

RENDERED: August 29, 2003; 2:00 p.m.  
TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000778-MR

JAQUELINE FISCHER, Individually  
and as EXECUTRIX OF THE ESTATE OF  
RICHARD A. FISCHER, DECEASED

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBERGER, JUDGE  
ACTION NO. 01-CI-01154

TODD A. FISCHER

APPELLEE

### OPINION

### REVERSING AND REMANDING

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BEFORE: COMBS, MCANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a partial summary judgment entered by the Boone Circuit Court enforcing a buy-sell provision in a partnership agreement notwithstanding the prior dissolution of the partnership. For the following reasons, we reverse and remand.

In November 1994, appellee Todd Fischer and his father, Richard Fischer, formed the partnership of D&T

Enterprises for the purpose of owning and leasing a piece of real property in Boone County, Kentucky. One of their lessees was DAL, which was a closely held corporation owned solely by Richard. Although Todd had no ownership interest in DAL, he was heavily involved in its management and operation as one of its corporate officers.

In June 1995, the parties amended their partnership agreement to include a buy-sell provision. Subsequently, on July 27, 2000, Richard's attorney sent a formal letter to Todd's attorney which explicitly stated that "effective immediately [Richard] is exercising his right pursuant to KRS 362.300(1)(b) to dissolve the partnership since no definite term or particular undertaking has been specified." According to the letter, Richard chose to dissolve the partnership because the buy-sell provision stated that upon the death of either partner, the survivor was entitled to purchase the decedent's share of the partnership and its assets for \$50,000. Richard, who anticipated that he would die before his son, apparently believed that \$50,000 was nominal compared to the property's actual value. In the letter, Todd was further advised that although Richard would consider forming a new partnership under "more equitable terms," until such an agreement could be reached, the property would be held in joint tenancy. Finally,

the letter encouraged Todd to respond with his comments about how he might like to proceed.

Although Richard and Todd continued to correspond through their attorneys for almost a year in an effort to resolve the problem, no real steps were taken to wind up the partnership. Unfortunately, on June 28, 2001, Richard Fischer died. His widow, appellant Jackie Fischer, was named the executor of Richard's estate. Several months later, Jackie filed a complaint alleging that Todd, as an officer of DAL, had breached his fiduciary duties and that he had misappropriated corporate opportunities. Todd counterclaimed, asserting that he had entered into an oral contract with Richard for the purchase of DAL's stock, that Richard's last will and testament was the product of fraud or undue influence, and that he was entitled to specific performance of the buy-sell provision in the partnership agreement. Although the trial court subsequently found that Jackie, as Richard's sole heir, owned DAL, it found in response to Todd's motion for partial summary judgment that the partnership agreement's buy-sell provision was enforceable. This appeal followed.

Jackie's single argument on appeal is that partial summary judgment was improper because the buy-sell provision in the partnership agreement became unenforceable on the date of the partnership's dissolution, and it was irrelevant that the

partnership did not complete winding up its affairs prior to Richard's death. It is well settled that "[b]ecause summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo" to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" Lewis v. B & R Corporation, Ky. App., 56 S.W.3d 432, 436 (2001) (citations omitted).

As this appears to be a matter of first impression, we initially turn to Kentucky's Uniform Partnership Act (KRS 362.150 to KRS 362.360), which defines dissolution of a partnership 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." KRS 362.290. According to KRS 362.300(1)(b), either partner's expressed will is sufficient to cause dissolution when there is no definite term or particular undertaking specified for the partnership. See also Golden v. Kirtley, Ky., 268 S.W.2d 934, 936 (1954). In addition, a "partnership dissolution by operation of law dates generally from the occurrence of the event causing it," such as "the date of a party's manifestation of his unequivocal election to dissolve the partnership." 59A

AM.JUR.2D Partnership §814 at 638 (1987). Accordingly, in the matter now before us, the partnership was effectively dissolved upon Todd's receipt of Richard's letter expressing his unequivocal desire to dissolve it.

The parties, nevertheless, dispute the extent to which the dissolution affected the partnership agreement since, upon dissolution, a partnership is not immediately terminated but instead "continues until the winding up of partnership affairs is completed." KRS 362.295. Although Todd argues that a partnership agreement also continues until such winding up is completed, a partner's postdissolution authority is in fact limited to winding up the business. KRS 362.310. Such limited authority removes the partners' implied power to act on behalf of the partnership with respect to any future transactions but allows the partnership to continue as to past matters until they are concluded. 59A AM.JUR.2D Partnership §886 at 672 (1987). Here, the buy-sell provision was not a past undertaking of the partnership as it was written in contemplation of a future event that did not occur before the partnership was dissolved. On the date of dissolution, absent further direction from the partnership agreement, the buy-sell provision and all provisions of the agreement that were not germane to winding up the business became extinguished and unenforceable on the date of

dissolution. To hold otherwise would render the concept of dissolution meaningless.

This conclusion is consistent with that reached by other jurisdictions which have dealt with similar circumstances. In Canter's Pharmacy, Inc. v. Elizabeth Associates, 578 A.2d 1326 (Pa. Super. Ct. 1990), the Superior Court of Pennsylvania concluded that an arbitration clause in a partnership agreement was rendered unenforceable upon the partnership's dissolution, even though the winding up of the business's affairs was incomplete. Likewise, in Girard Bank v. Haley, 332 A.2d 443 (Pa. 1975), the Pennsylvania Supreme Court held that a partnership agreement was not enforceable following dissolution of the partnership even though the dissolving partner died before winding up of the partnership's affairs. The court stated that if "dissolution occurred during the lifetime of Mrs. Reid, those portions of the agreement, which are concerned solely with the effect of the death of a partner, are not germane. The agreement being otherwise silent as to winding up and liquidation, the provisions of the Act will control." Id. at 446. Similarly, Parduhn v. Bennett, 61 P.3d 982 (Utah 2002) and Goergen v. Nebrich, 174 N.Y.S.2d 366 (N.Y. App. Div. 1958) both held similar provisions in partnership agreements unenforceable because dissolution occurred prior to the partner's death.

Finally, we are not persuaded by Todd's argument that because Richard allegedly took no steps to wind up the business, the buy-sell provision remained in force. To the contrary, "[t]he Uniform Partnership Act is held to contemplate that dissolved partnerships may continue in business for a short, long, or indefinite period of time, so long as the rights of creditors are not jeopardized and none of the partners insist on a winding up and final termination of the partnership business." 59A AM.JUR.2D Partnership §888 at 674 (1987) (citations omitted). See also Clevenger v. Rehn, \_\_\_ N.W.2d \_\_\_ (Neb. Ct. App. 2003); 8182 Maryland Associates v. Sheehan, 14 S.W.3d 576 (Mo. 2000); Schoeller v. Schoeller, 497 S.W.2d 860 (Mo. Ct. App. 1973). Although Todd claims that Richard did nothing to wind up the partnership, he admits that "[t]he parties were in negotiations to wind up as evidenced by the letters from the respective party's attorneys." We also note that there is nothing within the Kentucky Uniform Partnership Act which provides a time frame for the completion of winding up procedures.

Here, the partnership was dissolved and the partnership agreement was effectively revoked when Richard advised Todd in writing of his intent to dissolve the partnership. While the partnership still existed at the time of Richard's death, it existed only for the limited purpose of winding up its affairs. "In short, no one can be forced to

continue a partnership against his will." 59A AM.JUR.2D

Partnership §818 at 640 (1987) (citations omitted).

The partial summary judgment is reversed, and this matter is remanded to the Boone Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

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