# CASE LAW UPDATE: A SURVEY OF RECENT TEXAS PARTNERSHIP AND LLC CASES

LLCs, LPs and PARTNERSHIPS 2024

UT Law CLE Austin, Texas July 11, 2024

Elizabeth S. Miller Professor of Law M. Stephen and Alyce A. Beard Chair in Business and Transactional Law Baylor Law School

Douglas K. Moll Beirne, Maynard & Parsons, L.L.P. Professor of Law University of Houston Law Center

1

#### If it walks like a duck...

(inadvertent, informal, de facto general partnerships)



#### If it walks like a duck...

(inadvertent, informal, de facto general partnerships)

- Whether parties have created a general partnership (so as to result in duties among partners, buyout on withdrawal, personal liability of partner, or some other consequence of partnership relationship) has been a frequently litigated issue.
- Five statutory factors considered under TBOC: (1) receipt or right to receive a share of the profits; (2) expression of an intent to be partners; (3) participation or right to participate in control; (4) sharing or agreeing to share losses or liabilities; and (5) contributing or agreeing to contribute money or property. Proof of all factors not required, but proof of only one ordinarily insufficient.
- Totality-of-the-circumstances analysis, BUT "[a]n agreement not to be partners unless certain conditions are met will ordinarily be conclusive on the issue of partnership formation as between the parties." *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.*, 593 S.W.3d 732 (Tex. 2020)

3

#### If it walks like a duck...

(inadvertent, informal, de facto general partnerships)

- Test for "joint venture" is same as partnership under Texas law
  - Some litigants and courts have continued to cite the old judicially created 4-element test (in which all 4 elements were required): (1) community of interest, (2) agreement to share profits, (3) agreement to share losses, (4) mutual right of control or management.
- The cases continue to reflect that it is not easy to prevail on such a claim. In the five opinions (4 Texas courts of appeals and 1 federal district court) summarized in the paper:
  - 1 case affirmed a judgment based on a finding of partnership by a jury
  - 1 case survived summary judgment against the party claiming partnership
  - 1 case was dismissed on the pleadings (lacked sufficient specific allegations as to factors)
  - 1 case was disposed of by summary judgment against the party claiming partnership
  - 1 case resolved contradictory jury findings by holding that the jury's finding rejecting a "statutory partnership" precluded a "common-law partnership"

## I thought we had a deal!

(The statute of frauds applies to partnership and LLC agreements)



5

### I thought we had a deal!

(The statute of frauds applies to partnership and LLC agreements)

The TBOC defines a partnership agreement and company agreement to include oral and implied agreements:

TBOC § 151.001(5)

"Partnership agreement" means any agreement, written, implied, or oral, of the partners concerning a partnership and the partnership's affairs or business, and includes amendments to the partnership agreement....

TBOC § 101.001(1)

"Company agreement" means any agreement, written, implied, or oral, of the members concerning the affairs or the conduct of the business of a limited liability company....

But these provisions do not override the general statute of frauds in Tex. Bus. & Com. Code  $\S$  26.01.





Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the <u>UT Law CLE eLibrary (utcle.org/elibrary)</u>

Title search: Case Law Update

Also available as part of the eCourse

<u>Answer Bar: LLCs and Partnerships Formation</u>

First appeared as part of the conference materials for the  $33^{\rm rd}$  Annual LLCs, LPs and Partnerships session "Case Law Update Part 1"