No. 44289-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Domestic Partnership of:

JEAN M. WALSH,

Appellant/Cross-Respondent,

and

KATHRYN L. REYNOLDS,

Respondent/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE STEPHANIE AREND

REPLY BRIEF OF CROSS-APPELLANT

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I. INTRODUCTION

The parties lived together as self-described "life partners" for 22 years – raising three children and registering as domestic partners. The trial court properly found as a matter of fact that the parties were in a committed intimate relationship prior to their registration as domestic partners in Washington, but erred in concluding as a matter of law that it could not use the common law equitable doctrines that would have governed the division of the property of a heterosexual couple in a committed intimate relationship who later married because it would somehow "retroactively" apply domestic partnership laws.

The trial court's decision is neither just nor equitable, leaving Reynolds with very little from the $2 million-plus estate accumulated during her relationship with Walsh. The trial court's decision wrongly undermines the Legislature's intent in enacting the Domestic Partnership Act to both ensure "equal treatment" between registered domestic partners and married spouses and to not affect any common law remedies available had the parties not formalized their relationship. RCW 26.60.010; RCW 26.60.015; RCW 26.60.060(2). This court should reverse and remand with directions to the trial court to reconsider its property distribution in

light of the proper characterization of all assets accumulated during the parties' committed intimate relationship, beginning in 1988, and award Reynolds her attorney fees on appeal.

II. CROSS-REPLY ARGUMENT

A. Neither sexual intimacy nor jointly titled property must be proven before the court can equitably divide property acquired during the parties' 22-year relationship.

Whether a committed intimate relationship exists is a question of fact, subject to the deferential "substantial evidence" standard of review. *In re Sutton & Widner*, 85 Wn. App. 487, 490-91, 933 P.2d 1069, *rev. denied*, 133 Wn.2d 1006 (1997). This court must reject Walsh's challenge to the trial court's determination that the parties were in a committed intimate relationship. (Cross-Response Br. 5-10; Conclusion of Law (CL) 11, CP 374-75; CP 412)

A committed intimate relationship "is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). This was the very essence of the parties' 22-year relationship. (*See* Cross-Appeal Br. 37-42) That the parties may not have always had a vigorous sex life (Cross-Response Br. 1, 5, 7, 10, 34-35) does not make their relationship any less "marital-like" – just ask any number of

middle-aged spouses who have been married 20 years and are now raising three teenagers!

Contrary to Walsh's argument, the term "committed intimate relationship" was not intended to make *sexual* intimacy the "up-or-down" litmus test for whether an equitable division of property may be made at the end of the relationship. (*See* Cross-Response Br. 1, 5, 7) Instead, the court adopted the term in rejecting the "antiquated" (and derogatory)[1] term "meretricious relationship." *Olver v. Fowler,* 131 Wn. App. 135, 141, fn. 9, 126 P.3d 69 (2006), *aff'd,* 161 Wn.2d 655, 168 P.3d 348 (2007). "Intimacy and commitment are just two non-exclusive relevant factors a trial court can consider in deciding if equity applies to support an equitable

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[1] The adjective "meretricious" derives from the Latin term for a prostitute. *Peffley-Warner v. Bowen,* 113 Wn.2d 243, 246, fn. 5, 778 P.2d 1022 (1989).

property division." *Long v. Fregeau,* 158 Wn. App. 919, 922 ¶ 1, 244 P.3d 26 (2010).[2]

Walsh also denies the parties were in a "traditional" relationship warranting equitable treatment based on her claim the parties did not create or use joint accounts. (Cross-Response Br. 4-10) But the fact that parties held property only in the name of Walsh – the primary wage earner - is not evidence that they "purposefully organize[d]" their lives to "keep[ ] financially separate lives." (Cross-Response Br. 7)

There is nothing unusual nor "un-traditional" in the wage earner in the family depositing the family's only income into an account in his or her name, paying the family's major expenses, and providing the stay-at-home parent with an allowance to "use[ ] entirely as she pleases," (Cross-Response Br. 2) – particularly when, as here, the stay-at-home parent also pays the day-to-day

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[2] In holding that two men were in a committed intimate relationship even though one was not sexually faithful, the *Long* court suggested that the more proper "phraseology" is "equity relationship" - the term used by the trial court in this case and a "neutral, more accurately descriptive, substitute term in analyzing the common fact-equity issues found in this subject area." 158 Wn. App. at 922, ¶ 2. If use of the adjective "intimate" causes a party to make the sort of argument made by Walsh here, Reynolds agrees that the focus should be redirected to the "equity" of attempting to deny a life partner any of the benefit of two decades of accumulated assets based on a belated claim that the litigants' sex life was unsatisfactory.

expenses for herself and children from her "allowance." (RP 227-28, 238) *See, e.g., Olver,* 161 Wn.2d at 658, ¶ 3; *Connell,* 127 Wn.2d at 344 (parties in both cases were in a committed relationship even though all property held in the man's name only). For centuries, married couples "traditionally" arranged their finances in just this way.

Nor can it be said that Walsh and Reynolds "intentionally titled things in their own names" (Cross-Response Br. 18) absent evidence that Reynolds had any control over how Walsh titled property acquired with her income during the relationship. As Walsh repeatedly acknowledges, Reynolds had no income of her own except for the "pin money" Walsh gave her, and there is no evidence that Reynolds had any say in how Walsh handled the parties' finances. To hold that the parties intended to dispose of their property based on the names in which property was held would return to the "*Creasman* presumption" that the Supreme Court expressly overruled in *Marriage of Lindsey,* 101 Wn.2d 299, 304, 678 P.2d 328 (1984). (*See* Cross-Appeal Br. 41)

Walsh also claims that because the parties "lack[ed] any intent for a formal marriage," the committed intimate relationship doctrine could not apply. (Cross-Response Br. 7-10) First, the

undisputed evidence is directly to the contrary regarding the parties' intent. Every action they took proves that if these women could, they would have married: they committed to each other by exchanging rings in November 1988 (RP 216-17); gave birth and adopted each other's children between 1992 and 1998 (RP 55, 57, 60, 64, 83); registered as domestic partners in 2000 in California, as soon as they were allowed to (RP 71, 245; Ex. 41); "married" in Oregon in 2004 (RP 106; Ex. 60); and registered as domestic partners again in 2009 in Washington.[3] (Ex. 40) The problem was not that the parties lacked the intent to marry, it was that they lacked the means until social mores (and legislation) changed.

In any event, under the committed intimate relationship doctrine "equitable claims are not dependent on the 'legality' of the relationship between the parties." *Vasquez v. Hawthorne,* 145 Wn.2d 103, 107, 33 P.3d 735 (2001). Walsh relies on concurrences in *Vasquez* by Justices Alexander and Sanders, who apparently "expressed some reservation to broadening this quasi-marital

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[3] When Washington first passed its own domestic partnership law in 2007, it was similar to the 2000 California law under which the parties were already registered, granting only limited rights to same-sex couples. RCW 26.60.010. In 2009, the Legislature amended the statute to state its intent to ensure that domestic partners are "treated the same as married spouses." E2SSB 5688, ch. 521, Laws of 2009; RCW 26.60.015. It was under this law that the parties registered.

doctrine" based on the "quality" of the parties' relationship if they could not, and did not, marry. (Cross-Response Br. 9) Whatever the law when these two former justices concurred in *Vasquez* 13 years ago, since then our courts have repeatedly held that the parties' inability to marry is not a bar to the application of the committed intimate relationship doctrine. *See Long,* 158 Wn. App. at 925, ¶ 15, (two men)*; Gormley v. Robertson,* 120 Wn. App. 31, 37, 83 P.3d 1042 (2004) (two women).

B. Using the committed intimate relationship doctrine to divide assets acquired after the parties began cohabiting in 1988 is not a "retroactive" application of the Domestic Partnership Act.

The common law committed intimate relationship doctrine continues to protect parties in a same-sex relationship if they subsequently register as domestic partners. *See* RCW 26.60.015; RCW 26.60.060(2). Once the trial court found that these parties were in a committed intimate relationship, it should have concluded that the doctrine required it to consider all of the property acquired during the relationship as "community-like" regardless when any community property rights might have arisen by virtue of their registration as domestic partners. Instead, the trial court wrongly concluded that it was barred from applying the equitable principles underlying the committed intimate relationship

doctrine to property acquired before the parties registered because it would somehow result in "retroactive application" of the domestic partnership law. (CL 4, 5, CP 373)

Neither the trial court nor Walsh can articulate any reason why this case is different from those where the property accumulated by heterosexual couples who cohabit prior to marrying is treated as "community-like" and available for distribution on divorce. *See, e.g., Bodine v. Bodine,* 34 Wn.2d 33, 207 P.2d 1213 (1949); *Marriage of Lindsey,* 101 Wn.2d 299, 304, 678 P.2d 328 (1984); *Marriage of Hilt,* 41 Wn. App. 434, 704 P.2d 672 (1985). The trial court in fact acknowledged that "if the two people in this case were a heterosexual couple," it "would not hesitate to find that a meretricious or equity relationship existed for the 20 plus years prior to the date of marriage." (CP 412)

Walsh argues that recognizing Reynolds' equitable claims before rights were conferred under the domestic partnership statute would deprive Walsh of her "vested rights" in property. (Cross-Response Br. 11-19) But Reynolds is not asking the court to characterize the parties' pre-registration property as "true" community property. Instead, just as in every case since at least *Bodine,* she is asking that the domestic partnership statute be

applied by "analogy" when considering property acquired during a committed intimate relationship in the same way the Supreme Court in *Connell v. Francisco,* 127 Wn.2d 339, 351, 898 P.2d 831 (1995) applied RCW 26.09.080 by analogy at the conclusion of a committed intimate relationship between heterosexuals. *See also Vasquez,* 145 Wn.2d at 107-08 (*discussed at* Cross-Appeal Br. 27-28).

Application of the common law committed intimate relationship doctrine prior to the parties' domestic partnership registration is consistent with the intent of the Legislature in enacting the domestic partnership laws to not affect "any remedy available in common law" and to ensure "equal treatment" between registered domestic partners and married spouses. RCW 26.60.015; RCW 26.60.060(2). Nothing in the Domestic Partnership Act affects the "ways in which legal rights and responsibilities between two adults may be created, recognized, or given effect in Washington." RCW 26.60.010. In other words, the enactment of the Domestic Partnership Act did not deprive parties of any equitable claims that they could make under the common law, which recognizes that both parties have equitable rights in property acquired during their committed intimate relationship

regardless in whose name the property is held. *See Olver v. Fowler,* 161 Wn.2d at 670-71; *Witt v. Young,* 168 Wn. App. 211, 217, 219, ¶¶ 13, 16, 275 P.3d 1218, *rev. denied,* 175 Wn.2d 1026 (2012). (*See* Cross-Appeal Br. 30).

Walsh also is wrong when she claims that recognizing community-like property under the committed intimate relationship doctrine would be contrary to the "legislature's directive" that the domestic partnership law operate "prospectively." (Cross-Response Br. 16) Reynolds is not asking the court to apply the domestic partnership law to the assets acquired by the parties prior to registration, but asks that the common law committed intimate relationship doctrine be applied. As our Supreme Court recently stated, "it is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Custody of B.M.H.*, _ Wn.2d _, ¶ 31, _ P.3d _ (Nov. 27, 2013 WL 6212020) (*quoting Potter v. Wash. State Patrol,* 165 Wn.2d 67, 77, 196 P.3d 691 (2008)). "It must not be presumed that the legislature intended to make any innovation to the common law without manifesting such intent." *Custody of B.M.H.*, ___ Wn.2d ___, ¶ 31 (*citing Parentage of L.B.,* 155 Wn.2d

679, 695, fn. 11, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006)).

Finally, Walsh claims that there were no "community like" assets available for distribution because the trial court found that the assets acquired prior to the effective date of the California domestic partnership law were Walsh's separate property. (Cross-Response Br. 11-12) But the trial court's determination was based on its erroneous conclusion that the committed intimate relationship doctrine could not be applied to assets acquired any earlier.[4] Had the trial court properly applied the committed intimate relationship doctrine, it would have found that those assets acquired during that period were "community-like" and available for distribution. "Income and property accumulated during [a committed intimate] relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a [committed intimate] relationship is presumed to be owned by both parties." *Connell,* 127 Wn.2d at 351. In this case, the "community-like"

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[4] For instance, the trial court found that Walsh's SEP-IRA was her separate property only because she was "able to trace all deposits made to her USAA SEP-IRA to dates pre-dating the California registered domestic partnership." (FF 13, CP 366)

property that should have been equitably distributed includes all assets acquired during the parties' relationship from Walsh's wages, commencing in 1988.

C. The trial court should have recognized that the parties' domestic partnership commenced no later than 2000 when the parties first registered as domestic partners.[5]

The parties registered as domestic partners in Washington in 2009 after previously registering as domestic partners while living in California in 2000. (RP 71, 245; Ex. 40) RCW 26.60.090 specifically provides that domestic partnerships formed in another jurisdiction "shall be treated the same as a domestic partnership registered in this state." Thus, even if Walsh was correct on the legal consequences of registration to the treatment of pre-registration assets, the trial court should have found that the parties' domestic partnership commenced in 2000, when they first formed a valid domestic partnership.

Walsh argues that the trial court could not have recognized a domestic partnership from another jurisdiction before the date

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[5] This court need not consider this argument if it concludes that the common law committed intimate relationship doctrine should have been applied starting in 1988 when the parties began cohabiting.

RCW 26.60.090 was enacted, June 12, 2008.[6] (Cross-Response Br. 19-20) But nothing in the statute prevents the trial court from acknowledging the commencement of the domestic partnership in California prior to RCW 26.60.090's enactment. "The utilization of data or facts antedating the effective date of a statute in a prospective operation of that statute does not render the legislation retroactive." *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974).

Walsh likens this case to those situations where same sex couples legally marry in one state but cannot obtain a divorce in their home state because their home state does not recognize same-sex marriages as legal. (Cross-Response Br. 20) But here, the trial court acknowledged not only the legality of domestic partnerships, but specifically recognized the legality of domestic partnerships formed in other states. (*See* CL 2, CP 372)

The trial court should have thus recognized that the parties' domestic partnership commenced in 2000, and concluded that any property acquired after that date but before the parties separated in

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[6] Walsh apparently concedes that under her theory the trial court should have found the parties' domestic partnership commenced June 12, 2008, and not as it found, on August 20, 2009. (FF 2.4, CP 360; Cross-Appeal Br. 4, Assignment of Error no. 2)

2010 as community in character and subject to RCW 26.60.080. Even if, as Walsh argues, community property rights could not be conferred under RCW 26.60.080 prior to June 12, 2008, (Cross-Response Br. 19-20) the trial court should have at the very least recognized the formalization of the parties' domestic partnership then, rather than 14 months later.

D. The trial court erred by ignoring the parties' intentional titling of the family home as joint tenants with right of survivorship.

The parties titled their family home in both of their names, as "joint tenants with right of survivorship, and not as community property or tenants in common."[7] (Ex. 33; RP 262) The trial court properly acknowledged that the title was an "expression of their intent" to hold the property as joint tenants with right of survivorship (CP 420), but then erred by ignoring the parties' expressed intent and concluding that the property was held as "tenants in common" because only Walsh was liable after she refinanced the mortgage. (CL 15, CP 375-76)

The parties did not "terminate" the joint tenancy, contrary to Walsh's claim. (Cross-Response Br. 39) As Walsh acknowledges,

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[7] Regardless of the designation, the trial court should hold that the family home was jointly owned because it was acquired in 2003, during their committed intimate relationship.

the trial court must look at the intent of the parties to determine whether a joint tenancy has been terminated. (Cross-Response Br. 40, *citing Estate of Phillips v. Nyhus,* 124 Wn.2d 80, 874 P.2d 154 (1994)). The fact that Walsh, the sole wage-earner, unilaterally refinanced the property in her name did not terminate the joint tenancy. Nor did it show any express intent by both parties to do so.

In *Estate of Phillips,* for instance, the parties executed a deed stating their intention to "acquire said premises as joint tenants with right of survivorship and not as tenants in common." Our Supreme Court rejected the claim by the executor for the estate of one of the parties that the joint tenancy was severed when the parties entered into a subsequent earnest money agreement that failed to indicate that the property was held in joint tenancy. The Court held that absent any language in the earnest money agreement that the parties "intended to change their status as joint tenants with right of survivorship [ ] that status never changed." *Phillips,* 124 Wn.2d at 87.

Walsh argues that the fact that she "was solely liable for the mortgage is indicative of the parties' intent to own the property in proportion to contributions." (Cross-Response Br. 40) But the

reality is that when the parties acquired the property as "joint tenants with right of survivorship and not as tenants in common," Reynolds had no employment income of her own and the mortgage would necessarily be paid with Walsh's wages. If the parties intended to own the property based on their contributions, they would not have titled it as they had in the first place. The fact that Walsh later refinanced the property and placed the obligation only in her name was not inconsistent with the parties' original decision to hold the property as joint tenants. The trial court should have upheld the parties' intent by concluding that the property was owned by the parties as joint tenants with right of survivorship, not as tenants in common.

E. This court should award attorney fees to Reynolds.

RAP 18.1 permits an award of attorney fees "if applicable law grants a party the right to recover reasonable attorney fees or expenses on review." Here, RCW 26.09.140 provides for an award of attorney fees at the end of the parties' domestic partnership. (*See* Cross-Appeal Br. 45-49) Under the statute, Reynolds should be awarded her attorney fees on appeal because, as the trial court also acknowledged, she has the need and Walsh has the ability to pay. (CL 3.8, CP 372)

Walsh complains that Reynolds cannot be awarded attorney fees under RCW 26.09.140 because Reynolds' appeal does not deal with "the dissolution of the domestic partnership itself." (Cross-Response Br. 21) But the language of the statute is broad, providing that "the court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter." There is no authority for the proposition that this court cannot award attorney fees to a party in need of fees at the end of a domestic partnership solely because the issues litigated include claims under the common law committed intimate relationship doctrine. *See Seals v. Seals,* 22 Wn. App. 652, 657-58, 590 P.2d 1301 (1979) (awarding attorney fees under RCW 26.09.140 for the wife's separate partition action against former husband).

In this case, it would be "manifestly unjust," *Seals,* 22 Wn. App. at 658, to deny Reynolds a fee award when it was *Walsh* who chose to continue the litigation by filing her appeal even after substantially prevailing in the trial court and receiving nearly all of the assets that the parties acquired during their 20-plus year

relationship. An award of attorney fees to Reynolds is wholly appropriate under these circumstances.

Further, Walsh is wrong when she claims that Reynolds' cross-appeal deals solely with whether the "equity relationship doctrine is misapplied in this case." (Cross-Response Br. 21) Instead, Reynolds' challenge is to whether the trial court wrongly interpreted the Domestic Partnership Act by concluding that Reynolds' equitable claims were precluded because it would result in a retroactive application of the Act. In other words, the "dissolution of the domestic partnership itself" was central to the appeal. Reynolds' common law claims under the committed intimate relationship doctrine are so interrelated with the Domestic Partnership Act and is based on the same set of facts that she should not be required to segregate her attorney fees. *See Ethridge v. Hwang,* 105 Wn. App. 447, 461, 20 P.3d 958 (2001) (court is not required to "artificially segregate time in a case [ ] where the claims all relate to the same fact pattern").

Finally, this court should reject Walsh's claim that any attorney fees should be limited by any "prediction" of the amount necessary to appeal. (Cross-Response Br. 22) Any fees should be

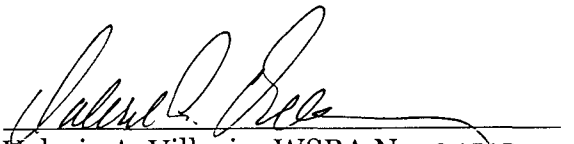
based on the actual fees incurred as set forth in her RAP 18.9(d) fee affidavit when it is filed with the court.

III. CONCLUSION

This court should reverse and remand with directions to the trial court to reconsider its property distribution in light of the proper characterization of all assets accumulated during the parties' committed intimate relationship, starting in 1988. This court should reject Walsh's appeal and award Reynolds her attorney fees on appeal.

Dated this 6th day of January, 2014.

SMITH GOODFRIEND, P.S.

By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 6, 2014, I arranged for service of the foregoing Reply Brief of Cross-Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 6th day of January, 2014.

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