

Third Supplement to Memorandum 86-89

Subject: Study L-1037 - Estate and Trust Code (Estate Management:
Partnerships)

This supplement proposes several improvements in the provisions dealing with partnership interests. (See Sections 9761-9762 in the draft statute attached to Memorandum 86-89, which generally restate the substance of existing Probate Code Sections 571 and 572.) The problem is that these provisions have never been fully reconciled with the Uniform Partnership Act. The questions involved are discussed in the attached draft of an explanatory text, statute, and comments which, if approved, will be included in the *Tentative Recommendation Relating to Estate Management*.

Respectfully submitted,

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Staff Draft**[ESTATE MANAGEMENT: PARTNERSHIPS]**

The Probate Code provides special rules in the case where a partner dies. Section 571 requires that the personal representative include the partnership interest in the inventory and appraisal and provides that the surviving partner has the right to continue in possession of the partnership and settle its business. This section also imposes a duty on the surviving partner to settle the affairs of the partnership without delay, account to the personal representative, and pay over amounts due the decedent from time to time. The personal representative is given the authority to maintain any action against the surviving partner that the decedent could have maintained. These provisions date back to the Probate Act of 1851 and have remained largely undisturbed since then.¹

Probate Code Section 572 permits the personal representative to continue the partnership if to do so is consistent with the partnership agreement, subject to conditions determined by the probate court to protect the interests of the estate and interested persons and subject to the approval of the other partners. If there is no written partnership agreement, the business may be continued subject to conditions determined by the court and the approval of the surviving partners.²

The comprehensive law relating to partnerships is in the Corporations Code.³ The statutes relating to partnerships in the

1. 1851 Cal. Stat. ch. [].

2. The special authority to continue the partnership business under Probate Code Section 572 was enacted in 1971. 1971 Cal. Stat. ch. 1648, § 2.

3. See Uniform Partnership Act, Corp. Code §§ 15001 et seq.; Uniform Limited Partnership Act, Corp. Code §§ 15501 et seq.; California Revised Limited Partnership Act §§ 15501 et seq.

Corporations Code contain more detailed and extensive provisions applicable to the situation where a partner dies than does the Probate Code.⁴ In some instances, the rules in the Corporations Code differ from the rules in the Probate Code. For example, the Probate Code imposes a duty on the surviving partner to "settle the affairs of the partnership without delay."⁵ This provision varies from the Uniform Partnership Act which gives the right to wind up the affairs of the partnership to surviving partners,⁶ permits them to continue the partnership,⁷ and even recognizes the continuation of a terminated partnership.⁸

The potential conflict between the Probate Code and the comprehensive partnership statutes is recognized in a provision included in the Uniform Partnership Act under which the Probate Code provisions are subordinated to the Uniform Partnership Act.⁹ The

4. As to general partnerships, see Corp. Code §§ 15010.6, 15020-15021, 15025, 15029-15043. As to limited partnerships, see Corp. Code §§ 15520-15521, 15524, 15642, 15675.

5. Prob. Code § 571. This language remains unchanged since its original enactment in 1851.

6. Corp. Code § 15037.

7. Corp. Code §§ 15041(3) (continuation of business of partnership dissolved by death of partner), 15042 (representative of deceased partner treated as creditor of continued partnership business). Although Probate Code Section 571 recognizes that the business may be continued under the terms of Probate Code Section 572, this exception on its face applies only to the second sentence of Section 571 which deals with the inventory and appraisal and recognizes that the surviving partners have the right to remain in possession of the partnership property. The surviving partners' right of possession is also set out in the Uniform Partnership Act. Corp. Code § 15025(2)(d).

8. Corp. Code § 15023.

9. Corporations Code Section 15045 reads as follows:

15045. The rights and duties of surviving partners, the legal representatives of deceased partners, the creditors of such partners, and the creditors of the partnership created by or defined in this chapter shall be given full force and effect notwithstanding any provisions inconsistent therewith in the Probate Code, but nothing in this chapter shall otherwise affect any provision of the Probate Code.

proposed law does not continue the conflicting rules concerning rights and duties of partners that appear in Sections 571 and 572 of the Probate Code and thus implements the override provision in the Uniform Partnership Act.

The proposed law retains two Probate Code provisions designed to protect the interests of the decedent's estate and of interested persons in a partnership. First, the proposed law preserves the jurisdiction of the probate court to order a surviving partner to account.¹⁰ Second, the proposed law continues the power of the court to control the personal representatives participation in the continuation of the partnership business.¹¹ As under existing law, the participation of the personal representative in the partnership is subject to the terms of any written partnership agreement and to the written approval of the surviving partners.

10. Probate Code Section 571 permits the court, on application of the personal representative, to order a surviving partner to account "whenever it appears necessary" and in case of neglect or refusal, after notice, to compel the accounting "by attachment." The proposed law also makes clear that the probate court can enforce its order by exercise of the power to punish for contempt, rather than "by attachment." See Code Civ. Proc. § 1209 et seq. The proposed law incorporates the accounting rights stated in the relevant partnership laws. As to general partnerships, see Corp. Code §§ 15020 (disclosure of information on demand), 15022 (formal accounting "when circumstances render it just and reasonable"), 15043 (right to account in absence of contrary agreement). As to a limited partnership, see Corp. Code §§ 15510, 15521, 15634, 15675.

11. See Prob. Code § 572.

Revised Staff Draft

ESTATE AND TRUST CODE SECTIONS 9761-9762

§ 9761. Right to accounting from surviving partner

9761. If a partnership existed between the decedent and another person at the time of the decedent's death, on application of the personal representative, the court [or a judge thereof] may order the surviving partner to render an account pursuant to Section 15043, 15510, or 15634 of the Corporations Code. An order under this paragraph may be enforced by the court's power to punish for contempt.

Comment. Section 9761 replaces the authority provided in former Section 571 to order an accounting where necessary and to enforce the order "by attachment." The standard for ordering an accounting is provided in the statutes governing partnerships. As to a general partnership, see Corp. Code §§ 15022 (right to formal accounting where "just and reasonable"), 15043 (right to account of deceased partner's interest accrues to personal representative); see also Corp. Code §§ 15019 (right to inspect partnership books), 15020 (right to information on demand). As to a limited partnership, see Corp. Code §§ 15510(1)(a)-(b) (right to information), 15521 (personal representative's exercise of rights), 15634 (right to information), 15675 (personal representative's exercise of rights).

The order to account under this section is enforceable by the power to punish for contempt under Code of Civil Procedure Section 717.010. Only the personal representative may apply for an accounting under Section 9761. An interested person may neither make application under this section nor petition for instructions under Section 9611.

Note. This section would be more logically located with other provisions concerning accountings. See draft Sections 8870-8873 attached to Memorandum 86-84. The staff suggests that this provision be consolidated with draft Section 8872 (citation to appear and account).

The inventory provision included in draft Section 9761, as set out in the draft tentative recommendation (attached to Memorandum 86-89, p. 37) is unnecessary and has been omitted. Section 8850(b)(2) (attached to Memorandum 86-84, p. 19) requires the inventory to include a statement of the interest of the decedent in a partnership in which the decedent was a member.

§ 9762. Personal representative continuing as partner in decedent's general partnership

9762. (a) After authorization by order of court upon a showing that it would be to the advantage of the estate and in the best interest of the interested persons, the personal representative may

continue as a general or a limited partner in any partnership in which the decedent was a general partner at the time of death. In its order, the court may specify any terms and conditions of the personal representative's participation as a partner that the court determines are to the advantage of the estate and in the best interest of the interested persons, but any terms and conditions that are inconsistent with the terms of any written partnership agreement are subject to the written consent of all of the surviving partners.

(b) If there is a written partnership agreement permitting the decedent's personal representative to participate as a partner, the personal representative has all the rights, powers, duties, and obligations provided in the written partnership agreement, except as otherwise ordered by the court pursuant to subdivision (a).

(c) If there is not a written partnership agreement, the personal representative has the rights, powers, duties, and obligations that the court specifies in its order pursuant to subdivision (a).

(d) To obtain an order pursuant to this section, the personal representative or any interested person shall file a petition showing that the order requested would be to the advantage of the estate and in the best interest of the interested persons. Notice of the hearing on the petition shall be given for the period and in the manner provided by Section [1200.5]. In addition, unless the court otherwise orders, the petitioner, not less than 10 days before the hearing, shall cause notice of hearing and a copy of the petition to be mailed to each of the surviving general partners at his or her last known address.

Comment. Section 9762 restates a portion of the first sentence and all of the second sentence of former Section 572 without substantive change except as indicated below.

This section is limited to a partnership in which the decedent was a general partner at the time of the decedent's death. Insofar as former Probate Code Section 572 may have applied to a partnership in which the decedent was a limited partner, this section is superseded by Section 9763. See the Comment to Section 9763.

The authority of the surviving partners to consent to participation by the personal representative notwithstanding the terms of the partnership agreement, which is provided in the second sentence of subdivision (a), is new. Former law did not appear to allow the personal representative to continue participation in the partnership where to do so would be inconsistent with the terms of the partnership agreement. See Prob. Code § 572; but cf. Corp. Code § 15023 (continuation of terminated partnership).

The requirement in subdivision (d) that notice of the hearing on the petition be given for the period and in the manner provided in

Section [1200.5] and by mail to each of the surviving partners is substituted for the requirement of former Probate Code Section 572 that the order be made after notice to all persons interested in the estate, given in such manner as may be directed by the court [or a judge thereof]. If the court determines that notice as provided in Section [1200.5] is not sufficient, the court can require such further and additional notice to be given as the court considers proper. See Section [1204].

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). See also Section 9612 (effect of court authorization or approval).

§ 9763. Exercise of decedent partner's rights

9763. [(a) If the decedent was a general partner, the personal representative may maintain any action against the surviving partner that the decedent could have maintained.]

(b) The personal representative may exercise the decedent's rights as a limited partner as provided in Section 15675 of the Corporations Code.

Comment. [Subdivision (a) of Section 9763 restates the last part of the last sentence of former Probate Code Section 571 without substantive change.]

Subdivision (b) replaces the provisions of former Probate Code Section 572 that may have required court approval for the personal representative to exercise the decedent's rights as a limited partner. Under Section 15675 of the Corporations Code, court approval is not required, but the personal representative may exercise the decedent's rights only for the purpose of settling the estate.

Note. The staff has relocated the provision appearing in subdivision (a) from draft Section 9761, as it appears in the draft tentative recommendation attached to Memorandum 86-89. It does not appear that subdivision (a) is really needed. Draft Section 9820 permits the personal representative to "institute and maintain actions and proceedings for the benefit of the estate." It would be appropriate to note in the Comment to Section 9820 that it also restates the last part of the last sentence of former Probate Code Section 571 without substantive change.

COMMENTS TO REPEALED PROBATE CODE SECTIONS

§ 571 (repealed). Possession of decedent's estate

Comment. The first sentence of former Probate Code Section 571 is restated in paragraph (1) of subdivision (a) of Estate and Trust Code Section 9650 without substantive change.

The duty of a surviving partner to wind up partnership affairs provided in the second sentence of former Probate Code Section 571 is omitted since this is a matter governed by the Uniform Partnership Act. See Corp. Code §§ 15024 (rights of partner), 15025(2)(d) (rights in specific property upon death of partner), 15037 (right to wind up partnership affairs), 15041 (creditor's rights against continued partnership), 15042 (rights of deceased partner where partnership continued). The requirement that the personal representative include the partnership interest in the inventory and appraisal is superseded by Estate and Trust Code Sections 8800 (inventory and appraisal required), 8850(b)(2) (contents of inventory), and 8900 (appraisal).

The duties imposed on surviving partners by the third sentence of former Probate Code Section 571 are omitted as unnecessary in light of the comprehensive rules in the Uniform Partnership Act. See, e.g., Corp. Code §§ 15018 (rights and duties of partners), 15020 (disclosure of information on demand), 15022 (right to formal accounting), 15025 (rights in partnership property), 15031(4) (dissolution on death of partner unless otherwise provided), 15033 (effect of dissolution on partner's authority), 15034 (liability of partner on dissolution), 15037 (right of surviving partner to wind up partnership affairs), 15040 (rules for settling accounts between partners after dissolution), 15042 (right of personal representative of deceased partner against partners continuing business).

The first part of the fourth sentence is restated in Estate and Trust Code 9761 without substantive change. The second part of the fourth sentence is restated in [Estate and Trust Code Section 9820 (authority to sue and defend)] [subdivision (a) of Estate and Trust Code Section 9763] without substantive change.

§ 572 (repealed). Operation of decedent's business

Comment. The first portion of the first sentence of former Probate Code Section 572 (decedent's business other than partnership) is superseded by Estate and Trust Code Section 9760. The remainder of former Probate Code Section 572 is superseded by Estate and Trust Code Section 9762.