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The Uniform Partnership Act and Its Effect Upon the West Virginia Decisions and Statutes II

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THE UNIFORM PARTNERSHIP ACT AND ITS EFFECT
UPON THE WEST VIRGINIA DECISIONS
AND STATUTES. II*

By J. R. TROTTER **

PART VI

DISSOLUTION AND WINDING UP

SECTION 29. [Dissolution Defined.] The dissolution of a partnership is the 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.

Dissolution is frequently understood to mean the termination of the act of conducting the ordinary business and the final settlement thereafter. In this section dissolution designates the point in time when the partners cease to carry on the business together. After dissolution comes the winding up of the business.

SEC. 30. [Partnership Not Terminated by Dissolution.] On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

This represents the West Virginia law. *Brown's Est. v. Higginbotham*, *supra*; *Ruffner, Conally & Co. v. Hewitt, Kercheval & Co.*, 7 W. Va. 586; *Smith v. Zumbro et al.*, 41 W. Va. 623, 24 S. E. 653.

SEC. 31. [Causes of Dissolution.] Dissolution is caused:

- (1) Without violation of the agreement between the partners,
 - (a) By the termination of the definite term or particular undertaking specified in the agreement,
 - (b) By the express will of any partner when no definite term or particular undertaking is specified,

This refers, of course, to a partnership at will, terminable at the mere caprice of any partner. *McMahon et al. v. McClernan*, 10 W. Va. 419.

- (c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for

* For first installment of this discussion, see 27 W. VA. L. QUAR. 28-64.
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their separate debts, either before or after the termination of any specified term or particular undertaking,

That is to say, all the remaining partners may agree to modify the original contract of partnership and shorten its term of existence.

(d) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners;

A willful exclusion of a partner is ground for dissolution at common law but under this section expulsion, *ipso facto*, dissolves it.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

It is conceded by the weight of authority that a court of equity cannot stand over a partner and make him carry out his contract of partnership. It is therefore generally held that any partner may break his partnership agreement, but, of course, is liable in damages for the breach. This section of the Uniform Law in permitting him to do so follows the weight of authority. Although *McMahon v. McClernan*, *supra*, seems *contra*, it probably means what this section together with Section 38 (2) holds, *viz.*, that the partner who breaks the contract will be liable for damages.

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

So held in *Davis v. Christian*, 15 Grat. 11 (Va.).

(5) By the bankruptcy of any partner or the partnership;

This is in accord with *Conrad v. Buck*, *supra*.

(6) By decree of court under Section 32.

SEC. 32. [Dissolution by Decree of Court.] (1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

The general rule is that insanity of a partner does not dissolve the partnership but is ground for dissolution as provided in this section.

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

In subsections (b), (c), and (d) the general rule is given.

(e) The business of the partnership can only be carried on at a loss,

Accord, *Cross v. Hopkins*, 6 W. Va. 323; *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under Sections 28 or 29:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

As noted under Sections 28 and 29, at common law, sale of his interest by a partner dissolved the partnership. Under this act the partnership continues, but the assignee has no voice in the control of the business and not until the termination of the specified time or undertaking may he apply for dissolution.

SEC. 33. [General Effect of Dissolution on Authority of Partner.] 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,

This and the following sections mean simply that after dissolution one partner can not carry on the firm business so as to make his partners liable except that if the dissolution is caused by the act of another partner he may bind the firm if he does not have actual knowledge or notice of the dissolution. This is a change in the law although there are no decisions on it in this state. At present when dissolution is brought about by operation of law every one must take notice thereof.

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or

If the dissolution is not by the act, the bankruptcy or the death of a partner, it must be by decree of court or because it is unlawful. If dissolution

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is by decree of court each partner has been made a party and has actual knowledge that the partnership is dissolved. If he then in an attempt to bind the partnership binds himself, his fellows should not be held liable, and, if the business is unlawful, he should not expect relief.

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where Section 34 so requires.

(2) With respect to persons not partners, as declared in Section 35.

SEC. 34. [Right of Partner to Contribution From Co-partners After Dissolution.] Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

The distinction between notice and knowledge set out in Section 3 should be kept in mind.

SEC. 35. [Power of Partner to Bind Partnership to Third Persons After Dissolution.]. (1) After dissolution a partner can bind the partnership except as provided in paragraph (3).

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

Although at common law the general agency of partners is terminated by dissolution there is still a mutual agency for closing up the firm business but its scope embraces only such acts as are reasonably necessary to accomplish this purpose. This section seems to require notice or knowledge of dissolution by operation of law as well as by acts of parties.

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction-

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

The weight of authority seems to be that only one who has extended credit to a partnership is entitled to notice although there are decisions holding that one who has had any business transactions is entitled to notice. This section settles it. No decision in this state.

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

This is the general rule that the public at large is entitled only to published notice. This section seems to require knowledge or notice of dissolution by operation of law as well as of dissolution by act of the parties and is, therefore, like Section 33 (1) (b), change in the law.

(2) The liability of a partner under Paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

This is the general rule as to dormant partners.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in Paragraph (1bII).

(4) Nothing in this section shall affect the liability under Section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

Sec. 36. [Effect of Dissolution on Partner's Existing Liability.]

(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

This is the general rule. *Barnes v. Boyers*, 34 W. Va. 303, 12 S. E. 708; *Burdett v. Greer*, 63 W. Va. 515, 60 S. E. 497; *Bays v. Johnson*, 80 W. Va. 559, 92 S. E. 792.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

If there is an express agreement between the creditor and the partnership whereby the creditor agrees to take the individual note or obligation of one partner in discharge of the partnership or joint debt, such agreement is founded on a valid consideration and will discharge the firm debt. Whether such an agreement has been made is a question of fact for the jury. *Bowyer v. Knapp & Martin*, 15 W. Va. 278; *Burdette v. Greer*, 63 W. Va. 515, 60 S. E. 497. In *Johnson v. Young*, 20 W. Va. 614, the court seems to hold that the continuing partner is principal debtor and the retiring partner is surety; but this is expressly repudiated in *Barnes v. Boyers*, *supra*, and in *Bays v. Johnson*, *supra*, the latter case holding that the creditor's assent to the assumption of the debt by the continuing partner is not sufficient without an express or implied agreement to rely exclusively upon the credit of such partner.

It would seem, therefore, that this section does not change the existing law in this state.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

This subsection applies to those cases where the creditor has not agreed to release the retiring partner as provided in subsection (2). This is clearly on the theory that the continuing partner is now a principal debtor and the retiring partner a surety, under the well-known rule that any material alteration in the obligation of the principal releases the surety. As shown above, subsection (2), this is not the law in this state.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

The provision of this subsection is decidedly different from the law in this state. In *J. Morris' Admr. v. S. Morris' Admr.*, 4 Grat. 293 (Va.),

the court divided equally on whether a firm creditor, after exhausting firm assets could then proceed *pari passu* with individual creditors against the individual property of a deceased partner and the case was decided on other grounds. Then evidently to clear up this point, W. VA. CODE, c. 99, § 13 (CODE VA. 1849, c. 144) was passed, and in *Ashby's Admr. et als v. Porter et als.*, 26 Grat. 455 (Va.), followed by *Pettyjohn's Exrs. v. Woodruff's Exrs.*, 86 Va. 478, and in *Freeport Stone Co. et al. v. Carey's Admr. et al.*, 42 W. Va. 276, 26 S. E. 183, it was held that firm creditors came in *pari passu* with individual creditors after firm property had been exhausted, because the section referred to made firm debts joint and several. It is evident, however, that firm debts are joint and several only by virtue of this West Virginia code provision, and that it applies only to those cases in which there is a deceased partner.

SEC. 37. [Right to Wind Up.] 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.

There seem to be no cases in point in West Virginia except that *Buffner, Donnelly & Co. v. Hewitt, Kercheval & Co.*, *supra*, lays down the commonly accepted principle that a dissolution of the partnership leaves every partner in possession of full power to settle up the partnership, unless otherwise agreed.

SEC. 38. [Rights of Partners to Application of Partnership Property.] (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. But if dissolution is caused by expulsion of a partner, *bona fide* under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under Section 36 (2), he shall receive in cash only the net amount due him from the partnership.

This section gives to each partner the right to have his share of the surplus paid in cash, instead of having his share of the property.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in paragraph (1) of this section, and

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for the purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2aII) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2aII), of this section,

(II) If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused by his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

There seems to be no case touching this section in West Virginia.

SEC. 39. [Rights Where Partnership is Dissolved for Fraud or Misrepresentation.] Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without a prejudice to any other right, entitled,

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the

purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

This section refers to annulment on account of fraud in procuring the contract rather than to dissolution. Because the parties have held themselves out as partners they will be liable to all persons who have treated with them as such, but as between themselves the decree will declare they have not been partners. The innocent partner, therefore, after partnership debts are paid is entitled to have refunded all he paid into the concern because of the fraud or misrepresentation of the other. Moreover, subsection (b) gives him the right to proceed, after the firm debts are paid, against the firm property still remaining, ahead of the individual creditors, who but for this provision would probably come in *pari passu* with him.

SEC. 40. [Rules for Distribution.] In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are;

(I) The partnership property,

(II) The contributions of the partners necessary for the payment of all liabilities specified in clause (b) of this paragraph.

Inasmuch as the contributions of partners towards the losses of the partnership are, by this section, declared to be partnership assets, it necessarily follows that bankruptcy of a partnership is not possible so long as there is a solvent partner. This seemed to be the law but there was much confusion.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) Those owing to partners other than for capital and profits,

(III) Those owing to partners in respect of capital,

(IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by Section 18 (a) the amount necessary to satisfy the liabilities; but if any,

but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, and other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

The West Virginia law is the same. *Teter v. Moore, supra.*

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the right of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

- (I) Those owing to separate creditors,
- (II) Those owing to partnership creditors,
- (III) Those owing to partners by way of contribution.

SEC. 41. [Liability of Persons Continuing the Business in Certain Cases.] (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

This section does not alter the universal rule that any change in membership dissolves the old partnership and creates a new partnership. But under the rule now in force if all the partners consent to a change of the firm and thereby a change in the ownership of the assets they thereby waive the

so-called partner's lien and the creditors of the old firm, who have their priority against the firm property only through such lien, lose all their advantage and must depend entirely on their claim against the individual partners, while the creditors of the second firm may be paid in full out of the firm property, that is, the property handed over by the first firm.

This section corrects this injustice and puts the creditors of the old firm on an equality with those of the second.

No cases in this state.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

This changes the present law to the same extent as subsection (1). No West Virginia cases.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraph (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

This subsection brings about the same result where there is no assignment as subsections (1) and (2) where there is an assignment.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

The promise to pay the debts of the old firm seems to be the individual promise of the assignee or assignees. In addition to this obligation this section makes the creditors of the old firm also creditors of the new so that they may proceed with the creditors of the new firm against the property.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of Section 38 (2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

This provision is essentially the same as Section 17, except that this section covers the liability of one continuing a dissolved partnership, whereas Section 17 provides for liability of one admitted into a continuing partnership.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

Ordinarily a partner cannot compete with firm creditors against the firm property, but if a partner should sell out his interest in a firm to his co-partners who promise to pay him a certain consideration he would then be a creditor of the new firm, and, but for this section, probably would then compete with the creditors of the old firm of which he was a member, who by the preceding subsections of this section are made creditors of the new firm. This subsection simply provides that his claim, or the claims of those claiming under him, for his interest so conveyed to his co-partners shall be postponed until the claims of the creditors of the old or dissolved firm have been satisfied. He then comes in *pari passu* with the other creditors of the new firm.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

SEC. 42. [Rights of Retiring or Estate of Deceased Partner When the Business is Continued.] 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.

No West Virginia cases.

SEC. 43. [Accrual of Actions.] The right of an account of his interest shall accrue 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.

This is the general rule. *Sandy v. Randall*, 20 W. Va. 244.

PART VII

MISCELLANEOUS PROVISIONS

SECTION 44. [When Act Takes Effect.] This act shall take effect on the.....day of.....one thousand nine hundred and.....

SEC. 45. [Legislation Repealed.] All acts or parts of acts inconsistent with this act are hereby repealed.