

# Death, disability and divorce – drafting agreements with trusts as parties in light of *Han v. Hallberg*

02 JULY 2019

Charles S. Kolstad

PARTNER | US

**CATEGORY:**  
[ARTICLE](#)

**CLIENT TYPES:**  
[HIGH-NET-WORTH INDIVIDUALS](#)

[TAX](#)

[BENEFICIARIES AND HEIRS](#)

[TRUSTEES, EXECUTORS AND FIDUCIARIES](#)



How often do you draft agreements that provide for buyout rights etc. upon the occurrence of the death, disability or divorce of a party to the agreement? All the time. But do you fully think through and address the mechanics of those provisions when one or more of the parties, either initially or at some later date, is a trust or other entity? *Han v. Hallberg* (CA Court of Appeals, 5/21/2019) (“*Han*”) reminds us that you fail to do so at your own peril.

*Han* is a relatively straight forward case involving four dentists who set up a general partnership to own a building used for a dental practice. The partnership agreement required partners to be practicing dentists, and provided for buyout rights in the event of the death of a partner. In 1994, some years after the general partnership was formed, the partnership and the partners allowed Dr. Hallberg to assign his general partnership interest to The Richard W. Hallberg Trust, of which Dr. Hallberg was the grantor and trustee. The assignment agreement provided as follows “Upon the consent of all general partners, Richard W. Hallberg, as Trustee of The Richard Hallberg Trust, shall be substituted as a general partner in place of Richard W. Hallberg, individually, .....”

Dr. Hallberg died in March 2010. Under the partnership agreement, his estate had 90 days to give the surviving partners notice of the estate’s intent to retain the interest in the partnership. No such notice was given by the estate; under the partnership agreement the surviving partners had 60 days to give notice to the estate of their intent to purchase Dr. Hallberg’s partnership interest. The surviving partners notified the estate of their intent to exercise that purchase option. However, the estate did not want to sell to the surviving partners but rather notified them that under the 1994 agreement Dr. Hallberg was no longer a partner rather The Richard W. Hallberg Trust was the partner and therefore the purchase option was not applicable as Dr. Hallberg and not the Trust had died.

Several of the surviving partners then sued the Trust and a trial was held in 2012. The trial court held that it was bound to follow *Presta v. Tepper* (2009) 179 Cal. App. 4th, 909, 918 which held that the trustee and not the trust was the party to a particular agreement. Accordingly, the trial court concluded that the buyout provisions applied to Dr. Hallberg even after the 1994 assignment.

Dr. Hallberg’s son, as successor trustee, appealed that decision. The Court of Appeals reviewed the 1994 assignment, as well as the California Uniform Partnership Act of 1994 (“Act”) and concluded that under the Act a partnership was an association of two or more persons, and that the term “person” specifically included a trust, in addition to individuals, companies, estates and other entities<sup>1</sup>. It noted that the trust for these purposes was an entity separate from the Trustee, and that the court was not persuaded that the holding in *Presta* required a different conclusion.

The Court of Appeals further concluded that the 1994 assignment clearly contemplated a change in Dr. Hallberg’s status from that of being a partner individually, to only being a partner indirectly through his trust. The court stated “We cannot ignore the express substitution of Dr. Hallberg as trustee ‘in place of [Dr. Hallberg] individually’ .... The whole point of the assignment... was to avoid having the partnership interest pass to Dr. Hallberg’s estate”. Accordingly, the court concluded that the buyout provisions did not apply since Dr. Hallberg was not a partner at the time of his death.

What should we learn from the *Han* case? Particularly in California, where trusts are prevalent as probate avoidance devices, care must be taken when drafting buyout and other provisions which are tied to the death, disability or divorce of an individual. If such provisions are to be included and effective, then such provisions need to be tied not only to the death, disability or divorce of an individual, but also to the death of grantors and/or trustees of trusts, and owners of LLCs, corporations and other entities. Such a look-through to ultimate beneficial owners will require carefully drafting, not just when the agreement is initially drafted but also at later dates when a party is transferring or assigning its rights and obligations under the agreement to a third party.

<sup>1</sup> The definition of “person” under the Act to include a trust is consistent with the definition of person in the California Revised Uniform Limited

*Liability company Act, the Delaware Revised Limited Partnership Act, and the Delaware Limited Liability Company Act.*

# Authors

Charles S. Kolstad

PARTNER | LOS ANGELES

Private client and tax | Corporate

 +1 310 228-5744

 [charles.kolstad@withersworldwide.com](mailto:charles.kolstad@withersworldwide.com)