

4080 PARTNERSHIP

A partnership is an association of two or more persons to carry on as co-owners a business for profit. [Persons may include any of the following: individuals, partnerships, limited liability companies, corporations, other associations] [and to the extent authorized by governing instrument or court order, personal representatives and trustees]. A business includes any trade, occupation, or profession.

Four elements must be present for you to find a partnership exists:

1. The persons intended to form a partnership and agreed to accept the legal requirements and duties of that relationship.
2. The persons have a shared interest in the partnership property.
3. The persons have an equal right in management and conduct of the partnership.
4. The persons share and distribute profits and losses from the partnership and its property.

[The receipt of a share of the profits of a business by a person is evidence that person is a partner in the business except if the profits were received for the following reasons:

- a. As payment for a debt;
- b. As wages of an employee or rent to a landlord;
- c. As an annuity to a surviving spouse or representative of a deceased partner;
- d. As interest on a loan; or
- e. As consideration for the sale of the goodwill of a business or other property.]

COMMENT

This instruction and comment were approved in 2009. This instruction is for use in cases where no written partnership agreement exists. The instruction is taken substantially from Chapter 178 of the Wisconsin Statutes, The Uniform Partnership Act. See §§178.03, 178.01(2)(b) and (e), and 178.04(4) for the definition of a Partnership. See also; Anderson v. Anderson, 54 Wis. 2d 666, 196 N.W.2d 727 (1972); Skaar v. Dept of Revenue, 63 Wis. 2d 506, 217 N.W. 2d 326 (1974); In re Estate of Schaefer, 72 Wis. 2d 600, 241 N.W.2d 607(1976).

Additional Considerations. Additional considerations in determining whether a partnership exists include:

- Persons who are not partners to each other are not partners to third persons;
- The manner in which property is owned or titled, does not of itself establish a partnership, whether the co-owners do or do not share any profits made by the use of the property;
- The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common interest in any property for which the returns are received;
- No person can become a member of the partnership without the consent of all the partners.

See Wis. Stat. §§178.04 and 178.15(7).

Intent. A partnership agreement, whether expressed or implied, may be in writing or proven by circumstantial evidence demonstrating that the conduct of the parties was of such a nature as to clearly express the mutual intent of the parties to enter into a contractual relationship. Sander v. Newman, 174 Wis. 321, 328, 181 N.W. 822 (1921); Hayton v. Appleton Machine Co., 179 Wis. 587, 601, 192 N.W. 168 (1923); Bartelt v. Smith, 145 Wis. 31, 129 N.W. 782 (1911). Every partnership depends on the mutual consent and understanding of its members, and as a result, there must be a meeting of minds of the parties, and thus the intention of one party alone cannot create a partnership. Morris v. Resnick, 268 Wis. 410, 415, 67 N. W.2d 848 (1955); Anderson v. Anderson, 54 Wis. 2d 666, 669, 196 N.W.2d 727 (1972).

The ultimate and controlling test as to the existence of a partnership is the parties' intention of carrying on a definite business as co-owners. Such intention may be determined from the terms of the parties' agreement or from their conduct under the circumstances of the case. Bartelt v. Smith, *supra* at 35; Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 286 N.W.2d 831, (1980).

Burden of Proof. The party claiming that a partnership exists has the burden of proving the existence of a partnership. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 360, 286 N.W.2d 831, 836 (1980); Morris v. Resnick, *supra*; Anderson v. Anderson, *supra*.