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THE RIGHT OF SURVIVORSHIP AS IT RELATES TO PARTNERSHIP PROPERTY IN MONTANA

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I. INTRODUCTION

In fashioning a body of law suited to governing partnerships, the common law courts combined elements of tenancy in common and joint tenancy to create a new form of property ownership.[1] This new common law form of ownership differed from joint tenancy in that it did not include the right of survivorship[2] characteristic of joint tenancy.[3] As partnership law developed in the courts, inconsistencies and insufficiencies in the law also developed, leading to a need for legislation.[4]

The Commissioners on Uniform State Laws completed original drafting of the Uniform Partnership Act (UPA) in 1914.[5] Since then a majority of jurisdictions have enacted the UPA.[6] In 1947 Montana joined this majority by enacting the Montana Uniform Partnership Act (Montana UPA).[7] The Montana UPA has remained relatively unchanged since its original adoption.[8] The UPA and the Montana UPA contain the stated purpose of establishing uniformity in partnership law among the states enacting the UPA.[9]

The drafters of the UPA included the new form of ownership that evolved under the common law,[10] and labelled that new form "tenancy in partnership."[11] Similar to the common law form, tenancy in partnership includes no right of survivorship.[12] However,

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1. J. CRANE & A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 40(a) at 228-29 (1968).

2. *Id.* § 40(a) at 228.

3. "The essential characteristic of a joint tenancy is the right of survivorship." Casagranda v. Donahue, 178 Mont. 479, 483, 585 P.2d 1286, 1288 (1978).

4. CRANE & BROMBERG, *supra* note 1, § 40(a), at 228-29.

5. *Id.* § 2, at 13.

6. UNIF. PARTNERSHIP ACT § ____, 6 U.L.A. 1 (Supp. I 1987). The updated table on page 1 of the Pocket Part shows that every state except Louisiana has enacted the provisions of the UPA. The District of Columbia, Guam, and the Virgin Islands have also enacted the UPA.

7. The Montana UPA can be found at MONT. CODE ANN. §§ 35-10-101 to -615 (1987).

8. Only four sections of the Montana UPA have been amended since its adoption.

9. MONT. CODE ANN. § 35-10-104(4) (1987), provides: "This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it." UNIF. PARTNERSHIP ACT § 4(4), 6 U.L.A. 16 (1914).

10. CRANE & BROMBERG, *supra* note 1, § 40 (b), at 230.

11. MONT. CODE ANN. § 35-10-502(1) (1987).

12. MONT. CODE ANN. § 35-10-102 (2)(d) (1987) states in part that: "the last surviving partner has no right to possess the partnership property for any but a partnership purpose."

this did not completely eliminate the right of survivorship in a partnership setting. According to the Montana UPA, partners hold property acquired with partnership funds as tenants in partnership, "unless the contrary intention appears."[13]

In re Estate of Palmer[14] presented the Montana Supreme Court with the question of what constitutes sufficient evidence of a "contrary intention" by the parties to hold property as joint tenants, rather than as tenants in partnership. Deciding the case without setting down a clear standard for Montana practitioners to follow, the Montana Supreme Court essentially left open this question. This note suggests a possible framework for Montana lawyers handling a similar case.

II. THE FACTS

William and Robert Palmer were brothers who owned and operated a cattle ranch. In 1947 they opened a checking account together, signing a signature card stating the account was joint tenancy property.[15] The brothers used only this checking account in conjunction with their ranch business.[16]

Commencing in 1949 and continuing until Robert's death the Palmers operated their ranch as a partnership named "Palmer Brothers."[17] William married and had a son, Brad Palmer, who also participated in the ranch operation.[18] William and Robert added Brad's name to the checking account used by the partnership.[19] They made no other change in the signature card for the checking account at that time.[20]

The Palmers branded the cattle on their ranch with two brands.[21] The brothers originally registered the first brand to Wil-

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13. MONT. CODE ANN. § 35-10-203(2) (1987) provides: "Unless the contrary intention appears, property acquired with partnership funds is partnership property." MONT. CODE ANN. § 35-10-502(1) (1987) provides: "A partner is co-owner with the other partners of specific partnership property holding as a tenant in partnership."

14. ___ Mont. ___, 708 P.2d 242 (1985).

15. *Id.* at ___, 708 P.2d at 248.

16. *Id.*

17. *Id.* at ___, 708 P.2d at 243. There was no written partnership agreement between the brothers. However, Montana law does not require a written agreement to form a partnership. *See, e.g.*, Truck Ins. Exch. v. Industrial Indem. Co., ___ Mont. ___, 688 P.2d 1243 (1984); Walsh v. Ellingson Agency, 188 Mont. 367, 372, 613 P.2d 1381, 1384 (1980).

18. Appellant's Brief at 22 (available in the State Law Library in Helena); *Palmer*, ___ Mont. ___, 708 P.2d at 242.

19. *Palmer* at ___, 708 P.2d at 248.

20. Appellant's Brief at 9; *Palmer*, ___ Mont. ___, 708 P.2d 242.

21. *Palmer*, ___ Mont. at ___, 708 P.2d at 249. Under Montana law there is a presumption of ownership of cattle by the owner of the brand they have been marked with. MONT. CODE ANN. § 81-3-105 (1987) in part provides: "the certificate [recording ownership of

liam *and* Robert.[22] In 1971 they re-registered that brand, changing the ownership to William *or* Robert.[23] The second brand was originally registered to William *or* Robert.[24]

In 1979, William opened a brokerage account with Merrill Lynch.[25] William used funds from the partnership checking account to establish this brokerage account.[26] The brokerage firm records disclosed the account as belonging solely to William.[27] However, Robert signed an "Authorization to Transfer Customer's Segregated Funds" as a joint tenant, thus giving control over the funds in the brokerage account to Robert as well as William.[28]

The partnership also utilized other assets, most notably real property.[29] Title to the real property was held by William and Robert as tenants in common.[30]

Robert married Constance in 1979.[31] He died two years later, leaving Constance as his sole heir.[32] As personal representative of Robert's estate, Constance petitioned the court for division of the real property.[33] The trial court ordered the property sold and the proceeds divided.[34] This decision was affirmed by the Montana Supreme Court in *Palmer v. Palmer*.[35] As a result, Constance received one half of the value of the real property.[36]

During the probate of Robert's estate, Constance maintained that William and Robert owned the checking account, brokerage account, brands and cattle as tenants in partnership and therefore ownership of Robert's share should pass to her by inheritance.[37]

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a brand] is also prima facie evidence that the person, firm, or corporation entitled to use the mark or brand is the owner of all animals on which it appears in the position and on the species of animal stated in the certificate." This point is further discussed in Marshall v. Minlschmidt, 148 Mont. 263, 270, 419 P.2d 486, 490 (1966): "A corollary to this statutory rule, that prima facie, one is the owner of cattle bearing his recorded brand is that prima facie the owners of the recorded brand have the same interest in the cattle bearing their brand as is indicated by the brand record."

22. *Palmer*, ___ Mont. at ___, 708 P.2d at 249.
23. *Id.*
24. Appellant's Brief at 4. On this point, by not differentiating between the registration of the two brands, the court stated the facts differently than presented by the parties.
25. *Palmer*, ___ Mont. at ___, 708 P.2d at 243.
26. *Id.* at ___, 708 P.2d at 250.
27. *Id.*
28. *Id.*
29. Appellant's Brief at 19.
30. *Id.*
31. *Palmer*, ___ Mont. at ___, 708 P.2d at 243.
32. *Id.*
33. Palmer v. Palmer, 202 Mont. 182, 183, 657 P.2d 92, 92 (1983).
34. *Id.* at 183, 657 P.2d at 92.
35. *Id.* at 184, 657 P.2d at 93.
36. Appellant's Brief at 23; *Palmer*, ___ Mont. ___, 708 P.2d 242.
37. *Palmer*, ___ Mont. at ___, 708 P.2d at 243.

William maintained that he and Robert owned the assets as joint tenants and, therefore, ownership should pass to him by right of survivorship.[38] The trial court held that William and Robert owned all these assets as tenants in partnership. From this decision William appealed.[39]

III. The Court's Treatment

In *Palmer*, the Montana Supreme Court began by stating that the provisions of the Montana UPA controlled the ownership of the property.[40] With little Montana case law to utilize in interpreting the UPA, the court looked to the historical background of partnership law citing three treatises published in the nineteenth century.[41]

From these historical sources the court extracted the predominant common law rule prior to the twentieth century, that "legal title alone could not control."[42] The court then set out, without discussion, various relevant provisions of the UPA.[43] With this background, the court considered the ownership of the items of property in question: the checking account, brands, cattle and brokerage account.[44]

As noted by the court, the Montana UPA provides that property acquired with partnership funds is owned by tenancy in partnership unless a contrary intention is shown.[45] William maintained that the signature card of the checking account, stating the parties were joint tenants, showed the necessary contrary intent.[46] Constance contended that the account consisted exclusively of partnership funds and served as the only partnership checking account.[47] The court followed the common law rule that, in a partnership, the form of ownership was disregarded.[48] Applying that rule to interpret the relevant Montana UPA provisions, the court found no sufficient evidence of intent by the parties to hold the property other than by tenancy in partnership.[49]

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38. *Id.*
39. *Id.* at ___, 708 P.2d at 244.
40. *Id.*
41. *Id.* at ___, 708 P.2d at 244-46.
42. *Id.* at ___, 708 P.2d at 246.
43. *Id.*
44. *Id.* at ___, 708 P.2d at 247-50.
45. Mont. Code Ann. § 35-10-203(2) (1987).
46. *Palmer*, ___ Mont. at ___, 708 P.2d at 248. *See also*, Appellant's Brief at 8.
47. *Palmer*, ___ Mont. at ___, 708 P.2d at 248.
48. *Id.* at ___, 708 P.2d at 249.
49. *Id.*

Still relying on the nineteenth century treatises to interpret the Montana UPA, the court in turn addressed the question of ownership of each of the remaining assets. Having decided that the checking account was held by tenancy in partnership the court concluded that the other assets were likewise held by tenancy in partnership.[50] The court held that William had not produced any credible evidence to show a contrary intention sufficient to overcome the presumption of tenancy in partnership.[51]

As a result of the court's decision Constance Palmer received one-half of the checking account, cattle, and brokerage account of Palmer Brothers. The dissent to *Palmer* suggests that "uncertainty and doubt" concerning property ownership will also follow as a further result of the decision.[52]

IV. ANALYSIS

The reasoning in *Palmer* is based largely upon the belief that the UPA merely codifies the historical authority that preceded it. The court relied on pre-UPA authority in making its determination,[53] ignoring relevant post-UPA cases and treatises.[54] While the authors cited by the court had a major impact upon the formation of the laws of partnership,[55] it does not necessarily follow that these older authorities can be used to properly interpret the UPA. As stated by Professor Crane, a leading commentator on partnership law:

> The assertion [that the UPA merely codifies the common law] is sometimes used as an excuse for ignoring the Act and invoking inconsistent prior precedent. This is an old common law technique for undermining statutes and has little to recommend it. In many respects, depending on a jurisdiction's version of the common law, the Act does merely codify. But in many others, particularly those centering on property and creditors' rights, it makes major changes.[56]

The Montana UPA included these major changes, allowing

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50. *Id.* at ____, 708 P.2d at 250.

51. *Id.*

52. *Id.* at ____, 708 P.2d at 251 (Turnage, C.J., dissenting).

53. *See, e.g., Palmer*, ____ Mont. at ____, 708 P.2d at 249.

54. *Palmer*, ____ Mont. at ____, 708 P.2d at 252 (Morrison, J., dissenting). "At the time that majority's treasured treatises were published, Blacks were chattels and women could neither own nor convey real estate. I find it useful to examine some cases decided in this century."

55. S. ROWLEY, ROWLEY ON PARTNERSHIP § 1.1, at 8 (1960). Rowley lists Story and Collyer, both cited in *Palmer*, as having had a strong influence in shaping partnership law.

56. CRANE & BROMBERG, *supra* note 1, § 2 at 13.

partners to hold partnership property other than by tenancy in partnership when that intention appears. Following the common law rule that disregards the form of ownership, the *Palmer* court virtually eliminated any method of establishing such a contrary intention.[57] This reliance on outdated authority flawed the court's reasoning. By looking to case law actually interpreting the UPA,[58] the court may have reached a different result.[59]

For example, in *Block v. Schmidt*,[60] the Michigan Supreme Court addressed a case factually similar to *Palmer*.[61] In *Block*, two brothers engaged in a partnership farming operation that continued for a number of years. They held the partnership checking account in joint tenancy. In addition, they held title to the land as joint tenants. The court in *Block* gave effect to the joint tenancies of the checking account and the land, as they showed intentions contrary to holding the property in partnership.[62]

Clearly, the intent of the partners is the central issue in determining the form of ownership under the UPA. Therefore, this analysis will focus on the various means of establishing the partners' intent: Agreements between the partners, source of funds, record title, other evidence of intent, and fraud, mistake and estoppel.

A. *Agreements Between the Partners*

The court in *Palmer* stated that assets are held by tenancy in partnership if used in the partnership or acquired with partnership funds.[63] However, modern authority on partnership law generally disagrees with that contention, giving more weight to agreements

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57. Perhaps a different result would have been reached if the parties expressed their intention of passing the assets by survivorship at the death of one partner in a written partnership agreement. However, Montana law allows partnerships to be formed absent a written agreement. *See supra* note 17. It would seem that the court should not discriminate against parties who form partnerships by means other than a written agreement.

58. Unless otherwise indicated the cases herein were decided following the adoption of the UPA by the state whose court decided the case.

59. *Palmer*, ___ Mont. at ___, 708 P.2d at 253 (Morrison, J., dissenting). "I have been unable to find any American cases in the last 100 years that support the majority's position here."

60. 296 Mich. 610, 296 N.W. 698 (1941).

61. *Block* is factually distinguishable from *Palmer* in that real property was also involved. The *Palmer* court based its analysis upon rules relating to ownership of real property by partnerships, and then reasoned that the same rules applied to personal property. *Palmer*, ___ Mont. at ___, 708 P.2d 246. Therefore *Block* is also helpful to demonstrate that the provisions of the UPA discussed herein apply to real and personal property alike. *See also*, Estate of Allen, 239 N.W.2d 163 (Iowa 1976).

62. 296 Mich. 610, 620, 296 N.W. 698, 702 (1941).

63. *Palmer*, ___ Mont. at ___, 708 P.2d at 249.

between the partners. As Professor Crane explains:

> The partners can decide what shall and shall not be partnership property. Their decision binds creditors and third persons unless overridden by rules of estoppel or apparent ownership. . . . Often there will be a specific written agreement that expresses their intent beyond any reasonable doubt. . . . All too frequently, however, there is no such agreement, a dispute arises, and the problem must be settled by inferring their intent from their behavior. . . . Thus, possession or use is not very significant because of the tendency to mix personal and partnership affairs, especially in family firms.[64]

As Professor Crane suggests, the best evidence of intent is a written agreement between the partners. The Florida Supreme Court addressed such a situation in *Hirsch v. Bartels*.[65] In *Hirsch* a written partnership agreement provided that at the death of one partner the assets of the business would pass to the remaining partners by survivorship. The court held that this agreement constituted an expression of a contrary intention sufficient to defeat a claim for a share of the assets by an heir of a deceased partner.[66]

The more difficult situation occurs, as in *Palmer*, where the partners have no written partnership agreement, and one partner has died. In *Bailes v. Bailes* the Arkansas Supreme Court addressed such a situation.[67] In that case, the court found an oral partnership agreement concerning a dog food business. The *Bailes* court determined that the assets in question, including checking accounts used in the business, were partnership assets. The court upheld the right of partners to make agreements allowing the deceased partner's share of the partnership to pass by survivorship to the surviving partners.[68] In addition, the court stated that the agreement need not be in writing, if supported by sufficient evidence of the partners' intent.[69] Included in the supporting evidence in *Bailes* was the joint tenancy signature cards of the partnership checking accounts.

The dissent to *Palmer* cited both *Hirsch* and *Bailes* as authority for enforcing the survivorship rights of the joint tenants in *Palmer*.[70] While the majority in *Palmer* did not choose to follow these cases, they remain available as valid authority for a similar

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64. CRANE, *supra* note 1, § 37(a), at 203.
65. 49 So. 2d 531 (Fla. 1950).
66. *Id.* at 532.
67. 261 Ark. 389, 549 S.W.2d 69 (1977).
68. *Id.* at 396, 549 S.W.2d at 73.
69. *Id.* at 391-92, 549 S.W.2d at 71.
70. *Palmer*, ___ Mont. at ___, 708 P.2d at 253 (Morrison, J., dissenting).

case.

B. *Source of Funds*

Relying on pre-UPA authority to determine ownership, the court in *Palmer* looked solely to the source of funds used to acquire the property. Under the UPA there exists a presumption of ownership from the source of funds used to acquire the property.[71] But this presumption from source of funds is not conclusive, and courts have generally enforced the parties' contrary intent when it is expressed.[72]

In *Cave v. Cave*,[73] the New Mexico Supreme Court held that the partners could use partnership funds to purchase assets they would own as joint tenants. The joint tenancy assets, Treasury bonds in that case, could pass by survivorship. The court stated that: "Even if the brothers were partners, they could purchase property from partnership assets to be held in joint tenancy. We have no trouble in concluding that these bonds were held in joint tenancy with right of survivorship and became the sole property of the survivor."[74]

So, while the general rule is that the source of funds used to purchase an asset creates a presumption of the ownership of the asset, a party may rebut that presumption. The presumption becomes more helpful, however, when the asset in question is not of a type that has recorded ownership or title, and there is little other evidence of intent.

C. *Record Title*

Certain types of property have a corresponding record of ownership. When the record suggests ownership other than by the partnership, the intent expressed in the record creates a presumption against ownership by tenancy in partnership. Professor Crane states this presumption as follows:

> If the property is a kind which has a record title (such as real estate, motor vehicles or stock certificates) or is carried in a given name (like a checking account or savings account), there is presumption of some vigor that the named owner is the beneficial owner.[75]

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71. MONT. CODE ANN. § 35-10-203(2) (1987).

72. CRANE & BROMBERG, *supra* note 1, § 37(c), at 208; ROWLEY, *supra* note 55, § 8.2, at 209.

73. 81 N.M. 797, 747 P.2d 480 (1970).

74. *Id.* at 803, 747 P.2d at 486.

75. CRANE & BROMBERG, *supra* note 1, § 37(d), at 209.

The assets involved in *Palmer* were all of the type having recorded ownership. Interpreting the UPA through modern authority would have allowed the presumption from source of funds to be overcome by the intent expressed in the documents of ownership.

The dissent in *Palmer*[76] offered *Stroh v. Dumas*[77] as authority for finding that the partners held the assets in question by joint tenancy. Factually similar to *Palmer*, *Stroh* involved a partnership engaged in buying and selling cattle. The partners held the partnership checking account as joint tenants. The court in *Stroh* held that at the death of one partner the checking account passed to the surviving joint tenant: "As between themselves, the partners had the right to make such disposition of the partnership property as they deemed fit. . . . The Uniform Partnership Act recognizes this right and provides that the intention and agreement of the parties is to control."[78]

In *Wright v. Smith*, decided during the early years of the UPA, the Michigan Supreme Court considered the ownership of a checking account held in joint tenancy by the members of an alleged partnership.[79] In allowing the funds to pass by survivorship, the court found that the alleged partnership would not defeat the ownership of the checking account by joint tenancy. Instead, the court held that the possibility of a partnership being imposed provided an additional reason why the owners clearly made the account a joint tenancy.

With respect to the ownership of the checking account, William Palmer relied upon an earlier Montana decision, *Casagranda v. Donahue*.[80] That case involved a bank account with a joint tenancy signature card. The joint tenancy ownership was not questioned until after the death of one of the joint tenants. In the *Casagranda* opinion the Montana Supreme Court stated, "[i]ntention is clearly expressed on the face of the signature card. Additional evidence is unnecessary."[81] Since deciding *Casagranda*, the Montana Supreme Court has stated that a signature card is not conclusive evidence of a joint tenancy.[82] However, the general rule remains that the signature card establishes ownership when another intent is not shown.[83]

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76. *Palmer*, ___ Mont. at ___, 708 P.2d at 252 (Morrison, J., dissenting).
77. 117 Vt. 13, 84 A.2d 408 (1951).
78. *Id.* at 16, 84 A.2d 410.
79. 235 Mich. 509, 209 N.W. 576 (1926).
80. 178 Mont. 479, 585 P.2d 1286 (1978).
81. *Id.* at 484, 585 P.2d at 1288.
82. *See, e.g.*, Anderson v. Baker, 196 Mont. 494, 500, 641 P.2d 1035, 1038 (1982).
83. *See, e.g.*, Malek v. Patten, ___ Mont. ___, ___, 678 P.2d 201, 204 (1984).

The Montana UPA section that allows the contrary intention to show ownership other than by tenancy in partnership,[84] when taken together with the court's holding in *Casagranda*, supports finding joint tenancy ownership of the checking account. A Montana practitioner handling a similar case could further support this argument with cases such as *Stroh* and *Wright*. Interpreting the Montana UPA as allowing the presumption of tenancy in partnership to be overcome under a test such as in *Casagranda*, the court in *Palmer* would have kept Montana law in conformity with that of other jurisdictions which adopted the UPA.

D. *Other Evidence of Intent*

Regarding the ownership of the brands, William Palmer relied on the Montana Supreme Court decision in *Marshall v. Minlschmidt*.[85] The court in *Marshall* held that the names of the owners joined by the word "or" creates a joint tenancy interest in the brand.[86] As noted previously, the owners of a brand have the same interest in the cattle branded with that brand as they have in the brand itself.[87] This view concerning the wording of an ownership document establishing title has since been reaffirmed by the Montana Supreme Court.[88]

William and Robert re-registered one brand in 1971, using "or" in place of "and." William testified at trial that he and Robert understood the effect of registering the brand in the way they did.[89] This act by the Palmers showed an intent to create a certain ownership in the cattle.

In other jurisdictions this act would show a contrary intention sufficient to consider the brand joint tenancy property. In *District of Columbia v. Riggs National Bank*, the District of Columbia Court of Appeals decided the ownership of savings accounts held by partners as joint tenants.[90] The court held that if partners maintain property as joint tenants, and evidence produced shows they understood the consequences, the court should give effect to the right of survivorship.[91]

The Iowa Supreme Court in *Estate of Allen* dealt with the

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84. MONT. CODE ANN. § 35-10-203(2) (1987).
85. 148 Mont. 263, 419 P.2d 486 (1966).
86. *Id.* at 269, 419 P.2d at 489.
87. *Id.* at 270, 419 P.2d at 490.
88. First Westside Nat'l Bank v. Llera, 176 Mont. 481, 485, 580 P.2d 100, 103 (1987).
89. Record at 12-20, *Palmer* ___ Mont. at ___, 708 P.2d 242 (available at clerk of court's office in Park County).
90. 335 A.2d 238 (D.C. App. 1975).
91. *Id.* at 244.

question of whether property is owned by the partnership.[92] *Allen* involved a farming partnership utilizing a number of parcels of land. According to the title to those parcels of land, each partner was a joint tenant as to his wife. The partner and his wife, as a couple, in turn had a tenancy in common with another couple. Regarding this arrangement the court said: "It is manifest the parties carefully thought out and provided for the nature of their ownership in the parcels. The trial court was correct in determining the land was not a partnership asset."[93]

Under the reasoning of the Iowa court, the change in the recorded ownership of the cattle brand in *Palmer* would be strong evidence of the parties intent to hold the brand other than as a partnership asset.

The large span of time between the opening of the bank account in 1947 and Robert's death in 1981 also seemed to be a factor in the court's decision in *Palmer*.[94] Significant in this respect is *Brooks, Inc. v. Brooks*, in which the South Dakota Supreme Court found property used in a partnership to be partnership property even though title was held in joint tenancy.[95] In *Brooks*, two brothers operated a long continuing farming operation. One tract of land purchased by the brothers had title held as joint tenants.[96] The brothers held all of the other assets involved with the partnership, including other tracts of land as tenants in common. One brother died. The surviving brother lived for six more years. During this time the surviving brother continued to manage the partnership property, and never claimed the property by right of survivorship. Ownership of the one tract of land by joint tenancy was not discovered until the partnership assets were being divided following the death of the second brother.

At first blush, the *Brooks* decision appears to support the court's implication in *Palmer* that time may lessen the certainty of some methods of showing intent. However, in *Palmer* the partners added William's son Brad's name to the signature card many years after the opening of the account, and made no other changes at that time. This change to the signature card, without changing the form of ownership suggests reaffirmation of the intent to have a joint tenancy.

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92. 239 N.W.2d 163 (Iowa 1976).

93. *Id.* at 167.

94. *Palmer*, ___ Mont. at ___, 708 P.2d at 248.

95. 86 S.D. 676, 201 N.W.2d 128 (1972).

96. *Id.* at 677, 201 N.W.2d at 129. Title was conveyed to the brothers as "joint tenants with right of survivorship."

E. *Fraud, Mistake, and Estoppel*

An example of fraud in relation to survivorship rights in partnership property is found in *Condos v. Felder*.[97] The illiterate Felder did not know the contents of documents he signed. Felder's partner led Felder to believe that they had a joint tenancy with right of survivorship as to the real property and inventory of their business. But the documents Felder signed, as prepared by his partner, created a partnership in which Felder had an interest in the business inventory, but no interest in the real property. After the death of his partner, Felder became aware of the true situation. Finding that Felder had been defrauded, the court awarded him all the assets of the partnership. The court reasoned that the assets should have passed by survivorship, as Felder's partner had led him to believe they would.[98]

The doctrine of mistake can be used in cases factually similar to *Brooks*.[99] In *Brooks* the evidence suggested mutual mistake by the partners in taking title to one tract of land as joint tenants. Similarly, the court in *Brooks* could have applied the doctrine of estoppel, due to the time that elapsed while the surviving brother could have claimed the property but did not.

The court in *Palmer* also could have applied equity principles such as fraud, mistake, or estoppel. In doing so the court could have clearly expressed any underlying factors involved in its decision and still kept Montana partnership law in conformity with other jurisdictions.

V. CONCLUSION

The court's analysis in *Palmer* of property ownership in a partnership setting was flawed by reliance on outdated authority. The *Palmer* decision creates at least two problems. First, the decision will cause uncertainty for Montana property owners utilizing joint tenancy ownership in conjunction with a partnership arrangement.[100] And second, by diverging from the interpretations of other jurisdictions, Montana's law concerning partnership property differs from that of other states, defeating a primary purpose of enacting uniform laws.[101]

By combining and synthesizing the authority presented in this

97. 92 Ariz. 366, 377 P.2d 305 (1962).

98. *Id.* at 372, 377 P.2d at 309 (1962).

99. *See supra* note 95; *Brooks*, 86 S.D. 676, 201 N.W. 128.

100. *Palmer*, ___ Mont. at ___, 708 P.2d at 251 (Turnage, C.J., dissenting).

101. MONT. CODE ANN. § 35-10-104(4) (1987). UNIF. PARTNERSHIP ACT § 4(4), 6 U.L.A. 16 (1914).

note, a workable formula can be derived for answering a question such as in *Palmer*. The formula consists of a systematic series of presumptions of differing weight derived from the combined wisdom found in the UPA and the case law.

Following this formula the court should first look for any agreement between the partners. If an agreement exists that states the assets are to be held in a particular manner, or are to pass a certain way at the death of a partner, the agreement should be given effect. Since a written agreement is usually the best evidence of intent, practitioners should suggest such a written agreement to clients in a relationship that may be declared a partnership. Under the formula offered here, such an agreement should control, unless extenuating circumstances exist.

The extenuating circumstances the court should look to include fraud, such as in *Condos*,[102] mistake or estoppel, such as in *Brooks*,[103] or other similar circumstances that should affect the outcome. If there are none of these extenuating circumstances, an agreement between the parties should control.

In the absence of an agreement by the parties, the court should next look to the source of funds used to purchase the asset. It is presumed that the ownership of the asset is the same as that of the source of funds used to acquire it. Generally this source of funds will suggest the asset is partnership property, as assets taken out of the partnership by the partners individually would still be viewed as partnership property under the source of funds analysis. Therefore, record title and other evidence of intent must be allowed to rebut the presumption from source of funds. But the presumption from source of funds remains important in that all assets will have a source of funds, while other methods of establishing intent may be absent.

The next consideration involves record title of the asset. In this phase of the formula the court should use the same test as it does normally in regards to the particular type of asset. For example, regarding checking accounts it should use an analysis such as in *Casagranda*,[104] and with brands an analysis such as in *Minlschmidt*.[105] Under that analysis if the asset is considered joint tenancy, there is a presumption it is joint tenancy, in the partnership setting. This presumption from record title must be of greater strength than that of source of funds, in order to give effect to the

102. 92 Ariz. 366, 377 P.2d 305.
103. 86 S.D. 676, 201 N.W.2d 128.
104. 178 Mont. 479, 585 P.2d 1286.
105. *See supra* note 85. 148 Mont. 263, 419 P.2d 486.

language of the Montana UPA.[106]

Next the court should consider additional evidence of intent. This step is essentially used to strengthen or overcome the presumptions from source of funds and recorded title, especially when they are in conflict. It is important to note the weakness usually present in this step of the analysis. Generally this step will involve inferences regarding intent of the deceased, while the only positive evidence of the deceased's intent is found in the source of funds, the recorded title, or a written agreement.

Using the authority and approach presented here, Montana practitioners, in a case similar to *Palmer*, can present the Montana Supreme Court with a systematic approach based on the UPA as interpreted in other jurisdictions. This would help the court establish standards for evaluating the ownership of property used in conjunction with a partnership in Montana. With clear standards for evaluating the ownership of assets in the partnership setting Montana practitioners would be able to provide more certain advice to their clients. Such a standard would also place Montana law back in line with that of other jurisdictions.

106. MONT. CODE ANN. § 35-10-203(2) (1987).