No. 97664-3

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Domestic Partnership of:

JEAN M. WALSH,

Petitioner,

and

KATHRYN L. REYNOLDS,

Respondent.

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

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

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A. Introduction.

Dr. Jean Walsh for the second time petitions this Court for review, of the Court of Appeals' unpublished opinion rejecting for the second time her efforts to deny an equitable share of the parties' assets in the dissolution of her domestic partnership to respondent Kathryn Reynolds, with whom she raised three children during a 23-year cohabitation. *Walsh v. Reynolds*, 183 Wn. App. 830, 335 P.3d 984 (2014), *rev. denied*, 182 Wn.2d 1017 (2015), *after remand*, 9 Wn. App. 2d 1041, 2019 WL 2597785 (2019) ("Op."). This Court should deny review of Division Two's unpublished opinion and grant Reynolds her fees pursuant to RAP 18.1(j).

B. Restatement of Facts.

Division Two has already considered this matter twice. Its opinions (the first published, the second (from which Walsh now seeks review), unpublished and non-precedential) set out the facts and the procedural history relevant to Division Two's remand of this action dissolving the parties' registered domestic partnership to a different judge to determine when, prior to 2005, the parties' committed intimate relationship began, to characterize the parties' property (applying the presumption that property acquired during their committed intimate relationship was community-like in nature,

regardless of their inability to marry during much of their 23-year relationship), and to distribute the property. (Op. 2)

The parties separated and this litigation began in 2010, when Walsh petitioned for dissolution of the parties' domestic partnership (which had first been registered in California in 2000, and then again in Washington), asserting "[t]here is community and separate property owned by the parties. The court should make a fair and equitable division of all the property." (Ex. 109, ¶ 1.9) After a 3-day trial, the trial court entered a decree dissolving the parties' domestic partnership on November 5, 2012, holding as a matter of law that the parties' committed intimate relationship could not have begun until 2005, when California amended its domestic partnership law to provide that registered domestic partners would have the same protections and rights as married spouses. 183 Wn. App. at 839, ¶¶ 16, 17, fn. 5.

Walsh appealed, arguing (as she does in this petition for review) that the parties could not have acquired community-like property before they could register as domestic partners in Washington in 2009. 183 Wn. App. at 840, ¶ 20. Reynolds cross-appealed, because the trial court had recognized that if the parties were heterosexual, it "would not hesitate" to find that their

committed intimate relationship had begun in 1988, when they first began cohabiting.[1] 183 Wn. App. at 839, 841, ¶¶ 16, 21.

In its published 2015 decision, Division Two rejected Walsh's appeal and reversed on Reynold's cross-appeal, holding that "the findings of fact and the record do not support the trial court's legal conclusion that the parties' 'equity relationship' began no earlier than 2005." 183 Wn. App. at 851, ¶ 42. Division Two remanded to the same trial judge, but directed the trial court on remand to reconsider when *before* 2005 the parties' equity relationship started, and its distribution of property based on the true length of their committed relationship, 183 Wn. App. at 852-53, ¶ 45, holding that the parties' 2000 registration of their domestic partnership in California was "an unimpeachable indicator of the intended nature of their relationship." 183 Wn. App. at 848, ¶ 35.

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[1] The parties had begun living together in California in 1988, exchanging rings in a ceremony. (RP 49, 75, 216-17; Op. 2) They had three children (each adopting the other's biological child), for whom Reynolds was the stay-at-home caregiver (RP 55, 57, 60, 64, 83; Op. 2-3), registered as domestic partners in California in March 2000 (Op. 3-4), participated in a marriage ceremony in Oregon in 2004 (RP 106), and registered as domestic partners in Washington in 2009, days after the Washington Legislature amended its domestic partnership law to ensure that domestic partners are "treated the same as married spouses." (Op. 5; RCW 26.60.015)

After this Court denied Walsh's petition for review (striking her reply in support of review), the trial court finally held a hearing on remand in June 2016, taking (over Reynolds' objection) an additional two days of testimony.[2] (Op. 7) In findings virtually identical to those it had entered in 2012, the trial court refused to follow the law of the case in Division Two's first published opinion (Op. 16-18), instead concluding that the parties were *never* in a committed intimate relationship (Op. 7-8) and that treating property acquired during their relationship as community-like would be unconstitutional because of Walsh's "expectation" that the property she had titled in her name would remain "hers," and indivisible. (Op. 7, 30)

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[2] As set out in Appendix D to Reynolds' opening merits brief in this appeal, the evidence taken in 2016 was virtually the same as that taken in 2012, with the exception of testimony about the current condition of one of the parties' three children and Reynold's post-decree relationship with another woman. Although inconsistent with her claim to "vested property rights" because she could not have had any expectation that Reynolds could have any interest in "her" assets when they could not marry, Walsh makes much of the parties' supposed oral "agreement" to hold property separately. In reality, the parties' testimony in both trials was to a financial relationship little different than that in any heterosexual relationship in which the party (usually the man) who earns the money, controls the money, *see, e.g., Marriage of Mueller,* 140 Wn. App. 498, 167 P.3d 568 (2007), *rev. denied,* 163 Wn.2d 1043 (2008) (discussed Reynolds Reply Br. 39-40) – the only exception being that Walsh here would have been able to attribute to Reynolds income that would otherwise have been taxed at Walsh's far higher marginal rate.

On Reynolds' appeal, Division Two once again reversed, remanding to a different trial court judge "for the purpose of determining the appropriate pre-2005 start date for the parties' committed intimate relationship and characterizing their property for distribution." (Op. 30) Walsh has once again petitioned for review. This Court should deny review of the Court of Appeals' unpublished opinion and allow this long-delayed case to return on remand to a trial court judge who will apply the law and equitably divide the parties' property.

C. Why This Court Should Deny Review.

1. Walsh has no constitutionally-protected right to separate property on dissolution of the parties' domestic partnership, or that prohibits consideration of Reynolds' equitable interest in property acquired during their relationship.

Walsh voluntarily registered with Reynolds as domestic partners, and then asked the courts of this State to dissolve their partnership and "make a fair and equitable division of all the property." (Ex. 109, ¶ 1.9) This Court held many years ago that because separate property is available for distribution under RCW 26.09.080, neither party to a dissolution has a vested right in property subject to division. *Marriage of MacDonald,* 104 Wn.2d 745, 709 P.2d 1196 (1985). And even before *Marriage of Lindsey*, 101 Wn.2d

299, 304, 678 P.2d 328 (1984) overruled the *Creasman* presumption and developed the committed intimate relationship doctrine, this Court had recognized the community-like nature of property acquired by the parties while cohabiting before formalizing their relationship in marriage. *Marriage of Bodine,* 34 Wn.2d 33, 36-37, 207 P.3d 1213 (1949). This Court should deny review because the Court of Appeals' unpublished opinion is wholly consistent with this precedent and Walsh has no constitutionally-protected right to "her" separate property upon dissolution of the parties' domestic partnership.

This Court rejected Walsh's "takings" argument (Petition 6-9) in *MacDonald,* 104 Wn.2d at 750. The law prohibited division of military retired pay when the parties divorced in *MacDonald*, but was later changed to allow division of military retired pay. The husband argued that the new law could not be applied "retroactively" to his interest in military retired pay because it would "deprive[] him of property without due process as prohibited by the Fifth Amendment." *MacDonald*, 104 Wn.2d at 750. This Court rejected the argument as "without merit," noting "[u]nder state law, all property of a married couple, both separate and community, is subject to division by the court in a dissolution of their marriage. As

between husband and wife while married, neither has a vested right to their property." *MacDonald,* 104 Wn.2d at 750 (citation omitted).

The Court of Appeals correctly rejected Walsh's argument that *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 725, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) nevertheless supports the proposition that making "her" property subject to distribution on dissolution of the parties' domestic partnership would be a "judicial taking" in violation of the Fifth Amendment of the U.S. Constitution. (Op. 23-25) The Supreme Court in *Stop the Beach rejected* a "takings" argument based on a change in regulations governing the claimant's supposed "vested rights" in property. And as Division Two recognized, Washington has never recognized "judicial takings in the context of equitable distribution of property following dissolution." (Op. 25)

The argument that the property rights of the individual in whose name property is titled are violated by an award of property to a cohabitant has never been an impediment to development of the committed intimate relationship doctrine, *e.g., Marriage of Lindsey*, 101 Wn.2d at 304; *Connell v. Francisco*, 127 Wn.2d 339, 350, 898 P.2d 831 (1995), or to its application to same-sex relationships. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107, 33 P.3d 735 (2001);

Gormley v. Robertson, 120 Wn. App. 31, 37-38, 83 P.3d 1042 (2004); *Relationship of Long/Fregeau*, 158 Wn. App. 919, 925-26, ¶ 16, 244 P.3d 26 (2010). Community-like property interests arising in the course of a committed intimate relationship in equity do not violate "vested" rights, and dividing community-like property at the conclusion of the parties' committed intimate relationship would not be "'transferring her property' from Dr. Walsh to Ms. Reynolds." (Petition 7) Instead, "justly divid[ing] property the couple has earned during the relationship through their efforts" ensures "that one party is not unjustly enriched at the end of such a relationship." *Connell,* 127 Wn.2d at 350.

Nor does due process prohibit consideration of Reynolds' equitable rights in property acquired during her committed intimate relationship with Walsh. (Petition 9-15) Even if the parties had not been in a committed intimate relationship prior to registering as domestic partners, Walsh's claimed separate property was not "entitled to special treatment" upon the dissolution of their domestic partnership. *Marriage of Larson & Calhoun*, 178 Wn. App. 133, 140, ¶ 16, 313 P.3d 1228 (2013), *rev. denied*, 180 Wn.2d 1011 (2014).

Further, "due process does not prevent a change in the common law as it previously existed. There is neither a vested right

in an existing law which precludes its amendment or repeal nor a vested right in the omission to legislate on a particular subject." *Godfrey v. State*, 84 Wn.2d 959, 962-63, 530 P.2d 630 (1975). "The Fourteenth Amendment does not curtail a state's power to amend its laws, common or statutory, to conform to changes in public policy." *Godfrey,* 84 Wn.2d at 963. The committed intimate relationship doctrine was developed specifically to protect the economically disadvantaged partner in non-marital relationships, to ensure that "one party is not unjustly enriched at the end of such a relationship." *Connell*, 127 Wn.2d at 349.

The purpose of the committed intimate relationship doctrine was "to avoid inequitable results" under prior law, including this Court's decision in *Creasman v. Boyle*, 31 Wn.2d 345, 196 P.2d 835 (1948), which allowed the party in whose name property had been acquired to keep that property free of the claim of a cohabitant. *Connell*, 127 Wn.2d at 347. The *Creasman* presumption, which this Court overturned in *Lindsay,* 101 Wn.2d at 304, was originally created in a case in which an African-American man (unsuccessfully) sought an equity interest in property that had been titled in the name of the European-American woman with whom he cohabited; he could not purchase the property in his own name because of deed

restrictions. Motion for Reconsideration, *Creasman v. Boyle,* Cause No. 30446 (available in Court's archives). That sorry result was finally rectified when this Court overturned the presumption in *Lindsey,* yet Walsh in her petition essentially invokes the *Creasman* presumption for same-sex relationships.

The committed intimate relationship doctrine was developed precisely to prevent the result for which Walsh advocated in both her unsuccessful first appeal, and now. In her relentless quest to avoid any responsibility to her former domestic partner, with whom she lived and raised a family for over two decades, Walsh urges this Court to rely on homophobic laws, rightly declared unconstitutional, *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), that prevented countless citizens from establishing a legal relationship with their long-term partners due solely to their sexual orientation. Walsh embraces a disgraceful interpretation of the committed intimate relationship doctrine to deny the same protections afforded economically disadvantaged partners in heterosexual relationships to same-sex partners, long after sexual orientation has ceased to be a reasoned basis for claiming a couple was not in a committed intimate relationship. *Vasquez v. Hawthorne*, 145 Wn.2d at 104, *reversing* 99 Wn. App. 363, 994 P.2d

240 (2000). This Court should reject Walsh's invitation to grant review in order to treat same-sex partners as second class citizens just so she can avoid sharing with Reynolds property acquired during their 23-year relationship.

2. The Washington Constitution would not require a different result and this issue has not been preserved for review.

Walsh argues that Wash. Const. Art. 1, § 16 also prohibits a "judicial taking" of "her" property (Petition 15-17), but she has never provided any analysis how this provision differs in any material respect from the federal takings or due process clauses. Since petitioner "has failed to brief *Gunwall,* this court will not address its argument that the state constitution provides greater protection. *See Guimont v. Clarke,* 121 Wn.2d 586, 604, 854 P.2d 1 (1993) (refusing to analyze a takings claim under the state constitution because the party asserting that claim failed to brief the *Gunwall* factors), *cert. denied*, 510 U.S. 1176 (1994)." *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 32–33, 940 P.2d 274, 277 (1997).

3. No "procedural defect" in Reynolds' assignments of error provides a basis for review of the Court of Appeals' unpublished opinion.

Walsh finally advances as a ground for review that Reynolds did not assign error to the findings on remand. (Petition 17-19)

Reynolds assigned error to *entry* of findings on remand (App. Br. 2), and devoted 15 pages of her opening brief to quoting each remand finding (and the virtually identical 2012 finding) and explaining why these findings do not support the trial court's decision. (App. Br. 29-44) As Division Two recognized (Op. 12), Reynolds' objection to the entry of findings on remand (and to the substance and consequence of those findings) was clear and preserved. *See Green River Community College, Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986). There were no procedural impediments to Division Two considering, and correcting, the trial court's violation of its law of the case on remand, and this is not a basis for further review in this Court of its unpublished opinion.

D. Reynolds is Entitled to Fees Under RAP 18.1(j).

The Court of Appeals awarded attorney fees to Reynolds pursuant to RCW 26.09.140. (Op. 32) This Court too should award Reynolds her fees for having to answer the petition under RAP 18.1(j), which provides that a party awarded attorney fees in the Court of Appeals is entitled to fees in successfully defending a petition for review in this Court.

E. Conclusion.

With each pleading filed in this unduly protracted litigation, Walsh's insistence on her "vested property rights" becomes more extreme, and less defensible. This Court should deny review of the Court of Appeals' unpublished opinion and award Reynolds her fees under RAP 18.1(j). In the unlikely event this Court grants review, Reynolds preserves all arguments she has previously made, including but not to limited to law of the case.

Dated this 14 day of October, 2019.

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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 October 9, 2019, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 9th day of October, 2019.

Sarah N. Eaton

SMITH GOODFRIEND, PS

October 09, 2019 - 1:23 PM

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