

Recent Decisions: Partnership: The Concept of the "Continuing Partnership"

Thomas A. Plein

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Thomas A. Plein, *Recent Decisions: Partnership: The Concept of the "Continuing Partnership"*, 48 Marq. L. Rev. (1964).
Available at: <http://scholarship.law.marquette.edu/mulr/vol48/iss2/10>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

are supported by corroborating circumstances, in order that the opportunity to perpetrate fraud upon the courts shall not be presented.

COLLEEN A. ROACH

Partnership: The Concept of the "Continuing Partnership"—The recent Wisconsin case of *Adams v. Jarvis*¹ involved a three-man medical partnership at will, governed by a formal and detailed partnership agreement. Under the rather unique contract, the partnership was not to terminate at the withdrawal or death of a partner. Instead, until a full settlement was made in accordance with the agreement, the withdrawing partner or the deceased partner's estate would continue to participate in partnership profits and losses, but not in the management of the clinic. A retiring partner would receive any balance standing to his credit on the books of the partnership, the amount of his capital account, and that proportion of profits to which he was entitled pursuant to the agreement. It was specifically agreed that on the withdrawal of any partner the accounts receivable were to remain the property of the clinic. The books of the firm were not to close until the end of the fiscal year.

On May 8, 1961, the plaintiff submitted a letter to the partnership giving notice of withdrawal, declaring the partnership dissolved, and requesting an accounting. The plaintiff terminated his association with the firm on June 1. The remaining partners carried on the business of the firm and refused, by virtue of the agreement, to pay any portion of the accounts receivable to the plaintiff. The plaintiff brought an action for a declaratory judgment in the county court, urging that the partnership was dissolved upon his withdrawal and that partnership property, including accounts receivable, be divided equally among the three partners. The plaintiff reasoned that if the partnership dissolved upon withdrawal, the retiring partner's rights should be determined pursuant to section 123.37² of the Wisconsin statutes, and the partnership affairs

¹ 23 Wis. 2d 453, 127 N.W. 2d 400 (1964). Relevant portions of the partnership contract were quoted by the court.

² "*Rights of retiring or deceased partner.* When any partner retires or dies, and the business is continued under any of the conditions set forth in [section] 123.36(1), (2), (3), (5) and (6) or [section] 123.33(2)(b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by [section] 123.36(8)."

wound up pursuant to section 123.33.³ The trial court agreed, holding that the plaintiff's withdrawal constituted a statutory dissolution,⁴ that the assets of the clinic should be liquidated, and that the plaintiff's share would be one-third of the total, including accounts receivable.

The decision of the trial court was reversed by the Wisconsin Supreme Court. In answering the plaintiff's contention that the partnership dissolved by operation of law at the withdrawal of the plaintiff, the court said that "while the withdrawal of a partner works a dissolution of the partnership under the statute as to the withdrawing partner, it does not follow that the rights and duties of remaining partners are similarly affected."⁵ The court went on to say:

The agreement does provide that Dr. Adams shall no longer actively participate and further provides for winding up the affairs insofar as his interests are concerned. In this sense his withdrawal does constitute a dissolution. *We conclude, however, that when the plaintiff, Dr. Adams, withdrew, the partnership was not wholly dissolved as to require complete winding up of its affairs, but continued to exist under the terms of the agreement.* The agreement does not offend the statute and is valid.⁶ (Emphasis added.)

Has the court by this language decreed that the partnership was dissolved⁷ at the withdrawal of the plaintiff? If the partnership was not "wholly dissolved," was a "partial dissolution" effected by the withdrawal? A "partial dissolution" would be an anomaly, considering the statutory definition of dissolution,⁸ which conforms to section 29 of the Uniform Partnership Act. The Commissioners' note to this section furnishes an insight to the term "dissolution," and distinguishes it from other verbiage relating to the final phases of partnership life:

In this act dissolution designates the point in time when the partners cease to carry on the business together; termination is the point in time when all partnership affairs are wound up;

³ "Application of partnership property on dissolution. (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnerships, unless otherwise agreed, may have the partnership *properly* applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. . . ." (Emphasis added.) (This statute does not correspond exactly with its counterpart as enacted in Wis. Laws 1915, ch. 358, or Wis. STAT. §§1724(m)-33 (1915), due to a typographical error which has persisted through the revisions. The word *properly* should read *property*.)

⁴ Wis. STAT. §123.25 (1961): "Dissolution of partnership defined. (1) The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

(2) On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

⁵ 23 Wis. 2d at 458, 127 N.W. 2d at 403.

⁶ *Id.* at 459, 127 N.W. 2d at 403-04.

⁷ Annot., 55 A.L.R. 2d 1391, 1395 (1957).

⁸ See note 4 *supra*.

winding up, the process of settling partnership affairs after dissolution.⁹

There is no doubt that in this case the partners did cease to carry on the business *together* on June 1, 1961. Therefore, considering the definition quoted, the Adams-Jarvis partnership must have dissolved on that date.¹⁰ Had the court unequivocally granted the plaintiff's first contention; namely, that the partnership dissolved on the effective date of the withdrawal, it would not follow that the clinic assets need be liquidated under the applicable statutes.¹¹ The contract stated that the partnership shall not terminate on withdrawal, but no specific provision was made against dissolution. The paragraph of the agreement which defines "withdrawal" as "any situation in which a partner leaves the partnership, at a time when said partnership is not dissolving, pursuant to a written agreement of the parties to do so" could be said to be an attempt to preclude dissolution on withdrawal, if not read in the light of the rest of the agreement. A specific provision was made for dissolution by agreement of the parties whereby business assets would be liquidated. It appears, therefore, that the definition merely speaks of "withdrawal" as any time when a partner leaves the firm when the firm is not liquidating its assets under a general agreement of the partners to close the clinic. The court held that the contract did not offend the partnership chapter of the statutes. The provision that the accounts receivable were to remain the property of the clinic was not construed to be void as a forfeiture against public policy.¹²

Considering these determinations, the plaintiff's contention that the assets should be distributed pursuant to the applicable statutes is without merit. These statutes outline the rights of the partners and provide rules for settling accounts on dissolution. The statutes contemplate a liquidation of partnership assets which, under the Adams-Jarvis agreement, would not be necessary at the death or retirement of a partner. The assets of the firm will be used by the remaining members, and the retiring partner will receive his settlement under the contract. A liquidation would be necessary only if the partners agreed to close the clinic. The statutes themselves contain express limitations on their applicability; *viz.*, "unless otherwise agreed,"¹³ or "subject to any agree-

⁹ UNIFORM PARTNERSHIP ACT §29, Commissioners' Note.

¹⁰ *Egner v. States Realty Co.*, 223 Minn. 305, 26 N.W. 2d 464 (1947); *Harwell v. Cowan*, 175 Ga. 33, 165 S.E. 19 (1932); 40 AM. JUR. PARTNERSHIP §242 (1942). *But cf.* *California Employment Stabilization Comm'n v. Walters*, 64 Cal. App. 2d 554, 149 P. 2d 17 (1944); *Moore v. May*, 117 Wis. 192, 94 N.W. 45 (1902); 68 C.J.S. *Partnership* §347 (1950). The *Moore* decision was handed down prior to the adoption of the Uniform Partnership Act in Wisconsin.

¹¹ *Devlin v. Rockey*, 295 F. 2d 266 (7th Cir. 1961); 68 C.J.S. *Partnership* §§243, 246 (1950).

¹² 23 Wis. 2d at 459, 127 N.W. 2d at 404; see also *McPherson v. J. E. Surrine & Co.*, 206 S.C. 183, 33 S.E. 2d 501 (1945); 17A C.J.S. *Contracts* §320 (1963); 68 C.J.S. *Partnership* §246 (1950).

¹³ WIS. STAT. §§123.33, .37 (1961).

ment to the contrary."¹⁴ Therefore, a thoughtfully drafted agreement supplying a different method of ascertaining a partner's rights will operate to preclude the general statutory rules governing accountability.¹⁵

The Adams-Jarvis partnership dissolved and proceeded to a winding-up pursuant to the partnership contract. A question that immediately arises is whether the partnership terminated notwithstanding a contract provision to the contrary. In other words, is the two-man partnership which was in existence after the three-man partnership wound up its affairs the same partnership or a different one? This question is important, because it involves the controversy over the entity versus the aggregate theory of partnership law. The aggregate theory sees the partnership as an association of individuals which has no existence distinct from the persons who compose it.¹⁶ Many other jurisdictions recognize the partnership as an entity distinct from its members.¹⁷ It seems to the author that if the original three-man partnership never terminated, but continued and is identical with the two-man partnership, then the clinic can be viewed as a separate entity, distinct from its members. However, if two technically distinct partnerships are involved, the court has reasoned consistently with the aggregate theory. It was not necessary in the instant case to decide whether a termination took place; indeed, the court did not openly deal with the question. Neither theory was mentioned by the court, but inferences might be seen in the following language:

We conclude the parties clearly intended that even though a partner withdrew, *the partnership* and the partnership business *would continue* for the purposes for which it was organized. . . . The agreement contemplates *a partnership would continue to exist* between the remaining partners even though the personnel constituting the partnership was changed. . . . [W]hen the plaintiff, Dr. Adams, withdrew, *the partnership* was not wholly dissolved so as to require complete winding up of its affairs, but *continued to exist* under the terms of the agreement.¹⁸ (Emphasis added.)

Wisconsin has always followed the aggregate approach to partnership law in substantive matters.¹⁹ Despite the language quoted, there seems little basis for arguing that the court views the partnership as an entity

¹⁴ WIS. STAT. §123.35 (1961).

¹⁵ *In re Eddy's Estate*, 175 Misc. 1011, 26 N.Y.S. 2d 115 (1941); Annot., 2 A.L.R. 2d 1084, 1092 (1948); see also authorities cited note 11 *supra*.

¹⁶ 37 MARQ. L. REV. 66, 69 (1953).

¹⁷ *Ibid.*

¹⁸ 23 Wis. 2d at 458-59, 127 N.W. 2d at 403-04.

¹⁹ *Westby v. Bekkedal*, 172 Wis. 114, 178 N.W. 451 (1920); *Thomas v. Industrial Comm'n*, 243 Wis. 231, 10 N.W. 2d 206 (1943); and *Kalson v. Industrial Comm'n*, 248 Wis. 393, 21 N.W. 2d 644 (1946); all cited in 37 MARQ. L. REV. 66 (1953). The *Kalson* case deals with a partnership as an entity for purposes of the workmen's compensation statutes.

distinct from its members. This is especially true considering that neither theory was mentioned in the opinion. The court has, however, been urged to adopt the entity approach to partnership law,²⁰ and the language of this case could be used to argue that the court is leaning in the direction of the entity theory. The court's statement that "*the* partnership . . . continued to exist"²¹ (emphasis added) could be construed to mean that the old partnership "entity" survived the withdrawal of a member. It is more reasonable to assume, however, that the court still regards the partnership as an aggregate of individuals having no recognized separate existence except for certain procedural matters. It would follow, then, that the Adams-Jarvis partnership dissolved, wound up in accordance with the contract, and at least technically terminated,²² and that a new partnership sprang up in its place consisting of the two remaining members. This new partnership is governed by the old agreement. Any change in membership, as by the admission of a new member, will send the partnership through its technical evolution, and a new, legally distinct partnership will result.²³

The "continuing partnership" is a useful form of business organization, especially for firms whose membership is constantly changing.²⁴ It would be impractical, indeed, for a firm to be forced to liquidate its assets each time a member leaves the firm and each time a new partner is admitted. The "continuing partnership" provides a means whereby a firm may continue its day to day business without the impediment of a statutory settlement of accounts. A specific contractual provision will eliminate the necessity of dividing the accounts receivable each time a new member is admitted or an old member withdraws.²⁵ It is essential, however, that careful consideration be given to the drafting of the agreement, in order that it be kept consistent with the theory of partnership law.

THOMAS A. PLEIN

Evidence: Attorney-Client Privilege: Communications with Insurance Agent— In *Jacobi v. Podevels*,¹ an automobile negligence case, both drivers testified during the trial that they were traveling at a rate of speed below the legal limit of twenty-five miles per hour. In a statement given to his insurance company's agent, however, respondent admitted that he was traveling at a speed of thirty miles per hour, and also included damaging remarks concerning his lookout at the time of the accident.

²⁰ 37 MARQ. L. REV. 66 (1953).

²¹ 23 Wis. 2d at 459, 127 N.W. 2d at 404.

²² *Egner v. States Realty Co.*, note 10 *supra*; 40 AM. JUR. *Partnership* §197 (1942).

²³ Annot., 45 A.L.R. 1240 (1926); 40 AM. JUR. *Partnership* §233 (1942).

²⁴ Millikan, *The Continuing Partnership Whether and When*, 28 LOS ANGELES B. BULL. 123 (1953).

²⁵ Hirsh, *The Medical Partnership*, 13 DE PAUL L. REV. 28 (1963).

¹ 23 Wis. 2d 152, 127 N.W. 2d 73 (1964).