

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ANNA ELLERO KYDD

Respondent

v.

KYDD INVESTMENTS, a Washington general Partnership; and
JOHN W. KYDD, Managing Partner

Appellants

On Appeal from the Kitsap County Superior Court
Cause No. 07-2-01586-0
The Honorable Judge Jeanette Dalton

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APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This case of first impression asserts errors of law in a ruling 18 months after trial. Respondent has not defended the specific authority relied upon by the Court. Instead, she now seeks relief in equity by spending over half of her brief reframing this case as a bitter blood feud where ANNA¹, the party who sued defendants and did not prevail on any claim, is now a victim who seeks equity. These allegations are as untrue as they are irrelevant.

What is relevant is how each side's brief chooses to deal with fact and law. The PARTNERSHIP'S limited factual statement was tied tightly to the Findings and other citations to the record. ANNA'S lengthy factual statement was tied loosely to the record (43 sentences without citation to the record in her Counterstatement of the Case). Such unverified allegations violate RAP 10.3 and should be disregarded.

Our legal analysis carefully analyzed each Term (8.3-8.7) of the authority relied upon by the Court and the RUPA statutes related to this

¹ We will follow Respondent's preference to address her ANNA. As in the initial brief, the 1996 version of the Partnership Agreement used by the Court will be called the AGREEMENT, Terms 8.3-8.7 there shall be called the PARTNER LIQUIDATION process and the July 1, 2009 Agreed Order Adopting Stipulation shall be called the STIPULATION. Partners in Kydd Investments shall be called PARTNERS.

authority. ANNA does not analyze Terms 8.3-8.7 or the relevant RUPA statutes, opting instead to paint the PARTNERSHIP² as a bully and then pursuing various theories of legal sympathy without providing one RUPA case that allows a transferee to avoid her debt by relinquishing her interest. ANNA'S legal analysis distorts the law like her "Counter Statement of the Case"³ distorts the facts.

At base, ANNA'S brief seeks to divert the reader from verified facts and relevant law towards false and irrelevant character allegations and appeals to equity since there is no authority for the relief in RUPA, the STIPULATION or the AGREEMENT. The now undisputed facts are that ANNA ceased paying her share of debt in 2011 while continuing to demand her full share of use until October of 2012. She provides no RUPA case law to rebut her duty to pay.

II. REPLY ARGUMENT

A. The key assertions of fact and law remain essentially unchallenged.

They are:

1. The MANAGING PARTNER, William Kydd, negotiated the option to make ANNA a partner in 1996 and declined to

² PARTNERS were the initial defendants in this action. No claim or counter claim against any PARTNER was granted at trial. There has always been more than one PARTNER. Melissa withdrew from the litigation as an individual after the PARTNERSHIP became a party.

³ Resp. Br. pp. 3-17

exercise that option while he lived and declined again in his Will.

2. That 1996 AGREEMENT addresses only PARTNERS and is silent to transferees like ANNA.
3. The PARTNER LIQUIDATION process relied upon by the Court cannot apply to ANNA, because she is not a PARTNER or a signator to the AGREEMENT.
4. RUPA provides a similar partner liquidation process in RCW 25.05.225 but, like the AGREEMENT, it is available only to partners, not transferees.
5. Even if ANNA was a partner, the PARTNER LIQUIDATION process could not be used, because the preconditions required in Terms 8.6-8.7 have not occurred.
6. Neither RUPA nor the AGREEMENT allows a Court to give a non-partner a partner's withdrawal rights.
7. The STIPULATION is a contract⁴ and an agreed Order that binds all parties. Under it, ANNA received 64% of the PARTNERSHIP profit (the use of the premises) subject to paying 64% of the PARTNERSHIP loss (expenses).
8. The Court concluded that ANNA'S status in the PARTNERSHIP was that of a tenant at will or at sufferance.⁵
9. ANNA continued to demand enforcement of the STIPULATION to secure her 64% share of the tenancy until she departed in October 2012. ANNA has refused to pay her rent (64% share of expenses) since 2011.
10. Since the STIPULATION is both a contract and an Order, ANNA has breached the former and violated the latter.

⁴ ANNA contests this on p 9 of her brief ignoring both the plain meaning of the term "stipulation" and the cases defining that plain meaning (see infra at p. 18). Her basis for this is that counsel for the PARTNERSHIP made an argument for proposed findings that ANNA'S interest per the will, the AGREEMENT and the STIPULATION was what she deserved and not the product of coercion ("not bargained for or some sort of deal"). The Court denied the proposed finding and made no finding whether or not the STIPULATION was or was not an agreement or a contract.

⁵ (CP 14 1:9); ANNA contests this without authority on p. 22 of her brief.

B. The key assertions of error of law remain essentially unchallenged.

They are:

1. The Court erred in stating that the PARTNERSHIP remedies against a transferee were limited to the 1996 AGREEMENT that was silent as to transferees. Partners have a right to manage, propound policy and amend their agreement. To deny these rights is error.
2. The Court erred in awarding a non-partner a PARTNER'S rights under the PARTNER LIQUIDATION process.
3. The Court erred in invoking the PARTNER LIQUIDATION process that only Partners can invoke and when no PARTNER provided the written notice of intent to purchase and other preconditions required by Term 8.6 and 8.7 of the AGREEMENT.
4. The Court erred in ruling that the PARTNER LIQUIDATION process in the AGREEMENT extinguished her duty to pay under the STIPULATION. The Court modified a stipulation by the parties that was also its order. This is error.

C. ANNA'S brief provides no authority to rebut the PARTNERSHIP'S central legal position, that the Court's application of the PARTNER LIQUIDATION process (Terms 8.3-8.7 of the AGREEMENT) to a non-partner was an error of law.

Terms 8.3-8.7 were the specific authorities noted by the Court.⁶

Each Term was stated and analyzed in the initial brief and shown to be inapplicable to ANNA. ANNA'S brief neither addresses nor disputes

⁶ The appealed terms were Term 3 and Term 4 of the Order. (CP 161-162)

he analysis of Terms 8.3-8.7.⁷

All sides agree that where a partnership agreement is silent, we must look to RUPA (RCW 25.05). The initial brief provided an extensive analysis of the RUPA statutes relevant to partner and transferee withdrawal (i.e., RCW 25.05.030, .050, .150, .160, .205, .210, .225, .250, and .904⁸). Particular attention was paid to RCW 25.05.205 and 210 which are noted in the STIPULATION as key sources of ANNA'S "rights and responsibilities" and RCW 25.05.225 which supports the PARTNER LIQUIDATION process in Terms 8.6-8.7 of the AGREEMENT (CP 56, Terms 8.6-8.7).

D. ANNA'S brief does not even mention the statutes most relevant to her rights: RCW 25.05.205, .210 and .225.

ANNA does not rebut or even address the analysis showing that the RCW 25.05.225 withdrawal process cannot be applied to a non-partner.⁹ ANNA'S brief also does not respond to the analysis of RCW 25.05.030, .050, .150, .160, .250, and .904. Instead, ANNA jumps over

⁷ ANNA'S brief notes Term 8.4 once (p. 26) to argue about what "capital" means (p. 26) and Term 8.6 twice (pp. 12, 33) regarding a 2011 default allegation. None address the legal authority on appeal; whether applying the PARTNER LIQUIDATION process to ANNA'S withdrawal is an error of law.

⁸ Initial brief at 10, 16, 18, 20, 22, 27, and 28

⁹ ANNA does mention RCW 25.05.015 and .021 (Resp. Br. at iii and 19, 24), but neither refers to the withdrawal process. RCW 25.05.015 confirms that when a partnership agreement is silent, RUPA controls and RCW 25.05.021 generally describes transferee rights and responsibilities that are addressed in much more detail in RCW 25.05.205, .210).

the relevant RUPA statutes to RCW 25.05.020 which allows general principles of law and equity to be considered where RUPA is silent. Here RUPA is not silent. It does not provide ANNA the right to avoid paying what she owes by relinquishing her transferee interest.

E. The Fifth Circuit Court of Appeals concluded that ANNA’S central claim - that an assignee should have the same liquidation rights as the assigning partner - “constitutes error.”

ANNA asserted a failure to provide authority so more authority has been found. In *Adams v. U.S.*¹⁰ the court carefully construed the Texas UPA (TUPA) regarding assignee rights and held, in part:

The district court grounded its holding in the premise that the law establishes to a legal certainty that the assignee of a partner has precisely the same liquidation rights as the assigning partner. We reach the opposite conclusion, i.e., that this premise is not established to a legal certainty, and to hold that it is constitutes error.
Id. at 391

F. Instead of addressing the legal analysis, ANNA attacks John’s character while failing to refer to the record, citing to Clerks Paper’s that either do not exist, lack the stated content or distort the actual record.

Failure to refer to the record. The first four pages of ANNA’S brief contain only two references to the record. The 14 page “Restatement of the Case” contains 43 allegation laden sentences without reference to the record. Statements of fact not referencing the

¹⁰ *Adams v. U.S.*, 218 F.3d 383, 391 (5th Cir. 2000).

record should be disregarded. RAP 10.3(a)(5), (b). Many unreferenced statements are contradicted by the record. For example, ANNA attempts to create the impression that John Kydd rudely refused to communicate with ANNA stating, “For about a year after Bill’s death John and ANNA did not communicate”.¹¹ The Court saw it very differently noting that, “There was a year that he [John] voluntarily declined to use the property out of deference to her grieving process”.¹² ANNA also appears to assert that John and his family did not attend his father’s memorial service or speak to ANNA during it. The one year communication limit was limited to use of Chinom.

Similarly exaggerated is the claim that “John and ANNA have *never gotten along well.*”¹³ This assertion of conflict since marriage in 1989 is unsupported by the record and unsupported by ANNA’S citation to page 13 of the Clerk’s Papers where the Court said something far narrower:

ANNA and John do not get along very well and do not communicate very well. ANNA did not really [want] to be involved in the partnership pursuit with John. John was willing to assent to a partnership to get along with ANNA but there was no mutual pursuit of a common objective.” (CP 13: Finding 21 and 22).

¹¹ Resp. Br. 7

¹² VRP 1/10/11, 72:16-17

¹³ Emphasis added. Resp. Br. 7

This finding was proposed by ANNA'S counsel (VRP 1/10/11, 41:1-6). From 2007 on, John sought reconciliation counseling with ANNA¹⁴ in order to "bury the hatchet."¹⁵ When John became counsel for the PARTNERSHIP, he offered to meet with Mr. Horton and a third party to work out differences. (CP 580:17-18). The response was, "Neither I nor my client has any obligation to respond to John Kydd." (CP 580:20-21)¹⁶.

The record shows the following:

1. There is no record of PARTNERSHIP conflict between John or Melissa and William Kydd since the inception of the PARTNERSHIP.
2. There was no unresolved PARTNERSHIP conflict between John and Melissa and ANNA and Bill from their marriage in 1989 to his death in 2006.
3. Until she filed litigation to end the PARTNERSHIP, John and Melissa were not aware that ANNA had no desire to be in any form of partnership.

Per the Court's Findings, John was open to being in partnership and working out differences with neutrals. ANNA was unwilling to do either. In addition to exaggerating problems, ANNA also blames John

¹⁴ CP 580:9-13.

¹⁵ CP 580:13

¹⁶ This put the PARTNERS in peril as it was responsible for the structures, yet ANNA would not agree to notify John of broken pipes, gas leaks or other emergencies during her 64% use time. (CP 582:footnote 4)

for them.¹⁷

Erroneous citations of the record. The following footnote citations do not exist in the record: 16 and 22. The following footnote citations exist, but do not contain the stated content on the stated page(s): 40, 52, 55, 56, 60, and 62.

G. ANNA’S claim of “reliance”¹⁸ upon a Court’s ruling and Special Master’s ruling ignores the fact that the Court ruling was deferred and not made and that the Special Master’s ruling was overruled.

The Court made many statements during the May 13th, 2011 hearing, but declined to include them in any order. Counsel, Mr. Horton, read the content of what was ordered into the record, stating:

“so what this order says, the motion to clarify shall be decided by further order and the clerk of the court may disburse \$3,848 dollars to Kydd Investments care of John Kydd.¹⁹ (emphasis added)

ANNA insists that there was a Court “*ruling that* John’s attempt to suspend use rights were *ultra vires*” and that she had the withdrawal

¹⁷ On page 15, ANNA objects to John’s claim that she should replace a raised bed she removed. Fifteen years prior, ANNA asked that the child PARTNERS not alter the premises without prior consent. John continued ANNA’S rule when he took over and asked that ANNA *restore* the raised bed she removed. (CP 97) ANNA refused to do so. She also badly damaged the wooden deck by pressure washing it without prior notice and Steve Dixon barred her from doing this again (CP 93) or any other alteration of the structure or landscape without prior consent. ANNA was unwilling to abide the rule she had made 15 years prior.

¹⁸ Resp. Br. p 27

¹⁹ VRP May 13, 2011, 41:3-7

rights of a PARTNER²⁰. The decision about this was *ordered* to be decided by *further order*. No order was made upon which ANNA could “rely”.²¹

ANNA next relies upon a July 1, 2011 ruling by the Special Master (CP 90; term 9) that her expenses could be paid from the damage funds ANNA paid to the PARTNERSHIP. However, the Court overturned the Special Master’s ruling stating ANNA had no right to have her expenses paid from her damage payments deposited in the PARTNERSHIP’S capital account.²² Another example of distortion is:

ANNA’S Quotation of the VRP:²³

“John previously stated, “[ANNA] can say I don’t want any part of this. I’m not going to pay for it...”²⁴

The VRP actually states:²⁵

“The *minority partner* can state, I don’t like it so buy me out. That’s the legal remedy I see under business law, that I see under partnership law. They can say I don’t want any part of this.” (emphasis added)

²⁰ Resp. Br. 13-14; noted anew in argument at 28.

²¹ The Court was addressing a motion for failure to pay for expenses for a year and ANNA objected to the suspension of use and a \$50 fee for counsel to draft a collection demand letter as a PARTNERSHIP expense since letters from John were ignored. ANNA paid what was due, but did not have to pay the \$50 fee. VRP May 13, 2011, 35

²² VRP, November 9, 2012, 2:17-25 and 3:1-3

²³ Resp. Br. 17

²⁴ VRP May 13 2011, 19:11-16, Resp. Br. 17

²⁵ VRP May 13 2011,19:10-13

H. ANNA’S claim that she should have the partner rights of her husband due to “partnership purpose and history” and being a “surviving spouse” contradicts partnership purpose, history, RUPA and case law.²⁶

PARTNERSHIP history opposes ANNA having PARTNER rights. William Kydd had 27 years (1989-2006) to nominate ANNA to be a PARTNER. He never did. He had 20 years to give her B Shares per Term 13.3. He never did.

ANNA’S litigation to dissolve the PARTNERSHIP violated both William Kydd’s PARTNERSHIP purpose²⁷ and his chosen PARTNERSHIP duration of 2046.²⁸ ANNA sought to take the PARTNERSHIP from the defendants (who were quite comfortable with her right of 64% lifetime use) by seeking judicial dissolution in violation of the AGREEMENT requirement of the consent of “all partners”.²⁹

Awarding ANNA Partnership rights because she is a “surviving spouse” violates the AGREEMENT, RUPA and case law. Only partners can create partners. The bedrock principle of Partnership Law,

²⁶ Resp. Br. 20, Term C

²⁷ “to continue to own and maintain the property for family use”

²⁸ “Until 12/31/2046, unless all PARTNERS decided to dissolve it.” (CP 414,415).

²⁹ CP 415, Term 15.3. When that failed, ANNA sued to dissolve the PARTNERSHIP, to remove John as a PARTNER and to compel Melissa Kydd to sell. She then denied John’s family two years of use and exposed the PARTNERSHIP to massive liability to Kitsap County by building on sensitive zone, Hood Canal waterfront, without a septic or building permits.

delectus personae (“choice of the person”), is codified at RCW 25.05.150(9). Upon a partner’s death, RCW 25.05.225 (7)(a) dissociates all partnership rights save for the right to profits, losses and dividends per RCW 25.95.205 and 210. This is *delectus personae*: death cannot convey partnership to a surviving spouse or child; only partners can. Case law confirms this³⁰ even when the Partnership expressly allows Partners to convey partnership rights to heirs³¹ or to spouses even if it is marital property.³²

It is the same with Partnership property. Partners are not co-owners of Partnership property; they have no right to transfer it alone. RCW 25.05.200. In *Casey v. Chapman*³³ our Court held that the transfer of an “entire Partnership interest” did not include the transfer of management rights due to the statutory no-management-rights limit imposed by former RCW 25.04.270(1).³⁴

³⁰ A partnership cannot be created without the voluntary consent of all alleged partners. *Beebe v. Allison*, 112 Wash. 145, 192 P. 17 (1920).

³¹ Even where a partnership agreement *expressly* provides a partner the rights to transfer all rights to a non-partner family member, “[T]o succeed the deceased partner with the same rights and privileges and the same obligations....” The court held that this violates RUPA and that the heirs would, “[O]nly have the rights of assignees to receive a share of partnership income and profits of the assignors”. *Rappaport v. 55 Perry Co. et al*, 50 A.D. 54, 57, 58 376 NYS 147 (1975).

³² Even where property is acquired during marriage and the partner’s interest is marital property, the court cannot award partner status to the non-partner wife. *Warren v. Warren*, 12 Ark.App. 260, 675 S.W.2d 371 (1984). The PARTNERSHIP property in the case at bar was William Kydd’s separate property. (CP 14:8)

³³ *Casey v. Chapman*, 123 Wn. App. 670, 679-680, 98 P.3d 1246 (Div. 1, 2004).

³⁴ Former RCW 25.04.270(1) provided, in relevant part:

I. ANNA seeks relief in equity without doing equity and with unclean hands.

Counsel seeks relief in equity, citing the PARTNERSHIP'S *ultra vires* act of suspending ANNA'S use after she failed to pay expenses for six months. ANNA committed the following *ultra vires* acts:

1. Soliciting two PARTNERS to sell their interest to her without authority or the required notice to all PARTNERS.³⁵
2. Violating RUPA and the AGREEMENT by:
 - a. Suing to dissolve the PARTNERSHIP and to remove John as a PARTNER.³⁶
 - b. Suing to compel Melissa to sell her interest to ANNA.³⁷
 - c. Demolishing part of the cabin built by John.³⁸
 - d. Building a structure without notice to the

(I) A conveyance by a partner of his interestmerely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

This statute is quoted in the *Casey v. Chapman*, 123 Wn.2d at 678-679.

³⁵ AGREEMENT, Term 13.4. Except as otherwise specifically provided in this Agreement, no partner may sell, transfer or assign (outright or for security purposes) all or any portion of his or her interest in the Property or the Partnership without the consent of all Class A Partners. (emphasis added) (CP 60)

³⁶ "Pursuant to RCW 25.05.225 (5)(c) only partner can seek dissociation of partner. (CP 176:18-26)

³⁷ (CP 177: 4) Term 13.4 Bars sale of Partnership interest without partner consent. (CP 60, Term 13.4)

³⁸ CP 12:13-15.

PARTNERS and without seeking building, septic, electric or construction permits.³⁹

- e. Refusing to seek permits she knew were required⁴⁰
- f. Denying John's family two years of use (88 days as his total annual use right of 44 days for two years).⁴¹

ANNA has unclean hands: she cannot seek equity. Nor can she argue equity to void RUPA or her duty to pay expenses due per her STIPULATION.

J. ANNA'S argument that "The partnership agreement dictates how [her] contributions for normal expenses are requested and paid"⁴² is provably false.

The AGREEMENT is silent to transferees. Silence cannot "dictate" how non-partner expenses are noted and paid. We know that it is not possible to file a partnership tax return if we apply the partner capital account to ANNA that she demands.⁴³

Per Term 4 of the AGREEMENT the Managing Partner has the right to create policy and manage all aspects of the PARTNERSHIP. John was made Managing Partner (CP 13:1) and thus had the authority to create policy just as William Kydd did from 1981 to his death in

³⁹ CP 12:3-15.

⁴⁰ CP 13:17.

⁴¹ CP 13:24-25.

⁴² Resp. Br. 24

⁴³ CP 560

2006.

In early 2011, the PARTNERSHIP provided its policy for dealing with transferee expenses. (CP 550-552) It was based on discussions with ANNA'S seventh Counsel, David Kerruish. (CP 550) The PARTNERSHIP has a right to create and enforce policy. ANNA claims the opposite, that the PARTNERSHIP is forever limited to the remedies in the 1996 AGREEMENT that is silent to transferees. This is a clear error of law unsupported by authority.

K. During the last four years of litigation, both sides made contradictory statements about the law as the case law regarding a transferee was quite limited.

The parties' understanding of the governing law evolved over two phases. In the first phase, ANNA was adamant that she was the Managing Partner and that John and Melissa had no management rights⁴⁴. The child PARTNERS had no experience running the PARTNERSHIP and had chosen to trust ANNA'S representation. This belief was not challenged until ANNA sued to end the PARTNERSHIP and legal research was done. All parties were initially wrong about ANNA'S status under the law.

In the second phase, the parties believed that the terms of the

⁴⁴ That ANNA inherited William Kydd's management rights. (CP 175:10) That John and Melissa Kydd did not have management rights. (CP175:20-21)

AGREEMENT, which did not address transferees, could somehow be applied to transferees. All parties tried to use PARTNER terms like “capital” and “capital call” for ANNA’S expense payment process. No one knew this was wrong because neither ANNA nor William Kydd had ever filed a PARTNERSHIP tax return. When the PARTNERSHIP hired a CPA to file a tax return, it learned it was impossible to file a partnership return if a non-partner was subject to capital calls or had a Capital account.⁴⁵ All parties were wrong about using AGREEMENT terms for ANNA’S duty to pay under the STIPULATION.

By August of 2012 the lawful method was clear; ANNA’S expense payment would go into an “Operations” account and PARTNERS’ payments went into the “partner Capital account”. (CP 140) When an expense came due, the PARTNERS’ share was transferred from the “Capital account” to the “Operations” account and the bill was paid.⁴⁶

In both phases, ANNA resisted the law. ANNA knew her alleged management rights were dissociated under RCW 25.05.225(7)(a) for years before she agreed to the STIPULATION in

⁴⁵ CPA, Carol Didier’s Analysis (CP 139-141)

⁴⁶ CPA, Carol Didier’s Analysis (CP 140-141) See also App. Br. pp 24-25

2009. ANNA continues to resist the legal reality that she cannot have a “Capital account” or withdraw as if she were a PARTNER. She still seeks to void her duty to pay under the STIPULATION.

L. Reply re ANNA’S other Arguments.

1. Reply re A, “ANNA can withdraw”.

Anna may depart, but only as a transferee and not as a PARTNER. A tenant may depart, but not refuse to pay long overdue rent by insisting she is a landlord.

2. Reply re B, “The partnership agreement provides for withdrawal”.

The AGREEMENT provides for withdrawal of PARTNERS, provided the conditions for PARTNERS’ withdrawal are met. Here they are not met.

3. Reply re C, “Even if the AGREEMENT is silent as to withdrawal, the AGREEMENT must be interpreted to allow it”.

If the AGREEMENT is silent, then there is no ambiguous term to interpret. ANNA actually seeks judicial modification of the AGREEMENT to vest her with PARTNER rights outside of those agreed to in the STIPULATION. RUPA and case law do not allow this⁴⁷.

⁴⁷ ANNA cites 16 cases in her brief and not one provides a transferee the right to withdraw and pay her expenses by relinquishing her interest. Only three cases

4. Reply re D, “The STIPULATION is not a contract...”⁴⁸

Stipulations are agreements and are to be interpreted as contracts.⁴⁹ ANNA has used the STIPULATION since 2009 to secure 100% of her share of profits.⁵⁰ Now, when asked to pay her share of the losses, she asserts it has no legal meaning. She cannot have it both ways. It is a contract.⁵¹ ANNA enforced the STIPULATION to secure her profits; she must now pay her agreed share of the losses.⁵²

concern a partnership and none support ANNA’S contention. *Casey v. Chapman* confirms that no rights beyond profits losses can be assigned even where the partners agreed otherwise. 123 Wn App at 679. *Yatsuanagi v. Shimamura* is a pre UPA case, but confirms a partner’s duty to pay upon improper withdrawal the full liquidated damages amount . 109 P. 282 at 284. No cases give the assignee the right to avoid a written duty to pay. Two cases reverse the trial court for modifying its ruling as ANNA seeks here *Rivard v. Rivard*, 75 Wn. 2d 415, 417 451 P.2d 677 (1969) (“The decree is not that broad and cannot be extended by interpretation”) and *In re Marriage of Thompson*, 97 Wash App. 873,878, 988 P.2d 499 (1999) (“The trial court does not have authority to modify even its own decree in the absence of conditions justifying reopening of the judgment.”)

⁴⁸ Resp. Br.at 21.

⁴⁹ *Barton v. State, Dep't of Transp.*, No. 86924-3, 2013 WL 4411228 (Wash. Aug. 15, 2013); *In re Marriage of Pascale*, 173 Wn. App. 836, 841, 295 P.3d 805, 809 (2013); *Balmer v. Norton*, 82 Wn.App. 116, 121, 915 P.2d 544 (1996) ; *Morris v. Maks*, 69 Wash.App. 865, 868, 850 P.2d 1357 (1993).

⁵⁰ As a Family Use Property Partnership, (CP 540) the only profits are the use of the premises and the losses are the expenses of the premises. The Court agreed. (VRP 11/9/12, 2:13-14)

⁵¹ Offers were made. Agreement is evidenced by the signatures of all concerned. Consideration for both sides was the avoidance of the cost of a status trial. A second form of consideration for ANNA was the avoidance of substantial liability. Had ANNA not secured the agreement that she was “never a PARTNER” she would have had staggering liability to the PARTNERSHIP for her many breaches of the AGREEMENT and her fiduciary duties under RUPA. (CP 15:11-17)

⁵² ANNA asserts (Resp. Br. 21) that John is bound by his assertion re the intent of the STIPULATION. John did not make that assertion. His counsel said this as part of an argument for two findings that were rejected by the Court. (CP 66-67) Similarly ANNA’S seven earlier counsel argued that she was the MANAGING PARTNER. (CP 175:10-11) Should ANNA be bound by this prior inconsistent statement by seven counsel?

5. Reply re, “ANNA is not a tenant and had no responsibility to pay rent”.⁵³

The Court found ANNA to be a “tenant at will”.⁵⁴ ANNA has not cross-appealed from that decision. ANNA stated that she decided to withdraw at the time of the August 2011 Motion to Clarify.⁵⁵ She ceased paying, but did not stop taking her 64% share of the profits or announce her intent to withdraw. Instead of paying her “rent”, ANNA now claims that she owns an interest in the building that should be used to pay her rent.⁵⁶ Anna has failed to show she has the right to withdraw under RUPA and relies only on John’s statement that she had a right to withdraw. *Her “absolute” right to withdraw includes an equally “absolute” duty to pay what she owed per the STIPULATION.*

6. Reply re F, “John is seeking a capital contribution under the PARTNERSHIP AGREEMENT”.⁵⁷

ANNA provides no case law or statute allowing a partnership to create capital accounts for non-partners. As previously noted, John seeks capital contributions from PARTNERS per the AGREEMENT

⁵³ Resp Br. 22

⁵⁴ CP 14:10.

⁵⁵ Resp. Br. 16.

⁵⁶ In a similar way, her interest is like that of an airline passenger and the PARTNERSHIP is the pilots and crew. Both have use of the plane, but the PARTNERS have to maintain it and fly it. ANNA has the right to use it and pay for doing so. In this case, ANNA has flown for two years without paying and seeks to avoid paying by insisting that she is a pilot.

⁵⁷ Resp. Br. 25

and expense contributions from ANNA per the STIPULATION. For years, the parties attempted to run the PARTNERSHIP using terms in the AGREEMENT, but this effort hit a brick wall when it came to filing PARTNERSHIP taxes and doing a proper accounting. CPA, Carol Didier's analysis (CP 140-141) is as emphatic as it is unchallenged: No transferee can be subject capital calls, can make capital contributions or have a capital account.⁵⁸

7. Reply re: "For John's Argument to prevail, the Court will have to find that a transferee's liability is greater than that of the partners whose interest she holds."⁵⁹

If William Kydd owed \$100,000 to the PARTNERSHIP and had a capital account interest of \$200,000 and refused to pay, he would pay far more than ANNA. Per Term 8.7, his interest would be purchased at 60% of value. (CP 423) Thus, he would lose \$80,000 (40% of the value of his capital account) and the \$100,000 owed would be deducted from the \$120,000 giving him only \$20,000. Thus, it would cost him \$180,000 to pay a \$100,000 debt if he was a defaulting PARTNER.

ANNA has no capital account and suffers no 40% discount.

⁵⁸ ANNA contradicts this by asserting that since the PARTNERSHIP AGREEMENT defines expenses as capital calls for PARTNERS, then they must be so for transferees. (Resp. Br. 26) To assert this, one must conclude that a "tenant" is a "landlord."

⁵⁹ Resp. Br. 27

She would have to pay the \$100,000. Her liability could not be greater than William Kydd's would have been.

M. ANNA'S frivolous fee award argument fails on both facts and law.

Where "the parties set forth debatable issues, there is no right to an award of attorney fees as sanctions under RAP 18.9."⁶⁰

"In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal."⁶¹

We note four of many "debatable issues":

1. The Court's stated authority (Terms 8.3-8.7) does not apply to non-partners and cannot be applied to ANNA without violating RUPA. A debatable issue.
2. The PARTNER LIQUIDATION process could not apply if ANNA was a PARTNER due to failure to meet the preconditions. A debatable issue.

⁶⁰ *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005).

⁶¹ *Tiffany Family Trust*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) quoting *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Personnel Bd.*, 107 Wash.2d 427, 442-43, 730 P.2d 653 (1986) and *Streater v. White*, 26 Wash.App. 430, 434-35, 613 P.2d 187 (1980).

3. ANNA'S statement that the STIPULATION is neither an agreement nor a contract is without legal authority and contradicted by case law. Another debatable issue.
4. ANNA'S statement that she should have a PARTNER'S right of withdrawal because she was a surviving spouse is unsupported by case law or RUPA. We provided RUPA case law and statutes to the contrary. Another debatable issue.

III. CONCLUSION

As a matter of law, the Court cannot extend the PARTNER LIQUIDATION process in Terms 8.3-8.7 of the AGREEMENT to a non-partner without violating the central tenants of RUPA. The ruling should be reversed.

To forever limit the PARTNERSHIP to remedies in a 1996 AGREEMENT that is silent to transferees is a denial of the right to manage and an error of law. The ruling should be reversed.

A PARTNER in ANNA'S circumstances could not withdraw as the preconditions required by Terms 8.6-8.7 of the PARTNER LIQUIDATION process have not occurred. ANNA claims rights no PARTNER has. The ruling should be reversed.

ANNA has no present right to withdraw under RUPA, the STIPULATION or the AGREEMENT. Her right is based solely on the PARTNERSHIP'S saying she could withdraw if she paid her expenses

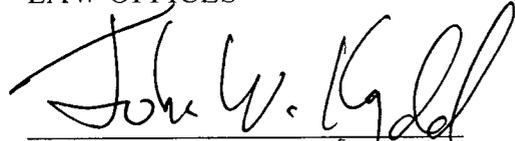
due under the STIPULATION, She should be ordered to do so.

Three paths lead to the same result: The STIPULATION as an Order, the STIPULATION as a contract and the April 29, 2011 notice and expense payment process each require Anna to pay her 64% share of expenses plus interest.

Rulings that violate RUPA must be reversed. This Court should reverse and remand with directions to enter judgment against ANNA for her 64% share of PARTNERSHIP expenses through November 9, 2012, plus interest at the statutory rate (or as prejudgment interest) from the date each expense was incurred.

Respectfully submitted this September 19, 2013.

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DECLARATION OF SERVICE

2013 SEP 20 PM 1:13

I, Linda Gant, declare and say as follows:

STATE OF WASHINGTON

1. I am a citizen of the United States and resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

DEPUTY

2. On September 19, 2013, I caused service for September 20, 2013 of Appellant's Reply Brief on the individuals named below, in the specific manner indicated:

David C. Ponzoha	<input type="checkbox"/> Electronic filing / Email
The Court of Appeals, Division II	<input type="checkbox"/> Facsimile
950 Broadway, Suite 300	<input type="checkbox"/> U.S. Mail, Postage Prepaid
Tacoma, WA 98402-4454	<input checked="" type="checkbox"/> Legal Messenger
	<input type="checkbox"/> Federal Express
Court Clerk	<input type="checkbox"/> Hand Delivery

David P. Horton	<input type="checkbox"/> Electronic filing / Email
3212 Northwest Byron Street,	<input type="checkbox"/> Facsimile
Suite 104	
Silverdale, WA 98383	<input type="checkbox"/> U.S. Mail, Postage Prepaid
	<input checked="" type="checkbox"/> Legal Messenger
Attorney for Respondent	<input type="checkbox"/> Federal Express
	<input type="checkbox"/> Hand Delivery

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th, day of September, 2013 at Seattle, Washington.


Linda Gant
Paralegal