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Partnerships - Valuation of Assets on Death of a Partner

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PARTNERSHIPS—VALUATION OF ASSETS ON DEATH OF A PARTNER —There are three phases to the problem of arriving at a final dollar and cents valuation of a deceased partner's share in a partnership. In their proper chronological order they are: a determination of what the partnership assets are,[1] a valuation of those assets once determined, and a division of the remainder (after liabilities have been subtracted) into the proper proportions according to the partnership agreement.[2] Only the second phase is within the scope of this comment, the purpose of which is to examine various asset valuation methods both with respect to, and in the absence of, a valuation established by the partners themselves. While the determination of asset value in the absence of agreement is largely an evidentiary problem, no inquiry will be made into the admissibility of evidence of value;[3] instead, attention will be centered upon the qualitative importance of that evidence once it is proved. Particular emphasis will be given to the valuation of goodwill where there has been no agreement covering it, such emphasis being justified by the variety of methods evident in the cases.[4]

The Valuation of Assets in the Absence of Agreement

There is general agreement among the courts that on the dissolution of a partnership by the death of a partner, the survivor(s) must account for the fair and reasonable value of the assets of the business[5] as of the

[1] CRANE, PARTNERSHIP §§37-47 (1938); 68 C.J.S., Partnership §385 (1950).

[2] CRANE, PARTNERSHIP §90 (1938); 68 C.J.S., Partnership §§391-404 (1950).

[3] On this problem see 3 WIGMORE, EVIDENCE, 3d ed., §§711-721 (1940).

[4] Perhaps this difficulty is partially the result of the confusion over the question of the existence of business goodwill in some types of partnerships. See 44 A.L.R. 517 (1926); Laube, "Goodwill in Professional Partnerships," 12 CORN. L.Q. 303 (1927); Crane, "Partnership Goodwill," 18 VA. L. REV. 651 (1932).

[5] Gunnell v. Bird, 10 Wall. (77 U.S.) 304 (1869); Flagg v. Stowe, 85 Ill. 164 (1877); Gillett v. Hall, 13 Conn. 426 (1840). Appellate courts are not likely to overturn

date of the death of the partner.[6] Disharmony has resulted, however, from the fact that the evidence presented to prove this value is generally either probative of that value at some time other than death or, in the case of goodwill, probative of some different fact which must be related to the value of goodwill in some arbitrary manner.

A bona fide sale of the entire business to a third person is generally regarded as the best evidence of what the assets, including the goodwill, are worth.[7] It does not seem to matter whether it is a public or a private sale[8] as long as there is no evidence of fraud or collusion between the surviving partner and the purchaser.[9] On the other hand, a few courts have been unwilling to accept sale price as possessing any greater weight than other evidence of value.[10] These courts will examine the circumstances of the sale, including the adequacy of the effort by the surviving partner to get the best price possible, rather than limit their scrutiny to actual fraud or collusion in the sale.[11] This reluctance by some courts to accept sale price per se may result partly from the fact that in some jurisdictions the survivor is in a fiduciary relationship with the deceased partner's estate,[12] while in others he must exercise only reasonable care in accounting for the value of partnership assets.[13] In addition to an actual sale of the assets, a bona fide offer of purchase by a third person is good evidence even

a trial court valuation. Ott v. Boring, 139 Wis. 403, 121 N.W. 126 (1909); Parker v. Broadbent, 134 Pa. 322, 19 A. 631 (1890). Unfortunately they are also inclined to pass lightly over the problem with generalities like "fair" and "reasonable."

[6] Snead's Executrix v. Jenkins, 225 Ky. 832, 10 S.W. (2d) 282 (1928); 68 C.J.S., Partnership §387c (1950). But see Young v. Scoville, 99 Iowa 177, 68 N.W. 670 (1896), where equity valued it at the time of the accounting.

[7] Cook v. Collingridge, Jac. 607, 37 Eng. Rep. 979 (1823); Matter of Arnold, 114 App. Div. 244, 99 N.Y.S. 740 (1906); Spalding v. Spalding's Admr., 248 Ky. 259, 58 S.W. (2d) 356 (1933).

[8] Matter of Herman, 110 Misc. 475, 180 N.Y.S. 509 (1920); Decker v. Lanhan, 300 Ky. 595, 189 S.W. (2d) 960 (1945); Gillett v. Hall, 13 Conn. 426 (1840).

[9] And where the purchaser is the surviving partner, the adequacy of the purchase price will be closely scrutinized. Galbraith v. Tracy, 153 Ill. 54, 38 N.E. 937 (1894); Tennant v. Dunlop, 97 Va. 234, 33 S.E. 620 (1899).

[10] The real question is ". . . [what it would have sold for], if it had been sold in the most advantageous manner and under such circumstances that it would have produced the largest sum for all the parties interested?" Mellersh v. Keen, 28 Beav. 453 at 455, 54 Eng. Rep. 440 (1860). See also In re Silkman, 121 App. Div. 202, 105 N.Y.S. 872 (1907).

[11] That value should not be set at a forced sale price, see Waterbury v. Waterbury, 278 Ky. 254, 128 S.W. (2d) 568 (1939). See also Froess Admx. v. Froess, 284 Pa. 369, 131 A. 276 (1925), where a sale price was rejected in favor of an appraisal.

[12] Welbourn v. Kleinle, 92 Md. 114, 48 A. 81 (1900); Dial v. Martin, (Tex. Civ. App. 1931) 37 S.W. (2d) 166.

[13] Mulherin v. Rice and O'Connor, 106 Ga. 810, 32 S.E. 865 (1899).

if the offer is refused. Next to the actual sale itself it is probably the most convincing evidence, especially if the offer is higher than an appraisal value.[14]

But lacking an actual sale of the business by the surviving partner, or by direction of the court through a receiver,[15] the courts must rely on an appraisal of value by a referee or a master in chancery. This process requires the parties to produce the books of the business as well as vouchers, evidence of independent appraisal by the parties themselves,[16] and all other testimony bearing on the value of the business.[17] Whatever the procedure in the various courts, the appraisal system has been plagued with uncertainty resulting not only from the inevitable difference of opinion over the value of tangibles, but also from the attempt to value the assets as a going business[18] and the requirement that the value of existing goodwill be included in the statement of account.[19]

The latter problem, the valuation of goodwill, has proved particularly difficult. A few courts have faced the problem calmly, employing evidence of the appraisals by the parties themselves,[20] value on the books,[21] cost,[22] testimony of third persons, and other types of evidence

[14] Peck v. Knapp, 137 N.Y.S. 70 (1912).

[15] The court may order a sale of the assets through a receiver, but only on clear proof of mismanagement and unfair conduct by the surviving partner. Miller v. Miller, 80 N.J. Eq. 47, 82 A. 513 (1912).

[16] The rule is quite general that the surviving partner can never take the property at an appraisal without the consent of the administrator or executor of the deceased partner's estate. Whittaker v. Jordan, 104 Me. 516, 72 A. 682 (1908). And even where the appraisal is agreed to by the executor or administrator the heirs or next of kin may set it aside if it is not reasonable, in good faith, and in perfect fairness. PARSONS, PARTNERSHIP, 4th ed., 441-443 (1893).

[17] As to the various types of evidence used by a master in appraising assets, see PARSONS, PARTNERSHIP, 4th ed., 517-531 (1893).

[18] An appraisal by the surviving partner of asset value based on probable market price if the assets were sold separately and apart from the business is not adequate. Welbourn v. Kleinle, 92 Md. 114, 48 A. 81 (1900). The courts also allow ample time for the continuation of the business by the surviving partner to avoid sacrificing the assets, and to provide opportunity for making an advantageous disposition of the business. Frey v. Eisenhardt, 116 Mich. 160, 74 N.W. 501 (1898).

[19] That the value of goodwill may be affected by the competition of a surviving partner, see Hutchins v. Page, 204 Mass. 284, 90 N.E. 565 (1910); Ruppe v. Utter, 76 Cal. App. 19, 243 P. 715 (1925). See also Whitman v. Jones, 322 Mass. 340, 77 N.E. (2d) 315 (1948).

[20] In New York, at least, an appraisal by an appraiser hired by one of the parties was held to be prima facie evidence of value. Matter of Mullon, 145 N.Y. 98, 39 N.E. 821 (1895). The parties themselves can testify to value in all states. Haley v. Traeger, 92 Cal. App. 360, 268 P. 459 (1928).

[21] Zeibak v. Nasser, 12 Cal. (2d) 1, 82 P. (2d) 375 (1938).

[22] Haley v. Traeger, 92 Cal. App. 360, 268 P. 459 (1928).

similar to those used in the valuation of tangible assets.[23] The attempted solution in other courts has been to avoid the appraisal of goodwill by a master, determining it instead by means of a formula developed by the court. This formula recognizes that the value of goodwill arises out of the possibility of future profits, the latter being determined generally for sale purposes by some evidence of past profits.[24] Some courts have merely multiplied net average profits by an arbitrary number of years and have called the result the value of goodwill.[25] Other courts have been more elaborate, subtracting a fair percentage (usually six to twelve) of net tangible worth from average profits over the same period (from one to twelve years)[26] and multiplying the difference by some suitable factor (usually one to four) representing the probable stability of that goodwill depending on the type of business involved and the consequent number of years that should be required to pay for it.[27] No case indicates that this method has been used in preference to actual bona fide sale price,[28] and in New York the courts have applied the formula only in the absence of some other acceptable basis of appraisal agreed upon by the parties themselves.[29]

In addition to the use of past profits in setting a present market value on goodwill, one other method is available. In many cases anticipatory profits may be specifically determinable or the suit for accounting may be months or years after the death of the partner and the actual profit figures for the period subsequent to the death of the partner may be available to the court. Massachusetts has indicated that if anticipatory profits can be proved to a fair degree of certainty and accuracy, they may be used by a master in chancery in valuing goodwill. They may not be used if they are speculative or conjectural.[30]

[23] An appraisal by third parties will not overcome a sale price. Matter of Arnold, 114 App. Div. 244, 99 N.Y.S. 740 (1906), but an appraisal is to be relied on to the exclusion of valuations contained in the books of the business. Ott v. Boring, 139 Wis. 403, 121 N.W. 126 (1909).

[24] Matter of Borden, 95 Misc. 443, 159 N.Y.S. 346 (1916).

[25] Mellersh v. Keen, 28 Beav. 453, 54 Eng. Rep. 440 (1860).

[26] Any period may be used if it results in a fair average of net profits. That one year's profits is not a fair "average," see Waterbury v. Waterbury, 278 Ky. 254, 128 S.W. (2d) 568 (1939).

[27] Thursby v. Kurby, 171 Misc. 310, 12 N.Y.S. (2d) 279 (1939). Also see 2 BONBRIGHT, VALUATION OF PROPERTY 727 (1937), for an explanaton of the formula.

[28] Matter of Herman, 110 Misc. 475, 180 N.Y.S. 509 (1920), indicates that the formulated method should not be used in place of an actual sale valuation. But see In re Silkman, 121 App. Div. 202, 105 N.Y.S. 872 (1907), where the formula was used in place of auction sale.

[29] Brooklyn Trust Co. v. McCutcheon, (D.C. N.Y. 1914) 215 F. 952.

[30] Murray v. Bateman, 315 Mass. 113, 51 N.E. (2d) 954 (1943). But the case actually held the anticipatory profits speculative.

New York has allowed examination of the books for periods subsequent to sale for purposes of drawing conclusions as to the worth of the business at the time of sale, but the evidence was admitted only for purposes of comparison.[31] No case has been found in which either anticipatory profits or profits subsequent to the death of the partner has been the actual basis for determination of goodwill value.

Any comment on the advantages of the various methods of valuing goodwill must include some sympathy for the master in chancery faced with the problem. On the whole there can be little disagreement with the acceptance of a valuation based on present market value as indicated by either an actual sale or an offer of purchase. Such a valuation is not only consistent with the surviving partner's duty to liquidate the assets of the partnership,[32] but in most cases will result in the closest approximation to the value at the death of the partner. The difficulty arises where no evidence of actual market value based on a sale is in evidence and the court encounters the inaccuracies of appraisal. The acceptance of any predetermined formula for appraising the value of goodwill has both its advantages and disadvantages. There is no doubt that it usually claims at least some relationship to an actual marketplace determination of goodwill value. It also does away in many cases with the wearisome presentation of many types of evidence of goodwill. But most important, it is a recognition that a need exists for some specific method of valuing goodwill, such a need having its genesis in a desire to relieve surviving partners of the uncertainty inherent in a master's retrospective examinations of the care that has been used in disposing of the assets of the partnership.

Any formulated method runs the risk of confusing earned efficiency, based on the skill and ingenuity of the partners, with the unearned profits derived from goodwill. In addition, the formulated method takes no account of the effect which competition by a surviving partner might have on the value of goodwill.[33] Its use implies that certainty is more important than the greater accuracy of the appraisal method.

[31] ". . . the jury were entitled to consider pertinent facts in the subsequent history of the company for the purpose of making comparisons and drawing conclusions as to its condition at the time of the sale." Von Au v. Magenheimer, 126 App. Div. 257 at 270, 110 N.Y.S. 629 (1908). This was a suit by stockholders against the directors of a corporation, but the principle of the case is applicable to the partnership area in this respect.

[32] In the absence of agreement between the parties, or statute, this duty exists in most states. 9 NEB. L. BUL. 211 (1930).

[33] In Miller v. Hall, 65 Cal. App. (2d) 200, 150 P. (2d) 287 (1944), the court, while recognizing the value of the goodwill to be between $15,000 and $25,000, accepted the lower figure because of the likelihood of the competition of a partner. This figure was considerably less than the profits of the business for one year. See also cases cited in note 19 supra.

Yet it can be argued that uncertainty in valuation is justified even if it serves only as an incentive to surviving partners to exercise the requisite care in looking after the deceased partner's share of the assets. At least for those who think that certainty in valuation is not necessarily the millenium, the most severe criticism of the formulated method is that it is likely to be totally inaccurate since a formula cannot possibly take into consideration the thousand and one market influences determining a final price.

The use of evidence of actual profits subsequent to the sale is subject to many of the same objections. The profits once determined must still be related to goodwill in some arbitrary manner. There exists the same imperfect line between profits as a result of productive efficiency and profits due to goodwill. It may also be argued that the value of goodwill should not be determined by reference to actual profits subsequent to sale, but only with reference to the information a prospective buyer would have had at the time of sale, i.e., profits prior to the death of the partner.

Whatever may be the relative merits of the different methods, one conclusion becomes obvious after a study of the cases. When actual sale price is not available the vagaries and inaccuracies inevitable in a court determination of value can be avoided only by the prudence and foresight of the partners and their counsel in agreeing on a value of the assets, or a method of computing that value, in the original partnership agreement. In the absence of such an agreement, however, there is no good reason to hold certainty of valuation more important than accuracy. Logically at least, accuracy can more readily be achieved by allowing a master in chancery or a referee to appraise goodwill in the same manner as he would appraise a tangible asset. At least the result reached would combine the many factors making up a market-determined price and would take into consideration the factors likely to influence a purchaser in bidding for the business.[34]

The Valuation of Assets by Agreement of the Parties

With the growing number of advantages to the partnership form of organization, and the consequent increasing use of that form in compli-

[34] Many courts have recognized the limitations of an appraisal by a master, while at the same time arguing that no better method could be devised. Moore v. Rawson, 185 Mass. 264, 70 N.E. 64 (1904); Parker v. Broadbent, 134 Pa. 322, 19 A. 631 (1890). And even most of the courts that recognize the formulated methods of determining goodwill treat it only as evidence, or as a presumption which may be rebutted if necessary. Waterbury v. Waterbury, 278 Ky. 254, 128 S.W. (2d) 568 (1939); Von Au v. Magenheimer, 126 App. Div. 257, 110 N.Y.S. 627 (1908).

cated business ventures,[35] businessmen have endeavored to avoid losses, uncertainty, and delays inherent in a dissolution and liquidation of partnership assets on the death of a partner. The standard method is to provide in the partnership agreement for the purchase, or an option for the purchase,[36] of the deceased partner's share in the business at a price set by, or by a method of determining a price contained in, the agreement itself.[37]

Generally such an agreement for purchase by the survivor has been held to be valid and specifically enforceable.[38] It is classed as a contract to be performed on the happening of an event, the consideration for which is both the mutuality of the provision for purchase and the other stipulation and agreements in the articles of partnership.[39] One objection to such agreements has been that they are void because of their testamentary character and lack of conformance with the Statute of Wills,[40] but this objection has been sustained with decreasing frequency, and only in cases in which there has been a rather obvious attempt to avoid the statute.[41]

For the same reasons parties may make enforceable agreements as to the methods by which the value of the deceased partner's share is to be determined.[42] And these methods, if equally available to all the partners, will generally be enforced even if they lead to a purchase price grossly inadequate, or greatly in excess of, the real value

[35] That the use of the partnership form is growing, largely due to the effect of corporation tax policies, see 23 MINN. L. REV. 506 (1939).

[36] The usual method is an option to purchase, but some agreements have contained provisions that the survivor must purchase the assets. Pailthorpe v. Tallman, 72 N.Y.S. (2d) 784 (1947).

[37] In a number of instances this has been done by testamentary direction. See Fuller, "Partnership Agreements for Continuation of an Enterprise After the Death of a Partner," 50 YALE L.J. 202 (1940).

[38] McKinnon v. McKinnon, (8th Cir. 1891) 46 F. 713; Warrin v. Warrin, 169 App. Div. 97, 154 N.Y.S. 458 (1915); Murphy v. Murphy, 217 Mass. 233, 104 N.E. 466 (1914).

[39] Casey v. Hurley, 112 Conn. 536, 152 A. 892 (1931); Rohrbacker's Estate, 168 Pa. 158, 32 A. 30 (1895); Rankin v. Newman, 114 Cal. 635, 46 P. 742 (1896).

[40] Ferraba v. Russo, 40 R.I. 533, 102 A. 86 (1917); Gomez v. Higgins, 130 Ala. 493, 30 S. 417 (1900). The vast majority of cases hold that the Statute of Wills does not prevent an owner of property from stipulating by contract for its disposition at the time of his death. Hale v. Wilmarth, 274 Mass. 186, 174 N.E. 232 (1931); Eisenlohr's Estate, (No. 2), 258 Pa. 438, 102 A. 117 (1917).

[41] This occurs usually where the purchase agreement runs for the benefit of one partner only, or where the partners are father and son or in other close relationships. Gomez v. Higgins, 130 Ala. 493, 30 S. 417 (1900). A provision that the survivor takes the assets free and clear may also be held testamentary. In re Mildrum's Estate, 108 Misc. 114, 177 N.Y.S. 563 (1919).

[42] Casey v. Hurley, 112 Conn. 536, 152 A. 892 (1931); Murphy v. Murphy, 217 Mass. 233, 104 N.E. 466 (1914).

of the assets.[43] The refusal of equity to enforce such an agreement has been limited to cases where the right to purchase at the valuation has been unfair and was limited to only one, or less than all, of the partners.[44]

The major obstacle to the effectiveness of such provisions has been one of interpretation. In a surprisingly large number of instances the parties themselves have made the agreed method of valuation ambiguous by using terminology either essentially controversial or difficult to define. The most frequently litigated example of this ambiguity is the use of a valuation based on the term book value,[45] the courts being in irreconcilable conflict over its meaning. In *Rubel v. Rubel*,[46] the Supreme Court of Mississippi held that under an agreement providing for the purchase of the deceased partner's interest in the partnership at a price equal to 75 percent of the book value, figures shown on the general ledger and balance sheet were determinative of the book value of the assets. The court also held that equipment which had been depreciated on the general ledger and charged off prior to partner's death could be assigned no book value. A number of other courts have also held that book value means value as shown on the books,[47] but others, perhaps a numerical majority, have held that the term means either market value,[48] or original price minus actual depreciation.[49] The difference in the result reached under the various views may be much more than merely the difference between market price and actual book value of the assets. Under the view taken in the *Rubel* case, unless goodwill is actually valued on the books of the business it may not be includible in the account. On the other hand, in states holding that book value means market value, goodwill may be valued whether or not it is listed on the books.[50]

[43] In Kaufmann v. Kaufmann, 222 Pa. 58, 70 A. 956 (1908), the price set by the agreement was grossly inadequate, while in Sands v. Miner, 16 App. Div. 347, 44 N.Y.S. 894 (1897), the price set was too high. The agreement was enforced in both cases. See also Coe v. Winchester, 43 Ariz. 500, 33 P. (2d) 286 (1934).

[44] This objection is based on a breach of the fiduciary relationship between partners. Hagen v. Dundore, 187 Md. 430, 50 A. (2d) 570 (1947).

[45] As to the meaning and import of book value of corporate stock, see 33 A.L.R. 366 (1924). See also 5 WORDS AND PHRASES, perm. ed., 693 (1940).

[46] (Ala. 1954) 75 S. (2d) 59 (1954). See the cases cited in this case for additional definitions of book value.

[47] Lane v. Barnard, 185 App. Div. 754, 173 N.Y.S. 714 (1919); Gurley v. Woodbury, 177 N.C. 70, 97 S.E. 754 (1919). If the agreement provides that the assets are to be valued "as shown on the books," a different problem is presented, Sands v. Miner, 16 App. Div. 347, 44 N.Y.S. 894 (1897).

[48] Wineinger v. Kay, (Tex. Civ. App. 1933) 58 S.W. (2d) 876; Elhard v. Rott, 36 N.D. 221, 162 N.W. 302 (1917).

[49] Mills v. Rich, 249 Mich. 489, 229 N.W. 462 (1930).

[50] Steeg v. Leopold Weil Bldg. and Improvement Co., 126 La. 101, 52 S. 232 (1910).

The interpretation of the term book value is only one of many problems facing the courts in this area. From the infinite number of possible types of valuation agreements, three categories are distinguishable.[51] They are (1) an absolute cash valuation of the assets,[52] (2) a valuation by appraisal and account by some person appointed in the agreement,[53] and (3) one of the many formulated methods relating the value of the assets to some percentage of profits or to some capitalization of the average earnings. Where a method is provided in the agreement for the valuation of goodwill, the method will also generally fall into one of these three categories. However, the usual provision in regard to goodwill is that it shall not be included in the valuation at all.[54] The bulk of the litigation naturally results from the use of the third category of methods, for formulated methods almost always involve accounting terms, many of which have disputed meanings.[55] Even when the agreement has provided for a valuation by appraisal, litigation has been necessary to determine what assets should be included, or, if the assets are defined, what the definition means.

It can thus be seen that by providing for a valuation in the agreement to avoid the delays of liquidation and the uncertainties of judicial appraisal, partners have often merely jumped from the evidentiary frying pan into the interpretational fire. What is needed is an accurate

[51] For a brief discussion of the comparative advantages of various types of valuation agreements, see MULDER AND VOLZ, DRAFTING OF PARTNERSHIP AGREEMENTS 99-107 (1949). There is, of course, no question that the three categories often overlap and are combined. Their only value is as a convenience for discussion purposes.

[52] The agreement may contain a fixed cash amount. Rohrbacher's Estate, 168 Pa. 158, 32 A. 30 (1895). Or the valuation may be set at zero for the purpose of this purchase. Hale v. Wilmarth, 274 Mass. 186, 174 N.E. 232 (1931). Or it may provide for a stated sum to be paid to the widow periodically. Garratt v. Baker, 5 Cal. (2d) 745, 56 P. (2d) 225 (1936).

[53] The appraiser may be a third party. Gerding v. Baier, 143 Md. 520, 122 A. 675 (1923). Or it may be the survivor himself. Casey v. Hurley, 112 Conn. 536, 152 A. 892 (1931). See also Coffey v. Coffey, 210 Mass. 480, 96 N.E. 1027 (1912).

[54] In Douthart v. Logan, 190 Ill. 243, 60 N.E. 507 (1901), and Moore's Estate, (No. 2), 228 Pa. 523, 77 A. 902 (1910), it was provided that goodwill should not be considered in the purchase price. In Kaufmann v. Kaufmann, 222 Pa. 58, 70 A. 956 (1908), a formulated method was used, and in Murphy v. Murphy, 217 Mass. 233, 104 N.E. 466 (1914), the goodwill was set at a fixed sum. For a discussion of the various methods used in valuing goodwill, see MULDER AND VOLZ, DRAFTING OF PARTNERSHIP AGREEMENTS 106-107 (1949); Edmonds, "The Disposition of Partnership Interests: Considerations on Death of a Partner," 39 A.B.A.J. 283 (1953).

[55] The following is a representative, but by no means complete list of the common terms of accounting which have led to litigation when used in partnership agreements on valuation of assets: "earnings," Gerding v. Baier, 143 Md. 520, 122 A. 675 (1923); "books and accounts," Pailthorpe v. Tallman, 72 N.Y.S. (2d) 784 (1947); "assets," Block, Exr. v. Mylish, 351 Pa. 611, 41 A. (2d) 731 (1945); "net cost price," Cohen v. Elias, 176 App. Div. 763, 163 N.Y.S. 1051 (1917); "from the books," In re Witkind's Estate, 167 Misc. 885, 4 N.Y.S. (2d) 933 (1938); "net returns," Jeffrey v. Genter, (Pa. Com. Pl.) 45 Lack. Jur. 101 (1944).

method of determining the value of assets of the business, described in a way which avoids ambiguity. The best method of avoiding litigation is to set a fixed cash value for the assets in the agreement. Such a method is simple and allows the parties themselves to determine the fair value. The agreed price may even be altered periodically to meet changing business conditions. But it is not only unusual for normally optimistic businessmen to agree to set a present cash value on a growing business, but it is also unusual for them to have the time or inclination to revalue assets periodically.[56] The use of arbitration or appraisal is also subject to many of the same objections which the parties face when, with no agreement for purchase by the survivor at a valuation, a master appraises the assets on dissolution. In addition, appraisal to be effective must be related to some accounting method, and again the definitional problems are raised.

It is tentatively suggested, therefore, that perhaps the best method of valuing the deceased partner's share of the assets is to provide for a periodic audit and inventory, valuation being based on the net worth of the business as shown by the audit last preceding the death of the partner. This method combines the advantage of a fixed value determined prior to the death of the partner with a recognition of the need for a constantly changing valuation based on changing business conditions. Since most partnership agreements are likely to provide for an annual inventory, audit, and closing of the books, such a method entails no extra burden of work or expense for the partners. The notice which all partners are actually or constructively given by the annual audit and opportunity thus furnished to dispute those values are the probable reasons why no case has been found in which such a method has been the subject of interpretational litigation.[57]

John F. Dodge, Jr., S.Ed.

[56] Brooklyn Trust Co. v. McCutcheon, (D.C. N.Y. 1914) 215 F. 952.

[57] Both the estate and income tax implications of such provisions are important considerations in choosing such a method, but are outside the scope of this comment. See 26 TAXES 931 (1948); Weher and Flom, "Death and Income Taxes—The Demise of a Partner," 52 COL. L. REV. 695 (1952). No such method of valuation is practical unless the parties provide a means by which the survivor can obtain the purchase money. Fuller, "Partnership Agreements for Continuation of an Enterprise After the Death of a Partner," 50 YALE L.J. 202 (1940).