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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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PORTER J. KIMM ESTATE,
Marian Paulsen and Dale Kimm,
Co-Administrators,

Plaintiff-Appellant,

vs.

DALE KIMM and FRANCIS KIMM,
d/b/a KIMM AND SONS READY MIX,
BLAIRSTOWN, IOWA,

Defendants-Appellees.

Filed November 20, 1984

4-274
83-444

Appeal from the Iowa District Court for Benton County - William L. Thomas, Judge.

Porter Kimm and his sons, Dale and Francis, established a cement mixing business during the 1950's. Porter Kimm died intestate in 1979. His estate later filed the present action alleging that Porter had owned a one-third partnership interest in the business; the estate sought a judgment for one-third the value of the business at the time of Porter's death. The trial court found that the business was not a partnership but a sole proprietorship of Dale's, with other family members being salaried employees rather than partners. The estate appeals from that judgment. REVERSED AND REMANDED.

Jay Nardini of Ball, Kirk, Holm & Nardini, P.C., Waterloo, for plaintiff-appellant.

Gregory M. Lederer and Thomas R. Zinkula of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for defendants-appellees.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

SNELL, J.

In the early 1950's, Porter Kimm and his sons, Dale and Francis, established a cement mixing business known as Kimm and Sons Ready Mix.

Porter Kimm died intestate in 1979. His estate later filed the present action to establish the nature and value of Porter's interest in the Kimm and Sons Ready Mix business. The estate contended that the business was a partnership, that Porter had held a one-third partnership interest, and that the estate was therefore entitled to one-third of the value of the business at the time of Porter's death. Dale initially contended that the business was a joint venture; however, at trial both Dale and Francis testified that the business was a sole proprietorship of Dale's, with Francis working as a salaried employee. Dale and Francis contended that Porter Kimm had also been a salaried employee of Dale's sole proprietorship.

The case was tried in equity. The trial court found that the estate had not met its burden to prove that Kimm and Sons Ready Mix was a partnership. Instead, the court found that Kimm and Sons Ready Mix was a sole proprietorship and declined to award the estate a share of the value of the business.

The estate has appealed from the trial court's ruling. The estate contends that the evidence proved the business was a partnership.

A history of Kimm and Sons provides the factual background of the case. Porter Kimm entered the cement business in the Blairstown area in the 1940's. The business was small in scale and the equipment consisted primarily of the necessary equipment for raising and straightening buildings, and mixing, forming, and finishing cement. In the late 1940's Dale Kimm was engaged in the trucking business with his uncle.

Approximately 1952 Porter and Dale Kimm formed Kimm and Sons cement business. The equipment used in the business was comprised of cement mixing equipment which Porter Kimm had used in business, a truck owned by Dale Kimm, and other equipment purchased after the company was formed.

It appears that Porter Kimm was actively involved in the business during the 1950's. During the 1960's, he went into semi-retirement and worked 15 to 20 hours a week. By the 1970's, Porter Kimm was fully retired. There was testimony that even after he retired, Porter continued to give advice to the business and the customers.

The primary area of dispute is Porter Kimm's status with Kimm and Sons. Dale Kimm claims that he was the sole owner and driving force behind the business from the time of its formation. He asserts that Porter Kimm worked for him as an employee. The estate argues that Kimm and Sons was a partnership and that Porter Kimm was a partner with Dale Kimm.

Our review is de novo. Iowa R. App. P. 4. While we are not bound by the trial court's findings of fact, we give them weight, especially with regard to credibility of witnesses. Iowa R. App. P. 14(f)(7).

"The terms of a partnership agreement need not be formally expressed, but may be inferred or established in whole or in part, from the acts of the parties." Medd v. Medd, 219 N.W.2d 29, 34 (Iowa 1980). The essential elements of a partnership are: (1) a community of interest in profits and losses; (2) a community of interest in the capital employed; and (3) a community of power in administration. Butler v. Lloyd, 230 Iowa 422, 428, 297 N.W. 871, 875 (1941). Proof of these elements must be established by clear and convincing evidence. Id. at 429-30, 297 N.W. at 875.

A. Community of Interest in Profits and Losses. Appellees claim that Porter Kimm did not regularly share in the profits and losses of the business. They emphasize that the business did not have a separate bank account but rather was also Dale Kimm's personal bank account and the bank account of his trucking business. It is their contention that Porter Kimm was only an employee and that Dale Kimm authorized distributions to support his father as he saw fit.

We find the appellees' argument refuted by other facts. No W-2 forms were

filed for Porter Kimm reporting his earnings as an "employee." Since the formation of the business, Kimm and Sons has filed a partnership return. Dale, Francis, and Porter each reported one-third of the net income on their individual returns each year. Dale Kimm signed some of the returns indicating he was a "partner." In determining whether a partnership exists, weight is frequently given to the filing of partnership returns. See, Lamp v. Lempfert, 259 Iowa 902, 908, 146 N.W.2d 241, 245 (1966) (filing of partnership return supports finding that partnership continued through year of decedent's death).

Appellees argue that merely reporting the income does not constitute actually sharing in the profits. Although Porter Kimm may not always have received one-third of the profits of Kimm and Sons, the money was income to him and he was personally liable for the taxes on it. Appellees also argue that Dale Kimm was personally liable for the business's notes and that, had there been losses, Porter Kimm would not have shared in them. Where the fact of a partnership is established by other evidence, mutual liability for losses may and will be implied. Danico v. Ford, 230 Iowa 1237, 1241, 300 N.W. 547, 549 (1941). Appellees do not deny that these notes were repaid out of the business earnings.

The record establishes a sharing of profits and losses by clear and convincing evidence.

B. Community of Interest in Capital Employed. At the time Kimm and Sons was formed, both Porter and Dale Kimm contributed equipment and time to building up the company. Porter Kimm also contributed his experience and expertise in the cement business. Dale Kimm contributed real estate. The record indicates that over the years Porter Kimm made five direct capital contributions: three tax refunds deposited into the business; a loan taken out by Porter in 1961; and an ASC check deposited in 1968. It is apparent that both Dale and Porter made capital contributions to the company.

C. Community of Power in Administration. Testimony from witnesses with less of a personal stake than Dale and Francis indicates that while Dale was the managing partner, Porter was actively involved in the business. The record indicates that involvement declined as he approached retirement. It appears that during the 1950's and into the 1960's Porter Kimm worked full time in the business. During the 1960's and into the 1970's, he worked 15 to 20 hours per week. He then retired and up until the time of his death played a minimal role in the business.

We find there to be sufficient evidence to establish a community of power in administration.

There is no exclusive test to determine the existence of a partnership. Malvern Nat. Bank v. Halliday, 195 Iowa 734, 736, 192 N.W. 843, 845 (1923). "The relation is predicated on mutual consent and is evidenced by the terms of the contract, the conduct of the parties, and the circumstances surrounding the transaction." Id. at 739, 192 N.W. at 846. The essential elements of a community of interest in profits and losses, in capital employed and in power in administration have been established. Other factors such as the name, the application for a retail sales tax permit designating the business as a partnership, and previous statements by Dale and Francis during depositions that they considered the business to be a partnership at that time provide further support for the finding that Kimm and Sons is a partnership. Accordingly, we find that Kimm and Sons is a partnership and Dale and Porter Kimm were partners.

Because of our finding, it is unnecessary to consider the argument of partnership by estoppel or joint venture. Similarly, we do not consider appellant's argument that Dale and Francis made admissions in their pleadings regarding the status of Kimm and Sons. This argument was raised for the first time on this appeal. Although our review is de novo, we do not have the authority to consider legal arguments not presented or passed upon by the trial court. See, In re Marriage of Full, 255 N.W.2d 153, 156 (1977).

We remand this case for a valuation of the partnership interest.

REVERSED AND REMANDED