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Partnership Liability and Parental Immunity

todial proceeding.[37] As long as the presumption of fitness of the surviving parent is not overcome by the opposing party, that parent will be awarded custody even though the opposing party may be more fit as a custodian.

In conclusion, there appears to be merit in both the minority and majority approaches. The majority approach is undoubtedly the more practical one in relation to the status of custody of the child immediately upon the death of the parental custodian, while the minority approach is more adequate in requiring jurisdiction to be in the original divorce court when custody is contested.

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PARTNERSHIP LIABILITY AND PARENTAL IMMUNITY

Under the traditional theory of partnerships—the aggregate theory, the members are jointly and severally liable for the wrongful acts committed by a partner while acting in the course of employment.[1] However, a somewhat different theory, the entity theory, has found expression in several jurisdictions. Under this theory suits are authorized against the partnership as a legal entity.[2] Under the aggregate theory, liability results from the common law principle of respondeat superior, each partner being deemed the agent or servant of the other partners.[3] The entity theory naturally leads, by the same agency principle, to imposing firm liability for the acts of its agents and servants.

In a jurisdiction that allows the partnership to be sued as a legal

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[37]See note 36 supra. In the Hutchinson case the court said, " 'The father is the natural guardian of his infant children, and in the absence of good and sufficient cause . . . is entitled to their custody.' "

[1]Uniform Partnership Act § 15(a); Crane, Partnerships § 64 (2d ed. 1952).

[2]Hotchkiss v. Di Vita, 103 Conn. 436, 130 Atl. 668 (1925); Chisholm v. Chisholm Constr. Co., 298 Mich. 25, 298 N.W. 390 (1941); In re Zents' Estate, 148 Neb. 104, 26 N.W.2d 793 (1947); State v. Pielsticker, 118 Neb. 419, 225 N.W. 51 (1929); Caswell v. Maplewood Garage, 84 N.H. 241, 149 Atl. 746 (1930); Byers v. Schlupe, 51 Ohio St. 300, 38 N.E. 117 (1894); Southard v. Oil Equip. Corp., 296 P.2d 780 (Okla. 1956); Fowler v. Brooks, 193 Okla. 580, 146 P.2d 304, 307 (1944); Anderson v. Dukes, 193 Okla. 395, 143 P.2d 800 (1943); Hassen v. Rogers, 123 Okla. 265, 253 Pac. 72, 74 (1926); Dunbar v. Farnum, 109 Vt. 313, 196 Atl. 237 (1937).

[3]Morrison v. Coombs, 23 F. Supp. 852 (D. Me. 1938); Rogers v. Carmichael, 58 Ga. App. 343, 198 S.E. 318 (1938); Schloss v. Silverman, 172 Md. 632, 192 Atl. 343 (1937); Roux v. Lawand, 131 Me. 215, 160 Atl. 756 (1932); Caswell v. Maplewood Garage, 84 N.H. 241, 149 Atl. 746 (1930); Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935); Uniform Partnership Act §§ 9, 13.

entity, the question can arise as to whether the doctrine of parental immunity is affected when an unemancipated child of a partner sues the partnership for a personal tort committed by his father. This was the question presented to the Supreme Court of Iowa in *Cody v. J.A. Dodds & Sons.*[4]

An action was brought on behalf of an unemancipated child against a partnership, which included the child's father as a member, for injuries sustained as a result of the father's negligence while acting in the course of partnership business. As authorized by the Iowa Rules of Civil Procedure the partnership was named as sole defendant. The defendant moved for judgment on the pleadings on the ground that an unemancipated child cannot maintain an action for damages for personal injuries caused by his father. The trial court overruled the motion, and the defendant subsequently suffered an adverse decision. On appeal the Iowa Supreme Court affirmed the action of the trial court. The court assumed, for the purpose of the decision, that an unemancipated child may not maintain an action against his parent to recover damages for injuries caused by negligence. The court reasoned that since a partnership is considered a legal entity, the fact that the plaintiff's father is a member of the firm does not immunize the partnership from the alleged tort. The holding emphasizes that a partnership is a separate entity and may be sued as such; it cannot assert personal immunities available to an individual partner; and its liability is distinct from that of the members.

Under the aggregate theory, each partner is considered an agent of the other partners, and the partners are jointly and severally liable[5] for any tortious acts committed by a partner while acting in the course of his employment.[6] The aggregate theory is the majority view of partnership liability, and the view taken by the Uniform Partnership Act.[7] The plaintiff may institute an action against all or any members of the partnership at his option. If the suit is brought against all the partners and a judgment is obtained, it can be satisfied from the partnership property (joint assets) or the individual property of any partner as a joint tortfeasor. If, on the other hand, the suit is brought against only one partner on the theory that liability is several as well

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[4]110 N.W.2d 255 (Iowa 1961).

[5]Roux v. Lawand, 131 Me. 215, 160 Atl. 756 (1932); Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935); Uniform Partnership Act § 15(a); Crane, Partnerships § 64 (2d ed. 1952); Henn, Corporations § 24 (1961).

[6]See note 3 supra.

[7]Uniform Partnership Act § 15.

as joint, the satisfaction of a judgment can be taken only from the partner's separate, individual property.[8]

Several jurisdictions have recognized the partnership as an entity,[9] and permit a suit to be instituted against the partnership by merely naming the firm.[10] Under this practice, a judgment is against the partnership and execution cannot be levied on the personal assets of a partner unless he is individually joined in the action.[11] The judgment is said to invoke the joint liability of the partners.[12] This joint liability does not attach to the personal assets of the partners, but attaches only to the firm assets which are the joint interests of the partners. Therefore, each partner is affected under the entity theory only to the extent of his interest in the firm, and his personal liability cannot be invoked unless he is joined as a party defendant with the partnership. Thus the distinction between the aggregate theory and the entity theory is upon whom liability is placed. Under the aggregate theory, if all the partners are sued, firm assets and also each partner's personal assets can be reached in satisfaction of a judgment because all the partners are before the court as joint tortfeasors. However, if only one partner is sued, only his personal assets can be reached. Under the entity theory, in which only the firm is named, only firm assets can be reached in satisfaction of judgment because only the firm is before the court, unless individual partners are joined in the action.

In the New York case, *Caplan v. Caplan*,[13] the plaintiff, in an action for personal injuries received as a result of her husband's negligence while acting in the course of his employment, was denied a

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[8]Roux v. Lawand, 131 Me. 215, 160 Atl. 756 (1932); Camhi v. ILGWU, 28 Misc. 2d 93, 208 N.Y.S.2d 162, 165 (Sup. Ct. 1960); Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935); In re Peck, 206 N.Y. 55, 99 N.E. 258 (1912); Boston Foundary Co. v. Whiteman, 31 R.I. 88, 76 Atl. 757, 759 (1910); Dixon v. Haynes, 146 Wash. 163, 262 Pac. 119, 221 (1927).

[9]See note 2 supra.

[10]Hotchkiss v. Di Vita, 103 Conn. 436, 130 Atl. 668 (1925); Markam v. Buckingham, 21 Iowa 494 (1866); Mexican Mill v. Yellow Jacket Silver Mining Co., 4 Nev. 40 (1868); Byers v. Schlupe, 51 Ohio St. 300, 38 N.E. 117 (1894); Hamner v. B. K. Bloch & Co., 16 Utah 436, 52 Pac. 770 (1898).

[11]Holmes v. Alexander, 52 Okla. 122, 152 Pac. 819, 820 (1915); Heaton v. Schaeffer, 34 Okla. 631, 126 Pac. 797, 798 (1912); Hamner v. B. K. Bloch & Co., 16 Utah 436, 52 Pac. 770 (1898); Dunbar v. Farnum, 109 Vt. 313, 196 Atl. 237 (1937). Accord, Hassen v. Rogers, 123 Okla. 265, 253 Pac. 72 (1926).

[12]Deeny v. Hotel & Apartment Clerks' Union, 57 Cal. App. 2d 1023, 134 P.2d 328, 330 (App. Dep't 1943); Nathan v. Thomas, 63 Fla. 235, 58 So. 247, 248 (1912); Heaton v. Schaeffer, 34 Okla. 631, 126 Pac. 797, 798 (1912); Hamner v. B. K. Block & Co., 16 Utah 436, 52 Pac. 770 (1898). Accord, Gozdonovic v. Pleasant Hills Realty Co., 357 Pa. 23, 53 A.2d 73 (1947).

[13]268 N.Y. 445, 198 N.E. 23 (1935).

recovery against the partnership of which he was a member. The suit was brought against all the partners, jointly. The court, following the aggregate theory,[14] reasoned that since the plaintiff could satisfy a judgment from the partners' joint assets in the firm, necessarily involving her immune husband's interest therein, the suit must be dismissed. The court also pointed out that she did not have to assert her claim against firm assets, but could reach individual assets if she so chose because all the partners were before the court; but this would be unfair to the other partners because she could not choose her husband. Therefore, her husband's immunity should not be circumvented merely because the plaintiff could choose the assets out of which to take satisfaction. The court further resolved that if the plaintiff had sued only one partner instead of all the partners as she did, recovery would have also been denied. Since the husband would have been immune if he had been the partner sued separately, it would be unfair to allow recovery against another partner merely because the plaintiff chose to sue him, not her husband.

Under the aggregate theory, if a non-wrongdoing partner is held liable, under agency principles, he is entitled to indemnification from the tortfeasor.[15] Under the entity theory the partnership has a right to indemnification against the wrongdoing partner.[16] Thus, eventually, if recovery is allowed against a partner or partners, or the partnership under either theory of partnerships, the parent will ultimately be liable for the whole amount; hence a result which is denied directly is reached by a circuity of suits. Therefore, the courts usually deny recovery in the first instance against the partner or the partnership for a tort committed by a partner against his own unemancipated child. The principal case does not say whether the firm has a right to indemnification from the parent partner. The court was not required to decide this issue, since parental immunity was assumed for purposes of this decision only.

Under strict agency principles, the master is not shielded by his servant's personal immunity, despite the fact that he is entitled to indemnification.[17] The rationale behind denying the master a right

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[14]198 N.E. at 25.

[15]Restatement (Second), Agency § 14A (1958); Id. §§ 317A, comment a and 401, comment d.

[16]"The law of partnership is the law of agency .... When a loss is paid by a partnership, there is a right of indemnity against the partner whose negligence caused the loss." United Brokers' Co. v. Dose, 143 Ore. 283, 22 P.2d 204, 205 (1933); Restatement (Second), Agency § 317A, comment a (1958).

[17]Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948); Restatement (Second), Agency § 217, comment b (1958).

to assert his servant's parental immunity is that the master, in seeking indemnification, does not need to proceed on a theory of subrogation, but may proceed on the theory of breach of duty by a fiduciary, so that the parent is not a necessary party to the original controversy.[18] By using indemnification based on breach of a fiduciary duty, a duty not to impose an unauthorized expense on the principal, instead of indemnification based on subrogation, stepping into the injured party's shoes, the court is merely ignoring the reason for the principal's liability in the first instance.

Following the above agency principles to their logical end, since a partner is deemed to be the agent of the partnership, then liability could be imposed on the partnership or other partners despite the husband's immunity and indemnification sought for the breach of duty of the partner as a fiduciary.[19] However, partnership liability is imposed only to the extent of the wrongdoer's liability.[20] Thus it appears that if the father was a mere agent of the firm and not a partner, recovery would be allowed. In other words, since the immune party is ultimately liable under agency principles, a circuity of suits is permitted absent a partnership relation, merely by ignoring the reason for the principal's liability and allowing indemnification on the theory of breach of duty by a fiduciary instead of subrogation.

It is submitted that if the parental immunity doctrine is to be sustained, the entity theory of partnership provides no solution where the immune parent is a member of the firm. Since liability under the entity theory involves only partnership assets, it could be rationalized that there is no violation of the immunity doctrine because the father's personal liability is not directly involved. The payment of the judgment out of partnership assets would be treated like the payment of any other business expense. However, since it seems that the firm has a right to seek indemnification, the father will ultimately be held liable, so that a result is reached indirectly that is denied directly, regardless of which theory is used to obtain indemnification. Furthermore, if some of the partners are individually joined and firm assets are insufficient to satisfy the judgment, the personal assets of those partners would be subject to payment of the judgment. This is unfair,

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[18]Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 Atl. 107, 108 (1930); Restatement (Second), Agency § 217, comment a (1958).

[19]Cf. Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928). See generally 84 U. Pa. L. Rev. 429 (1935).

[20]Belleson v. Skilbeck, 185 Minn. 537, 242 N.W. 1 (1932); Uniform Partnership Act §§ 13, 15.