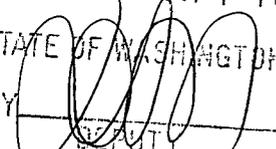


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY 

No. 44292-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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ANNA ELLERO KYDD

Respondent

v.

JOHN W. KYDD, an individual;  
MELISSA KYDD, an individual; and  
KYDD INVESTMENTS, a Washington general Partnership

Appellants

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

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APPELLANTS' OPENING BRIEF

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ORIGINAL

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## I. INTRODUCTION

Appellants, Kydd Investments Partnership, John Kydd and Melissa Kydd challenge a ruling made 18 months after a trial at which, by STIPULATION<sup>1</sup> adopted by the Court, ANNA secured the right to 64% use for life of a Hood Canal summer home (the PARTNERHIP property) in exchange for paying 64% of PARTNERSHIP expenses.

Per the STIPULATION, all parties agreed that ANNA had a life estate in a transferee's interest, not a partner's interest. The trial court concluded that ANNA's interest was that of a tenant at sufferance or tenant at will. Neither party appealed the trial court's March 4, 2011, Findings of Fact and Conclusions of Law, and they are the law of the case.

ANNA exercised her right of 64% use, but did not pay her 64% share of expenses for two years. Eighteen months after trial ANNA

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<sup>1</sup> In this brief, the Appellants, Kydd Investments Partnership, John Kydd and Melissa Kydd, will be referred to as the PARTNERSHIP. The Respondent Anna Ellero Kydd will be referred to as ANNA. The 1996 Amended Kydd Investment Partnership Agreement will be referred to as the AGREEMENT. The July, 1, 2009, Order on Stipulation which declared ANNA a non-partner transferee for life with the right of 64% use subject to the duty to pay 64% of expenses will be referred to the STIPULATION. The partner default and liquidation process noted by the Court as paragraphs 8.3-8.7 of the AGREEMENT shall be called the PARTNER LIQUIDATION process.

sought to end her tenancy without paying her expenses. She asserted that the PARTNER LIQUIDATION process applied to her. ANNA had no capital account or share in the PARTNERSHIP. No value of her tenancy was shown.

Under the AGREEMENT, a partner's right to invoke the PARTNER LIQUIDATION process was limited. It requires prior written notice by another partner of intent to purchase the defaulting partner's interest. No partner provided the required written notice.

The PARTNERSHIP did not seek ANNA's departure, but did agree that she could depart if she paid what she owed per the STIPULATION. The Court ruled that:

- A. The controlling law was RCW 25.05 (RUPA), the STIPULATION, and the AGREEMENT.
- B. The PARTNERSHIP's right to collect expenses owed per the STIPULATION was limited to the PARTNER LIQUIDATION process in the AGREEMENT.
- C. The PARTNER LIQUIDATION process was invoked by ANNA's motion to relinquish her tenancy.
- D. ANNA's duty to pay two years of expenses per the STIPULATION was extinguished by the relinquishment of her tenancy.

## II. ASSIGNMENTS OF ERROR

The trial court erred in entering of its November 9, 2012, Order Clarifying Order Approving Stipulation Dated July 1, 2009. (CP 161-3)

## III. ISSUES OF LAW PERTAINING TO ASSIGNMENT OF ERROR

A. Does the trial court's March 4, 2011, Findings of Fact and Conclusions of Law and the incorporated STIPULATION establish the parties' respective rights with respect to the Partnership Property as the law of the case?

The answer is "yes."

B. Under RUPA, the AGREEMENT and the STIPULATION, does the Court have authority to limit the PARTNERSHIP's rights to collect a debt owed by a non-partner to the PARTNER LIQUIDATION clause?

The answer is "no".

C. Under RUPA, the AGREEMENT and the STIPULATION, does the Court have authority to invoke the PARTNER LIQUIDATION process when no Partner provided the written notice of intent to purchase required by the AGREEMENT?

The answer is "no"

D. Under RUPA, the AGREEMENT and the STIPULATION, does the Court have authority to give ANNA, a non-partner, a partner's rights under the PARTNER LIQUIDATION process?

The answer is "no".

E. Under RUPA, the AGREEMENT and the STIPULATION, does the Court or ANNA have authority to compel the PARTNERSHIP to liquidate her interest without PARTNERSHIP agreement or wind up?

The answer is “no”.

**F. Is the STIPULATION a binding contract by which judgment should be entered requiring ANNA to pay her share of expenses as liquidated damages plus prejudgment interest from the date each expense was incurred?**

The answer is “yes”.

#### **IV. STATEMENT OF THE CASE**

##### **A. Substantive Pretrial Facts**

The Findings of Fact and Conclusions of Law entered after trial on March 4, 2011, establish the following:

William “Bill” Kydd owned a summer place property on Hood Canal. (CP 9, FF 1) and in 1989 he conveyed the property into a Partnership (Kydd Investments) giving shares to each of his children and the majority of shares to himself. (CP 9, FF 2 and 6) This family use real estate partnership contains only the Hood Canal Property. (CP 53, para. C)

Anna Ellero (“Anna”) and Bill Kydd were married in 1991. Throughout the remainder of his lifetime, Bill was the Managing Partner of the Kydd Investments (CP 10, FF 3).

Bill Kydd passed away in 2006 and his Will conveyed his 64% interest to Anna for life with the remainder to the Partners, the Kydd

children. (CP 10, FF 12). No community interest was found in this property. (CP 10, FF 3).

Term 7.4 of the AGREEMENT allowed Bill to gift a new class of stock (Class B) to ANNA which would make her a Partner if she agreed to be bound by the AGREEMENT. It says:

Bill shall have the right to create this Class B interest by inter vivos or testamentary gift to Anna Ellero Kydd, his wife, subject to Anna's written adoption of and agreement to be bound under this Agreement.  
(emphasis added) (CP 55, para. 7.4)

There is no record of ANNA agreeing "*to be bound under this Agreement*" or Bill Kydd creating the "*Class B interest*" by either "*inter vivos or testamentary gift*". Instead ANNA received a life estate in his Class A shares with the remainder going to his children. (CP 12 FF 18)

In March 2007 without notice to the Partners, ANNA began demolition of the structure and construction of a new addition without seeking a building or septic permit. The unpermitted construction was closed in without inspections for the foundations, structure, wiring or plumbing. (CP 12, FF 15 and 16)

**B. Trial Court Proceedings**

ANNA filed a lawsuit in June of 2007 to dissolve the PARTNERSHIP and the partners counterclaimed for, inter alia, waste

and conversion. (CP 8, ll. 1-9 and CP 14, COL 3-4 and CP 15, COL 7)  
Trial was bifurcated with the first trial addressing ANNA'S legal status  
in the PARTNERSHIP. On July 1, 2009, the parties agreed to the  
STIPULATION to resolve her status issues. It stated in pertinent part:

1. Plaintiff Anna Kydd received a life estate in William L. Kydd's Class A partnership in Kydd Investments. Under the Revised Uniform Partnership Act ("RUPA") the nature of the interest conveyed to Plaintiff is as a transferee or assignee.
2. The interest held by Plaintiff entitles Plaintiff to the rights of a transferee or assignee of a partnership interest, and under the Kydd Investments Partnership, such rights include the right to 64% of the use of the partnership property distributed equitably throughout the year, subject to responsibilities including, but not limited to, 64% of the reasonable costs of maintaining the property; and
3. Plaintiff's additional rights and responsibilities as a transferee are as stated in RCW 25.05.205, RCW 25.05.210 and RCW 25.05. (e.g. Plaintiff did not receive the right to manage, the right to vote or any other powers generally associated with being a partner or a managing partner).  
(emphasis added) (CP 29, ll. 20-25 and CP 30, ll. 1-8)

Following trial, the Court found that ANNA committed commissive waste, conversion and unlawful detainer. (CP 14, COL 4 and CP 15, COL 6 and 7) The Court concluded that, "ANNA'S status within the Partnership was as a *tenant at will or a tenant at*

*sufferance*”’. (CP 14, COL 2) The trial court rejected any claim Tortious Interference and Breach of Partnership because ANNA “was not a Partner in Kydd Investments. There is no implied or de facto partnership.” (CP 15, COL 6) All other claims by both sides were denied. (CP 16, COL 10)

After trial, ANNA did not pay her share of expenses to the PARTNERSHIP. The expenses were documented by copies of receipts or checks and noted on a spreadsheet provided to her counsel. (CP 130-135)

Mr. Steve Dixon was appointed Special Master in 2011 and was replaced by Mr. Tolman who filed a motion for clarification on October 18, 2012. (CP 110-115)

On July 8, 2011, the Trial Court entered judgment against ANNA in favor of the PARTNERSHIP and John Kydd for treble damages of \$70,716, \$13,200 for conversion and \$60,000 in attorney’s fees. ANNA did not appeal, but satisfied the judgment. The waste damage funds were placed in the capital account and with the special master. (CP 37, FF 1.1; CP 40, FF 1.10 and FF 1.11; CP 42 and CP 43 FF 2.3-2.4 and IV)

In 2011, ANNA ceased paying her 64% share of expenses while continuing to require 64% of use time. Her counsel noted that this was “...because the partnership had ample funds to pay operating expenses, and for other reasons, ANNA decided to not make the payments demanded by John.” (CP 155, ll. 8-10). The “ample funds” referred to were the commissive waste damages Anna paid to the PARTNERSHIP.

On September 27, 2011, Special Master Dixon ruled that ANNA had no duty to pay her \$6,663.81 share of PARTNERSHIP expenses as there were “...more than sufficient partnership funds to cover these expenses.” (CP 93, para. 2) The funds referred to were the waste damages paid by ANNA.<sup>2</sup> ANNA also alleged that the PARTNERSHIP had historically failed to maintain the property and the Special Master ruled: “I do not find that Mr. Kydd has mismanaged repair obligations to date.” (CP 93, para. 7)

The record contains no assertion that ANNA was denied her allotted 64% use time.

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<sup>2</sup> On November 9, 2012, Judge Dalton ruled that ANNA had no right to have her expenses paid from PARTNERSHIP capital. (VRP, November 9, 2012, page 2, ll. 17-25 and page 3, ll. 1-8) Thus, her debt, excluding interest, was increased by \$6,663.81. (CP 93, para. 2)

In July 2012, the PARTNERSHIP resolved the long outstanding health permit and construction permit problems resulting from ANNA's unpermitted demolition and addition to the home. (CP 118, ll. 1-4)

On October 15, 2012, ANNA filed the motion that is the basis of this Appeal. She sought to withdraw from the Partnership and asserted that her duty to pay for expenses was extinguished if she relinquished her right to future use. (CP 46, ll.11-14)

The PARTNERSHIP did not agree that she could withdraw without paying, but agreed she did have a right to depart if she paid the two years of expenses she owed per the STIPULATION. (CP 128, ll. 14-17 and 24 and CP 129 ll. 1-4)

The Trial Court entered an Order granting ANNA's motion (CP 161-3) Terms 3 and 4 of Judge Dalton's ruling state:

Term 3. Reading the statutory scheme as a whole, consistent with the stipulation, and partnership agreement Ms Kydd's interest as an assignee is extinguished and reverts to the other partners without further obligation under paragraphs 8.3 -8.7 of the partnership agreement.

Term 4. Anna Kydd has no liability to the partnership, under the terms of the partnership agreement. She defaulted under paragraphs 8.3 & 8.5 & 8.6, the %

[percentage] share she was assigned is extinguished and reverts to the other partners.  
(CP 162, ll. 14-23)

## **V. SUMMARY OF ARGUMENT**

ANNA is not a Partner based upon the 2011 unappealed Findings (and incorporated STIPULATION) that bind all parties and are the law of the case.

Since ANNA is not a Partner and did not agree to be bound by the AGREEMENT, she has no rights under the AGREEMENT.

Since the AGREEMENT does not address the rights or duties of ANNA or any other non partner, it cannot be a source of PARTNERSHIP duties to ANNA.

The only agreement made regarding the rights and duties of ANNA and her relations with the PARTNERSHIP was the STIPULATION.

RUPA and the AGREEMENT provide no authority for ANNA to avoid paying her agreed share of the expenses she owes under the STIPULATION.

RUPA and the AGREEMENT provide no authority for ANNA to invoke the PARTNER LIQUIDATION process. Even if ANNA

was a Partner, the PARTNER LIQUIDATION process could not be invoked because its preconditions were not met.

The STIPULATION was incorporated into the Trial Court's 2011 unappealed Order that ANNA has breached for two years by refusing to pay her agreed expenses while claiming her agreed use time. This Court should enforce the STIPULATION by entering a judgment in the amount owed plus prejudgment interest from the date each expense was incurred.

## **VI. ARGUMENT**

### **A. Standard of Review**

No Undisputed Facts. Judge Dalton provided a comprehensive set of Findings of Fact and Conclusions of Law for the Trial in a decision that neither party has appealed or disputed. Its previous decision is the law of the case. *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 386, 292 P.3d 108 (2013)

De Novo Review. Since the Trial Court resolved this post trial dispute based upon stipulated facts and a written record, this Court's review is de novo.

“When the record consists entirely of written material, we stand in the same position as the trial court and review the record de novo.”

*Truly v. Heuft*, 138 Wn. App. 913, 916, 158 P.3d 1276 (2007)

RUPA has little application to non-partners. The parties drafted the STIPULATION, in part, to clarify which RUPA terms addressed ANNA's rights and responsibilities. ANNA does not have a full transferee interest. She has a life estate and the PARTNERSHIP has the remainder.

RUPA limits the authority of the Court to alter the agreements of partners. The bedrock principle of Partnership Law, *delectus personae* ("choice of the person"), is codified at RCW 25.05.150(9): "A person may become a Partner only with the consent of all of the Partners."<sup>3</sup> In other words, Courts cannot transfer partner rights to non-partners without the agreement of partners. Case law construing RUPA in any state is considered relevant to Courts in any other state. RCW 25.05.904.<sup>4</sup>

**B. Consideration of Issues**

**1. ANNA is Not a Partner and thus has neither Rights nor Responsibilities under the AGREEMENT.**

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<sup>3</sup> RCW 25.05.150(9) is identical to the Revised Uniform Partnership Act, Section 401(i).

<sup>4</sup> RCW 25.05.904. Uniformity of application and construction--1998 c 103  
This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.

Both the 2009 STIPULATION and the trial court's final judgment in the 2011 action provide that Anna is not a partner. Per Term 1 of the Stipulation:

1. Plaintiff, ANNA KYDD, received a life estate in William L. Kydd's Class A partnership in Kydd Investments. Under the Revised Uniform Partnership Act ("RUPA") the nature of the interest conveyed to Plaintiff is as a transferee or assignee.

The Court incorporated this Stipulation into its Findings in (CP 12, FF 18) ANNA avoided liability for breach of partnership by asserting she had no rights or duties under the partnership agreement. (CP 15, COL 6) ANNA remains bound by her STIPULATION and the unappealed Findings of the Trial Court.

2. **The Trial Court Erred in Limiting the PARTNERSHIP's Rights Against a Non-partner to those Established for Partners by the AGREEMENT.**

The AGREEMENT does not contain the terms "assignee" or "transferee" and does not limit the PARTNERSHIP's rights to collect money owed by a non-partner. Since the AGREEMENT is silent we look to RUPA and the STIPULATION. Neither limits the PARTNERSHIP's rights to collect funds owed by non-partners.

Per RCW 25.05.020(1) the “principles of law and equity supplement this chapter”. Per RCW 25.05.030, Washington law is the governing law.

Per the STIPULATION, ANNA is a transferee of a life tenancy. She has no capital account, no share in the PARTNERSHIP and, her tenancy has no demonstrated value in excess of its expenses.

Per the STIPULATION her “rent” for 64% of use is, “*subject to responsibilities including but not limited to 64% of the reasonable costs of maintaining the property*”. Her departure cannot erase her debt.

The PARTNERSHIP has the right to use any relevant Washington law to enforce ANNA’s agreement to pay under the STIPULATION.

**3. Even if ANNA was a Partner and Bound by the AGREEMENT, the Trial Court Erred in Allowing her to Invoke the PARTNER LIQUIDATION Process in the Absence of Written Notice and Other Actions Required by the AGREEMENT.**

Per Term 3 of the Court’s ruling, the PARTNER LIQUIDATION process is found in paragraphs 8.3-8.7 of the AGREEMENT:

Term 3. Reading the statutory scheme as a whole, consistent with the stipulation , and partnership agreement Ms Kydd’s interest as an assignee is extinguished and reverts to the other partners without

further obligation under paragraphs 8.3 -8.7 of the partnership agreement.  
(emphasis added)

The “process” of paragraphs 8.3-8.7 allows Partners to buy out a defaulting Partner at a discount if two conditions are met: 1. The defaulting Partner fails to pay a capital call; 2. Other Partners declare the Partner in default and provide formal written notice of intent to purchase the interest.

Paragraphs 8.3-8.5 allocate various capital expenses between “A” and “B” Shareholders.<sup>5</sup>

Paragraph 8.6 defines “default” as “any Partner”, who “fails to make capital contributions”, “required under this Agreement”. (CP 56)

ANNA cannot be in default as she is not:

1. a “partner”;
2. who “fails to make capital contributions”; or
3. “required under this Agreement”.

ANNA has no authority to declare herself in default under the AGREEMENT. Only the PARTNERSHIP can do that and it did not do so. Paragraph 8.6 cannot apply to ANNA.

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<sup>5</sup> Per Term 8.3, Partner capital pays PARTNERSHIP expenses. ANNA asserts that by reimbursing the PARTNERSHIP for her share of expenses, she is making a capital contribution and thus has Partner rights under Terms 8.2-8.7. Per this, paying rent is the same as paying the mortgage.

Paragraph 8.7 gives partners the right “to elect to purchase the Defaulting Partner’s interest by notice in writing”.<sup>6</sup> Paragraph 8.6 cannot apply because:

1. No partner can “elect in” the absence of default; and
2. No partner can “purchase” in the absence of “prior written notice”.

Neither occurred.

In sum, even if ANNA was a Partner, the PARTNER LIQUIDATION process could not be invoked, because there was no declaration of default and no “notice in writing”. This is error.

**4. If ANNA had Paid her Expenses and Relinquished her Interest, she Would Have Received Nothing.**

Per the AGREEMENT, ANNA’s interest would have no value. If a partner seeks to withdraw, then Term 13.2 controls and they are paid back the amount in their capital account.

Such withdrawing Partner shall be entitled to receive for his or her interest the balance of his or her Capital Account on the date of the withdrawal, paid by the Partnership in 120 equal monthly installments including interest on the date of withdrawal at the prime rate at Seafirst Bank or its successor.

The Capital Account is the amount each partner has invested in excess of expenses. A transferee cannot have a capital account

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<sup>6</sup> This process is taken from RCW 25.05.250(1-2) save for an inclusion of a 60% illiquidity discount.

because a transferee only pays expenses. ANNA's interest upon withdrawal would be zero.

**5. The Court Provided no Specific Authority for Extending the PARTNER LIQUIDATION Process to ANNA.**

The trial court had no legal basis to extinguish a non-partner's obligations to the partnership based upon the liquidation provisions that apply exclusively to partners. Yet that is what it did in Terms 3 and 4 of its Order:

Term 3. Reading the statutory scheme as a whole, consistent with the stipulation and partnership agreement, Ms Kydd's interest as an assignee is extinguished and reverts to the other partners without further obligation under paragraphs 8.3 -8.7 of the partnership agreement<sup>7</sup>.

Term 4. Anna Kydd has no liability to the partnership, under the terms of the partnership agreement. She defaulted under paragraphs 8.3 & 8.5 & 8.6, the % [percentage] share she was assigned is extinguished and reverts to the other partners.

None of the three principles that the Trial Court derived from "reading the statutory scheme as a whole" supports its order.

The first error is in reading "the statutory scheme[,] as a whole." without mentioning any specific statute or term of RUPA. The court considers a statutory scheme as a whole in order to give effect to

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<sup>7</sup> After the Court's oral ruling, PARTNERSHIP respectfully disclosed an intent to appeal the ruling. The Court then added text to the Order which clarified the paragraphs to which it was referring (VRP, November 9, 2011, page 11, ll. 4 - 20)

legislative intent “only if a court determines that the plain meaning cannot be derived from the statutory provision at issue and ambiguity necessitates further inquiry.” *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn. 2d 1, 10, 43 P.3d 4 (2002).

ANNA asserted that RCW 25.05.160 (“Partner’s rights and duties with respect to information”) was relevant, but the Court did not note that statute or any other statute in its Order or in its oral opinion. *RUPA contains no provision giving a transferee the right to extinguish her debt by relinquishing her interest.*

The second error is the Trial Court’s belief that the unstated sections of RUPA were “consistent with the STIPULATION”. No term or phrase in the STIPULATION is noted. The STIPULATION *contains no provision giving ANNA as transferee the right to extinguish her debt by relinquishing her interest.*

The third error is the Trial Court’s reliance on the AGREEMENT where, again, no term or phrase is cited to authorize extending the PARTNER LIQUIDATION process in paragraphs 8.3-8.7 to ANNA. The AGREEMENT *contains no provision giving a transferee the right to extinguish their debt by relinquishing their interest.*

**6. The Terms of the PARTNER LIQUIDATION Process Exclude ANNA and All Other Transferees.**

Paragraphs 8.3-8.5 allocate various capital expenses between “A” and “B” Shareholders. Since no “B” shares were created, all expenses are paid by “A” Shareholders. ANNA is not a Shareholder. Paragraphs 8.3-8.5 cannot apply to ANNA.

Paragraph 8.6 applies to only “any Partner”, “who fails to make capital contributions”, “under this Agreement”. As noted above, ANNA is not a “Partner”; who “fails to make” a capital contribution “under this Agreement”. Only Partners can make capital contributions “under this Agreement”. ANNA has no duty to make payments “under this Agreement”. Her duty to pay is found in the STIPULATION.

Paragraph 8.6 excludes ANNA and all other transferees.

Paragraph 8.7 requires a Partner “to elect to purchase the Defaulting Partner’s interest by notice in writing”. None did. Paragraph 8.7 cannot apply. ANNA seeks rights no partner has.

When the Special Master ruled, sua sponte, that ANNA’s duty to pay \$6,663.81 in expenses could be satisfied from the capital account, the PARTNERSHIP was placed in the untenable position of having to account for expenses as if Anna was a Partner who paid into

the Capital account. It made it impossible to file a proper Income Tax Return.

To remedy this situation the PARTNERSHIP provided an opinion letter from CPA, Carol Didier, who provides accounting services for many other family use real estate partnerships. She reviewed the case documents and wrote, in pertinent part:

...Any funds received by the partnership from Anna Kydd cannot be deemed a capital contribution or take the form of a capital call.<sup>8</sup> Only Partners in equity would be subject to capital calls; Anna has had no equity rights under the partnership agreement.  
(CP 140, para. 3)

...the 64% of the partnership expenses she remits are simply reimbursement for the costs associated with her ability to use the property. A “right to use” is a contractual right that can be enforced, similar to an agreement between a landlord and tenant. Therefore, the funds received would take the character of rental income to the partnership.  
(CP 140, para. 4)

...It is clear from the documents provided that there is no intention to convert Anna Kydd to a partner, though the proposed treatment of funds to be deemed a “capital contribution” does exactly that.  
(CP 141 para. 1)

For clarity I am offering the following guidelines:

1. Only partners can make contributions to the capital account[.]

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<sup>8</sup> ANNA asserts that since Partner capital pays expenses, then ANNA’s expense payments are contributions towards Partner capital expenses. Rent is not a mortgage payment.

2. Only partners can make withdrawals from the capital account.
3. An “Operations” account should be established on the Balance Sheet as a liability.
4. Anna pays her 64% share into the “Operations” account. The partners pay their 36% share of expenses into the “Operations” account...

After reviewing this letter, the Court set aside the Special Master’s 2011 ruling that ANNA could pay her expenses out of the Waste and remediation judgments she paid to the PARTNERSHIP. Yet under the court’s November 9, 2012 Order, the PARTNERSHIP has no recourse to obtain payment of ANNA’s fair share of expenses from any other source, but the funds paid to the PARTNERSHIP to compensate it for the damages that ANNA had caused to the PARTNERSHIP property.

**7. ANNA is Estopped from Claiming Any Partner Rights Under the AGREEMENT.**

At trial, ANNA avoided liability for a six figure claim for breach of the AGREEMENT and tortious interference by convincing the Court that, per her STIPULATION, she was never a partner thus had no rights she could breach or fiduciary duties she could neglect under the AGREEMENT. (CP 15 COL 6)

Eighteen months later she asserts the opposite. Now, she “has the same rights under default” as William Kydd, the Managing Partner.

“Anna has the same obligation to pay as did William Kydd under the agreement. But she also has the same rights under a default. As such, as a matter of law, under the partnership agreement, Anna can withdraw without further liability.”  
(CP 154, ll. 19-23)

ANNA is estopped from claiming she “has the same rights under default” and the “same obligation to pay” as William Kydd “under the Agreement”. William Kydd had the obligation to pay capital calls, to maintain a capital account and to honor his fiduciary duties to other partners under the AGREEMENT. ANNA did not and does not have these obligations.

Estoppel requires: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) an action by the other party on the faith of such admission, statement, or act; and (3) an injury to the other party if the claimant is allowed to contradict or repudiate his earlier admission, statement, or act. *Arnold v. Melani*, 75 Wash.2d 143, 147, 437 P.2d 908 (1968).

Per Term 1, ANNA avoided substantial liability at trial for Tortious Interference and Breach of Partnership by claiming that per

the STIPULATION, her transferee status meant that she had no partner rights, no partner obligations and no partner duties.

Per Term 2, ANNA was given her 64% use of the property for over two years based upon her STIPUALTION to pay her agreed share of the expenses.

Per Term 3, Now ANNA seeks to deny payment to the PARTNERSHIP for two years of expenses by repudiating the STIPULATION and claiming that she has the same rights as William Kydd.

She cannot have it both ways. ANNA is estopped.

**8. Even Without Estoppel, ANNA Does Not Have “the Same Rights Under Default” as William Kydd.**

A Partner’s right of withdrawal and liquidation of interest is a form of “dissociation”. RCW 25.05.225(1). The right of dissociation is a Partner right and the grounds for dissociation are limited. RCW 25.05.225(1-6).

Anna did not receive these rights under the STIPULATION and, as a non-partner transferee; she could not receive them under RUPA.

Per Term 3 of the STIPULATION:

Plaintiff's additional rights and responsibilities as a transferee are as stated in RCW 25.05.205, RCW 25.05.210 and RCW 25.05. (e.g. Plaintiff did not receive the right to manage, the right to vote or any other powers generally associated with being a partner or a managing partner).  
(emphasis added)

There can be no doubt that the "*powers generally associated with being a Partner*" that "Anna did not receive" per the

STIPULATION include:

1. Dissociation under RUPA per RCW 25.05.225, and
2. The PARTNERSHIP LIQUIDATION process per "paragraphs 8.6-8.7" of AGREEMENT.

Under RUPA, ANNA's right to liquidate her transferee interest is triggered by the wind up of the partnership, not her desire to depart.

Per RCW 25.05.210(2)(c), she has the right to seek a judicial determination that it is equitable to wind up the Partnership business.

She did not do so because there is no basis to do so.

Under RUPA ANNA's transferee interest has no cash value

Per RCW 25.05.210, ANNA has a right to share in "profits" and "distributions". This is a family use property partnership. There has never been income tax due on a tax return. There has never been a distribution to partners. Per the Court, the only "profit" is the right to

“the use of the property.” (VRP, November 9, 2011, page 2 ll. 13-14)

Moreover, ANNA has only part of a transferee interest. She cannot convey it to her heirs. It is hers only for her life.

**9. The STIPULATION is a Binding Order which ANNA Has Violated for Two Years by Refusing to Pay her Expenses. Judgment Should be Entered Against ANNA for her Unpaid Expenses Plus Pre Judgment Interest From the Date Each Expense was Incurred.**

The PARTNERSHIP has honored the STIPULATION Order that ANNA has violated. The STIPULATION is also a binding agreement. Contract interpretation normally involves an inquiry into the intent of the parties, but here there is no evidence before the Court of party intent re the STIPULATION other than the language of the STIPULATION. Thus, the matter is a question of law. Per *Noble v. Ogborn*,<sup>9</sup>:

The general rule is that the interpretation of a contract is a question of law. *Kelly v. Aetna Cas. & Sur. Co.*, 100 Wash.2d 401, 407, 670 P.2d 267 (1983). Contracts should be construed to reflect the intent of the parties. *Corbray v. Stevenson*, 98 Wash.2d 410, 415, 656 P.2d 473 (1982). There is no evidence of intent before this court other than the language of the contract. Absent disputed evidence concerning the intent of the parties, the construction or legal effect of a contract is determined by the court as a matter of law. *Yeats v. Estate of Yeats*, 90 Wash.2d 201, 204, 580 P.2d 617 (1978).  
(Id at 390)

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<sup>9</sup> 717 P.2d 285, 43 Wn. App. 387 (Wash.App. Div. 1 1986)

The expenses owed by ANNA per the STIPULATION are known and the dates they were incurred are fully disclosed. Judgment should be awarded against ANNA in favor of the PARTNERSHIP for the unpaid expenses. Interest at 12% should be awarded from the date each expense was incurred.

## **VII. CONCLUSION**

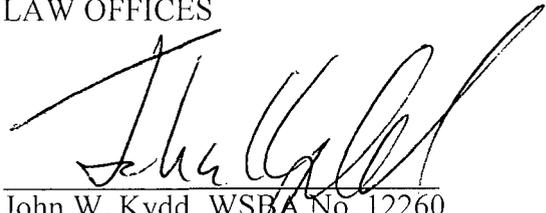
As a matter of law, the parties' STIPULATION controls their relations. The PARTNERSHIP's right to collect the expenses owed by a non-partner transferee is not limited to the methods noted in the AGREEMENT.

As a matter of law, ANNA does not have the the right to invoke the PARTNER LIQUIDATION process in paragraphs 8.3-8.7 of the AGREEMENT. The Court cannot extend those rights to her. Its ruling should be reversed.

As a matter of law, the STIPULATION is both an order and an enforceable contract. This court should reverse and remand with directions to enter judgment against ANNA for her 64% share of PARTNERSHIP expenses, plus interest at the statutory rate from the date the expense was incurred.

Respectfully submitted this April 24<sup>th</sup>, 2013

JOHN W. KYDD, P.S.  
LAW OFFICES

A handwritten signature in black ink, appearing to read "John W. Kydd", written over a horizontal line.

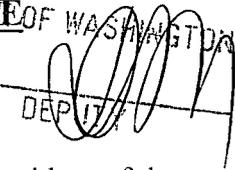
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DECLARATION OF SERVICE OF WASHINGTON

BY  DEPUTY

I, Linda Gant, declare and say as follows:

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.

2. On April 24, 2013, I served the following document on the individuals named below, in the specific manner indicated:

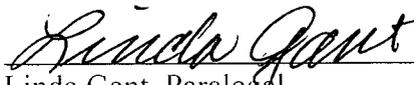
**Appellants' Opening Brief**

David C. Ponzoha	<input checked="" type="checkbox"/> Electronic filing / Email <i>leg</i>
The Court of Appeals, Division II	<input type="checkbox"/> Facsimile
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Court Clerk	<input type="checkbox"/> Federal Express
	<input type="checkbox"/> Hand Delivery

David P. Horton	<input checked="" type="checkbox"/> Electronic filing / Email
3212 Northwest Byron Street,	<input checked="" type="checkbox"/> Facsimile
Suite 104	<input type="checkbox"/> U.S. Mail, Postage Prepaid
Silverdale, WA 98383	<input 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 24th, day of April, 2013 at Seattle, Washington.

  
Linda Gant, Paralegal