

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 2, Honorable Drew C. Takaichi, Presiding**  
Audrey Nakamoto, Courtroom Clerk

191 North First Street, San Jose, CA 95113  
Telephone 408.882-2120

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

**PROBATE LAW AND MOTION TENTATIVE RULINGS**

**DATE: June 27, 2024**

**TIME: 10:00 A.M.**

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<b>LINE #</b>	<b>CASE #</b>	<b>CASE TITLE</b>	<b>RULING</b>
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## Calendar line 1

**Case Name:** *The Estate of William Eric Wickersham*

**Case No.:** 21PR190051

**Hearing date, time, and department:** June 27, 2024 at 10:00 a.m. in Department 2

### INTRODUCTION

Grover Wickersham and Ann Daugherty (“Administrators”), are the parents of William Eric Wickersham (“Decedent”), who died intestate. Administrators initiated the instant case by filing a petition to probate Decedent’s estate. In January 2022, Administrators filed a petition pursuant to Probate Code section 850 seeking an order confirming that a limited partnership interest in the Wickiup Limited Partnership (“Wickiup”), which had been assigned to Decedent by his grandparents, was property of the estate. The petition alleged that Hilary Clark (“Clark”), custodian of Decedent’s interest in Wickiup, failed to distribute that interest to Decedent when he reached the age of majority or to his estate when he passed away. The petition also sought certain documents from Clark that Administrators contend should have been turned over to Decedent prior to his death.<sup>1</sup>

Currently before the court is Administrators’ motion for summary adjudication of: (1) their Probate Code section 850 cause of action regarding Decedent’s interest in Wickiup and (2) Clark’s affirmative defense that Decedent was never a limited partner in Wickiup. The motion is opposed and Administrators have filed a reply.

### DISCUSSION

#### I. Administrators’ Request for Judicial Notice

For the first time in reply, Administrators request judicial notice of Clark’s opposition to their Probate Code section 850 petition, filed June 6, 2022. That request is DENIED as the court is required to consider the opposition in connection with the motion for summary adjudication. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn.1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer].)

#### II. Evidentiary Objections

Administrators submitted evidentiary objections to portions of Clark’s declaration in opposition to the motion and exhibits attached to Clark’s counsel, Elizabeth Dorsi’s declaration in opposition to the motion. The court declines to rule on these objections as they are not material to the outcome of the motion. (See § 437c, subd. (q) [“In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review.”].)

#### III. Analysis

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<sup>1</sup> That “cause of action” was successfully challenged via a motion for judgment on the pleadings.

## A. Legal Standard

“A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding.” (Code Civ. Proc., § 437c, subd. (a)(1).)<sup>2</sup> A “motion for summary judgment shall be granted if ‘all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” (§ 437c, subd. (c).) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) ... Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment. (§ 437c, subd. (f)(2).)” (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

A plaintiff moving for summary judgment bears the initial burden of production and must present evidence demonstrating there is no triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). A plaintiff moving for summary judgment also bears the burden of persuasion, and must establish each element of any cause of action alleged, and thus there is no defense thereto. (§ 437c, subd. (a)(1), (p)(1); see also *Aguilar, supra*, 25 Cal.4th at p. 850.) The plaintiff, who bears the burden of proof at trial by a preponderance of the evidence, must therefore “present evidence that would require a reasonable trier of fact to find the underlying material fact more likely than not - otherwise he [or she] would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact.” (*Aguilar, supra*, 25 Cal.4th at p. 851.)

Generally, the motion must be supported by evidence, such as declarations and discovery responses, and include a separate statement listing all material facts the moving party contends are undisputed. (§ 437c, subd. (b)(1); see also Rules of Court, rule 3.1350(c)(2).) The opposition shall also be supported by evidence and include a responsive separate statement. (§ 437c, subd. (b)(2)-(3).) While a party can object to the admissibility of evidence presented (Cal. Rules of Court, rule 3.1352), a court cannot weigh the evidence or deny summary judgment or adjudication on the ground any particular evidence lacks credibility. (*Melovich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v. Superior Court* (1977) 70 Cal.App.3d 656, 660.)

## B. Merits of the Motion

Administrators move for summary adjudication of: (1) their Probate Code section 850 cause of action regarding Decedent’s interest in Wickiup and (2) Clark’s affirmative defense that Decedent was never a limited partner in Wickiup.

### i. Clark’s Affirmative Defense

Administrators assert that they are seeking summary adjudication regarding Clark’s affirmative defense that Decedent was never admitted as a limited partner in Wickiup. In opposition, Clark contends that the argument that Decedent was never admitted as a limited partner is not an affirmative defense, rather Decedent’s admission as a limited partner is an element of the Probate Code section 850 petition, on which Administrators have the burden of proof. Administrators do not mention this argument in their reply. Accordingly, they have

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<sup>2</sup> All further undesignated statutory references are to the Code of Civil Procedure.

conceded this point. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is “equivalent to a concession”]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].) The court finds this concession to be well taken. (See Prob. Code, § 850, subd. (a)(2)(D) [Personal representative of interested person may file petition to recover property “[w]here the decedent died having a claim to real or personal property, title to or possession of which is held by another.”].) Accordingly, the motion is DENIED as to issue 2, Clark’s affirmative defense.

ii. Administrator’s Probate Code Section 850 Cause of Action

As explained in this court’s prior order denying Clark’s motion for summary judgment: “Wickiup Limited Partnership was created by James and Mildred. In 1997, James and Mildred each assigned Decedent a 6.667% interest in Wickiup, for a total interest of 13.334%. Because Decedent was a minor at the time, Clark, Decedent’s aunt and the current general partner in Wickiup, held Decedent’s interest as custodian.”

Section 10.7 of the LP Agreement provides, “Subject to the other provisions of this Section 10, a transferee of Interests may be admitted to the Partnership as a substituted Limited Partner only upon satisfaction of the conditions set forth below[,]” which include that the general partner consents to such admission, “which consent may be given or withheld in the sole and absolute discretion of the General Partner[.]” Section 10.6 of the LP Agreement provides, “A Person who acquires one or more Interests but who is not admitted as a substituted Limited Partner pursuant to Section 10.7 shall be entitled only to allocations and distributions with respect to such Interests in accordance with this Agreement, and shall have no right to any information or accounting of the affairs of the Partnership, shall not be entitled to inspect the books or records of the Partnership, and shall not have any of the rights of a General Partner or a Limited Partner under the Act or this Agreement.” Clark maintains that a transferee receiving an interest in a limited partnership only receives the rights of an assignee and not those of a partner. “An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled.” (Nev. Rev. Stat. § 88.530.)

The petition states, “Ms. Clark, as the purported general partner of the Wickiup Limited Partnership and/or as the custodian of the Decedent’s 13.334% Limited Partnership Interest, who has title or possession to Decedent’s Limited Partnership Interest, should be ordered to transfer such interest to the Administrators of the Estate so that they can administer Decedent’s estate and distribute the assets thereof to the beneficiaries entitled thereto.” (Petition at p. 7, lns. 13-17.)<sup>3</sup> The parties’ dispute centers over whether Decedent was an admitted limited

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<sup>3</sup> Both California and Nevada law provide authority for Administrators to exercise Decedent’s rights as an admitted limited partner, if he held such status, for the purposes of administering his estate. Nevada Revised Statutes section 88.545 provides, in pertinent part, “If a partner who is a natural person dies or a court of competent jurisdiction adjudges such a partner to be incapacitated, the partner’s executor, administrator, guardian, conservator or other legal representative may exercise all of the partner’s rights for the purpose of settling the partner’s estate or administering the partner’s property, including any power the partner had to give an assignee the right to become a limited partner.” California law similarly provides, “If a partner dies, the deceased partner’s personal representative or other legal representative may exercise the rights of a transferee as provided in Section

partner in Wickiup or whether he was merely an unadmitted assignee, without the rights held by a limited partner.

Administrators contend that summary adjudication is proper as to the sole remaining claim for transfer of Decedent's Wickiup interest.<sup>4</sup> Administrators assert that, in 1997, Mildred and James each transferred a 6.667 percent limited partner interest to Clark as custodian for Decedent and that Clark accepted these assignments. Mildred and James also executed consents to the transfer of Decedent's limited partner interest. Administrators contend that, because no consent was required to the transfer of the interest to Decedent, these consents must have been consents to admission of Decedent as a limited partner as required by section 10.7 of the partnership agreement. (See Motion at p. 5, Ins. 3-11.) Administrators have provided copies of the transfer documents and the consents as exhibits 2 and 3 to the Declaration of John David Kessler in Support of the Motion ("Kessler Decl.").

Notably, the documents transferring the interests each label the interests to be transferred as "a 6.667% *limited partner interest* in and to that certain limited partnership known as WICKIUP LIMITED PARTNERSHIP[.]" (*Italics added.*) This suggests that the interest transferred was a limited partner interest. However, the consents state "The undersigned hereby *consents to the foregoing assignment* of a 6.667% interest in and to the Partnership from James E. Wickersham to Hilary Clark, as Custodian for Eric W. Wickersham." (*Italics added.*) In light of this language, Administrators' argument that the consents could only be the consent to Decedent's admission as a limited partner because no consent was required to the transfer is unavailing. Further, the consents were signed on the same date as the transfer documents, suggesting that the document are related to each other.

Even if the consents could be read as consenting to Decedent's admission as a limited partner, rather than to the transfer of the partnership interest, Clark maintains that the mere consent to the transfer of the limited partnership interest is insufficient to admit Decedent as a limited partner. She points to the remaining portions of section 10.7, requiring that the transferee execute such documents as may be required by the general partner, reimburse the partnership for the costs of admitting the transferee, and provide the partnership with evidence that the transferee has made the representations and undertaken the warranties required by section 7 of the partnership agreement. (See LP Agreement, section 10.7(C)-(E).)

Administrators do not address this argument in reply. Instead, they reiterate their arguments that they have provided ample evidence that Decedent was a limited partner and that the partnership would cease to exist if it consisted only of Clark as a general partner. Thus, they have not made any argument or explained how the evidence they produced shows that the remaining conditions in section 10.7 of the LP agreement were either fulfilled or excused. In other words, the documents provided by Administrators do not show that the steps required to admit Decedent as a limited partner were taken, nor do Administrators make any argument as to why these steps need not have been completed to achieve Decedent's admission as a limited partner.

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15907.02 and, for the purposes of settling the estate, may exercise the rights of a current limited partner under Section 15903.04." (Corp. Code, § 15907.04.)

<sup>4</sup> Notably, Administrators state that they do not seek summary adjudication of their request for Probate Code section 859 penalties.

Administrators also provide documents showing that Decedent was treated as a limited partner at some points. Of importance, Administrators have provided a document which purports to transfer to Clark a two percent general partner interest in Wickiup.<sup>5</sup> The document lists Decedent as a limited partner and states that Clark consents to the assignment of the two percent general partner interest on Decedent's behalf as custodian. While this is surely evidence that Clark considered Decedent to be a limited partner, it is insufficient to establish that Decedent was actually admitted as a limited partner in light of the lack of evidence that the methods for admitting a limited partner as contained in the LP Agreement were complied with. In short, there remains a triable issue of fact as to whether Decedent held a limited partner interest at the time of death.

Administrators also argue that Clark cannot be the sole partner in a partnership and that the partnership would have necessarily dissolved if Decedent and the other relatives, who purportedly were provided with assignments from James and Mildred similar to that provided to Decedent, are not actually limited partners. (See Nev. Rev. Stat., § 88.315, subd. (8) [“ ‘Limited partnership’ . . . mean[s] a partnership formed by two or more persons under the laws of this State and having one or more general partners and one or more limited partners . . . .”]; Corp. Code, § 15901.02, subd. (q) [“ ‘Limited partnership or domestic limited partnership,’ . . . means an entity, having one or more general partners and one or more limited partners . . . .”].) They also cite to authority indicating that “[i]f a partnership consists of only two persons, the partnership dissolves by operation of law when one of them departs.” (*Corrales v. Corrales* (2011) 198 Cal.App.4th 221, 224.) Thus, they contend that the fact that Wickiup continues to be in existence is evidence that Decedent was an admitted limited partner.

In response, Clark argues that Wickiup had an appropriate number of partners at the time it was formed and, therefore, it was formed in compliance with Nevada law. She further contends that the departure of a general partner does not require that Wickiup dissolve under the LP Agreement or under Nevada law. She cites Nevada Revised Statutes, section 88.550, subdivision (4), which provides, “A limited partnership is dissolved and its affairs must be wound up upon the happening of the first of the following to occur . . . An event of withdrawal of a general partner unless at the time there is at least one other general partner and the written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partner and that partner does so . . . .” She also points to section 13.1(F) of the LP agreement, which provides that the withdrawal or removal of a general partner will not cause the partnership to dissolve if there is at least one remaining general partner, who continues to carry on the business of the partnership. Thus, she argues that Wickiup would not be required to dissolve even if she were the sole partner in the partnership.

In reply, Administrators contend that Clark's argument misses the mark as a limited partnership requires at least one general partner and one limited partner as a matter of law. But, the fact that Wickiup's existence may or may not comply with Nevada law is not a question before the court.<sup>6</sup> Further, if Clark has continued to run Wickiup when it should have

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<sup>5</sup> This document is attached to the Kessler Decl. as Exhibit 11.

<sup>6</sup> Notably, the existence of Wickiup is not one of the material facts stated in Administrators' separate statement.

dissolved due to lack of a limited partner, this is not sufficient evidence from which the court can conclude that Decedent was an admitted limited partner as a matter of law.

Instead, the court finds that, although Administrators have provided significant evidence suggesting that the interest owned by Decedent was a limited partner interest, they have not established that there is no triable issue of material fact as to whether Decedent held such an interest. Specifically, as discussed above, Administrators have not presented evidence that the terms of the LP Agreement were complied with, thereby accomplishing admission of Decedent as a limited partner, nor have they explained how this requirement is excused or inapplicable. The evidence presented by Administrators, including the evidence not explicitly discussed by the court above, shows that various individuals, including Clark herself, may have at various times considered Decedent to be a limited partner but it does not establish that Decedent was a limited partner under the terms of the LP agreement such that trial on this issue is unwarranted.

Accordingly, the motion is DENIED.

### **CONCLUSION**

The motion for summary adjudication is DENIED in its entirety.



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