partnership is not dissolved upon dissociation

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<sup>133</sup> ALA. CODE § 10-8A-302 cmt. 6 (2003).

<sup>134</sup> RUPA § 202(a).

<sup>135</sup> *Id.* § 201(a).

<sup>136</sup> See HILLMAN ET AL., *supra* note 3, at 2–3.

<sup>137</sup> RUPA § 202(b).

<sup>138</sup> *Id.* § 202(a).

of a partner due to death, bankruptcy, or incapacity,<sup>139</sup> and that in such a case the partnership is mandated to buy-out the dissociated partner's interest in the partnership,<sup>140</sup> seems to indicate a contemplation of the continuing viability of the partnership regardless of the number of remaining partners. Nonetheless, the Comment to RUPA Section 302(d) seems to make it clear that the drafters of RUPA contemplated a dissolution of the partnership upon the dissociation of all but one partner and the automatic conversion of a sole partner's partnership into a sole proprietorship.<sup>141</sup>

The state legislatures who have considered RUPA's dissociation/dissolution anomaly have been in accordance with the Comment to RUPA Section 302(d).<sup>142</sup> Unfortunately, while not only internally inconsistent with the entity view of partnership, this outcome would seem to result in the same waste, instability, and inefficiency as the forced dissolution under the UPA. Unless the partnership, or the remaining partner, has assets available to buy-out the dissociated partner's interest upon dissolution, the partnership's value as a going concern is lost and may not be recaptured by the remaining partner with the subsequent establishment of a sole proprietorship.

Future viability of the partnership form is predicated on its ability to adapt to the needs of the modern business world. With the advent of limited liability partnerships, limited liability companies, s-corporations, and the venerable c-corporation, individuals involved in private enterprise are presented with an array of entity choices, each offering a slightly different set of advantages and disadvantages. A primary element needed in most business contexts is predictability of outcomes, coupled with long-term stability in transactions with third parties. Under RUPA, a partnership creditor may remain confident that the partnership will continue to exist and to be profitable regardless of unexpected changes in partnership membership. This element allows the partnership entity to reach much higher levels of efficiency under RUPA than under the UPA.

Additionally, the predictability of the general partnership under RUPA benefits the partners themselves. Since much of the value of a partnership in most cases is its value as a going concern, as opposed to the value of its individual components, it is in the best interest of the partners to keep the

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<sup>139</sup> *Id.* § 801(1).

<sup>140</sup> *Id.* § 701(a).

<sup>141</sup> *Id.* § 302(d) cmt. 6.

<sup>142</sup> *See supra* note 59.

partnership intact and to provide for contingencies in a way that will allow the firm to continue production without interruption. Obviously, one of the best ways to ensure this type of predictability is to create a partnership agreement providing for the evidencing of the intent of the parties in a given contingency. Though many individuals in general partnerships conduct business in accordance with an agreement, others do not, and in light of the fact that the benefits of continuity and predictability are important in all business contexts, the default rules for any business entity should attempt to accommodate the needs and expectations of those utilizing the organizational form.

Regardless of what path one takes to resolution of the dissociation/dissolution anomaly, it seems clear that RUPA remains the most efficient version of partnership law with regard to the dissociation of a partner. RUPA protects the value of the partnership as a going concern, a very important element for many businesses that have good will and reputation as their most valuable asset. Further, due to increased stability and continuity, RUPA allows the partnership and partnership creditors to bargain for risk more efficiently. Because the partnership is not subject to dissolution and liquidation at some unpredictable time, transactions are simplified and the costs of obtaining capital are lowered. A smooth transition from the UPA to RUPA is aided by a well-considered prior resolution of the dissociation/dissolution anomaly. A statutory scheme providing for the "gaps" left open in RUPA allows parties operating under the jurisdiction's default rules to effectively plan for the future and allows the general partnership to continue as a viable and efficient organizational alternative.