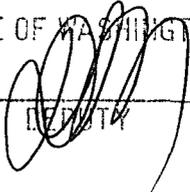


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 44292 -2-II

COURT OF APPEALS – DIVISION II  
OF THE STATE OF WASHINGTON

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ANNA KYDD.

*Respondent,*

v.

JOHN KYDD, et. al.,

*Appellants.*

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This case arises from a family partnership formed to enjoy a recreational property gone awry. The issue before the Court – two years after the trial – is a small one compared to the issues, amounts, and rights at stake at trial.

Anna Kydd<sup>1</sup> and Bill Kydd were happily married. Bill wanted Anna to enjoy his property at Chinom after he passed. For a time she did. Unfortunately, Bill's adult son, John Kydd and Anna did not get along. And through her own mistakes, and John's actions, this litigation ensued. After a partial settlement, a trial, and payment on the judgments against her, Anna tried to enjoy Chinom. She could not. She wanted out. John previously stated that was her absolute right.

John asserts<sup>2</sup> that she cannot withdraw without first paying him for partnership expenses she disputes and refuses to pay.

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<sup>1</sup> First names are used for all persons with the Kydd surname after their introduction to avoid confusion. No disrespect is intended

<sup>2</sup> John seeks to claim that Melissa Kydd is a party, but she was dismissed from the litigation long ago and has not participated, in any capacity, except as a witness at trial two years ago. John is the partnership's managing partner and the only remaining active participant in the partnership.

There are two basic issues in this appeal. First – did the July 1, 2009 stipulation<sup>3</sup> amend the partnership’s terms? Second – upon Anna’s withdrawal does she have any further liability to the partnership?

John’s appeal must fail because he has consistently and repeatedly taken positions contrary to those he asserts on appeal.

John does so by claiming that the Stipulation altered the partnership agreement’s terms or was a new agreement. But he asserted the exact opposite position previously in this litigation. He said that the Stipulation did nothing but express what already existed – that Anna owned an assignee’s interest in the partnership.

John previously stated that as an assignee, Anna cannot be held liable for partnership capital calls. But he seeks reimbursement for expenses that the partnership agreement unambiguously defines as “capital.”

John now claims that Anna cannot withdraw until she pays what she owes. But he previously stated that she had the “absolute” right to withdraw if she disputes costs – as she does here. Accordingly, as John said she could previously, the trial court found that Anna can withdraw from the partnership without further liability.

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<sup>3</sup> This document is referred to as “the Stipulation.”

This appeal must also fail because John's position that Anna, as an assignee, is liable for an obligation that could not be imposed on the partner whose interest she holds is untenable.

John's contradictory pleadings and representations doom his case to failure. The trial court's order correctly interpreted RUPA; the partnership agreement; and the parties' Stipulation. Because John's assertions on appeal are in direct contradiction to his previous assertions, this appeal is frivolous.

## **II. COUNTER-STATEMENT OF THE CASE**

John's factual statement is misleading and often unsupported by the record. He does not recite events in chronological order leading to confusion. A more complete factual background is helpful to understand the context of the narrow issue presented.

### The Kydd Family

William "Bill" Kydd and Anna were married in 1991.<sup>4</sup> Prior to his marriage to Anna, Bill had three children John, Melissa, and Susan.<sup>5</sup>

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<sup>4</sup> CP 10.

<sup>5</sup> Id.

### The Property

In 1960 Bill bought a one-seventh share in the Chinom Land Company which had acquired a large parcel on Hood Canal. Each owner built a summer home. Each owner owns their home and lot in fee simple. The remaining property is owned by the Land Company.<sup>6</sup> Bill's parcel and interest in the property owned by Chinom Land Company is referred to by the family, and throughout the litigation, as "Chinom."

### The Partnership

In 1988, in preparation for his estate plan, Bill formed a partnership, Kydd Investments, to hold Chinom.<sup>7</sup> In 1989 Bill recorded a deed transferring his interest in Chinom to the partnership. The partnership's purpose was to "continue to own and maintain the property."<sup>8</sup> The partnership's sole asset was Chinom.<sup>9</sup> Bill's interest in the partnership was, throughout his lifetime, his separate property.<sup>10</sup>

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<sup>6</sup> CP 9.

<sup>7</sup> Id; CP 284.

<sup>8</sup> Id at 9-10.

<sup>9</sup> Id.

<sup>10</sup> Id.

Initially, Bill gave his three adult children one partnership unit each.<sup>11</sup> In 1996 Bill gave each child additional shares, increasing their interest to twelve percent each, and retaining sixty four percent for himself.<sup>12</sup> Bill, Melissa, Susan and John entered into an amended and restated general partnership agreement.<sup>13</sup> This agreement still controls the partnership.<sup>14</sup>

Bill was always the managing partner and ran the partnership informally.<sup>15</sup> Bill ignored the partnership agreement's terms.<sup>16</sup> He never made a capital call or sought contributions for the property's expenses from the other partners.<sup>17</sup>

Bill and Anna spent much time at Chinom.<sup>18</sup> After Bill had a stroke Bill and Anna informed Bill's children that they needed to remodel the front cabin to add ramps to make accessibility easier for Bill, and to alter the front bedroom, bathroom and kitchen to make it safer and easier for Bill and Anna

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<sup>11</sup> CP 285.

<sup>12</sup> CP 10; 285.

<sup>13</sup> CP 10.

<sup>14</sup> CP 53-65.

<sup>15</sup> CP 10.

<sup>16</sup> VRP February 2, 2011 at 65:13-17.

<sup>17</sup> CP 11.

<sup>18</sup> CP 10.

to spend time there.<sup>19</sup> No permits were sought, although they were required.<sup>20</sup> All the partners supported this.<sup>21</sup>

#### Bill's Estate Plan

Bill wanted Anna to be cared for after his passing. He wanted her to be able to enjoy Chinom for life.<sup>22</sup> Bill intended for her to become the managing partner and that upon her death Anna's partnership rights would transfer to the other partners.<sup>23</sup> To this end his Will conveyed his 64% interest to Anna for life with the remainder to his children.<sup>24</sup> His Will did not clearly and unambiguously realize his goal.<sup>25</sup>

#### Bill's Death and Immediate Aftermath

Bill died in March, 2006. His estate's personal representative executed an "Assignment of Partnership Interests" to Anna.<sup>26</sup> The parties believed that she was the managing partner and acted as if she was.<sup>27</sup> Anna

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<sup>19</sup> CP 10.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> VRP February 10, 2011 at 33:22-24.

<sup>23</sup> CP 11; VRP February 18, 2011 at 24:11-15.

<sup>24</sup> Brief of Appellant at 8.

<sup>25</sup> This is certainly true based on the Stipulation. But, as will be discussed very briefly below, counsel for Ms. Kydd is not convinced a trial would have resulted in the same result as the Stipulation – nevertheless the Stipulation is the law of the case.

<sup>26</sup> CP 11.

<sup>27</sup> CP 12.

paid all expenses associated with the Chinom property.<sup>28</sup> For a about year after Bill's death John and Anna did not communicate.<sup>29</sup> John and Anna have never gotten along well.<sup>30</sup>

In March 2007 Anna agreed to purchase Susan and Melissa's interests in Chinom.<sup>31</sup> Anna also commenced a remodel on the property. Just as Bill had not sought permits for the 2002 remodel, she did not seek permits. But she knew they were required.<sup>32</sup> Melissa quickly revoked her option.<sup>33</sup>

#### The Early Litigation

In 2007 Anna filed this action to dissolve the partnership. The trial court found Anna brought the suit in good faith<sup>34</sup> -- as she did not wish to continue to be a partner with John. An amended complaint sought to disassociate John or dissolve the partnership and require Melissa to

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<sup>28</sup>CP 12.

<sup>29</sup> CP 12.

<sup>30</sup> CP 13.

<sup>31</sup> CP 11.

<sup>32</sup> CP 13.

<sup>33</sup> Id.

<sup>34</sup> VRP February 18, 2011 at 10:4-6.

specifically perform on the option.<sup>35</sup> The amended complaint stated that John would be compensated for his shares.<sup>36</sup> Susan was not a party.

John filed an answer and counterclaims alleging, among other things, waste for the unpermitted remodel.<sup>37</sup> John alleged that as an assignee of Bill's partnership interest Anna could not be a partner and could not be managing partner, relying on RCW 25.05 et. seq. the Revised Uniform Partnership Act (RUPA).<sup>38</sup>

Anna asserted that John agreed to the partnership agreement and under the agreement any partner could transfer his entire interest to a surviving spouse.<sup>39</sup> The litigation was bifurcated for trial. The first trial would determine Anna's status as a partner or assignee. The second would relate to the damages claims, including the waste claims.

#### The Stipulation

For a variety of reasons, shortly before the first trial was set to begin Anna threw in the towel. She entered into the Stipulation that resolved the

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<sup>35</sup> CP 173.

<sup>36</sup> CP 176.

<sup>37</sup> CP 178.

<sup>38</sup> CP 207-229.

<sup>39</sup> CP 59. ("Any Class A Partner may freely transfer all or part of his or her interest in the Partnership to any other Class A Partner, to his or her surviving spouse, or to his or her children, in each of which cases all Partners shall be notified.")

issues for the first trial in John's favor.<sup>40</sup> John now argues that the Stipulation is a contract that has to be interpreted<sup>41</sup> and that it modified the partnership agreement.<sup>42</sup> John argues that "there is no evidence before the Court of party intent re [sic] the STIPULATION other than the language of the STIPULATION."<sup>43</sup>

But John's attorney earlier stated the parties' intent. He articulated the opposite position John now takes. Counsel stated:

[O]ur intent is to simply make it clear that plaintiff got exactly what she was awarded under the will and under the partnership agreement and that the stipulation was not bargained for or was some sort of a deal. It simply set out that she was – that she got what she was entitled to receive.<sup>44</sup>

Accordingly, the Stipulation was not a contract and it did not modify the parties' rights or obligation. It merely affirmed John's position regarding the nature of the interest Anna inherited – that she was an assignee and was therefore not a partner, had no management rights, and could not

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<sup>40</sup> CP 29-30.

<sup>41</sup> Brief of Appellant at 29.

<sup>42</sup> CP 481 ("The Stipulation was an Agreement by the partners and the Plaintiff that amends the partnership agreement.")

<sup>43</sup> Brief of Appellant at 29. Emphasis in original.

<sup>44</sup> VRP January 10, 2011 at 66:13-18.

be managing partner under RUPA. Subsequently, Anna moved to dismiss her claims against Melissa.<sup>45</sup>

John amended his complaint to add the claims, and add the partnership as a party.<sup>46</sup>

### The Trial

The remaining issues went to trial. John sought damages for breach of the partnership agreement; breach of fiduciary duty; conversion, waste, trespass, and tortious interference with a business relationship.<sup>47</sup> Anna counterclaimed seeking to be reimbursed for partnership expenses she alone had shouldered. Anna admitted she committed waste by commencing a remodel without permits but denied she committed waste for landscaping issues; contested the claimed damages; asserted that she was committed permissive, not commissive waste; and denied the remaining claims.<sup>48</sup>

The Court found she committed commissive waste (related to the remodel – not the landscape issues) and awarded damages – but damages much less than had been sought by John.<sup>49</sup> The Court also awarded attorney’s fees – but much less than had been sought by John.<sup>50</sup>

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<sup>45</sup> CP 259

<sup>46</sup> CP 261.

<sup>47</sup> CP 240.

<sup>48</sup> CP 607-618.

<sup>49</sup> CP 309-316.

<sup>50</sup> CP 341-360.

### The First Motion for Special Master

Anna knew disputes would plague her time at Chinom, and that John would make unreasonable demands. She feared John would not manage the partnership in accord with the partnership agreement and the Stipulation. Accordingly, she brought a motion for the trial court to appoint a special master to resolve the disputes that were likely to arise.<sup>51</sup> The court denied the motion.<sup>52</sup>

### First Motion for Clarification

During the time the parties were sorting through the post-trial issues John's management of the partnership became an issue.<sup>53</sup>

John made demands on Anna to pay that Anna contested. While the disharmony was not unexpected, John also sought to impose new rules on the partnership.<sup>54</sup> A brief recitation of how this occurred follows.

On March 21, 2011<sup>55</sup> John made a demand for \$3,223.00. The charges were mostly not disputed. But the accounting did have some problems.

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<sup>51</sup>CP 361-389.

<sup>52</sup> CP 349.

<sup>53</sup> CP392-399.

<sup>54</sup> CP 530-531.

<sup>55</sup> CP 467-468.

Anna requested more information. It was not fully provided.<sup>56</sup> Instead John indicated that eight days after the call for contribution was made interest would accrue. He also demanded that Anna pay his attorney’s fees for correspondence regarding these issue.<sup>57</sup>

Less than thirty days later, on April 18, 2011 John declared Anna to be “in default for nonpayment.” He “suspended Anna’s use until her payments are brought current.”<sup>58</sup> Each of these actions, demands, or rules were in conflict with the partnership agreement’s terms:<sup>59</sup>

<b>John’s Rules</b>	<b>Partnership Agreement Term</b>	<b>Sections</b>
Interest after 8 days	Interest after 30 days	¶¶ 8.2; 8.6.
Attorney’s Fees	None	
Suspension of use	None	The default provisions under ¶8.6 do not contemplate suspending use.

While Anna had planned on paying the undisputed amounts within 30 days as required by the partnership agreement, she did not wish to have

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<sup>56</sup> CP 470.

<sup>57</sup> CP 470-473.

<sup>58</sup> CP 475.

<sup>59</sup> John still maintains that the partnership agreement’s terms do not apply to Anna, and he can impose any rules he chooses, as he attempted to do in 2011. *See* Brief of Appellant at 14.

her payment seen as acquiescence to the new terms John sought to unilaterally impose.<sup>60</sup>

Anna filed her first motion to clarify the stipulation to get a judicial determination that the partnership agreement's terms, where not inconsistent with the Stipulation, applied to Anna.<sup>61</sup>

The trial court agreed and clarified that the partnership's default provisions apply to Anna's interest.

We'll start with the governing body of law. It's the court's ruling that the partnership agreement and the terms and conditions of the partnership agreement shall control the interactions of the parties. Where the partnership agreement is silent, then the...Uniform Partnership Act will then fill in the blanks with respect to the rights and responsibilities of the partners to one another.<sup>62</sup>

The Court resolved the payment dispute in Anna's favor, ruling that John's attempt to suspend Anna's use rights were *ultra vires* – if Anna was

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<sup>60</sup> CP 550-552.

<sup>61</sup> CP 392.

<sup>62</sup> VRP May 13, 2011 at 2:4-12.

in default the partnership agreement's default provisions would control, and the other partners could buy her out.<sup>63</sup>

#### The Second Motion for a Special Master

During a hearing regarding the motion to clarify, the trial court realized that John was, to put it nicely, difficult to deal with. She invited Anna, *sua sponte*, to renew her motion to appoint a special master.<sup>64</sup> When another problem arose, Anna did just that.<sup>65</sup> John did not oppose the motion.<sup>66</sup>

The special master resolved many disputes between the parties. Both parties prevailed on issues.<sup>67</sup>

Early in his tenure, on July 1, 2011 the special master decided:

It is reasonable and appropriate for the partnership to make capital calls for estimated and reasonable and ordinary expenses to the extent sufficient capital is not available to do so. In other words, if there are not sufficient funds in the partnership, the amount of the capital call might be made....<sup>68</sup>

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<sup>63</sup> Id at 5-6.

<sup>64</sup> VRP May 20, 2011 at 46.

<sup>65</sup> CP 564.

<sup>66</sup> CP 578-579.

<sup>67</sup> CP 86-109.

<sup>68</sup> CP 90.

Although there was over \$70,000.00 in funds administered by the special master for the partnership's benefit, on August 24, 2011 John requested that Anna pay over \$6,000.00 in expenses.<sup>69</sup> Anna refused.<sup>70</sup> Anna realized she would not be able to do as Bill had hoped – enjoy Chinom for the remainder of her life. She made a decision to default on her obligation to pay.<sup>71</sup>

She knew she would be in default and was willing to accept the consequences. Having to pay 64% of the property's expenses with without *any* say in how the money was spent was untenable.<sup>72</sup>

This is exactly what John had said Anna was entitled to do in his oral argument on Anna's motion to clarify:

That's the legal remedy that I see under business law, that I see under partnership law. They can say, I don't want any part of this. I'm not going to pay for it. I'm out of here. Does the assignee have that absolute right? Sure. They always do.<sup>73</sup>

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<sup>69</sup> CP 96-101.

<sup>70</sup> CP 108-109.

<sup>71</sup> Id.

<sup>72</sup> Id. For example, Anna removed an old decayed planter while staying on the property. John asked the special master to find her guilty of waste. *See* CP 96-101.

<sup>73</sup> VRP May 13, 2011 at 19:11-16.

Nevertheless, upon Anna's refusal to continue to pay, despite the court's oral ruling, quoted above, the partnership's default provisions, and John's statement, above, John requested that the special master enter judgment against Anna for the expenses.<sup>74</sup>

The special master did not do so. To the contrary, he decided, *sua sponte*, that because the partnership had significant funds in the bank that a request for Anna to pay was inappropriate.

John did not move the special master or the court to revise the special master's decision.<sup>75</sup>

#### The Second Motion to Clarify

The special master took a seat on the Kitsap County Superior Court bench, and a new special master was appointed. Anna found herself in disputes with John over minor issues – and having to educate a new special master on what had occurred over the earlier five years of litigation. She had enough and decided to withdraw. She brought her second motion to

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<sup>74</sup> CP 96.

<sup>75</sup> In footnote 2 on page 12 of John's Brief he misquotes and mischaracterizes the Court's ruling. John had misinterpreted Anna's arguments to mean that Anna was seeking an interest in the damages she paid – she did and does not. But John goes on to conclude from the Court's comments that Anna's debt "increased by \$6,663.81." The Court did not say, or infer that statement.

clarify because she wanted to ensure that her rights under the partnership agreement and stipulation allowed her to withdraw without any further obligation to the partnership or John. Unfortunately, the trial court never reduced its oral decision on the first motion to clarify to writing. It committed to doing so<sup>76</sup> but the order was never entered. As such Anna wanted a written ruling that the stipulation did not alter the partnership agreement, it merely stated the law of the case, that Anna only acquired a transferee's interest, but that the partnership and RUPA controlled the parties' rights and responsibilities.<sup>77</sup>

The Court granted the motion and this appeal followed.<sup>78</sup>

### **III. ARGUMENT**

#### **A. ANNA CAN WITHDRAW**

John conceded unambiguously that Anna had the right relinquish her partnership interest, stating "Ms. Kydd has the right to relinquish her transferee interest."<sup>79</sup>

John previously stated "[Anna] can say, I don't want any part of this. I'm not going to pay for it. I'm out of here. Does the assignee [Anna] have

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<sup>76</sup> VRP May 20, 2011 at 43:2-5.

<sup>77</sup> CP 45-51.

<sup>78</sup> CP 161-163.

<sup>79</sup> CP 128.

that absolute right? Sure. [She] always do[es].”<sup>80</sup> John now reverses course and argues that her withdrawal is conditioned upon her paying the amount he believes she owes.<sup>81</sup> But for several reasons, upon her withdrawal, Anna has no liability to the partnership.

First, the partnership agreement controls what remedies the partnership can exercise upon a default. Seeking a judgment is not a remedy allowed by the agreement. Second, the Stipulation does not amend, or alter the partnership agreement, or Anna’s rights under it. It merely establishes her status as an assignee. Third, an assignee cannot have greater liability than the assignor under the agreement. If Bill had failed to pay a capital call (as Anna has) the partnership would have to declare him in default, make a loan for the sum owed, and then put Bill’s interest toward the loan – no deficiency would have been permitted.

The trial court’s order recognizes these facts and that under the law the partnership agreement’s terms applied to Anna.

#### **B. THE PARTNERSHIP AGREEMENT PROVIDES FOR WITHDRAWAL**

The Amended and Restated General Partnership Agreement provides for a partner’s withdrawal.

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<sup>80</sup> VRP May 13, 2011 at 19:11:16.

<sup>81</sup> Brief of Appellants at 13.

13.2 Any Class A Partner may withdraw from the Partnership at any time, by notice in writing to all Partners, and be relieved from any further obligation, accruing after the date of withdrawal, under this Agreement....Such withdrawing Partner shall be entitled to receive for his or her interest the balance in his or her Capital Account on the date of withdrawal....

13.3 Any Class B Partner may withdraw from the Partnership at any time, and be relieved from any further obligation, accruing after the date of withdrawal, under this Agreement. In such event, no payment shall be required to be made to the Class B Partner.<sup>82</sup>

Under the stipulation, Anna is neither a Class A nor Class B Partner. But as a transferee of a Class A interest, under RCW 25.05.021, Anna has the right “[t]o receive, in accordance with the transfer, allocations of profits and losses of the partnership and distributions to which the transferor would otherwise be entitled.”

The amount Anna is obligated to pay as an assignee is a “loss”. And that should be dealt with the same as with respect to the assignor. It follows that Anna is allowed to withdraw (as John has conceded) – without further

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<sup>82</sup> CP 60.

obligation. Anna does not seek her interest in the Capital Account, or a buyout under the default provisions. She merely seeks to be left alone.

John will argue that the above provisions do not apply to Anna because she is not a partner. But this ambiguity in the agreement should be interpreted to apply to a surviving spouse assignee in a consistent manner.

**C. EVEN IF THE AGREEMENT IS SILENT AS TO WITHDRAWAL, THE AGREEMENT SHOULD BE INTERPRETED TO ALLOW IT.**

John may argue that the partnership agreement does not address an assignee's ability to withdraw. But it should be interpreted as so. Based on this partnership's purposes and history, a surviving spouse should be permitted to withdraw without liability – just as the assignor/partner would have been permitted to do. This conforms to general principals of partnership law:

It is the rule that where a written agreement is silent as to one of the terms which is essential to the contract, that term may be supplied by parol evidence. In ascertaining the intention of parties to a written agreement, the court looks to the wording of the instrument itself as made by the parties, views it as a whole, and considers all the circumstances surrounding the transaction, including the subject matter, together with the subsequent acts of the parties to the instrument. *In re Estate of Garrity*, 22

Wash.2d 391, 156 P.2d 217 (1945). In interpreting a partnership agreement, the agreement must be read as a whole and construed in the light of the history of the partnership and its purpose. *Ashley v. Lance*, 75 Wash.2d 471, 451 P.2d 916 (1969). See also *Yatsuyanagi v. Shimamura*, 59 Wash. 24, 109 P. 282 (1910).<sup>83</sup>

Here, this was a closely held family partnership to own a family vacation property. The partnership was informally run, until the patriarch passed away and his son insisted on strict compliance with RUPA and the partnership agreement. A partner could withdraw without being pursued for any monies owed. A surviving spouse should be afforded the same right.

**D. THE STIPULATION DOES NOT AMEND OR MODIFY THE PARTNERSHIP AGREEMENT.**

The Stipulation was not a contract – it merely set out that Anna did not inherit a full class A partnership interest – she got only the interest of a transferee or assignee. John previously agreed that “the stipulation was not bargained for or was some sort of a deal. It simply set out that she was – that she got what she was entitled to receive.”<sup>84</sup>

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<sup>83</sup> *Bassan v. Inv. Exch. Corp.*, 83 Wash. 2d 922, 932-33, 524 P.2d 233, 240 (1974).

<sup>84</sup> VRP January 10, 2011 at 66:13-18.

John now, because it suits his current purposes, makes the opposite claim – that the Stipulation “is a binding agreement.”<sup>85</sup> He asserts that the Stipulation “amended the [partnership] Agreement...”<sup>86</sup>

His arguments are similarly without support. John says that “[p]er 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 expenses.” But John cites to no finding, conclusion or authority for these statements. As cited above, he has made the exact opposite arguments.

A correct statement is that Anna is the transferee of Bill’s partnership shares for her life. She has an assignee’s interest in the partnership. Her interest’s value has never been litigated or determined.

John goes on to say, “[p]er the STIPULATION her “rent” for 64% of use is, “subject to the responsibilities including but not limited to 64% of the reasonable costs of maintaining the property.” The stipulation did not say or infer this. The partnership is not Anna’s landlord. Anna was not a tenant and had no responsibility to pay “rent.” John could not evict her for not paying rent.

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<sup>85</sup> Brief of Appellants at 29.

<sup>86</sup> CP 477.

Regardless of John’s admissions, his primary position throughout this litigation, embodied by the Stipulation, is that Anna is not, cannot be, and has never been a partner. This being true, how can a non-partner’s agreement amend the partnership agreement? The Stipulation did not modify anything.

A trial court has authority to clarify its own order. Courts have inherent powers, in the absence of a statutory procedure, to adopt suitable procedures to enforce their decrees.<sup>87</sup> While it is true that a court cannot modify its own decree, it may clarify an ambiguous decree to spell out the parties’ rights more clearly.<sup>88</sup> The trial court clarified that the Stipulation did not modify the partnership agreement or the parties’ relationship – it merely stated the law of the case – that the interest inherited by Anna was that of an assignee and that the terms of the partnership agreement control her interest. This is consistent with John’s earlier statements regarding the Stipulation.

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<sup>87</sup> RCW 2.28.150; see also *In re Estate of Campbell*, 46 Wn.2d 292, 297, 280 P.2d 686 (1955) (“Courts have inherent power in probate proceedings to clarify orders at any time.”).

<sup>88</sup> *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969); see also *In re Marriage of Thompson*, 97 Wash.App. 873, 878, 988 P.2d 499 (1999).

**E. THE PARTNERSHIP AGREEMENT DICTATES HOW CONTRIBUTIONS FOR NORMAL EXPENSES ARE REQUESTED AND PAID.**

A partnership is governed by its partnership agreement. Where the agreement is silent, RUPA controls.<sup>89</sup> John has agreed with this principal – that the partnership agreement controls and where is it silent, RUPA fills in the blanks.<sup>90</sup> John states that “RUPA has little application to non-partners.” But he fails to cite any authority for that proposition.<sup>91</sup> And this position is contrary to RUPA.

RCW 25.05.021 provides that the “losses” (Anna’s obligation to pay) are governed by the partnership agreement. This is in accord with the general law regarding assignments. And, as John points out, RUPA is supplemented by general principals of law and equity.<sup>92</sup>

“Generally an assignee stands in the shoes of the assignor.”<sup>93</sup> “[R]ights may be freely assigned unless forbidden by statute or rendered ineffective for public policy reasons.”<sup>94</sup> Here, Anna stands in Bill’s shoes except that

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<sup>89</sup> RCW 25.05.015.

<sup>90</sup> VRP May 13, 2011 at 13:13-25.

<sup>91</sup> Brief of Appellant at 16.

<sup>92</sup> Id at 18 citing RCW 25.05.020.

<sup>93</sup> *Lewis v. Boehm*, 89 Wash. App. 103, 107, 947 P.2d 1265, 1268 (1997) citing *Paullus v. Fowler*, 59 Wash.2d 204, 212, 367 P.2d 130 (1961).

<sup>94</sup> *Fed. Fin. Co. v. Gerard*, 90 Wash. App. 169, 177, 949 P.2d 412, 415 (1998).

the Stipulation (and arguably RUPA) provides that Anna could not be assigned partner or management rights.

John, however, argues that because Anna is not a partner, the partnership agreement has no relationship to her – that the partnership can make up the rules with respect to her as it goes along “she has no rights under the agreement.”<sup>95</sup> This is contrary to RUPA and the law of assignments generally. This is also contrary to his correspondence where he cites to the partnership agreement’s terms in declaring her to be in default.<sup>96</sup>

When it suits his purposes the partnership agreement’s terms apply to Anna. They, of course, however, apply all the time.

#### **F. JOHN IS SEEKING A CAPITAL CONTRIBUTION UNDER THE PARTNERSHIP AGREEMENT**

John claims that Anna owes the partnership operating expenses such as insurance premiums and maintenance. John conducts a tortured analysis to show his point that the ongoing operating expenses are not “capital.” But the partnership agreement is unambiguously to the contrary. The partnership agreement provides that these contributions are capital. (“If the

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<sup>95</sup> Brief of Appellant at 14.

<sup>96</sup> CP 475.

purpose of the *capital* is to cover ongoing expenses of maintenance, repair or operations of the Property (e.g., insurance premiums, painting, dues or assessments to Chinom Point Association for regular maintenance, property taxes.)....”).<sup>97</sup>

The agreement then differentiates between this type of contribution and the type discussed by John as “capital” in his brief in the next paragraph stating that “[l]ong-term improvements to the Property of a “capital” nature....”<sup>98</sup> The use of quotes around the term capital in paragraph 8.4 recognizes the difference between the two types of contributions. But both are identified as capital. As such the agreement uses the term capital broadly to refer to any contribution -- operating expense *and* “capital” as defined and discussed by John and his accountant. As such, under the partnership agreement, a call for operating expenses is a capital call.

The partnership agreement dictates how the partnership deals with the situation when someone fails to pay a capital call. In short, the partner is declared to be in default, and the delinquent expenses are loans from the partnership to the defaulting partner. The partnership collects on the loan

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<sup>97</sup> CP 411. (Emphasis added).

<sup>98</sup> CP 411.

by purchasing the defaulting partner's interest at a discount and applying the proceeds to the delinquency.<sup>99</sup> There is no provision for a deficiency.

John could have invoked these provisions. While the value of Anna's interest may be subject to dispute, there is some value to her 64% use right. John admitted so previously, stating that if the partnership property were sold, she would be entitled to 64% of the proceeds.<sup>100</sup>

Accordingly, the trial court found that Anna's interactions with the partnership were governed by the partnership agreement. Anna has no more obligation than a partner would. She was responsible for her share of expenses. When she did not pay she was in default. The partnership paid her expenses on her behalf. Under the partnership agreement that is a loan to Anna. If the loan is not paid back the partnership's remedy is to remove her. But there is no provision for a deficiency, as John seeks.<sup>101</sup>

For John's argument to prevail, the Court will have to find that a transferee's liability is greater than that of the partner's whose interest she holds. But the partnership's remedies are the same against Anna as they would be if Bill, the transferor, had defaulted. The partnership agreement's

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<sup>99</sup> CP 411.

<sup>100</sup> VRP January 10, 2011 at 93.

<sup>101</sup> VRP November 9, 2012 at 9:1-14.

default provisions provide that a partner's payment obligations are secured by his or her interest in the partnership. As admitted by John, her interest had value.

John cites no authority in RUPA, or case law to support a contrary proposition. Anna has the same obligations to pay as Bill did under the agreement. But she also has the same rights under a default. As such, as a matter of law, under RUPA and the partnership agreement, Anna can withdraw without further liability.

**G. ANNA RELIED ON THE COURT'S PREVIOUS ORAL RULING ON THIS ISSUE.**

Anna brought her first motion to clarify because John had declared her to be in default and suspended her use rights. On May 19, 2011 in its oral decision on that motion the Court ruled that John's actions were *ultra vires* stating:

The partnership simply has a default provision. If the individual is in default, then the other partners can buy that person out. Those are the provisions that would apply here.<sup>102</sup>

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<sup>102</sup> VRP May 19, 2011 at 5:24-6:3.

Soon thereafter, in reliance on the above statement, because the partnership had ample funds to pay operating expenses, and for other reasons, Anna decided to not make the payments demanded by John. Anna was fully expecting to be declared a defaulting partner under the agreement. But John is requesting additional relief. He asks that a judgment be entered against Anna. Because this is contrary to the Court's oral ruling, and Anna relied on the Court's ruling, John should not be entitled to now seek a remedy outside the partnership agreement.

#### **H. JOHN CANNOT ARGUE ESTOPPEL**

John argues that Anna is estopped from making her arguments. John did not make this argument in the trial court. "The general rule prevailing in this state is that issues not raised in the trial court cannot be raised for the first time on appeal."<sup>103</sup>

Nevertheless, even if this argument is properly before the Court, John has not shown estoppel. The first element of equitable estoppel requires an admission, statement, or act inconsistent with the claim

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<sup>103</sup> *State v. Tradewell*, 9 Wash. App. 821, 825, 515 P.2d 172, 174 (1973) citing *Peoples Nat'l Bank of Washington v. Peterson*, Wash., 514 P.2d 159 (1973).

afterwards asserted.<sup>104</sup> Here, he cites to no admission, statement or act. He cited to a finding by the trial court that Anna was not a partner (which he agrees with) and that she did not breach the partnership agreement by attempting to purchase Melissa and Susan's interests.

John has not shown any statement that Anna made that is inconsistent with her position in this appeal.

**I. BECAUSE THIS APPEAL IS FRIVOLOUS, ANNA SHOULD BE ENTITLED TO HER ATTORNEY'S FEES.**

Because John's appeal is based on arguments and representations that directly contradict his previous arguments and representation, this appeal is frivolous and Anna should be awarded her attorney's fees.

RAP 18.9(a) permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. *Reid v. Dalton*, 124 Wash.App. 113, 128, 100 P.3d 349 (2004). An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wash.2d 225, 241, 119 P.3d 325 (2005). All doubts as to whether the appeal is

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<sup>104</sup> *Casey v. Chapman*, 123 Wash. App. 670, 682, 98 P.3d 1246, 1252 (2004).

frivolous should be resolved in favor of the appellant. *Id.*<sup>105</sup>

Throughout this brief Anna has identified instances where John's arguments on appeal directly contradict statements he (personally or through counsel) has made in the past.

Here, he argues that Anna cannot withdraw without payment.<sup>106</sup> But earlier in the litigation he argued it was her "absolute" right.<sup>107</sup>

Here, he argues that the Stipulation amended the partnership agreement or was a separate agreement.<sup>108</sup> But he earlier argued the opposite<sup>109</sup> – that the Stipulation merely set out what Anna received in the assignment from Bill.<sup>110</sup>

Here, he argues that Anna's interest has no value.<sup>111</sup> But he previously conceded that if Chinom were sold, Anna would be entitled to 64% of the proceeds.<sup>112</sup>

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<sup>105</sup> *Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd.*, 170 Wash. 2d 577, 580, 245 P.3d 764, 765 (2010).

<sup>106</sup> Brief of Appellants at 6.

<sup>107</sup> VRP May 13, 2011 at 19:11-16.

<sup>108</sup> Brief of Appellants at 13.

<sup>109</sup> VRP January 10, 2011 at 66:13-18.

<sup>110</sup> *Id.*

<sup>111</sup> Brief of Appellants at 18.

<sup>112</sup> VRP January 10, 2011 at 93.

Here, he argues that Anna is responsible the partnership's for ongoing expenses. The partnership agreement designates ongoing expenses as "capital." "If the purpose of the *capital* is to cover ongoing expenses of maintenance, repair or operations of the Property (e.g. insurance premiums, painting, dues or assessment to Chinom Point Association for regular maintenance, property taxes...."<sup>113</sup>

But he previously stated that "[a]s a transferee, Anna Kydd cannot be responsible for *any* capital expenditure."<sup>114</sup>

Here, he argues that "[t]he partnership did not declare Anna to be in default."<sup>115</sup> But it did.<sup>116</sup> It wrote:

As Anna is familiar with the default language and interest provisions set out in terms 8.6 of the Partnership Agreement, she should understand that she is in default for nonpayment.<sup>117</sup>

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<sup>113</sup> CP 56

<sup>114</sup> CP 120. (Emphasis added).

<sup>115</sup> Brief of Appellants at 19.

<sup>116</sup> CP 475.

<sup>117</sup> Id.

Finally, John argues here that the partnership agreement does not apply to Anna.<sup>118</sup> But he previously cited to paragraph 8.6 of the agreement to declare her to be in default.<sup>119</sup>

This appeal has no merit. It is defeated by John's own arguments in his own words. The Court should award Anna her reasonable attorney's fees in defending this frivolous appeal.

#### IV. CONCLUSION

The parties have spent more in attorney's fees than the subject property is worth. Anna started this litigation with the intent of severing her relationship with John. While Anna would love to be able to enjoy the property she shared with her deceased husband, she cannot. The Court should affirm the trial court's order allowing Anna to withdraw under the terms of the July 1, 2009 Stipulation, and award reasonable attorney's fees.

Respectfully submitted this 27<sup>th</sup> day of June, 2013.

LAW OFFICE OF  
DAVID P. HORTON, INC. P.S.



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<sup>118</sup> Brief of Appellants at 14.

<sup>119</sup> CP 475.