Cause No. 91078-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Domestic Partnership of:

JEAN M. WALSH,

Petitioner,

and

KATHRYN L. REYNOLDS,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR REVIEW

SMITH ALLING, P.S.

Barbara A. Henderson,
WSBA #16175
Morgan K. Edrington,
WSBA #46388
Attorneys for Petitioner

1501 Dock Street
Tacoma, Washington 98402
Telephone: (253) 627-1091
Facsimile: (253) 627-0123

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

WASHINGTON

STATUTES

OTHER AUTHORITIES

WASHINGTON

A. Reply in Support of Petition for Review.

Petitioner Jean Walsh files this reply in accordance with RAP 13.4 to address three issues raised by Reynolds' Answer to Petition for Review: (1) the parties never married; (2) the Court of Appeals September 30, 2014 Opinion (Opinion) is contrary to the established law that the only property before the court for division upon the termination of an equitable relationship is property that would have been community (community-like); and (3) Reynolds is not entitled to fees incurred to answer the Petition for Review under RAP 18.1(j)—the award of attorney's fees at the Court of Appeals was in error.

As an initial matter, Reynolds' Answer is replete with factual inaccuracies. For example, when the parties traveled to Oregon in 2004, they both knew they were not entering into a legal marriage as they were both aware that same-sex marriage was not legal in Oregon. RP 107. Notwithstanding, an important factual distinction must be made in this Court's consideration of whether to grant review: These parties never legally married. They registered as domestic partners under the 2008 Domestic Partnership Act (RCW 26.60.080, effective June 12, 2008). The "everything but marriage" amendment to the domestic partnership statute was enacted following the vote on Referendum 71 in November 2009,

with an effective date of December 3, 2009. There was no opt-out period. The parties separated in March 2010. The 2008 law specifically stated:

> Any community property rights of domestic partners established by chapter 6, Laws of 2008 shall apply from the date of registration of the domestic partnership or June 12, 2008, whichever is later.

RCW 26.60.080. The Opinion ignores this legislative instruction.

Reynolds' Answer asks this Court to reject review, asserting that the Court of Appeals properly applied the equitable relationship doctrine by mischaracterizing this relationship as if it had ended in a marriage. Again, there was no marriage. Walsh's argument does not ask this Court to treat same-sex couples differently than heterosexual couples on any prejudicial basis, but rather to recognize that these parties did not marry, and for all of their relationship, could not legally marry in Washington State. To retroactively apply the burdens and responsibilities of a legally recognized relationship without having been previously offered the rights and benefits, is inequitable in application. Because these parties could not marry, they never had the opportunity to decide for themselves upon which date a pre-marital relationship ended, and on which date they would be provided both the rights and responsibilities of marriage. Calling this relationship something it was not, nor could have been, does not correct the inequities or injustices in the law that may have existed toward same-

sex couples. Rather, it adds new injustices upon the old, and ignores that these parties organized their financial and personal lives consistent with the law as it existed at the time. By retroactively applying community property law to divide property acquired during a time when no such ownership regime was even possible, serves to deprive Walsh of her vested separate property.

Unlike the parties in *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995), legal marriage in Washington was never an option for these parties during the course of their relationship. Although the law and society have now adopted a more accepting and equal application of these rights, it is not equitable to retroactively apply responsibilities not offered to these parties during the relationship. The Opinion creates an expansion of the equity relationship doctrine and makes it applicable, even though these parties intentionally organized their lives in conformity with the very limited rights available to them at the time.

Petitioner is not seeking to apply the *Creasman* presumption. *Creasman v. Boyle*, 31 Wn.2d 345, 196 P.2d 835 (1948). In *Creasman*, the parties could legally marry, could acquire community property, and could enjoy the rights of marriage. More importantly, incorporating recognition of the parties' intentions is consistent with the public policy of allowing individuals to make informed decisions regarding their own

financial affairs—not allowing the court to rewrite the history of their relationship, and disregard over 20 years of intentional conduct to keep separate property separate.

For these parties, the near entirety of their relationship was lived in a society that did not recognize any legal relationship between the two of them. As such, they had no rights to acquire joint property, to make wrongful death claims, or even to simply visit one another in a hospital, other than by specific contracts or legal instruments. In this context, they had no notice that a court would later disregard all of their intentional actions and instead impose the obligations of a marriage (re-characterization of separate property as community, not even quasi-community), all without ever having any right to the correspondent benefits.

Public policy is not served by the retroactive expansion of the equitable relationship doctrine to the extent contained in the Opinion. This decision erodes the opportunity for any party, whether in a same-sex or heterosexual relationship, to make informed decisions regarding whether their assets are community, community-like, or separate. Absent creating a legal document to the contrary, no party can keep separate property in an equity relationship—the opportunity to rebut that property is community-like is gone. It places the burden of action on an individual

to preemptively establish separate property without any notice that this action is required, when it is required, or even if that action will be deemed effective at a later date. It removes all certainty. The Opinion effectively provides the basis for any party sharing a household with another to claim that an equitable relationship exists, thus creating community property, not community-like property, from the commencement of the relationship—regardless of whether the relationship ended before marriage, in a marriage, or was even eligible for marriage. The act of marriage is important. Marriage provides new and different rights and responsibilities and puts both parties on notice of the same. By expanding the equitable relationship doctrine that line is not only blurred, but becomes nonexistent. By failing to distinguish between community-like, and true community property, the Court of Appeals ruling has eliminated the last opportunity for unmarried individuals to protect any of what the parties may have understood—for the entirety of their relationship—to be separate property. Until this Opinion, the Court lacked jurisdiction over separate property at the termination of an equity relationship:

> Unlike the division of property upon dissolution of a marriage, when both community and separate property are before the Court for equitable division, a court dividing property acquired during a committed intimate relationship

> may exercise this discretion only as to property that would have been community property had the parties been married.

Olver v. Fowler, 131 Wn.App. 135, 140, 126 P.3d 69 72-73 (2006).

Societal norms today are different than they were when *Creasman* was decided in the 1940's. The evidence in this case demonstrates two individuals who decidedly organized their financial affairs to maintain separate property, but also to intentionally jointly-own other property. The Opinion retroactively takes Walsh's separate property and declares it to be community, all without notice that such a regime may be imposed.

As a final matter, Reynolds is not entitled to fees for answering this petition pursuant to RAP 18.1(j). As stated in the petition for review, the Court of Appeals erred by granting Reynolds' attorneys' fees. The court has consistently held that attorneys' fees are not available for issues related to termination of an equitable relationship. *See e.g. Bank v. Helmer*, 48 Wn. App. 694, 740 P.2d 359 (1987). The entirety of this appeal is dedicated to distribution of property under the equitable relationship doctrine. This case included a six and a half month domestic partnership and no issues on appeal by Petitioner (or Respondent) related to division of property under the domestic partnership. The court looked only to the issues arising from an equitable relationship on review. Cross-reference to the statute, or determination of the relationship of the date of

enactment of the Domestic Partnership Act with regard to the parties' relationship does not constitute deciding this case under that Act. Reynolds is not entitled to fees on appeal, and similarly should not be entitled to fees for answering this Petition.

B. Conclusion.

For the reasons set forth herein, Walsh respectfully asks this Court to accept review, and to deny Reynolds' request for fees in answering the Petition for Review.

DATED this 20th day of January, 2015.

SMITH ALLING, P.S.

By: 

Barbara A. Henderson, WSBA No. 16175
Morgan K. Edrington, WSBA No. 46388
Attorneys for Appellant/Cross-Respondent
1501 Dock Street
Tacoma, WA 98402
253-627-1091, 253-627-0123 (fax)
bhenderson@smithalling.com

CERTIFICATE OF SERVICE

I hereby certify that I have this 20 day of January, 2015, caused the document to which this Certificate is attached to be e-filed with the Clerk of the Supreme Court of the State of Washington (supreme@courts.wa.gov), and served upon counsel of record via the methods noted below:

Counsel for Respondent:

Catherine Wright Smith	____ Hand Delivery
Valerie A. Villacin	____ U.S. Mail
Smith Goodfriend PS	X ABC Legal Messengers
1619 8th Avenue North	____ Facsimile
Seattle, WA 98109-3007	X Email
cate@washingtonappeals.com	
valerie@washingtonappeals.com	____

Counsel for Respondent:

Ms. Jan M. Dyer	____ Hand Delivery
Attorney at Law	____ U.S. Mail
503 12th Ave. E.	X ABC Legal Messengers
Seattle, WA 98102-5103	____ Facsimile
jan@jandyerlaw.com	X Email

I declare under penalty of perjury under the laws of the State of Washington that the I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20 day of January, 2015, at Tacoma, Washington.

Lisa Schrader, Legal Assistant