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The Fiduciary Responsibilities of a Surviving Partner Acting as Executor of the Deceased Partner's Estate

I. INTRODUCTION

The Uniform Partnership Act provides that although the death of any partner effects a dissolution of the partnership,¹ the partnership continues until the surviving partner winds up the affairs of the partnership.² Generally, upon the death of a partner, a partnership either liquidates,³ continues with the consent of the representative of the deceased partner,⁴ continues without the consent of the deceased partner's representative,⁵ or follows the terms of a partnership agreement.⁶ The surviving partner plays a major role in each of those situations.

The relationship of a partner to his copartners or of a surviving partner to a deceased partner's legal representative is that of a fiduciary, with the duty to "render on demand true and full information of all things affecting the partnership."⁷ The issue of fiduciary responsibility, however, is more complicated when a surviving partner who wishes to continue the partnership is also the executor of the deceased partner's estate. An executor/surviving partner⁸ must consider whether his right to decide among several alternative courses of action is one that belongs to an executor or to a surviving partner; this classification will determine the fiduciary standard applicable.

This Note examines the nature of the fiduciary duty in the situation in which an executor/surviving partner must decide whether to consent to a continuation of the partnership business

1. Uniform Partnership Act § 29 defines dissolution as "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." See UNIFORM PARTNERSHIP ACT § 31(4).

2. UNIFORM PARTNERSHIP ACT §§ 30, 21(2).

3. Uniform Partnership Act § 40 provides the rules for distribution of the partnership's assets.

4. UNIFORM PARTNERSHIP ACT § 41(3).

5. The Uniform Partnership Act fails to expressly provide for the continuation of a partnership without the consent of the deceased partner's representative. Most courts treat this situation as identical to one in which the representative gives his consent to continue. See note 75 *infra* and accompanying text.

6. Uniform Partnership Act § 42 grants the deceased partner's estate certain rights when the partnership business is continued "unless otherwise agreed" in a partnership agreement. See notes 81-99 *infra* and accompanying text.

7. UNIFORM PARTNERSHIP ACT § 20.

8. The term "executor/surviving partner" is used to refer to a surviving partner who was appointed executor of the deceased partner's estate.

after dissolution and in the situation in which the surviving partner has an option to purchase the deceased partner's interest in the partnership under the terms of a partnership agreement. After separately considering the nature of the fiduciary duties of an executor and a surviving partner, the Note discusses the degree to which the fiduciary loyalty that an executor/surviving partner owes the deceased partner's estate governs his decision on whether to continue the partnership business after dissolution or to exercise an option to purchase.

II. FIDUCIARY RESPONSIBILITIES OF AN EXECUTOR

An executor is similar to a trustee in that "the executor is a fiduciary who holds the title to property for the benefit of others."⁹ An executor occupies a position of trust with regard to those with pecuniary interests in the estate. Nevertheless, an executorship differs from a trusteeship in several respects. As an officer of the probate court, the executor has an obligation to that court. Furthermore, the function of an executor is the temporary one of collecting the testator's personal property, converting the property to money as necessary, and paying taxes, expenses, legatees, and creditors of the testator.¹⁰

When examining the fiduciary responsibilities of an executor, however, the fiduciary obligations of a trustee provide the appropriate judicial standard. At least to the extent that an executor is one in whom power affecting property is vested for the benefit of another, the executor is a trustee and is held to the fiduciary standard.¹¹ Thus, as to matters within the scope of the trust relationship, an executor must act for the benefit of the other.¹²

Several courts have attempted to limit the situations in which an executor's personal interest may conflict with those of the estate. In *In re Anderson's Estate*¹³ the court held that "[a]n administrator should not be placed in a position in which he is torn between a legal duty to protect the estate and a natural desire to advance his own interests."¹⁴ Similarly, the court in *Ringer v. Lockhart*¹⁵ concluded

9. G.G. BOGERT & G.T. BOGERT, HANDBOOK OF LAW OF TRUSTS § 15 (5th ed. 1973).

10. *Id.*

11. *In re Estate of Cross*, 51 Cal. App. 3d 80, 123 Cal. Rptr. 825 (1975); *In re Estate of Scheibe*, 30 Wis. 2d 116, 140 N.W.2d 196 (1966); *McKeigue v. Chicago & N.W. Ry.*, 130 Wis. 543, 546, 110 N.W. 384, 385 (1907).

12. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

13. 168 Kan. 299, 212 P.2d 375 (1949).

14. *Id.* at 301, 212 P.2d at 378. See *Price's Adm'r v. Price*, 291 Ky. 211, 163 S.W.2d 463 (1942).

15. 240 Ga. 82, 239 S.E.2d 349 (1977).

that the executor must resign if the executor's personal interests might conflict with those of the beneficiary.¹⁶

Other courts, however, have held that an individual with potentially conflicting interests may serve as executor on the assumption that the testator knew of the conflict when he appointed the executor.¹⁷ In addition, the executor may proceed with a questionably adverse transaction if he has prior authority from the court¹⁸ or the permission of the devisees.¹⁹ The transaction will still be voidable, however, if either the executor fails to disclose material facts, the transaction is unfair or unreasonable, or the executor exerted his influence to gain the consent.²⁰ Moreover, a court may remove an executor for misconduct.

The conflict between an executor's personal interest and his fiduciary duty becomes acute when the executor wishes to buy the deceased's property. At common law, a sale by an executor to himself is voidable on a showing of good cause by one having a pecuniary interest in the estate.²¹ This rule is inapplicable, however, if the deceased's will, the applicable statute, or the court authorizes the purchase²² and if the sale is fairly made.²³ In addition, when the executor has a personal interest in the property, he will be allowed to buy property only to protect his interest and only for a fair price.²⁴

A major concern of the courts when the executor purchases the estate's property is the fairness of the purchase price. The fiduciary standard often employed is whether the executor exercised "such care and skill as a man of ordinary prudence would exercise in

16. *Id.* at 85, 239 S.E.2d at 351. The court quoted with approval from George G. Bogert:

It is generally, if not always, humanly impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction. Consciously or unconsciously he will favor one side as against the other, where there is or may be a conflict of interest. If one of the interests involved is that of the trustee personally, selfishness is apt to lead him to give himself an advantage.

G.G. BOGERT, TRUSTS AND TRUSTEES § 543 (2d ed. 1960).

17. *In re Foss' Will*, 282 A.D. 509, 513, 125 N.Y.S.2d 105, 108 (1953).

18. *In re Tannenbaum's Will*, 30 Misc. 2d 743, 219 N.Y.S.2d 149 (Sur. Ct. 1961).

19. *Klein v. Acco Prod. Inc.*, 79 F.2d 110 (2d Cir. 1935).

20. 2 A. SCOTT, THE LAW OF TRUSTS § 170 (2d ed. 1956).

21. *Toedter v. Bradshaw*, 164 Cal. App. 2d 200, 330 P.2d 688 (1958); *King v. King*, 225 Ga. 142, 166 S.E.2d 347 (1969) (common law rule applied to executor's sale of estate's property to his wife).

22. *Walters v. Wannemacher*, 6 Ohio App. 2d 226, 217 N.E.2d 695 (1964).

23. *Harlan v. Lee*, 174 Md. 579, 199 A. 862 (1938); *In re Frolich Estate*, 112 N.H. 320, 295 A.2d 448 (1972) (express language in will altering fiduciary duty); *O'Hayer v. de St. Auhin*, 30 A.D.2d 419, 293 N.Y.S.2d 147 (1968) (express language in will altering fiduciary duty).

24. *Adler v. Adler*, 87 Ga. App. 842, 75 S.E.2d 578 (1953); *Talbert v. Reeves*, 211 Md. 275, 127 A.2d 533 (1956); *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964).

dealing with his own property."²⁵ The executor must demonstrate a good faith effort to locate potential purchasers and to determine the fair market value of the property or to allow competitive bidding.²⁶ Even a good faith effort is insufficient, however, to sustain a sale if the executor failed to act in the best interests of the estate. In *In re Tannenbaum's Will*²⁷ a coexecutor purchased the stock of a company operated by the testator and herself and continued the business.²⁸ The executor failed to include a charge for goodwill and to search for other purchasers.²⁹ The court held that:

[W]hen certain actions would be for the best interests of the estate, but possibly involve personal gain or technical conflict of interest, the fiduciary must not proceed without prior authority from the court upon a proper showing. Good faith will not absolve him from the consequences of a violation of his duty, and any doubt will be resolved against him.³⁰

Thus, the safest course for an executor to pursue when he wishes to purchase estate property is to secure either the court's approval of the purchase or the consent of interested parties.

When faced with several courses of action in the administration of an estate, the executor's fiduciary obligations of loyalty and reasonable care require him to select the option most beneficial to the estate. In *In re Bush's Will*³¹ the testator's will allowed the executor to distribute at his own discretion certain stocks and bonds between himself and his son.³² Despite the language granting the executor broad discretion, the court held that the executor must make the distribution equitably and fairly between himself and his son.³³ Similarly, in *Matter of Estate of Rothko*³⁴ the testator had entered a contract to sell his paintings at only a ten percent commission to an art gallery with which one of the executors, Reis, was associated.³⁵ The court initially held that Reis' association with the gallery prevented him from impartially deciding whether the agree-

25. *In re Estate of Scheibe*, 30 Wis. 2d 116, 119, 140 N.W.2d 196, 198 (1966). See RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

26. *Landis v. First Nat'l Bank*, 20 Cal. App. 2d 198, 66 P.2d 730 (1937).

27. 30 Misc. 2d 743, 219 N.Y.S.2d 149 (1961).

28. *Id.* at 746, 219 N.Y.S.2d at 152.

29. *Id.* at 748, 219 N.Y.S.2d at 154.

30. *Id.* at 747, 219 N.Y.S.2d at 153.

31. 2 A.D.2d 526, 156 N.Y.S.2d 897 (1956).

32. *Id.* at 527, 156 N.Y.S.2d at 899.

33. *Id.* at 529, 156 N.Y.S.2d at 900.

34. 84 Misc. 2d 830, 379 N.Y.S.2d 923 (1975), *modified*, 56 A.D.2d 499, 392 N.Y.S.2d 870 (1977), *aff'd on rehearing*, 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449 (1977).

35. 84 Misc. 2d at 838, 379 N.Y.S.2d at 935. The executor, Bernard J. Reis, was director, secretary, and treasurer of Marlborough Gallery, Inc. The court found that a second executor, Theodoros Stamos, had a personal interest in enhancing his artistic career. Several months after the estate contracts were signed, Stamos entered a favorable contract with Marlborough.

ment survived the testator's death.³⁶ The executors chose, however, to enter a new contract with the gallery. The court found the contract to be unfair and invalid because Reis had committed a breach of trust.³⁷ Reis' duty as an executor was to obtain the most advantageous terms for the estate while his duty to the art gallery was to bargain in opposition.³⁸ The court concluded that a fiduciary with conflicting interests must resign or obtain the court's direction before he enters a questionable transaction.³⁹

The executor who manages an estate in which he has a conflicting interest is in a delicate situation. He must not only act in good faith in furtherance of the estate's interest but he must also uphold the estate's interests over his own. Although a surviving partner exercises a lesser degree of control over the property of his deceased partner than does the executor, the surviving partner also owes certain fiduciary obligations to the estate.

III. FIDUCIARY RESPONSIBILITIES OF A SURVIVING PARTNER

A. *Winding Up and Terminating the Partnership*

The common law treated a partner as a trustee over his copartner's interest in the partnership.⁴⁰ Sections 20 and 21 of the Uniform Partnership Act codify the common law in so far as it regards a partner as a fiduciary.⁴¹ The court in *Helmore v. Smith*⁴² captured the essence of the fiduciary relationship between partners:

If the fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another

36. *Id.* at 846, 379 N.Y.S.2d at 942.

37. *Id.* at 858, 379 N.Y.S.2d at 952.

38. *Id.* at 838-39, 379 N.Y.S.2d at 936.

39. *Id.* at 838, 379 N.Y.S.2d at 935.

40. *Yeomans v. Lysfjord*, 162 Cal. App. 2d 357, 327 P.2d 957 (1958); *Brown v. Leach*, 189 A.D. 158, 178 N.Y.S. 319 (1919), *appeal dismissed*, 228 N.Y. 612, 127 N.E. 909 (1920); Note, *Fiduciary Duties of Partners*, 48 IOWA L. REV. 902 (1963).

41. Uniform Partnership Act § 20 provides:

Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

Uniform Partnership Act § 21 provides:

(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

42. 35 Del. Ch. 436 (1887).

that they are partners in the first instance; it is because they continue to trust one another that business goes on.⁴³

This fiduciary relationship between partners survives the death of a partner; the surviving partner also owes a fiduciary duty to his deceased partner's representative. Under section 43 of the Uniform Partnership Act,⁴⁴ the surviving partner has a duty to account to the deceased partner's estate, and the deceased partner's representative can, upon cause shown, obtain a winding up of the partnership business.⁴⁵

The sole right of the deceased partner's representative with regard to the partnership is to call upon the surviving partner to account for the assets of the partnership.⁴⁶ The surviving partner has the burden of proof to show that he employed the highest degree of correctness and fairness in the charges and claims made.⁴⁷ In an action for an accounting, a court of equity will grant relief to a party who suffered a breach of obligation. For example, when one partner negotiates a contract prior to dissolution, the contract belongs to the partnership.⁴⁸ Moreover, if a surviving partner continues the partnership business after dissolution, without either an accounting and winding up or the consent of the deceased partner's representative, then the deceased partner's estate is entitled to receive either the value of the deceased partner's interest in the partnership at the date of dissolution with interest or the profits attributable to the use of his rights in the property of the dissolved partnership.⁴⁹ An accounting is governed, however, by any applicable terms of the partnership agreement, including, for example, a formula for determining the value of a partnership interest.⁵⁰ In the absence of an agree-

43. *Id.* at 444.

44. Uniform Partnership Act § 43 provides:

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

45. Uniform Partnership Act § 37 provides:

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.

46. *United States v. Wood*, 8 F. Supp. 939 (E.D. Pa. 1934), *aff'd*, 79 F.2d 286 (3d Cir. 1935), *cert. denied*, 296 U.S. 643 (1935).

47. *Stephens v. Stephens*, 298 Ky. 638, 183 S.W.2d 822 (1944). *See Lee v. Dahlin*, 399 Pa. 50, 159 A.2d 679 (1960).

48. *Bracht v. Connell*, 313 Pa. 397, 170 A. 297 (1933).

49. UNIFORM PARTNERSHIP ACT § 42; *Cahill v. Haff*, 248 N.Y. 377, 162 N.E. 288 (1928).

50. *Epperson v. Rosemond*, 100 Cal. App. 2d 344, 223 P.2d 655 (1950); *Keller v. Keller*, 4 Ill. App. 3d 89, 280 N.E.2d 281 (1972).

ment for continuation, an accounting precedes the winding up of the partnership business.

Because the Uniform Partnership Act fails to define "winding up," there is some confusion on whether winding up includes liquidation. At common law, upon the death of a partner, title to partnership property vested in the surviving partner who thereupon became a trustee in equity for all interested parties with the duty to wind up and account for the decedent's interest.⁵¹ In order to terminate the partnership business, the surviving partner had to liquidate the partnership assets to insure payment of creditors' claims and to determine the value of the partnership assets.⁵² In an action for an accounting, the court in *King v. Leighton*⁵³ noted that "it is the duty of the surviving . . . members to take possession of the firm assets and perform its contracts, extinguish its liabilities and close up its business in the manner most advantageous to the interests of all the parties concerned."⁵⁴ The surviving partner could continue to administer the partnership affairs only if he acted honestly and with due diligence.⁵⁵

In their treatise on the law of partnership, Professors Crane and Bromberg conclude that the Uniform Partnership Act codifies the common law view of winding up as including liquidation of assets.⁵⁶ Thus, they define winding up as the reduction of assets to cash to pay creditors and to distribute to partners the value of their respective interests.⁵⁷ The Uniform Partnership Act also codifies the common law view that the surviving partner has a fiduciary duty to the deceased partner's estate.⁵⁸ As trustee of the deceased partner's assets, his responsibility is to settle the partnership's affairs, to pay any debts, and to turn over to the executor the deceased partner's share.⁵⁹ Because the surviving partner usually has superior knowledge of the business, courts are flexible in applying the fiduciary standard to a surviving partner. Thus, the surviving partner's responsibility may vary according to the knowledge and experience of

51. *Gurley v. Gurley*, 77 Miss. 413, 26 So. 962 (1900).

52. See 62 MICH. L. REV. 106 (1963).

53. 100 N.Y. 386, 3 N.E. 594 (1885).

54. *Id.* at 393, 3 N.E. at 598.

55. J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 80 (1968). *Contra*, 62 MICH. L. REV. 106 (1963). The author argues that winding up is a term of art "encompassing the process of 'liquidation' yet not necessarily requiring a liquidation sale in every instance." *Id.* at 108.

56. J. CRANE & A. BROMBERG, *supra* note 55, at § 80; see note 45 *supra*.

57. J. CRANE & A. BROMBERG, *supra* note 55, at § 80.

58. *Cotton v. Stevens*, 79 N.H. 224, 107 A. 602 (1919); *Meyer v. Meyer*, 201 A.D. 596, 194 N.Y.S. 718 (1922); *Sharp v. Sharp*, 54 Utah 262, 180 P. 580 (1919).

59. *Grigg v. Hanna*, 283 Mich. 443, 278 N.W. 125 (1938).

the person with whom he deals.⁶⁰

The surviving partner also has a duty to represent accurately and to disclose any material facts. These responsibilities are particularly important when the surviving partner wishes to purchase the deceased partner's partnership interest. At common law the deceased partner's representative and the surviving partner could agree on the division of the property in kind or on the specific purchase price of the deceased partner's interest. In the absence of such an agreement, the surviving partner and the deceased partner's representative would liquidate the partnership assets and divide the proceeds according to each partner's interest.⁶¹ In the absence of a breach of fiduciary responsibility, courts have generally upheld the right of a surviving partner to purchase the deceased partner's interest at a fair and reasonable price when the deceased partner's representative agreed to the sale.⁶² Final approval of the sale, however, rests on the court's determination that the deceased partner's representative recognized the value of the partnership interest and represented the interests of the estate or that the interests of the estate were otherwise represented.⁶³

Under the fiduciary duty of loyalty, the surviving partner must disclose all facts that relate to the valuation of the interest being acquired.⁶⁴ The court in *Grigg v. Hanna*⁶⁵ noted that "a fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud."⁶⁶ If the surviving partner can reasonably assume that the deceased partner's representative has knowledge of

60. *Reed v. Robilio*, 273 F. Supp. 954 (W.D. Tenn. 1967), *aff'd*, 400 F.2d 730 (6th Cir. 1968).

61. See Brombert, *Partnership Dissolution-Causes, Consequences and Cures*, 43 TEX. L. REV. 631, 649 (1965); Ludlam, *Dissolution of Partnership by Death*, 23 MISS. L.J. 117, 118 (1952).

62. *Malden Trust Co. v. Brooks*, 291 Mass. 273, 290, 197 N.E. 100, 106 (1935); *Denholm v. McKay*, 148 Mass. 434, 19 N.E. 551 (1889). See generally *Detroit Bank & Trust Co. v. Dickson*, 78 Mich. App. 12, 259 N.W.2d 228 (1977) (Uniform Partnership Act provides a right to wind up, not to buy, the partnership).

63. *James v. Wade*, 200 Ark. 786, 141 S.W.2d 13 (1940) (a surviving partner may purchase partnership property when the sale is under the direction of a court of equity and there is no rule preventing the surviving partner from becoming a purchaser); *Cummings v. Russell*, 258 Mass. 502, 508, 155 N.E. 641, 643 (1927). See note 62 *supra*.

64. Note, *Fiduciary Duties of Partners*, 48 IOWA L. REV. 902 (1963). See *Estate of Witlin*, 83 Cal. App. 3d 167, 147 Cal. Rptr. 723 (1978); *Penner v. DeNike*, 288 Mich. 488, 285 N.W. 33 (1939); *Rogers v. Stacy*, 63 N.M. 317, 318 P.2d 1116 (1957); *Johnson v. Buck*, 540 S.W.2d 393 (Tex. 1976).

65. 283 Mich. 443, 278 N.W. 125 (1938).

66. *Id.* at 460, 278 N.W. at 132.

a material fact, however, then his silence is not a breach of good faith.⁶⁷ Thus, the general rule on the surviving partner's scope of disclosure is that if the transaction "is fair and open and no advantage is taken, it will be upheld."⁶⁸

The partnership relationship is a material fact that the surviving partner must disclose. In *Johnston v. Kitchin*⁶⁹ the court initially approved the sale of the deceased partner's partnership interest, but the purchaser failed to disclose to either the administrator or the court that he was a surviving partner. As a result, the court held that the surviving partner had the burden to show that the transaction was fair and was entered into by the seller with full knowledge of the facts.⁷⁰ The court reasoned that because the surviving partner occupied a position of advantage, the court would have approved the purchase only after a careful inquiry into the partnership's affairs and scrutiny of the transaction.⁷¹

Thus, the surviving partner engaged in winding up a partnership has a fiduciary responsibility to render an accurate accounting of the partnership's affairs and to represent fairly and to disclose material facts to the executor and the court. Winding up and terminating the partnership, however, is only one alternative that the Uniform Partnership Act provides a surviving partner. Another alternative is the continuation of the partnership by the surviving partner.

B. Continuing the Partnership Business

Section 41(3) of the Uniform Partnership Act gives the executor of a deceased partner's estate the power to consent to the continuation of the partnership business.⁷² Section 42 provides that, when the partnership is continued with the executor's consent and without any settlement of accounts between the estate and the person or partnership continuing the business,

unless otherwise agreed . . . [the] 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 the option

67. *Reed v. Robilio*, 273 F. Supp. 954 (W.D. Tenn. 1967), *aff'd*, 400 F.2d 730 (6th Cir. 1968).

68. *Coates v. Lunt*, 210 Mass. 314, 318, 96 N.E. 685, 687 (1911).

69. 259 P. 102 (Cal. Dist. Ct. App. 1927), *rev'd on other grounds*, 203 Cal. 766, 265 P. 941 (1928). The California Supreme Court reversed the district court decision because the defendant and the deceased were tenants in common and not partners.

70. *Id.* at 105.

71. *Id.*

72. UNIFORM PARTNERSHIP ACT § 41(3).

of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership.⁷³

Thus, while the executor may initially elect to allow the partnership business to continue, he may subsequently elect to withdraw the deceased partner's interest from the partnership. The executor then has the option to receive either the value of the deceased partner's interest in the partnership at the date of the deceased partner's death with interest or the profits derived from the use of the deceased partner's right in the property of the dissolved partnership.⁷⁴ Moreover, the majority of courts hold that section 42 gives the executor an option to receive profits or interest even if the surviving partner continues the business unnecessarily and without the consent of the executor.⁷⁵

The right of election under section 42 essentially embodies the common law⁷⁶ fiduciary duty of a continuing surviving partner to render a fair accounting of the partnership affairs. When a surviving partner continues the partnership business and commingles the partnership funds with his own funds, the entire fund is liable for any loss.⁷⁷ If the business is operated only in order to wind up the partnership business by liquidating the assets over a period of time, however, then the business is not continued within the meaning of section 42 and the representative does not have a right of election.⁷⁸ In addition, when the partners' main contributions to the partnership business are personal skill and time, the courts hold that the deceased partner's estate may not participate in post-dissolution profits.⁷⁹ The surviving partner will not breach his fiduciary duty to the deceased partner's estate because he will earn the profits through his own skill and time and not through partnership property.

Section 42 also provides for the continuation of the partnership

73. *Id.* § 42.

74. The option to receive either the value of the deceased partner's interest in the partnership at the date of the deceased's death with interest or the profits derived from the use of the deceased's right in the partnership property will hereinafter be referred to as "the right of election." The deceased partner's interest in the partnership at the date of his death with interest will hereinafter be referred to as the right to "interest." The deceased partner's interest in the profits derived from the use of his right in the property of the dissolved partnership will hereinafter be referred to as the right to "profits."

75. *Cauble v. Handler*, 503 S.W.2d 362 (Tex. 1973). See notes 100-03 *infra* and accompanying text.

76. *Ruppe v. Utter*, 76 Cal. App. 19, 243 P. 715 (1925); *In re Maloney's Estate*, 233 Pa. 614, 82 A. 958 (1912).

77. *Froess v. Froess*, 289 Pa. 69, 137 A. 124 (1927).

78. *Hurley v. Hurley*, 33 Del. Ch. 231, 91 A.2d 674 (1952).

79. *Blut v. Katz*, 13 N.J. 374, 99 A.2d 785 (1953).

business with the consent of the deceased partner's representative "unless otherwise agreed." Thus, when the partners have provided in a partnership agreement for the continuation of the partnership, the executor's consent is immaterial; the rights of the surviving partner will be governed by the terms of the partnership agreement.⁸⁰

C. *Exercising the Option to Purchase under the Partnership Agreement*

The general view is that a partnership agreement is a contract,⁸¹ the terms of which courts will enforce between the partners even if the result appears inequitable.⁸² Indeed, courts repeatedly have denied that partnership agreements which dispose of a partner's interest on death are testamentary.⁸³ Rather, courts have upheld partnership agreements, reasoning that the agreement was drafted by those who are most familiar with the character and value of the property.⁸⁴

Nevertheless, contracts are subject to interpretation. Thus, in construing partnership agreements, courts will consider the intention and the objectives of the parties.⁸⁵ The past conduct of the partners is one indication of their interpretation of the partnership agreement and may effectively amend the agreement.⁸⁶ Thus, if the partners habitually ignored a certain provision in their partnership agreement, the courts will refuse to uphold this provision when one partner seeks to enforce it.⁸⁷ Moreover, if a partnership continues beyond the expiration of the written partnership agreement and if the partners' actions indicate implied consent to continue the partnership under the terms of the written agreement, then the court will enforce the agreement's terms.⁸⁸ In addition, the Uniform Part-

80. See Forster, *Legal, Tax And Practical Problems Under Partnership Purchase And Sale Agreements Coupled With Life Insurance*, 19 S. CAL. L. REV. 1 (1945); Fuller, *Partnership Agreements For Continuation Of An Enterprise After The Death Of A Partner*, 50 YALE L.J. 202 (1940); Note, *Partnership Continuation Agreements*, 72 HARV. L. REV. 1302 (1959).

81. *Harris v. Klure*, 205 Cal. App. 2d 574, 23 Cal. Rptr. 313 (1962); *Balian v. Rainey*, 115 Cal. App. 2d 10, 251 P.2d 731 (1952); *Park Cities Corp. v. Byrd*, 534 S.W.2d 668 (Tex. 1976).

82. *Morgan v. Balzhiser*, 279 Or. 343, 568 P.2d 1354 (1977).

83. *Silverthorne v. Mayo*, 238 N.C. 274, 77 S.E.2d 678 (1953).

84. *In re Karlinski's Estate*, 180 Misc. 44, 38 N.Y.S.2d 297 (1942), *rev'd on other grounds*, 180 Misc. 44, 43 N.Y.S.2d 40 (1943).

85. *Harris v. Klure*, 205 Cal. App. 2d 574, 23 Cal. Rptr. 313 (1962).

86. *In re Dunham's Will*, 52 Misc. 2d 364, 276 N.Y.S.2d 132 (1966).

87. *Battista v. Carlo*, 57 Misc. 2d 495, 293 N.Y.S.2d 227 (1968). See *Balian v. Rainey*, 115 Cal. App. 2d 10, 251 P.2d 731 (1952).

88. See *Wagner v. Etoil*, 46 A.D.2d 990, 362 N.Y.S.2d 278 (1974).

nership Act applies to any matter on which the partnership agreement is silent.⁸⁹ Thus, although courts uphold partnership agreements, those courts often refuse to find themselves bound by the terms of the agreement.

When the surviving partner is granted an option to buy the deceased partner's interest under the partnership agreement, the surviving partner is subject to the fiduciary standard imposed by the Uniform Partnership Act. Although he is free to exercise the option to buy, the surviving partner, as a fiduciary, must deal fairly with the executor and the beneficiaries of the estate.⁹⁰ The surviving partner must disclose material facts, especially facts that relate to the value of the partnership interest, so that the transaction between the surviving partner and the executor will be fair and open.⁹¹ The courts assume that a partnership agreement contemplates fair dealings between the partners, and construe any ambiguity in the agreement in favor of the deceased partner's estate.⁹² In addition, the executor is also a fiduciary, but with limited authority⁹³ because the estate is bound by the partnership agreement, and the executor therefore must sell the deceased partner's share if the surviving partner exercises his option to buy⁹⁴ within a reasonable period of time.⁹⁵

The surviving partner with an option to purchase has also been characterized as a quasi-trustee. In *Murphy v. Murphy*⁹⁶ the court reasoned that the surviving partner succeeded as legal owner of the partnership's property, but that he took the property "subject to the duty to pay the firm debts, settle the partnership accounts, and

89. *Gardiner v. Gaither*, 162 Cal. App. 2d 607, 329 P.2d 22 (1958); *District of Columbia v. Riggs Nat'l Bank*, 335 A.2d 238 (D.C. 1975); *In re Dunham's Will*, 52 Misc. 2d 364, 276 N.Y.S.2d 132 (1966); *Adams v. Jarvis*, 23 Wis. 2d 453, 127 N.W.2d 400 (1964). *Contra*, *Tate v. Hoover*, 345 Pa. 19, 26 A.2d 665, cert. denied, 317 U.S. 677 (1942) (the terms of the agreement of continuation control the rights of subsequent creditors; third parties must inquire as to the contents of the agreement or extend credit at their own risk).

90. *Spencer v. Spencer*, 91 Idaho 880, 434 P.2d 98 (1967); *Malden Trust Co. v. Brooks*, 291 Mass. 273, 281, 197 N.E. 100, 106 (1935).

91. 291 Mass. at 282, 197 N.E. at 104. See *Reed v. Robilio*, 273 F. Supp. 954 (W.D. Tenn. 1967), *aff'd*, 400 F.2d 730 (6th Cir. 1968) (surviving partner's fiduciary duty may be breached by silence as well as by misrepresentation and concealment); *Malden Trust Co. v. Brooks*, 276 Mass. 464, 177 N.E. 629 (1931).

92. *Curtis v. Campbell*, 336 S.W.2d 355, 359-60 (Ky. 1960).

93. *Malden Trust Co. v. Brooks*, 291 Mass. 273, 286, 197 N.E. 100, 108 (1935).

94. *Id.* at 287, 197 N.E. at 108.

95. *In re Streck's Estate*, 35 Ill. App. 2d 473, 183 N.E.2d 26 (1962) (surviving partner accountable for profits earned, through the use of partnership property, subsequent to deceased partner's death and prior to the exercise of his option to purchase); *Altschuler v. Altschuler*, 410 Ill. 169, 101 N.E.2d 552 (1951); *Hagan v. Dundore*, 185 Md. 86, 43 A.2d 181 (1945).

96. 217 Mass. 233, 104 N.E. 466 (1914).

account to the personal representative of the deceased partner."⁹⁷ Thus, the surviving partner holds the property partly for the benefit of the deceased partner's estate.

While the courts have termed both surviving partners and executors as trustees, a surviving partner's fiduciary obligations to his deceased partner's estate are narrower than those of the executor. The fiduciary qualities of loyalty and fair dealing are applicable to both a surviving partner and an executor. The courts do not suggest, however, that a surviving partner must act solely in the interests of the estate.⁹⁸ A surviving partner who wishes to exercise the purchase option granted him under the partnership agreement may do so without considering the effect his actions will have on the estate. Similarly, a surviving partner may continue the partnership business with the consent of the deceased's representative without considering the interests of the estate. When a surviving partner also serves as executor of the deceased partner's estate, however, his fiduciary obligation may conflict with his personal interests. When confronted with this situation, courts have attempted to separate the rights and duties of a surviving partner from those of an executor and apply the standards of fiduciary responsibility accordingly.

IV. FIDUCIARY RESPONSIBILITIES OF A SURVIVING PARTNER/EXECUTOR

A. *Continuing the Partnership Business*

Section 42 of the Uniform Partnership Act provides certain safeguards against self-dealing and conflicts of interest to protect the deceased partner's interest in partnership business. The surviving partner must wind up the partnership upon its dissolution unless the deceased partner's representative consents to the continuation of the partnership business. Moreover, upon continuation, the representative can elect to receive either the value of the deceased partner's interest in the partnership at dissolution with interest or the profits attributable to the use of the deceased partner's right in the property of the dissolved partnership. The theory behind granting the representative this election is that the interests of the estate should be recognized and protected when the partnership business is continued utilizing the deceased partner's interest. The representative can investigate the financial solvency of the partnership before he consents to the continuation of the partnership business. When the surviving partner is also the executor of the deceased partner's estate, however, the safeguards imposed by section 42 are of lesser

97. *Id.* at 236, 104 N.E. at 468.

98. *Malden Trust Co. v. Brooks*, 291 Mass. 273, 286, 197 N.E. 100, 110 (1935).

value because the executor has only to consent to himself as the surviving partner.

The ability of an executor/surviving partner to consent to the continuation of the partnership business depends upon the court's construction of the consent requirement. Most courts interpret section 42 as embodying the common law principle that an executor may elect to receive profits or interest regardless of whether the partnership is continued with his consent.⁹⁹ In *Blumer Brewing Corp. v. Mayer*¹⁰⁰ an administrator/surviving partner,¹⁰¹ who continued the partnership after the death of his partner, credited the estate with the profits and charged the estate with the losses of the business. The court considered whether the administrator/surviving partner had the power to consent to leaving the deceased partner's interest in the partnership business.¹⁰² The court concluded that when the administrator/surviving partner has the power to sell the personal estate of the deceased partner without a court order, he also has the power to consent to the continuation of the partnership under section 42.¹⁰³ Even when an executor lacks the power to sell the deceased partner's personal estate, the court's holding would probably be the same. In the interest of allowing the estate of a deceased partner fair compensation for the deceased partner's partnership interest, the courts place little significance on the presence or absence of the executor's consent.

It is significant, however, whether the executor/surviving partner continued the partnership business within the meaning of section 42 since some continuations of partnership business are independent of section 42. In *McGee v. Russell's Executors*¹⁰⁴ the deceased partner's will required the liquidation and distribution of the

99. See *Froess v. Froess*, 284 Pa. 369, 131 A. 276 (1925); *Underdown v. Underdown*, 279 Pa. 482, 124 A. 159 (1924); *Cauble v. Handler*, 503 S.W.2d 362 (Tex. 1973). *Contra*, *Blut v. Katz*, 13 N.J. 374, 99 A.2d 785 (1953). The *Blut* court concluded that the Uniform Partnership Act requires the deceased partner's representative to consent to the continuation of the partnership business before he can exercise the option to receive profits. The administrator was allowed to recover only the deceased partner's interest in the partnership at the date of dissolution. Legal commentaries on the holding in *Blut*, however, have been critical. Note, *Profit Right And Creditors' Priorities After A Partner's Death Or Retirement: Section 42 of the U.P.A.*, 63 YALE L.J. 709 (1954); 38 MINN. L. REV. 553 (1954).

100. 223 Wis. 540, 269 N.W. 693 (1936).

101. An administrator differs from an executor only in that an administrator is appointed by the court while an executor is named in the deceased's will. Since the fiduciary duties of an administrator and an executor are virtually identical, their powers are also similar. It is arguable, in fact, that an executor possesses even broader powers than does an administrator because the deceased selected the surviving partner as executor of his will.

102. 269 N.W. at 694.

103. *Id.* at 696.

104. 150 Va. 155, 142 S.E. 524 (1928).

testator's estate. The court held section 42 inapplicable because the executor/surviving partner continued the partnership business only for the purpose of utilizing the remaining assets and winding up the business.¹⁰⁵ As long as the executor/surviving partner liquidates the partnership business within a reasonable length of time, sections 30 and 33 of the Uniform Partnership Act allow the continuation of the partnership business. If the partnership business continues for an unreasonable length of time, however, section 42 requires the executor/surviving partner to pay the deceased partner's devisees either interest or profits.¹⁰⁶ Thus, section 42 deals with partnerships that are continued for the purpose of winding up the businesses and utilizing the partnership assets rather than for the purpose of profit making.

The executor/surviving partner's right to consent to the continuation of the partnership business, however, has certain limitations. The executor/surviving partner must terminate the partnership business when the deceased partner's will requires liquidation of the partnership.¹⁰⁷ Furthermore, the executor/surviving partner cannot enter an agreement to forego the election between profits or interest allowed under section 42. For example, the court in *McDonald v. McDonald*¹⁰⁸ held that an executor/surviving partner must make a choice to pay the estate either the value of the deceased partner's interest or profits because the purpose of the election is to allow the executor to choose the option that "will most benefit the estate during the period when the partnership is being wound up after dissolution and before termination."¹⁰⁹

Another exception to the executor/surviving partner's right to consent to the continuation of the partnership business arises when the deceased partner's heirs and devisees oppose continuation and the evidence suggests that the election to continue would not benefit

105. *Id.* at 163, 142 S.E. at 527.

106. In the case of *In Streck's Estate*, 35 Ill. App. 2d 473, 183 N.E.2d 26 (1962), the surviving partners used the deceased partner's share of the partnership property until they exercised the option granted them under the partnership agreement to purchase the deceased partner's interest in the partnership. The court charged the surviving partner with the profits attributable to the use of a deceased partner's right in the partnership property.

107. *But see Klein v. Acco Prod. Inc.*, 79 F.2d 110 (2d Cir. 1935). The deceased partner bequeathed his undivided half interest in the partnership to three of his children. The executor/surviving partner continued the business, however, rather than exercising his option under the partnership agreement to purchase the decedent's interest. Since the legatees had agreed with the executor/surviving partner that the business should be continued, the court held that the continuation agreement was valid because all interested parties had joined in the agreement.

108. 68 Wis. 2d 292, 228 N.W.2d 727 (1975).

109. *Id.* at 308, 228 N.W.2d at 736.

the estate. In *Gianakos v. Magiros*¹¹⁰ plaintiff brought an action for an accounting against the executor/surviving partner challenging the latter's right of election.¹¹¹ The court held that the executor/surviving partner, absent a breach of his fiduciary duty, has the right to continue the business without liquidation and that this right of election is inherent in a surviving partner's position as executor, subject only to his duties as a fiduciary.¹¹² Conversely, if the exercise of the executor/surviving partner's power to consent or to elect interest or profits would profit the executor/surviving partner at the expense of the deceased partner's estate, the executor/surviving partner could not take this course of action.¹¹³ Thus, the court, citing authority on the fiduciary obligations of an administrator or an executor rather than that of a partner, emphasized that an executor/surviving partner must exercise his powers of election in a manner that will benefit the deceased partner's estate.

The standards that must govern an executor/surviving partner's decision whether to continue a partnership are the fiduciary obligations of an executor. An executor confronted with several courses of action must choose the one that is, in his judgment, most beneficial to the estate. This decision is especially important when one course of action would benefit the executor. In view of the control that an executor/surviving partner exerts over the estate, his accounting of the deceased partner's interest or share of the profits is subject to the strictest judicial review. The court in *In re Eddy's Estate*¹¹⁴ held that because a surviving partner serving as executor "has had absolute control over the assets of the estate and has had unlimited opportunity to manage such assets in his uncontrolled discretion it is appropriate that he be required to disclose in the greatest detail all of his acts in his respective fiduciary capacities"¹¹⁵

While section 42 of the Uniform Partnership Act gives an executor/surviving partner the right to continue a partnership business, the fiduciary obligations of an executor provide the restraints necessary to protect the interests of the deceased partner's estate. The situation in which a surviving partner acts as executor of his deceased partner's estate is not provided for under the Uniform Part-

110. 238 Md. 178, 208 A.2d 718 (1965).

111. The appellant argued that general equitable principles precluded the executor/surviving partner from taking any action in which the beneficiaries' interests and his own personal interests as surviving partner may conflict. *Id.* at 185, 208 A.2d at 722.

112. *Id.* at 184, 186, 208 A.2d at 721, 723.

113. *Id.* at 186, 208 A.2d at 723.

114. 175 Misc. 193, 22 N.Y.S.2d 961 (1940).

115. *Id.* at 194, 22 N.Y.S.2d at 963.

nership Act. Section 5 of the Uniform Partnership Act allows that in cases not provided for under the Uniform Partnership Act, the rules of law and equity govern.¹¹⁶ If the executor/surviving partner makes the election that is less beneficial to the deceased partner's estate, then the law of fiduciary responsibility must be imposed to reverse the election choice. Similarly, an executor/surviving partner's interest may conflict with those of the estate when he exercises an option to purchase the deceased partner's interest in the partnership.

B. Exercising the Option to Purchase under the Partnership Agreement

A partnership agreement may grant the surviving partner an option to purchase the deceased partner's interest in the partnership. As executor of the deceased partner's estate, the executor/surviving partner is aware of the economic consequences of such a purchase on the deceased partner's estate. As a result, the executor/surviving partner often finds himself torn between a desire to serve his own interests and a recognition of his fiduciary responsibilities to the estate. Exercise of the option to purchase the deceased partner's interest may be the most beneficial alternative for the estate. If, however, the purchase is also detrimental to the economic well-being of the partnership or surviving partner, the executor/surviving partner nevertheless may be tempted to decline to exercise the option. Instead, the executor/surviving partner might exercise his section 42 powers to consent to the continuation of the partnership, and thereby subject the deceased partner's interest in the partnership to the dangers of economic ruin.¹¹⁷ The option to purchase is a contract right that the surviving partner is entitled to exercise unless an overriding fiduciary obligation precludes such action.

Thus, the issue is whether the executor/surviving partner with an option to purchase his deceased partner's interest has a fiduciary obligation to consider the impact of his decisions on the estate and to act to further the interests of the estate. In this regard, it is often impossible to discern the testator's intent when the partnership

116. Uniform Partnership Act § 5 provides: In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

117. Uniform Partnership Act § 41(8) provides that creditors of the dissolved partnership have a prior right to any claim of the representative of the deceased partner against the person or partnership continuing the business, on account of "the 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."

agreement grants the surviving partner the option to purchase the testator's partnership interest and the testator's will appoints the surviving partner as executor of his will. It is possible that the agreement grants the surviving partner the option to purchase unconditionally.¹¹⁸ It is also possible, however, that the testator intends that the executor/surviving partner remain free to exercise the option unless a reasonably prudent executor would recognize that exercise of the option would harm the deceased partner's estate. The dilemma is a problem of economic priorities and the executor/surviving partner is not in a position to be objective.

The common law recognized the conflicting interests inherent in the surviving partner's position as executor of the deceased partner's estate. In the leading case of *Case v. Abeel*¹¹⁹ the court held that equity considers the surviving partner a trustee of the partnership property.¹²⁰ As such, he cannot make a valid agreement to purchase or to take the property without accounting for any profits.¹²¹ Furthermore, an executor/surviving partner cannot personally realize profit or gain through the use of the partnership's funds. Even when the partnership contract authorizes the executor to make an agreement with the surviving partner on the purchase price of the deceased partner's interest, courts hold an executor/surviving partner unable to value properly the assets for sale to himself.¹²² A court may, however, allow a master to determine the fair purchase price of the assets for the executor/surviving partner.¹²³ Moreover, if the testator's beneficiaries consent to a purchase by the surviving partner, the court may uphold the sale. Thus, in *In re Mamaux's*

118. In *In re Mulholland's Will Trusts*, [1949] 1 All E.R. 460, an English court held that an option to purchase land was unconditionally given to a fiduciary. The testator had granted a bank an option to purchase certain land after his death. He thereafter made a will appointing the bank as coexecutor. The court held that the bank was not precluded by its fiduciary position as executor from exercising the option because the bank had acquired the option before it became a fiduciary. The language of the decision limited the decision considerably:

I do not attempt to state any proposition which will necessarily apply to every type of option. I am dealing in the present case with an option to purchase land and I confine myself to that type of option. It must be remembered that an option as this confers an immediate equitable interest in the land which is the subject of the option . . . and that equitable interest is one which is capable of being registered under the Land Changes Act, 1925, s. 10, class C, sub-para. (iv)

Id. at 464.

119. 1 Paige Ch. 393 (N.Y. 1829).

120. *Id.* at 397-98.

121. *Id.* See *Colgate's Ex'r v. Colgate*, 23 N.J. Eq. 372 (1873); *In re Silkman*, 121 App. Div. 202, 105 N.Y.S. 872 (1907).

122. *Denholm v. McKay*, 148 Mass. 434, 440, 19 N.E. 551, 552 (1889).

123. See *id.* at 444, 19 N.E. at 554.

Estate,¹²⁴ although the testator's will gave the two surviving partners an option to purchase the deceased partner's interest in the partnership, the court declared the exercise of this option voidable because the testator's beneficiaries failed to consent to the arrangement and because the executor was also one of the surviving partners.¹²⁵

The courts have recognized, however, that the rights and duties of a surviving partner are separable from those of an executor. At the death of a partner, his right in the partnership property vests in the surviving partner.¹²⁶ The surviving partner has the right to wind up the partnership business under section 37 of the Uniform Partnership Act.¹²⁷ The surviving partner may also have an option to purchase the deceased partner's interest under the terms of the partnership agreement.¹²⁸ In *Keyes v. Hurlbert*,¹²⁹ the partnership agreement gave the two surviving partners the option to purchase the deceased partner's partnership interest at the property's official appraised value. The court held that although an executor/surviving partner cannot make a purchase agreement between himself as the surviving partner and executor, he can carry out a provision in the partnership agreement for the purchase of the deceased partner's share at a prescribed valuation.¹³⁰ Thus, while at common law a sale to an executor/surviving partner is voidable, under *Keyes*, a sale to an executor/surviving partner is voidable only if the prescribed valuation method is violated or if the sale price is unfair. In sum, the *Keyes* court subjects the executor/surviving partner only to the fiduciary responsibility of a surviving partner and disregards the second fiduciary relationship that binds the executor/surviving partner to the estate.

The central issue thus is whether any restraints are imposed on the executor/surviving partner's purchase option, that is, whether consideration of its effect on the deceased partner's estate qualifies the right to exercise or to refrain from exercising the option to purchase. In *In re Estate of Van Epps*¹³¹ a partnership agreement gave

124. 274 Pa. 533, 118 A. 441 (1922).

125. *Id.* at 538, 118 A. at 443.

126. In *Ellis v. Ellis*, 415 Pa. 412, 203 A.2d 547 (1964), the court upheld the right of coexecutors/surviving partners to purchase partnership assets under the supervision of the common pleas court.

127. *See* note 45 *supra*.

128. *See* notes 81-99 *supra* and accompanying text.

129. 43 Cal. App. 2d 497, 111 P.2d 447 (1941).

130. If the valuation method is not prescribed in the agreement, then the burden is on the executor/surviving partner to show that the sale price is fair. *Id.* at 501-02, 111 P.2d at 450.

131. 40 Wis. 2d 139, 161 N.W.2d 278 (1968).

the surviving partner the option to purchase the deceased partner's interest.¹³² The deceased partner's will appointed a bank and the surviving partner as coexecutors and expressly requested that the surviving partner forego the exercise of the option unless it would benefit the beneficiary of his will.¹³³ The court accepted the deceased partner's request in his will as a limitation on the surviving partner's right to exercise an option to purchase.¹³⁴ The decision indicates, however, that this limitation is merely an expression of the implied fiduciary duty that any executor owes the estate. The executor/surviving partner acts as trustee over the estate and has a duty to "act in the interests of the beneficiaries *at all times* with respect to the property in the estate."¹³⁵ The executor/surviving partner's duties as executor are superior to his individual rights under the contract.¹³⁶ The *Van Epps* court failed to separate the rights and duties of a surviving partner from those of an executor. Rather, the court viewed the executor/surviving partner as subject to the executor's duty to act in the interest of the beneficiary with respect to the estate's interest in the partnership. Yet, the court overlooked the fact that partnership property will not vest in the estate until after the surviving partner winds up the partnership business. Consequently, the other courts have not applied the *Van Epps* decision to imply that an executor/surviving partner has a duty to act with reference to the interest of the beneficiary.

The *Van Epps* court, like the *Keyes* court,¹³⁷ was also concerned with the reasonableness of the purchase price. In *Van Epps* the court found that the purchase price was lower than its fair market value. The court partially distinguished *Keyes* on the basis that *Keyes* involved a fair purchase price.¹³⁸ The reasonableness of the purchase price is an important factor in the determination of whether an executor/surviving partner breached his fiduciary duty to the estate.

When the partnership agreement obligates the surviving partner to exercise an option to purchase the deceased partner's interest at a specified price, the courts have upheld the purchase at the named price. In *Bloodworth v. Bloodworth*¹³⁹ the partnership agreement obligated the executor to convey the deceased partner's inter-

132. *Id.* at 141, 161 N.W.2d at 278-79.

133. *Id.* at 141, 161 N.W.2d at 279.

134. *Id.* at 142, 161 N.W.2d at 279.

135. *Id.* at 149, 161 N.W.2d at 282 (emphasis in original).

136. *Id.*

137. 43 Cal. App. 2d 497, 111 P.2d 447 (1941).

138. 40 Wis. 2d at 143, 161 N.W.2d at 280.

139. 224 Ga. 717, 164 S.E.2d 823 (1968).

est in the partnership to the surviving partners for a specified consideration. The deceased partner's will named two of the partners as executors. The court upheld the conveyance of the deceased partner's interest by the executor/surviving partners to themselves because the partnership agreement permitted neither variance nor room for bargaining.¹⁴⁰

The court's insistence on a fair purchase price is in essence the fiduciary standard applied to a surviving partner who purchases a deceased partner's interest.¹⁴¹ The fairness of a purchase price is a matter for judicial determination. Some states have attempted to avoid self-dealing by fiduciaries by enacting statutes that prohibit fiduciaries from purchasing property belonging to the trust or estate.¹⁴² The court in *Matter of Estate of Dillon*,¹⁴³ however, held such statutes inapplicable to options to purchase that are granted to the executor in buy-sell agreements.¹⁴⁴ Conversely, the *Van Epps* court held that the statute prohibited an executor/surviving partner from exercising an option to purchase without the court's permission.¹⁴⁵ Thus, the fairness of a purchase price may again become an important issue when the executor/surviving partner seeks such permission.

The most effective means of dealing with an alleged breach of fiduciary responsibility is on a case-by-case basis. The surviving partner has a contractual right to purchase the deceased partner's interest in the partnership for a fair price. The purchase of the deceased partner's share by the surviving partner is frequently in the best interests of the estate. Furthermore, the surviving partner is often a ready buyer and may be willing to pay a higher price for the deceased partner's interest than a potential buyer who has no

140. *Id.* at 719, 164 S.E.2d at 825.

141. See notes 62-64 *supra* and accompanying text.

142. CAL. CIV. CODE §§ 2222, 2230 (West 1954); IOWA CODE ANN. § 633.155 (West Supp. 1978); MICH. COMP. LAWS ANN. § 555.201 (MICH. STAT. ANN. § 26.85 (Callaghan 1974)); MISS. CODE ANN. § 91-7-253 (1978 Supp.); MONT. REV. CODES ANN. §§ 86-302 to -303 (1947); N.Y. EST., POWERS & TRUSTS LAW § 11-2.2 (Consol. 1967); N.D. CENT. CODE §§ 59-01-10 to -01-11 (1960); OHIO REV. CODE ANN. §§ 2109.43-.44 (Page 1968); OKLA. STAT. ANN. tit. 58, § 496 (West 1965); S.D. COMP. LAWS ANN. §§ 55-2-2 to -2-3 (1967); TEX. PROB. CODE ANN. § 352 (Vernon 1956); WASH. REV. CODE ANN. § 30.24.090 (1961); WIS. STAT. ANN. § 860.13 (West 1971); WYO. STAT. § 2-6-349 (1977).

143. 575 P.2d 127 (Okla. Ct. App. 1977).

144. *Id.* at 130. OKLA. STAT. tit. 58, § 496 (1971) reads: [n]o executor or administrator must directly or indirectly purchase any property of the estate he represents, nor must he be interested in any sale.

145. 40 Wis. 2d 139, 161 N.W.2d 278 (1968). WIS. STAT. § 313.093 (1969), restated in WIS. STAT. § 860.13 (1971), provides that no executor directly or indirectly may purchase estate property or be interested in the sale without the written consent of interested persons or court approval.

prior interest in the partnership. Finally, prior judicial approval of a sale after a hearing at which interested parties can oppose the sale is adequate to protect the interests of the estate.

V. CONCLUSION

The appointment of a surviving partner as executor of his co-partner's will is a practice that is likely to continue. The partnership is a popular form of conducting business, especially for family businesses, and it is only natural for an individual to appoint a family member or trusted business partner as the executor of his estate. Thus, it is important that the courts clearly define the fiduciary obligations of an executor/surviving partner.

The fiduciary responsibilities of an executor/surviving partner are strengthened by the fact that two fiduciary relationships bind him to the estate. An executor/surviving partner has broader duties and thus a higher level of fiduciary responsibility than does a mere surviving partner. Nevertheless, conflicting interests are often unavoidable when an executor/surviving partner faces certain decisions with regard to the continuation of the partnership business or the exercise of an option to purchase the deceased partner's interest.

Certain guidelines must be formulated to protect the interests of the estate and to acquaint the executor/surviving partner with the required standard of conduct. First, when an executor/surviving partner has the right to select one of several alternatives in dealing with the deceased partner's interest in the partnership, the executor/surviving partner must decide whether the right that he is exercising belongs to an executor or to a surviving partner. If the right is that of an executor, then the executor/surviving partner must act as would a reasonably prudent executor who has a reasonably prudent surviving partner's knowledge and understanding of the circumstances. He must pursue the course of action that will most benefit the estate. If the right is an option granted a surviving partner under the terms of a partnership agreement, however, then the fiduciary standard is that of a surviving partner to deal fairly and honestly with the estate. In this regard, the fairness of the purchase price is an important determinant of whether a transaction is equitable. Second, before entering into any transaction on behalf of the estate that could possibly involve a conflict of interest, the executor/surviving partner should both obtain the court's permission and notify interested parties of the proceedings to assure them of an opportunity to be heard.¹⁴⁶ Third, in reviewing the actions of the

146. See Bromberg, *Partnership Dissolution—Causes, Consequences and Cures*, 43 *TEX. L. REV.* 631, 649 (1965) (purchases by partners at a liquidation sale under court super-

executor/surviving partner, a court should also determine whether the executor/surviving partner was acting as an executor or as a surviving partner. When reviewing the actions of an executor/surviving partner acting as an executor, the court should emphasize the executor's duty to protect the interests of the decedent's estate. When reviewing the actions of an executor/surviving partner acting as a surviving partner, the court should place more emphasis on the contractual obligations and rights of the parties. In the latter situation, however, because one of the parties cannot adequately represent himself, the court should also assure that those rights and obligations are construed fairly by resolving any ambiguity in favor of the deceased partner's estate.

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vision are arguably allowable); 62 MICH. L. REV. 106 (1963) (court-sanctioned sale of the deceased partner's interest is an alternative to liquidation).

