

1965

Rulon R. West v. Terry R. West and Flora E. West : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RULON R. WEST,

Plaintiff and Appellant,

vs.

TERRY R. WEST and FLORA E.
WEST,

Defendants and Respondents.

Case No.
10251

APPELLANT'S BRIEF

Appeal From a Judgment of the Third District Court
For Salt Lake County
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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Appellant,

vs.

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Defendants and Respondents.

} Case No.
10251

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action for dissolution and winding up of a partnership, and distribution of its assets. Following a prior appeal the case was remanded and the trial court directed to make findings with respect to the actual intent of the partners when they executed two ambiguous documents: Articles of Partnership (Exhibit 1) and a Dissolution Agreement (Exhibit 2).

DISPOSITION IN LOWER COURT

After a trial without a jury the court ordered that the books of the partners be adjusted to provide, among other things, that the amounts plaintiff advanced to the partnership subsequent to December 3, 1958 (\$29,645.39 of approximately \$150,000.00 paid in by him) should be repaid with interest; but that the balance, subject to minor adjustments, be distributed 40% to plaintiff, 40% to defendant Terry R. West, and 20% to defendant Flora E. West.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment of the trial court and remand of the case to the District Court of Salt Lake County for entry of a decree directing the court-appointed receiver to pay to the plaintiff the sums provided in the judgment of the court dated February 27, 1963; to return to the plaintiff, subject to the minor adjustments agreed to by plaintiff, all sums paid into the partnership, with interest, to the extent that assets are available; and to divide the surplus, if any, on the basis of 40% to plaintiff, 40% to defendant Terry R. West and 20% to defendant Flora E. West. The desired form of decree is set out in Paragraph 12 of plaintiff's motion to amend (R. 75-79).

In the alternative, the plaintiff asks that the case be remanded for a new trial.

STATEMENT OF FACTS

This is the second appeal. The District Court originally had entered a summary judgment to the effect that all partnership capital and assets remaining after payment of non-partner creditors, were to be distributed 40% to plaintiff, 40% to defendant Terry R. West, and 20% to defendant Flora E. West. Appeal of that judgment was before this court as Case No. 9870 and is reported as *West v. West, et al.*, 15 Utah 2d 87, 387 P.2d 686 (1964). This court reversed, and remanded the case for trial, directing the court to "take evidence and make findings of fact as to what the intent of the parties was in executing" the Articles of Partnership and a subsequent dissolution agreement. In its opinion this court pointed out that it would be proper to "consider the background and circumstances, including the relationship of the parties, the purpose for which the various documents were made, and principles of equity and justice relating thereto."

A trial was held, and the parties offered testimony and exhibits relating to the circumstances leading up to the execution of the partnership articles, subsequent conduct of the parties, and negotiations and transactions aimed at dissolution of the partnership. Produced as witnesses were Rulon R. West; Paul S. Roberts, the attorney who drew the partnership articles; defendant Terry R. West; two daughters of Rulon R. West and Flora E. West; two accountants, Kenneth A. Elwood and Paul D. Tanner; and a former attorney of Terry

R. West, E. L. Schoenhals. Portions of the depositions of Flora E. West, and another West daughter, Ruth Francis, were heard.

The trial court entered a "Minute Entry of Decision" dated April 21, 1964 (R. 59-60), which set forth the "meaning" of the articles of partnership of October 15, 1957 (Exhibit 1); in it the trial court found that adjustment should be made to the books because of net profits and losses in various years; that the contributions made by Rulon R. West after December 3, 1958, were not contributed for "capital credit", and that they, like salary items, unpaid at the time due to Terry R. West and contributions of Flora E. West should have been kept separate, credited to a special account payable, and returned to the respective partners with interest. Substantially all of the remaining assets were to be distributed 40% to Rulon R. West, 40% to Terry R. West and 20% to Flora E. West. Thereafter findings of fact and conclusions of law were prepared by defendants' counsel and were signed by the court.

In this appeal the plaintiff challenges the sufficiency of the findings of fact, contending that they are manifestly erroneous. Because of the nexus between the testimony and findings, summaries of relevant testimony and exhibits will be set out in the argument, particularly that part challenging the validity of the findings of fact. Other facts are set out in this court's prior opinion.

ARGUMENT

I

THE COURT'S FINDINGS OF FACT AS TO THE INTENTIONS OF THE PARTIES IN THE ARTICLES OF PARTNERSHIP AND DISSOLUTION AGREEMENT WERE MANIFESTLY ERRONEOUS.

The findings of fact (R. 64-72) are difficult to analyze, because the court failed to find with respect to "actual intent," because the findings are repugnant to the Minute Entry of Decision, because they were drawn to take advantage of every conceivable theory supporting defendants' myriad positions, and because the findings apparently were drawn with one eye toward a future dispute with state and federal taxing authorities. They did little more than restate the defendants' contentions as to the "meaning" of the Articles of Partnership. Finding No. 2 (R. 65), for example, is that the "intent of the parties in said Articles of Partnership was that the initial contributions made by the plaintiff would be contributions to capital," which intent "was expressed in the Articles of Partnership in paragraph 3(a)." The effect of such a finding is to ignore the parties' actual intentions and overrule the prior decision of this court that the articles are ambiguous.

This objection is more than technical; upon the evidence presented, the only reasonable finding that could have been made with respect to "intention" was

either (1) that Rulon intended to have his capital contributions returned to him and the other parties knew this or should have known it; or (2) all parties so intended, or (3) the evidence fails to establish actual intention of one or more of the parties.

The following summary of trial evidence demonstrates that the findings of intent are not supported by sufficient evidence and are manifestly erroneous.

Paul S. Roberts

Mr. Paul S. Roberts, the lawyer who drew the original Articles of Partnership in 1957, had represented the sellers in their sale of the motel property, and met Rulon while assisting in the transaction. Rulon asked Mr. Roberts to prepare Articles of Partnership, telling him that he (Rulon) ought to have 5% interest on the money he put in the partnership, "about what he could get if he invested it someplace else" (R. 94). When Mr. Roberts inquired as to the "interests" of the partners, they agreed to make it 40% for Rulon, 40% for Terry, and 20% for Flora, but the discussion was in general terms. Return of capital was not discussed (R. 94-95). Mr. Roberts met with Rulon on only two or three occasions, and there was never a discussion with him about return of capital, the meaning of gross profits, or about any "gift."

Contract provisions for dissolution and distribution of assets were taken from other agreements and form

books, had not been discussed with Rulon, and were put in the agreement by Mr. Roberts (R. 98). He was not instructed to make distribution in any other proportion; and he drew the agreement to provide that the distribution would be made in the same proportion as the profits would be distributed, since he regarded this as usual practice (R. 99). He did not discuss paragraph 12 with Rulon West (R. 99), and the material in that paragraph came from his standard contracts (R. 100). He didn't read the clauses to Mr. West and he didn't talk to him about the phrase "including loss of capital" in paragraph 6 (R. 100). At the time of preparation of the agreement the drawing account was discussed between Rulon and Terry (R. 103), and it was agreed that the drawing account was to be \$500.00 per month "provided that there was enough profits to pay that" (R. 104). He did not discuss with Rulon the provisions in paragraph 15 relating to dissolution and distribution of assets. All he did was draw the contract and submit it to the partners.

Rulon R. West

In October 1957 Rulon and Flora, his wife, were going on a trip. At that time Rulon was purchasing the motel property with the idea of going into a partnership with Terry and he suggested that a written partnership agreement be drawn up (R. 148). Rulon told Terry they would share 50-50 (R. 150), Rulon would get 5% on his money as interest, his capital would be repaid, and Terry's equity in the partnership would

have to come out of the profits. Terry asked that Flora be brought into the partnership (R. 151).

Rulon told Mr. Roberts that 5% would have to be paid to him on his money, and that Terry would be permitted to buy an interest in the partnership with return to profits (R. 152). Rulon left for Hawaii shortly after execution of the partnership agreement, and while he was in Hawaii Terry made his first request for additional money. Rulon did not send him money but gave him some immediately upon his return (R. 153). At this time repayment of the money was not discussed (R. 154). Later at the trailer court Rulon requested payment of some interest (R. 155).

On December 3, 1958, Rulon wrote a letter to Terry (Exhibit 9) enclosing for signature 27 promissory notes for the checks theretofore made out in behalf of the partnership, totaling \$124,823.43 (R. 156). On December 10, 1959, Rulon wrote a second letter to Terry asking for execution of notes (R. 157, Exhibit 10).

Throughout, Rulon believed that the money advanced to the partnership belonged to him, and that Terry and Flora would get their interest from profits (R. 161-162). He was expecting 5% interest on his money. He and Terry had agreed upon this and he told Mr. Roberts to put it in the agreement. He didn't know whether to call the money he paid in "investment," "contribution," or "loan" (R. 163). He didn't know how the amounts were credited (R. 168).

Terry R. West

About three years prior to the execution of the partnership agreement Rulon West had indicated interest in owning a motel (R. 106). About a year before execution of the Articles, Rulon had had a nervous breakdown (R. 113). Before execution of the partnership agreement there had been a meeting between Rulon and Terry, alone, at a Chinese cafe in Murray. Rulon said that any further sums he contributed would be credited to Rulon's capital account, and Terry was agreeable to this because "it was his money anyway" (R. 110). In his initial testimony, Terry had difficulty in answering whether repayment of capital was discussed, but finally said it had been, and that Rulon said in terms, that "the capital I put in will not need to be repaid" (R. 111). But his subsequent testimony shows this is but little more than an audacious conclusion from statements that were non-specific.

"He told me of course, that he was getting 65 years old; that he was considerably — conservatively figured — worth half a million dollars, and that he and his attorneys — he didn't say who — he and his attorneys had had — discussed his other plan, and that he would like to have, in the partnership agreement, a statement that where, upon his death, that, automatically, I would be distributed part of his capital; and I told him, 'I wasn't so worried about what would happen upon your death as how worried I am as, after I changed my future plans in accounting and engineering, if I come out here, and, for one reason or another, this thing is a flop.' He

says, 'This is no problem because we can have another arrangement in the partnership agreement, whereby, upon a dissolution, you will be protected there, too.'

"Q. Is that the extent of his undertaking at that time?"

"A. I wouldn't say it was word for word, but this was about what was said between myself and my father, yes."

"Q. That is what you rely on that as separate oral understanding as the basis for the transfer on the books?"

*"A. I rely that, upon why the provision was placed into the partnership, paragraph 12, which carries down * * * Indirectly, yes; I relied upon that." (R. 132-133).*

Later Terry testified to substantially the same thing again:

"Dad told me that he was getting toward 65 or 70 years old — along in years. I don't know the exact age, he used the words, 'getting along in years.' He has been doing some estate banking, and that he thought he should have provision in that partnership whereby upon his death there would be an automatic distribution to me of part of his capital contribution."

"I told him, as well as I can remember, maybe not word-for-word, that I was not so worried about what would happen if he died, as I was not expecting him to drop dead, but I was worried what would happen after I quit school, and changed my future plans, and when out to Mur-

ray in a partnership, if for one reason or another, it went belly-up, and was dissolved.

“He said, ‘this was no problem. We can have provisions in the partnership that will take care of this also.’

“Q. *That is the conversation upon which you rely, as speaking that intent.*

“A. *That intent for drawing the original partnership, yes.*

“Q. As I understand, when the original partnership articles were drawn, Mr. Wunderli (should be Mr. Roberts), also your father, had never said anything to you to indicate he did not intend to get his money out.

“A. We never discussed it.

“Q. Never came up, or been a statement to you of that kind, in that three-year period?

“A. No sir.” (R. 320.) (Emphasis added.)

During the discussion of the partnership agreement Rulon stated that he wanted 5% back before distribution of any profit on a 40-40-20 basis (R. 112). Return of capital to Rulon, or to any of the partners, was never discussed with either Mr. Roberts, who drew the agreement, or with Flora, the third partner (R. 113). At the time of signing the articles, Terry went out of the room with Flora and explained the benefits of the contract to her, but he did not tell her she had a right to share in Rulon’s capital (R. 115).

Terry had a degree in accounting, and he managed the partnership and kept all the books (R. 115). When

Terry needed money for the partnership business he asked for it (R. 116), but he was careful never to ask for money for operations. He says that his father never mentioned notes (R. 117). When Terry obtained money from Flora, on the other hand, it was by way of loans which were paid back at 8 per cent interest (R. 119). Terry, in setting up the books, understood that capital accounts were meant to reflect "the monetary interest a partner has in the business as of that day" (R. 120). Prior to dissolution of the partnership Terry didn't regard himself as having any substantial monetary interest (R. 120) except for about \$1,000.00 paid in and a credit he had made to his own capital account (R. 121). It was his practice to credit his salary to capital if there were not enough profits to pay it, and he did this without prior consultation with his partners (R. 121).

As of the date the notice of dissolution was sent, March 21, 1960, substantially all sums paid by Rulon West to the partnership had been credited to Rulon's capital account (R. 128), and it was not until June 15, 1960, that Terry made an entry transferring 60% to him and Flora (R. 129). He refused to elect any particular written or oral agreement as the basis for his claimed right, taking the position that it came from numerous conversations and writings over a period of three or four years (R. 132-133).

Flora E. West

Defendant Flora E. West did not appear at the trial, and portions of her deposition were read into the record. She testified that the first thing she knew about the partnership was when she was taken to Mr. Roberts' office (R. 174-176). She signed the agreement after reading it over and over (R. 174-175). She didn't discuss the provisions with Mr. Roberts, and there had been no prior discussion of the terms with anyone. Her understanding that she was to receive 20% of Rulon's capital was based solely upon her interpretation of the agreement (R. 180-181), because "where would I get it?" (R. 181). No one obtained permission from her to make additional investments in the partnership (R. 181). She hadn't thought much about distribution of assets, but only about losses (R. 182). Rulon had never told her that she and Terry were to get 60% of his capital. He didn't talk to her about the partnership (R. 183). She didn't believe Rulon "gave contributions," but that he "put that investment in there" (R. 179). Rulon told her he intended to put "all my income from now on out" into the venture, and didn't hope to see a dime of it while he was living (R. 180).

Donna Holmes

Donna Holmes is a daughter of Rulon and Flora West. During the winter of 1959 Flora told her Rulon wasn't losing anything in the motel venture because his money was drawing interest, which was to come out

before any profits (R. 184-185). At a family meeting in February, 1960, attended by Terry, Rulon and some of Rulon's daughters, the daughters were told that it was to be understood that 'the motel was Dad's', that the profit and loss was being divided 40-40-20, and that Terry was "building the estate" of Rulon. Terry said he had \$3,000.00 in the venture, to which Rulon stated that he thought it was only \$1,500.00 (R. 186).

Betty Bills

Betty Bills, another daughter, was also at the family meeting of February, 1960. At this meeting Terry said all he had was a job and a right to 40% of the profit and loss; and that he was building his Dad's estate (R. 189).

Ruth Francis

Ruth Francis, another daughter (called by defendants) testified that Rulon told her in April, 1960, that he and Terry had reached a settlement, and that Rulon had *then* given Terry part of his inheritance (R. 209-210), but that Terry was to buy Rulon out (R. 257-258).

Le Roy E. Holmes

Le Roy E. Holmes, a son-in-law of Rulon and Flora, testified that during the winter of 1959, Flora West had told him that all the money Rulon put into the partnership would be returned to him before she would receive anything substantial (R. 251).

The testimony of all three partners and the scrivener, establishes that there was never any discussion with respect to Rulon's giving up the right to return of capital. Terry's entire case depends upon conversion of a general statement that he could be "protected" into an agreement that he would receive 40% of Rulon's capital regardless of whenever, however, and in what amounts the contributions might thereafter be made.

The evidence does not support the view that Terry and Flora believed what they now claim to have believed. The conduct of all three partners supports the construction claimed by Rulon.

Take Rulon's conduct when he talked to Mr. Roberts. He told him that he wanted 5% return on his money, which was about what he could get if he "invested" it someplace else. Thereafter, on December 3, 1958 (as the trial court must have believed) Rulon wrote to Terry that he wanted notes made up for amounts previously advanced at Terry's request. In a subsequent transaction with the First Security Bank aimed at obtaining some additional financing, Terry and Rulon both being present, Rulon submitted a financial statement showing the motel, El Rancho Enterprises, to be *his* asset, of a value of \$135,000.00 (R. 251-252; Exhibit 13). During this same time, which was subsequent to the letter of December 3, 1958, the partnership agreement was re-executed with the distribution of assets provision unchanged (R. 303).

Terry's conduct, on the other hand, is inconsistent

with a present claim of ownership. He kept the books of the partnership in which amounts contributed to capital by him and his partners was credited to their respective capital accounts, with knowledge that capital accounts reflect the "monetary interests" of the various partners (R. 120). His own financial statement for the First Security Bank (Exhibit 12) did not show as an asset any interest in El Rancho Enterprises. He continually asked his father for money for use in the partnership (R. 116) but between its inception in 1957 and April 2, 1960, neither he nor Rulon ever mentioned that the capital paid in by Rulon was not to be returned (R. 320). Notwithstanding dissolution of the partnership on about March 21, 1960, the event upon which Terry says his interest was to vest, he took no steps to make a transfer on the books of the partnership until June 15, 1960, after Rulon had left the country (R. 184). Terry admitted making the statements at a family meeting as related by his sisters, but explained that he was only telling them "what I considered as of that date my position in the El Rancho Enterprises was" (R. 278). He admits that he told his sisters that he had \$2,000.00 to \$3,000.00 and Rulon had \$140,000.00 in the capital accounts. He also testified at one point in the trial that he did recall telling his sisters that all he had at El Rancho "was a job and 40% interest in the profits" which was true at the time, that is, in February 1960 (R. 135-136). After a night's sleep, he changed his testimony (R. 278).

Flora's only basis for an understanding about the

meaning of the articles when she signed them was the articles themselves. Her conduct thereafter indicates that she did not believe that she had a right, present or contingent, to receive Rulon's capital or any part of it. It was her understanding that the "gift" made by Rulon to Terry was made at Murray during the meeting of April 2, 1960—not that she had always had a right to a share of Rulon's capital account (R. 176).

The 1960 talk between the parties about gifts, sharing capital accounts, and the desire of Rulon to make some provision for distribution of his estate, all occurred at about the time the parties were attempting to settle their differences. Almost three years had passed since the articles of partnership were entered into, and although those negotiations might have a bearing upon the interpretation and effect of the agreements of March and April, 1960, their bearing upon what the parties meant in September and October, 1957, is not discernable—except insofar as they seemed to be negotiating about something *Rulon* owned.

Moreover, Terry's testimony was sprinkled with half truths, inconsistencies and revisions throughout. The statements he made at the family meeting are clearly inconsistent with the position he takes now. In his first-day testimony Terry swore that Rulon "in terms" had said his capital would not have to be returned. In later testimony he twice admits the scope of the discussion to have been that he could be "protected" in event of dissolution. At the trial he swore that during

discussions of the dissolution agreement he told Earl Wunderli that there were "no liabilities to partners"; whereas in his deposition, in response to a direct question about such a discussion he had said only that "they had access to the books." Confronted with the inconsistency, he said, with reference to such a discussion, "I didn't say one way or the other, did I?" At the trial he swore that the supplemental "gift" agreement was meant to have operative effect, but on his deposition he had sworn that it was obtained only for tax purposes. When confronted with his deposition he swore that the "main reason" was for tax purposes (R. 308-309).

As this court indicated in *Wood v. Wood et al.*, 87 Utah 394, 49 P.2d 416, 422, a court may in evaluating the testimony of the parties, consider "natural behavior".

It is not natural behavior for a person to demand 5% interest on money while giving up return of the principal. It is not natural for persons claiming substantial ownership of a partnership to conduct their affairs as if they had no ownership. It is not natural behavior for a son, when queried by his sisters about being favored by his parent, to say all he has is a job and an interest in 40% of the profits, when he in fact claims an absolute right to receive 40% of his father's capital.

Under the provisions of 48-1-15 Utah Code Annotated 1953, contributions of partners are to be returned to them, "subject to any agreement." It is submitted

that a partner who wants to avoid the effects of 48-1-15 has the burden of showing an agreement that capital shall not be returned. In the articles in this case, it may be arguable that the \$48,500.00 was being “donated” to the partnership—and such a donation would be consistent with Terry’s idea that he could be protected. But subsequent contributions, according to paragraph 3(b), are to be credited to the capital account of the contributing partner. On the previous appeal this court said that the contract was ambiguous with respect to return of capital. The defendants have failed to produce evidence of any circumstances or actual intent which would show an agreement specific enough to overcome the effect of 48-1-15.

Insofar as the findings fail to state what the actual intent was, they fail to follow this court’s prior directive; and if they are construed as finding an actual intent that Rulon’s subsequent contributions need not be returned, they lack evidential support, and the judgment should be reversed.

II

THE COURT’S FINDING AND CONCLUSION THAT THE DISSOLUTION AGREEMENT OF MARCH 31, 1960, WAS VALID AND BINDING WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ERRONEOUS AS A MATTER OF LAW.

In its decision (R. 59-60) the trial court found that the articles were "binding upon the parties" and that the "intention of the parties to the articles as to the meaning of the articles" required adjustments as set out in the decision. There was no reference to the dissolution agreement of March 31, 1960 (Exhibit 2). Between the dates of the minute entry and preparation of the findings and conclusions the dissolution agreement became an operative document.

In Finding of Fact No. 8 (R. 70) the court found that the parties in executing the dissolution agreement of March 31, 1960, did not intend that "liabilities to partners" should include the capital accounts of the parties, nor did they intend that the phrase "liabilities of the partnership" should include capital accounts of the parties. There was no finding as to what they *did* intend.

And in Conclusions of Law No. 1 (R. 71) the court held that all the parties were "bound" by the dissolution agreement.

The court refused to find that the "supplemental agreement" (Exhibit 16) (found by this court insufficient to constitute a gift) had operative effect, taking the position that it was unenforceable for lack of consideration. The express negative finding is not included in the formal findings of fact, but may be implicit in the fact that it is not mentioned in Conclusion of Law No. 1.

The enforceability of the dissolution agreement should be considered in the light of paragraph 16 of the Articles of Partnership:

“Any decisions and major arrangements required or necessary in the operation of said business which are not in the ordinary course of operations shall only be made and effected by and with the unanimous agreement and consent of all the partners.”

The dissolution agreement is not “in the ordinary course of operations” of the partnership, since it provides for dissolution, the selling of all partnership property, and distribution of assets. It also in paragraph 2 contains provisions as to management of the business pending winding up, and for participation of an outside person, Le Roy E. Holmes, as sometime agent of Rulon R. West.

Although the parties are in conflict as to the meaning of the dissolution agreement, there is no substantial dispute as to the manner in which, and the times at which, it was signed.

Terry testified that the dissolution agreement was a result of negotiations after a dispute (R. 122). The agreement hadn't been discussed with Flora E. West, and she didn't see it or sign it until long after it was signed by Rulon and Terry, at a time when Terry and Rulon had found that they could not resolve their differences (R. 124). E. L. Schoenhals, who assisted in

negotiation of the dissolution agreement, swore that he had not discussed the matter with Flora (R. 340).

In written interrogatories served upon the defendant Flora West on June 14, 1961, and introduced at the trial, the following question and answer are set out:

“Q. If you signed, on what date or dates did you sign agreements (bearing date of April 2, 1960) relating to the dissolution of the partnership and distribution of assets? Where? Who was present?

“A. Not sure, probably January, 1961, probably at my home in the presence of Terry West” (R. 254).

It is thus clear that the dissolution agreement was negotiated between Terry West and Rulon West without the concurrence or consent of one of the partners. The agreement affected her rights, and could not bind her unless she agreed to it. Inasmuch as the agreement is not necessarily “beneficial” to her (if she really believed herself already entitled to 20% of Rulon’s capital), her assent cannot be presumed. There is no evidence that she ever agreed orally to the terms of the dissolution agreement before she signed it.

By the time she signed, any offer by Rulon to her to contract on such a basis would have expired. Not only had a reasonable time elapsed, but circumstances must have revoked the offer. When Flora signed it in January, 1961, in the presence of Terry West, a dispute

had developed between him and his father that could not be resolved. The records of this case show that the complaint was filed by Rulon West with the clerk of the District Court on January 6, 1961, and it is fair to infer that the agreement was not executed by Flora West until after this action had been brought, and that it was signed for the purpose of attempting to obtain some advantage in the action. If Terry and Flora rely upon the dissolution agreement, it is their obligation to show that the elements of a valid contract, viz., offer, acceptance, and consideration; and the acceptance of the offer must have been made while the offer was still open.

The evidence establishes that the parties contemplated a written dissolution agreement. The situation with respect to which they were contracting was one in which a writing would be desired. The contract had been drawn by the attorneys for Terry and Rulon and set out a detailed plan of dissolution. In light of the parties' prior disputes and problems, the only reasonable inference is that none was to be bound until the dissolution agreement had been executed by all. As said in *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797:

“When it is a part of the understanding between the parties that the terms of their compact are to be reduced to writing, and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding obligation on either.”

See also, 1 *Corbin on Contracts*, §30, p. 104 et seq.;

1 *Williston on Contracts* (3rd Ed.) §28A; *Hopkins v. Paradise Heights Fruit Growers' Assn.*, 58 Mont. 404, 193 Pac. 389.

There was no finding with respect to intention to be bound; but there is no evidence that Flora assented to the dissolution agreement at or about the time it was signed by Terry and Rulon. This being true, the dissolution agreement as signed by two of the partners is, with respect to the third, only an offer to contract—which could be accepted prior to its revocation, rejection, or expiration.

The offer was made on or about April 2, 1960. There is no evidence of any acceptance by (indeed, any communication to) Flora before January, 1961. If no time is specified in the offer, it terminates after a reasonable time; and what is reasonable depends in part upon “circumstances of the case which the offeree at the time of his acceptance either knows or has reason to know.” *Restatement of Contracts*, §40; 1 *Corbin on Contracts*, §36; 1 *Williston on Contracts* (3rd Ed.) §54.

Flora no longer had power to “accept” the offer by signing Terry’s carbon copy of the Dissolution Agreement (Exhibit 2). Nine months had passed, and Rulon had brought an action against Terry and Flora for dissolution and winding up of partnership affairs. She must have known that all bets were off.

The Dissolution Agreement purports to be an executory contract, and the provisions for distribution

of assets to the various partners are conditional upon Terry West taking steps to operate the properties for the partners, sell the property and wind up partnership affairs. The obligation to wind up and sell, so that partnership property could be converted into a distributable assets, appears to be an essential part of the agreement.

The agreement was signed by Rulon West on March 31, 1960, and by Terry West, apparently a day or two later. Yet the voluntary winding up of the partnership affairs never occurred. As of January 6, 1961, when this action was initiated, the business was being operated by Terry much as before, and no sale of any substantial part of the partnership assets had been made. Moreover, the findings of fact of the special master, confirmed by the court (R. 34, 48), establish that beginning in late March, 1960, and until October 25, 1961, the defendants Terry West and Flora West used a portion of the partnership property for their own business; that they made a profit on it, and that Rulon had to have court assistance to obtain his rightful share.

Not only that, but Terry never did sell the partnership property and wind up partnership affairs. On October 25, 1961, the District Court, after a hearing, found that it was necessary to appoint a receiver to do so (R. 29-32). The order appointing the receiver was entered more than a year and a half after Rulon and Terry had signed the dissolution agreement.

Because of the defendants' nonperformance, there was a failure of consideration, and Rulon's obligations under the Dissolution Agreement were excused. *Restatement of Contracts*, §274; 3A *Corbin on Contracts*, §658; 6 *Williston on Contracts* (3rd Ed.), §814.

III

THE COURT'S FINDING THAT AMOUNTS AWARDED TO DEFENDANTS WERE "BY WAY OF GIFT" WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ERRONEOUS AS A MATTER OF LAW.

*** a promise, unsupported by a valid consideration, to make a gift does not constitute a gift; nor can such a promise be enforced, even though the promise be made in writing, and the writing delivered to and accepted by the donee.

"A gift inter vivos to be valid must take effect at once, and there must be nothing to be done essential to the validity; for if it is to take effect in the future, there is no gift, but only a promise to give. So a gift to take effect at the death of the donor is void ***" *Thornton, Gifts and Advancements* (1893), §§ 74 and 76.

Until the findings were entered in the instant case, the above statement from a venerated writer had been almost unanimously accepted for decades as a correct statement of the law. If Thornton is right, the finding of "gift" must be set aside, even on the testimony of the defendants themselves.

In the following excerpt Terry West is being questioned by Rulon's counsel, using Terry's prior deposition:

“ ‘Q. Now I show you Exhibit 3 (the Supplemental Agreement; Exhibit 16 in the present appeal), Mr. West. You can read that over. It is not signed, as you will see, and it is not dated; however, is that substantially the agreement you were telling us about? *** It was your understanding, was it, that this agreement was part of this Exhibit 2?’ (Exhibit 2 being the Dissolution Agreement)

‘A. Yes. ***

‘Q. (reading from deposition) ‘Why were you so concerned about this gift business; you already owned it, didn’t you? *** Your answer then was this: ‘A. The gift business, as far as this Exhibit No. 3, was strictly to prevent Uncle Sam from coming in for any taxes. As far as the gift, it was already made and signed by my father with Exhibit No. 2 and the original partnership.’

“A. Yes.

“Q. You would like to change your answer to my next question, would you, earlier in the examination today?

“A. What was the question?

“Q. I said to you the sole purpose of this Supplemental Agreement was to meet an anticipated tax liability?

“A. I said no, partially. I couldn’t answer exactly one way or the other to that question. The biggest reason I had that drawn was for tax purposes, but that was not the only reason.

“Q. What was the other reason?

“A. So we knew exactly what was happening out there, and supported the other three documents.

“Q. Now going to our examination at that time, I asked you this question, do you recall: (page 40, line 22) ‘Q. You figured that a gift was made by your father at the time he signed the original partnership?’ *** Your answer to that was: ‘A. No. *The gift was promised if the business was ever sold* at the time of the original partnership. And then when he made these other documents, he verified that intent. And as far as this, Exhibit No. 3 was signed just strictly for income tax purposes.’ ***

“Q. The next question was: ‘Q. *So your understanding at the time of the partnership agreement itself was that there was not any gift then, but there (page 41) was a promise to make a gift?*’

“A. Yes.

“Q. And your answer: ‘A. If the partnership was ever sold.’

“A. Yes.

“Q. And is that still your testimony?

“A. *That is still my testimony*” (R. 307-309). (Emphasis added.)

Flora’s testimony at the trial is more skimpy than Terry’s, but of the same purport. She stated (R. 180) that whether she received 20% depended upon the sale of the motel. This is consistent with the averment in

her answer to the complaint, filed early in the case. Her third defense (R. 24) is as follows:

“On October 15, 1957, by the aforesaid partnership agreement, plaintiff made a gift to this defendant of 20% of all of the contributions made to said partnership by him, whether at its inception or thereafter and whether by way of capital contributions or by way of advances to the partnership, and this defendant in acceptance of said gift materially altered and changed her position and plaintiff is estopped and should not now be heard to say that said gift is or can be withdrawn, altered or modified.” (Emphasis added.)

Her position as well as Terry's, then, is that Rulon made a gift not only of \$48,500.00, which he contributed to the partnership at the time the articles of partnership were drawn, but at that same time he made or promised a gift of all future contributions, no matter how much they might be.

The theory of the trial court appeared to be that the articles of October 15, 1957, constituted a gift of the original contribution, and a promise to make a gift of future contribution. The court seemed to think an intention to make a gift was expressed in the partnership articles, from which he could presume a like intent every time Terry requested and obtained money from Rulon, regardless of the circumstances under which the request was made.

There is no basis for such a presumption—particularly in light of the evidence of “intent” outlined above,

and even if there were, the other essential elements of an *inter vivos* gift have not been proved. The sums paid in by Rulon were not paid to the partners, but were placed in Rulon's capital account, and continued to be subject to some control by Rulon. There was no assignment of a partnership interest as such. There was no delivery of property to the claimed donees at any time. The interest held by the partnership is not held by the partners as such. Under the Utah Partnership Act, a partner retains an interest in partnership property as a tenant in partnership, which interest is completely inconsistent with a completed *inter vivos* gift of property. As said in *Wood v. Wood et al.*, 87 Utah 394, 49 P.2d 416, 418:

“Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect, and a gift of property to take effect at some future date, or at the death of the donor is void. Such a transaction amounts only to a promise to make a gift in the future, and, being without consideration, cannot be enforced.”

A case nearly in point is *Meyer v. Meyer*, 106 Miss. 638, 64 So. 420, in which three sons claimed that their father had given them a half interest in his share of a partnership, by way of gift. The court held that the father had not made a gift of the share, but only an ineffectual promise to make a gift. In commenting on the claim of the sons that a gift had been made, the court said:

“These sons of Jacob Meyer were each employes of the firm receiving salaries as such, and this credit to them of a portion of their father’s interest in the profits of the business was not as compensation for any services rendered. These sons seem to have drawn each year out of the business something more than the salaries paid them though the amounts drawn in excess of their salaries constituted only a small portion of the profits credited to them. It does not appear that they were authorized to withdraw the profits credited to them, without the consent of the members of the firm, nor does it appear that either member had authority to withdraw profits therefrom without the consent of the other. It is hardly conceivable that the members of this firm intended that their sons and daughters should withdraw therefrom the profits credited to them, for it is perfectly obvious that had they so done the business would have been seriously crippled; and, moreover, the amounts credited to them were merely estimated and not ascertained profits.

“These facts evidenced nothing more than a promise on the part of Meyer to give to his sons a portion of his interest in the profits of the business, which promise he never complied with by withdrawing these profits from the business and delivering them to his sons; consequently they never became the owners thereof and their claim thereto should not have been allowed.”

The court held the gift ineffectual, notwithstanding amounts had been credited to the sons—at the direction of the father—on the partnership books.

The essential elements of gift include: (1) com-

petent donor, (2) freedom of will of the donor, (3) completion of the gift with nothing left undone, (4) delivery of property by the donor and acceptance by the donee, and (5) the gift must go into immediate and absolute effect. Applying these requirements in *Goggins et al., v. Herndon*, 73 Idaho 169, 249 P.2d 203, the Idaho Supreme Court struck down a claimed gift, notwithstanding a document had been signed by the claimed donor to the effect that the proceeds of any sale of mining claims were to be "divided and shared equally between the above named parties." The court held that the agreement lacked three of the elements: That it be complete and nothing left undone, that it be delivered by the donee and accepted by the donee, and that it go into immediate and absolute effect. In the present case the claimed donees both admit that they were to have a gift only if the business was sold.

The elements of gift must all be proved by clear and convincing evidence. *Lovett v. The Continental Bank and Trust Company*, 4 Utah 2d 76, 286 P.2d 1065; and "unless the intention to make a gift is expressed in writing or is clearly inferrable from the acts or declarations of the alleged donor, there must always be grave doubt" whether the transaction shall be considered a gift. *Holman v. Deseret Savings Bank*, 41 Utah 340, 124 Pac. 765.

Courts have sometimes found a presumption of gift where property has been delivered by a parent to a child, but there is no basis for such a finding where

the property is delivered to the child in his capacity as the manager of a partnership business, for use in that business. It makes a difference that Terry occupied a fiduciary position. As said by this court in *Sharp v. Sharp*, 54 Utah 262, 180 Pac. 580:

“The relation of partners as between themselves is a fiduciary one, that of trustee and cestui que trust.”

Or, as said in *Nelson v. Matsch*, 38 Utah 122, 110 Pac. 865:

“One of the fundamental principles of the law of partnership is that partners stand in a fiduciary relation to each other, and that it is the duty of each partner to observe the utmost good faith toward his co-partners in all dealings and transactions that come within the scope of the partnership business.”

Where such a fiduciary relationship exists there is a presumption that a transfer from a father to a son, in the context of a business relationship, is not a gift.

Ratliff v. Ratliff, 283 Ky. 418, 141 S.W. 2d 566, involved a claimed gift from father to son. The father had been a successful businessman. He loaned the son \$1,200.00 for which the son gave a note, which the father lost. The son and a witness testified that when they went to pay off the note to the father, the father gave the son a receipt signed by the father and refused to take the money, “which amounted to a gift inter vivos.” The court refused to recognize the receipt as delivery of a gift of a debt, saying:

“Gifts inter vivos are closely scrutinized by courts, especially where the donor and donee occupy confidential relations and it takes clear and convincing evidence to sustain them; *** The evidence in this record is neither clear nor convincing that William Ratcliffe made a gift to his son, Albert, of the balance due on this note by the alleged execution of the receipt of August 30, 1932, reciting \$1,200.00 was received from him ‘for note in full.’ There is nothing to connect the note sued on with the note mentioned in the receipt.”

A related case is *Gish v. St. Joseph Loan & Trust Co.*, 66 Ind. App. 500, 113 N.E. 394. There the defendant-appellant was “a practicing physician and a shrewd businessman of learning and ability * * * his father believed him to be honest, and relied upon and confided in him in the transaction of his business.” The son, acting as his father’s manager in relation to certain of his father’s property, obtained substantial amounts of property from his father. Before the father died, he discovered that his son had managed the affairs of his property in such a way that the son had obtained substantial property from the father. The father brought suit for the return of the property, but the son refused, relying upon certain notes and instruments which the father had signed. The court held that the transfers to the son were invalid, saying:

“The burden is on the one who holds such superior position to prove that he acted in perfect good faith, gave to the other party full and accurate information possessed by him, took no

advantage of his knowledge, or his influence over the other party, and that the transaction involved was fair, well understood, and voluntarily carried out by the person to whom he owed such duty. *** *'less positive and unequivocal proof is required to establish the delivery of a gift from parent to child than as between persons not so related, and in cases where there is no suggestion of fraud or undue influence very slight evidence will suffice; but that rule does not apply to a case where the child stands in a fiduciary relation to the parent, and has access to and control over his property.'* ***" (Emphasis added).

In *Baer v. Baer*, 109 Colo. 545, 128 P.2d 478, a transfer from the mother to her son, alleged to have been a gift, was held to be a loan. The son was his mother's advisor in regard to some of her business affairs. It was held that he had the burden of proving that the transfer was a gift, the presumption being it was not.

Terry's unconscionable behavior as a fiduciary consisted in asking his father for additional money for use in partnership business, without disclosing that he intended to claim part ownership of the moneys obtained. Rulon had a legal right to Terry's information—including his construction of the partnership articles. Cf. *Callister v. Callister*, 15 Utah 2d 380, 393 P.2d 477; see also, *Normand v. Normand*, 89 Vt. 77, 94 Atl. 172; *Nobles v. Hutton*, 7 Cal. App. 14, 93 Pac. 289; *Naeseth v. Hommedal*, 109 Minn. 153, 123 N.W. 287; *Barnard v. Gantz*, 140 N.Y. 249, 35 N.E. 430; *Morgan v. Owens*, 228 Ill. 598, 81 N.E. 1135; *Com-*

stock v. Comstock, 57 Barber (N.Y.) 458; *Weitz v. Moulden*, 109 Okl. 119, 234 Pac. 583; and *Thaw v. Thaw*, 27 F.2d 729, in which the U.S. Court of Appeals for the Second Circuit required of the fiduciary-donee “candor and communication,” and the “fairest and fullest explanation” to and with the persons so trusting.

Other cases dealing with the elements of gifts, including the requisite delivery, are *Johnson et al. v. Hilliard*, 113 Colo. 548, 160 P.2d 386; *In re Hall's Estate*, 154 Cal. 527, 98 Pac. 269; *Gardner v. Moore's Adm'r.*, 122 Va. 10, 94 S.E. 162; *Gammon Theological Seminary v. Robbins et al.*, 128 Ind. 85, 27 N.E. 341; *Banner Window Glass Co. v. Barriat et al.*, 85 W. Va. 750, 102 S.E. 726; *Steber v. Combs et al.*, 121 W. Va. 509, 5. S.E. 2d 420.

A gift of the initial \$48,500.00 paid into the partnership by Rulon West does not create as great a difficulty because there was a delivery of property to the partnership, and a writing relating to it, prior to the time the fiduciary relationship came into existence. But with respect to amounts of money subsequently advanced to the partnership, there is no evidence at all of any particular intent on the part of Rulon West at the time of each advance; moreover, the evidence is that Terry did not deal with his father with candor, or give him a full explanation when additional funds were requested.

IV

THE COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S MOTION TO AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.

The findings of fact as signed by the court violated the direction of this court on the prior appeal that it should take evidence and make findings as to the intent of the parties in executing the articles of partnership and the dissolution agreement. The findings also violated the dictates of Rule 52, Utah Rules of Civil Procedure, that the court shall find the facts specially. The judgment ignored the existing provisions of another judgment entered on February 27, 1963, and left it up to the receiver, or the court on the basis of a future motion, to determine the effect of the findings of fact, and the two judgments.

The manner in which the findings was drawn makes it impossible to determine the court's theory in ordering distribution in the way it did. It is impossible to tell whether the findings were based upon the "actual intent" of the parties, or a lack of evidence as to intent, or upon a construction of the partnership articles. His "findings of fact" are essentially conclusions as to the construction to be placed upon the partnership agreement.

The findings in this case are in such vague and general terms that they do not meet the requirements

previously laid down by this court. See *Gaddis Investment Co. v. Morrison*, 3 Utah 2d 43, 278 P.2d 284, to the effect that "the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial." In the present case there were material issues with respect to the actual intentions of the parties in executing the articles of partnership and the dissolution agreement; also, as to when, where and how a gift was made. The finding that the amounts being distributed to Terry and Flora were "by way of gift" is totally inadequate to apprise either the plaintiff or this court of the basis of the trial court's ruling.

In paragraph 3 of the plaintiff's motion to amend the findings of fact there is a challenge to the finding that Terry was entitled to salary that he was not able to take because of the unavailability of funds (R. 77). The finding allowing unpaid salary to Terry should have been vacated on the ground that the partnership agreement does not allow a credit if funds are not sufficient to pay the salary. Paragraph 5 of the Articles of Partnership contain the following provision:

"The said Terry R. West shall be the manager of the partnership business and shall be entitled to draw *up to but not exceeding the sum of \$500* per month for his services * * * " [Emphasis added.]

The only evidence relating to actual intent on this question is that of Paul S. Roberts, who drew the partnership articles. His testimony was that the draw-

ing account for Terry was to be \$500.00 "provided that there was enough profits to pay that" (R. 104).

The form of judgment should have been amended to make the provisions set out in paragraph 12 of the plaintiff's motion to amend, since only in a form such as that can the receiver make an accurate determination of the amounts of money to be paid to the various parties.

V

THE COURT ERRED IN AWARDING COSTS TO DEFENDANT.

The judgment (R. 74) provided that the defendants were to have their costs incurred in the action, which is out of harmony with the provisions of Rule 54(d), Utah Rules of Civil Procedure. It is submitted that in the instant case the plaintiff was the prevailing party in the action as a whole. It was an action for dissolution, winding up of partnership affairs, and distribution of the assets. The dissolution was ordered, the partnership was wound up at the instance and request of the plaintiff, the assets being sold by a receiver, and the assets distributed. Moreover, prior to the trial of this action the defendants had taken the position that the plaintiff was not entitled to return of any of the amounts he had contributed to the partnership, except only 40% of the remaining assets after the payment of non-partner creditors.

In pointing this out, we recognize that the action of the trial court is probably not prejudicial error, since a final judgment as to the manner of awarding cost is to abide the final determination of the cause. It is pointed out, however, so that this court can make a determination and a direction to the trial court with respect to costs.

As stated in the compiler's notes to Rule 54(d), "it is intended, however, that the court will follow the former practice, insofar as applicable in assessing costs"—that is the practice based upon the prior statute that costs would be awarded to the prevailing party as a matter of course. There is nothing in the record which would justify deviation from that course in this case.

VI

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE INCONSISTENT WITH THE COURT'S MINUTE ENTRY OF DECISION AND IN LARGE PART ARE NOT THE FINDINGS AND CONCLUSIONS OF THE COURT.

Although it is common practice for courts to have counsel prepare findings of fact, this case points up the problems that can be created when the trial court after having arrived at a basis for its decision, permits counsel to prepare findings of fact which are inconsistent with the trial court's original theory, and are drawn with an

eye to upholding the judgment at any cost, rather than preserving an accurate record of the basis of the trial court's judgment.

In this case the court in its minute entry of decision purported to be basing its findings upon a determination of the "meaning" of the articles of partnership—though it did not make a finding with respect to actual intent upon which the meaning was based. The findings of fact as prepared by counsel do not restrict themselves to the basis of the trial court's minute entry of decision but go off in all directions, finding the meaning of the articles of partnership, generally; that a gift was made somehow, sometime; the non-meaning of a dissolution agreement; and, generally, that the parties are "bound by" the dissolution agreement.

Although appellate courts have been reluctant to reverse decisions of trial courts because of the delegation to counsel of preparation of findings of fact, the practice has been criticized, and perhaps this is a proper case for the court to place some restrictions upon trial courts in this regard. The following statement by Judge J. Skelly Wright of the Court of Appeals of the District of Columbia was quoted with approval by the United States Supreme Court in *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 12 L. Ed. 12, 84 Sup. Ct. 1044:

"Who shall prepare the findings? Rule 52 says the court shall prepare the findings. 'The court shall find the facts specially and state separately its conclusions of law.' We all know

what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a non-compliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of lawsuit * * *

“When these findings get to the courts of appeal they won’t be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.”

See also *Welch Company of California v. Strolee of California, Inc.*, 290 F.2d 509, in which the findings of the trial court were set aside because a United States Court of Appeals was wholly unable to determine how the trial court reached its conclusions; and *United States v. Forness*, 125 F.2d 928, in which the late Judge Jerome Frank set out cogent reasons for having a trial judge prepare his own findings.

CONCLUSION

The Findings of Fact and Conclusions of Law as prepared by counsel and signed by the court are such a hodge-podge of conclusions, and designed for so many different purposes, that it is impossible to determine the basis for the trial court’s judgment. The trial court

disregarded the direction of this court to make findings of fact with respect to the actual intent of the parties in executing the Articles of Partnership and the Dissolution Agreement. The end result was a court-imposed compromise based upon a theory not advanced by any party, but moulded to almost-fit defendants' theory.

But remand of the case for preparation of findings by the trial court, unless he is instructed to prepare the findings himself on the basis of the manner in which he was impressed by the evidence, might serve no purpose since it could result only in additional findings being prepared by counsel to suit his theory and uphold the judgment. Upon examining the evidence, this court can decide, here and now, that the plaintiff is entitled to a decree which in effect returns to him the capital contributions made to the partnership, (except perhaps the initial \$48,500.00), prior to distribution of any assets to the defendants.

The defendants' continued insistence that they were promised a gift cannot now be construed as consideration. Consideration for a contract must be bargained for as such, and defendants' attitude toward the transaction was that there wasn't any bargain — only the promise of a gift.

The gifts, even if promised, never were consummated, and it was ultimately necessary for the plaintiff to obtain appointment of receiver for the purpose of selling the property and distributing the assets.

Finally, it is clear that there was no intention on the part of Rulon to make a gift to Terry and Flora—certainly no expressed intention on his part to donate 40% of all the contributions he might thereafter make at the specific request of Terry. Flora had no understanding of the transaction at all, except as gleaned from the partnership articles and related to her by Terry. Even Terry did not testify that Rulon promised him 40% of such capital as he might thereafter put into the partnership. He admits that the capital put in by Rulon was to be credited to his capital account; and the claim that Terry was entitled to share in Rulon's capital comes entirely from a self-serving assumption based on a statement he says his father made that the partnership articles might be so drawn that Terry could be "protected" in event of dissolution.

The proof falls far short of that necessary to establish an agreement that Rulon's capital would not be returned to him. Therefore the provisions of 48-1-15 Utah Code Annotated 1953 must be applied and capital should be repaid to the partners as provided in the Utah Partnership Act.

Respectfully submitted,

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