

N.D.A.G. Letter to Schaible (Jan. 14, 1988)

January 14, 1988

Mr. Robert R. Schaible
Deputy Secretary of State
Department of State
State Capitol
Bismarck, ND 58505

Dear Mr. Schaible:

Thank you for your letter of November 19, 1987, concerning the issuance of a contractor's license to a partnership. You inquire whether a new license is required should the identity of the partners involved in the partnership change. I apologize for the delay in responding to you.

I have learned additional facts concerning your inquiry. There are partnerships to whom a contractor's license has been issued which do not use a name showing the names of the persons interested as partners in that business. For example, partners A and B may be in partnership with one another and the name of their business may be named Acme Construction. A contractor's license was issued by your office in the name of the fictitious partnership name (in my example, Acme Construction). As part of the renewal process, your office has discovered a change in the identity of the partners of such partnerships. In my example, when forms are submitted for the renewal of the contractor's license for Acme Construction, your office has discovered that partner C has been added to partners A and B or, in some cases, partner B has been withdrawn and partner C has been added.

Apparently, this latter factual situation is what caused your inquiry to be sent to our attention. You question whether a new contractor's license should be obtained by a fictitious name partnership where the identity of the partners has changed since the original license has been issued.

No person may engage in the business nor act in the capacity of a contractor where the contract exceeds the sum of \$500.00 without first having a license issued by your office. N.D.C.C. § 43-07-02. The term "person" includes any individual, firm, co-partnership, association, corporation or other group or a combination thereof, acting as a unit. N.D.C.C. § 43-07-01(2).

Clearly, a partnership is eligible to receive a contractor's license. The question is whether a partnership continues where the identity of the partners changes either by a withdrawal of a partner, an addition of a partner, or a combination of both.

The Uniform Partnership Act (adopted by North Dakota in N.D.C.C. chs. 45-05 through 45-09) does not appear to make the admission of a new partner a ground for dissolution.

While there is both direct and implied authority for this proposition, there appears to be a conflict in the law. 59A Am. Jur.2d Partnerships § 826 (1987). Many courts have stated that the admission of a new partner is considered a cause of dissolution in the same manner as the withdrawal of a partner. Ellingson v. Walsh, O'Connor & Barneson, 104 P.2d 507 (Cal. 1940); Fenner & Beane v. Nelson, 13 S.E.2d 694 (Ga. App. 1941); Shunk v. Shunk Mfg. Co., 93 N.E.2d 321 (Ohio Ct. App. 1949). "In short, the general rule remains as it was prior to the adoption of the Uniform Partnership Act, namely, that any change in the personnel of a partnership dissolves it." 59A Am. Jur.2d at 645.

There is little doubt but that the withdrawal of a partner causes the dissolution of the partnership.

Although the Uniform Partnership Act's enumeration of the causes of rightful dissolution is held to preclude dissolution for any other cause, including a partner's withdrawal, it is more frequently recognized that the Uniform Act's definition of dissolution as the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on of the business, makes no change in the common-law rule [withdrawal causes dissolution]. This approach rests in part on reasoning that the right of withdrawal is an inseparable incident to every partnership, and that there is no such thing as an indissoluble partnership.

59A Am. Jur.2d Partnerships § 827 at 645-46 (1987).

In concluding that the admission or withdrawal of a partner causes the dissolution of the partnership, we next review the effect of a dissolution. A dissolution of the partnership is a change in the relation of the partners caused by any partner ceasing to be associated with the partnership. N.D.C.C. § 45-09-01. However, upon dissolution, the partnership has not been terminated, but continues until the winding up of partnership affairs is completed. N.D.C.C. § 45-09-02.

It [dissolution] designates the point in time when the partners cease to carry on the business together. So defined, "dissolution" is a technical legal concept, unlike the usage found in other areas of the law such as corporations. "Dissolution," under the Uniform Partnership Act, is not synonymous with "winding up" and "termination" which are additional steps in completing the affairs and ending a partnership.

Although dissolution may be followed by liquidation, this need not occur if the partnership agreement provides for continuation of the partnership business after dissolution and the departing partner is paid for his partnership contribution and share of accumulated profits.

Lonning v. Kurtz, 291 N.W.2d 438, 440-41 (N.D. 1980).

The statement by the North Dakota Supreme Court as to the distinction between

dissolution and termination of a partnership appears to reflect the general rule that most jurisdictions have pronounced on this subject.

Dissolution of a partnership does not cause the liquidation of the firm if there is an agreement among the partners stating that it does not do so, or if a partner is expelled pursuant to the terms of the partnership agreement and if he is paid the net amount due him from the firm and is protected from firm liabilities. Thus, the causes of dissolution do not preclude the remaining partners from carrying on the partnership business pursuant to a prior agreement with or without the addition of new partners. Agreements for the continuation of a partnership business after dissolution are generally valid and enforceable and they need not be in writing.

59 Am. Jur.2d Partnerships § 892 at 676 (1987).

In light of the applicable law on the issue of dissolution and termination of a partnership, it is my opinion that any change in the personnel of a partnership dissolves that partnership, but does not cause its immediate termination as a business entity. Instead, the partnership continues until the winding up of partnership affairs is completed. However, the "winding up" process may not occur following dissolution if the partnership agreement provides for the continuation of the partnership despite the dissolution.

As noted by the North Dakota Supreme Court, "[t]he partnership agreement in many respects is the law of partnership." Liechty v. Liechty, 231 N.W.2d 729, 731 (N.D. 1975). In each case, the partnership agreement will have to be consulted in determining whether dissolution causes a termination of a partnership. Where a termination does occur, it is clear that a new contractor's license will have to be obtained if the successor entity wishes to continue as a contractor. If the partnership agreement provides for the continuation of the partnership upon a dissolution, then the partnership continues and there is no need to obtain an additional contractor's license.

I realize that the thought of additional work and inquiry by the Secretary of State's Office in these situations is not going to be well received. I wish it were possible to provide a more convenient answer to your question. However, given the case law on this subject, it is my opinion that this is the correct legal answer to your question.

I understand that there is some concern over the failure to obtain a new contractor's license where the personnel of the partnership has changed with respect to the bond requirements and with respect to accuracy of records of your office indicating the names of the partners. The bond requirement continues to be fulfilled, however, as the bond names the fictitious name of the partnership rather than the individual partners involved. So long as the partnership agreement provides for the continuation of the partnership despite a dissolution, the bond should remain in effect despite a change of personnel in the partnership.

Actually, your records will indicate changes in the personnel of those partnerships using a

fictitious name. N.D.C.C. § 45-11-01 requires partnerships acting in this state under a fictitious name or a designation not showing the names of the persons interested as partners in such business to file a fictitious name certificate with your office. N.D.C.C. § 45-11-05 requires a new certificate to be filed whenever there is a change in the members of a partnership transacting business in the state under such a name.

Therefore, fictitious name partnerships which undergo a change of personnel may continue in operation so long as the partnership agreement so provides. Furthermore, such fictitious name partnerships will have a fictitious name certificate indicating the actual members of the partnership. A fictitious name certificate will be changed and updated every time there is a change in the members of the partnership transacting business.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

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