

FILED
Court of Appeals
Division II
State of Washington
8/22/2018 4:36 PM

No. 51125-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Domestic Partnership of:

JEAN M. WALSH,

Respondent/Cross-Appellant,

and

KATHRYN L. REYNOLDS,

Appellant/Cross-Respondent.

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

REPLY BRIEF OF APPELLANT/
MOTION TO DISMISS AND RESPONSE TO CROSS-APPEAL

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Appellant

TABLE OF CONTENTS

I. RESPONSE AND MOTION TO DISMISS CROSS-APPEAL.....1

II. REPLY ARGUMENT 3

A. Reynolds did not “invite” or “waive” her objections to the trial court’s violation of the law of the case by reinstating the decision this Court reversed in the first appeal. (Reply to Resp. Br. 7-8, 12-13, 32-35)..... 3

1. Reynolds did not “invite” an unnecessary retrial on remand. (Reply to Resp. Br. 8)7

2. The Commissioner’s denial of discretionary review of the letter ruling was not a “final” decision approving the trial court’s disregard of the law of the case. (Reply to Resp. Br. 32-35) 9

3. Reynolds’ objection to the findings on remand is clear and preserved. (Reply to Resp. Br. 1)..... 11

B. This Court should not reconsider its holding that the parties were in an equity relationship prior to registering as domestic partners in 2009. (Reply to Resp. Br. 12-14, 19, 21-25, 38-43, addressing Cross-Appeal Issue No. 4)13

C. Walsh has no constitutionally protected right to “her” separate property upon dissolution of the parties’ domestic partnership. (Reply to Resp. Br. 16-25, addressing Cross-Appeal Issues Nos. 2 and 3).....19

1.	Walsh could not have had any protected expectation to retain ownership of property acquired prior to the parties' registration as domestic partners. (Reply to Resp. Br. 16-21)	20
2.	Neither party has a "vested right" preventing distribution of property owned by either on dissolution of a domestic partnership. (Reply to Resp. Br. 21-25)	23
D.	Applying the equity relationship doctrine to characterize property acquired before 2005 does not violate Walsh's constitutional rights. (Reply to Resp. Br. 14-22, 25-31, addressing Cross-Appeal Issue No. 1).....	27
1.	Reynolds has an interest in property acquired during the equity relationship under Washington law pre-dating the amendment of California's domestic partnership statutes. (Reply to Resp. Br. 14-16, 19-22, 25-31)	28
2.	Reynolds has an interest in property acquired during her relationship with Walsh under both California common and statutory law. (Reply to Resp. Br. 17-19)	33
E.	The supposed "oral agreement" that Walsh would control "her" assets does not support the trial court's decision on remand violating the law of the case. (Reply to Resp. Br. 37-38, 39-41)	36
F.	This Court should award Reynolds all her fees. (Reply to Resp. Br. 43-45, 47)	41
III.	CONCLUSION	43

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alderson v. Alderson</i> , 180 Cal. App. 3d. 450, 225 Cal. Rptr. 610 (1986).....	35
<i>Anderson v. City of Issaquah</i> , 70 Wn. App. 64, 851 P.2d 744 (1993)	2
<i>Asche v. Bloomquist</i> , 132 Wn. App. 784, 133 P.3d 475 (2006), <i>rev. denied</i> , 159 Wn.2d 1005 (2007)	22
<i>Bank of America, N.A. v. Owens</i> , 177 Wn. App. 181, 311 P.3d 594 (2013), <i>rev. denied</i> , 179 Wn.2d 1027 (2014)	5, 29
<i>Connell v. Francisco</i> , 127 Wn.2d 339, 898 P.2d 831 (1995).....	18, 30, 32
<i>Dellen Wood Products, Inc. v. Washington State Dep’t of Labor & Indus.</i> , 179 Wn. App. 601, 319 P.3d 847, <i>rev. denied</i> , 180 Wn.2d 1023 (2014).....	30
<i>Estate of Langeland v. Drown</i> , 195 Wn. App. 74, 380 P.3d 573 (2016), <i>rev. denied</i> , 187 Wn.2d 1010 (2017).....	5, 42
<i>Folsom v. County of Spokane</i> , 111 Wn.2d 256, 759 P.2d 1196 (1988)	15
<i>Godfrey v. State</i> , 84 Wn.2d 959, 530 P.2d 630 (1975).....	25, 31
<i>Gormley v. Robertson</i> , 120 Wn. App. 31, 83 P.3d 1042 (2004).....	18, 29
<i>Green River Community College, Dist. No. 10 v. Higher Educ. Pers. Bd.</i> , 107 Wn.2d 427, 730 P.2d 653 (1986)	12

<i>Harman v. Dep't of Labor Indus.</i> , 111 Wn. App. 920, 47 P.3d 169, <i>rev. denied</i> , 147 Wn.2d 1025 (2002)	30
<i>Harp v. American Sur. Co. of New York</i> , 50 Wn.2d 365, 311 P.2d 988 (1957)	5
<i>Holst v. Fireside Realty, Inc.</i> , 89 Wn. App. 245, 948 P.2d 858 (1997)	6
<i>Humphrey Indus., Ltd. v. Clay St. Assocs., LLC</i> , 176 Wn.2d 662, 295 P.3d 231 (2013)	5
<i>In re Long & Fregeau</i> , 158 Wn. App. 919, 244 P.3d 26 (2010)	13, 15, 27
<i>Lodis v. Corbis Holdings, Inc.</i> , 192 Wn. App. 30, 366 P.3d 1246 (2015), <i>rev. denied</i> , 185 Wn.2d 1038 (2016).....	5
<i>Madison v. State</i> , 161 Wn.2d 85, 163 P.3d 757 (2007)	1
<i>Marriage of Bodine</i> , 34 Wn.2d 33, 207 P.3d 1213 (1949).....	22
<i>Marriage of Hilt</i> , 41 Wn. App. 434, 704 P.2d 672 (1985)	22, 31
<i>Marriage of Konzen</i> , 103 Wn.2d 470, 693 P.2d 97, <i>cert. denied</i> , 473 U.S. 906 (1985).....	26
<i>Marriage of Landry</i> , 103 Wn.2d 807, 699 P.2d 214 (1985)	20
<i>Marriage of Larson & Calhoun</i> , 178 Wn. App. 133, 313 P.3d 1228 (2013), <i>rev. denied</i> , 180 Wn.2d 1011 (2014)	26
<i>Marriage of Lindsey</i> , 101 Wn.2d 299, 678 P.2d 328 (1984)	18, 22, 30, 32

<i>Marriage of MacDonald,</i> 104 Wn.2d 745, 709 P.2d 1196 (1985)	24-25, 29
<i>Marriage of McCausland,</i> 129 Wn. App. 390, 118 P.3d 944 (2005), <i>rev'd on</i> <i>other grounds</i> , 159 Wn.2d 607, 152 P.3d 1013 (2007)	5
<i>Marriage of Mueller,</i> 140 Wn. App. 498, 167 P.3d 568 (2007), <i>rev. denied</i> , 163 Wn.2d 1043 (2008)	39-40
<i>Marriage of Neumiller,</i> 183 Wn. App. 914, 335 P.3d 1019 (2014)	28
<i>Marriage of Richardson and Fu,</i> 188 Wn. App. 1009, 2015 WL 3610205 (2015)	42
<i>Marvin v. Marvin,</i> 18 Cal.3d 660, 557 P.2d 106 (1976)	34-36
<i>Mattson v. Mattson,</i> 95 Wn. App. 592, 976 P.2d 157 (1999)	42
<i>Muridan v. Redl,</i> 3 Wn. App. 2d 44, 413 P.3d 1072 (2017), <i>rev.</i> <i>denied</i> , 422 P.3d 912 (2018)	23, 28
<i>Obergefell v. Hodges,</i> 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)	17
<i>Olver v. Fowler,</i> 161 Wn.2d 655, 168 P.3d 348 (2007)	28
<i>Parentage of G.W.-F.,</i> 170 Wn. App. 631, 285 P.3d 208 (2012)	36-38
<i>Roberson v. Perez,</i> 119 Wn. App. 928, 83 P.3d 1026 (2004), <i>aff'd</i> 156 Wn.2d 33, 123 P.3d 844 (2005)	6
<i>Sintra, Inc. v. City of Seattle,</i> 131 Wn.2d 640, 935 P.2d 555 (1997)	5

<i>State v. Strauss</i> , 119 Wn.2d 401, 832 P.2d 78 (1992)	5
<i>State v. Worl</i> , 129 Wn.2d 416, 918 P.2d 905 (1996)	15
<i>Vasquez v. Hawthorne</i> , 145 Wn.2d 103, 33 P.3d 735 (2001), <i>reversing</i> 99 Wn. App. 363, 994 P.2d 240 (2000)	18, 30
<i>Velez v. Smith</i> , 142 Cal. App. 4th 1154, 48 Cal. Rptr. 3d 642 (2006).....	36
<i>Wagers v. Associated Mortgage Investors</i> , 19 Wn. App. 758, 577 P.2d 622 (1978)	40
<i>Wainwright v. Bridges</i> , 19 La. Ann. 234 (1867)	24
<i>Walsh v. Reynolds</i> , 183 Wn. App. 830, 335 P.3d 984 (2014), <i>rev. denied</i> , 182 Wn.2d 1017 (2015)	<i>passim</i>
<i>Watson v. Maier</i> , 64 Wn. App. 889, 827 P.2d 311, <i>rev. denied</i> , 120 Wn.2d 205 (1992).....	43
<i>West v. Knowles</i> , 50 Wn.2d 311, 311 P.2d 689 (1957)	32
<i>Whorton v. Dillingham</i> , 202 Cal. App. 3d 447, 248 Cal. Rptr. 405 (1988)	35
<i>Witt v. Young</i> , 168 Wn. App. 211, 275 P.3d 1218, <i>rev. denied</i> , 175 Wn.2d 1026 (2012)	28
<i>Zandi v. Zandi</i> , 190 Wn. App. 51, 357 P.3d 65 (2015), <i>aff'd sub</i> <i>nom. Marriage of Zandi</i> , 187 Wn.2d 921, 391 P.3d 429 (2017)	2

Statutes

Cal. Fam. Code § 299.5(b), (c) 34

Cal. Fam. Code § 4(c) 34

Cal. Fam. Code § 297(a), (b)(1), (2) 33

Cal. Fam. Code § 297.5(k)(1) 33

Cal. Stats. 1999, ch. 588 § 1, Division 2.5, Part 1 33

Cal. Stats. 1999, ch. 588 § 1, Division 2.5, Part 4 34

Laws of 2008, ch. 6 § 101116

RCW 26.09.08019, 20-22

RCW 26.09.14041

RCW 26.60.01016

RCW 26.60.015 19, 21

RCW 26.60.06016

RCW 26.60.08016

Rules and Regulations

GR 14.1 42

RAP 2.3 11

RAP 2.5 15

RAP 3.1 1

RAP 10.3 11

RAP 10.4 3

RAP 12.9.....	11
RAP 13.5.....	11
RAP 17.7.....	11
RAP 18.1.....	41
RAP 18.9.....	2, 42

I. RESPONSE AND MOTION TO DISMISS CROSS-APPEAL

This Court should dismiss Walsh's "cross-appeal" because only an aggrieved party may seek review by the appellate court. RAP 3.1. Walsh was not "aggrieved" by the trial court's order on remand.

On remand, the trial court adopted Walsh's argument (previously rejected by this Court) that the parties could not be in an equity relationship prior to 2005. Walsh also asserted that the consequence of accepting her alternative argument that the parties were never in an equity relationship should be that the "prior distribution of property acquired after January 1, 2005 is not the subject of this remand and should not be addressed at all." (CP 521) (emphasis in original) The trial court agreed with Walsh, wholly adopting and reinstating its prior property division from the decree it had entered after the first trial, and which this Court had reversed in the former appeal. (See Conclusion of Law (CL) 17, CP 645: "The property distribution contained in the Decree of Domestic Partnership entered November 5, 2012 is hereby affirmed.")

Because the trial court on remand granted Walsh the exact relief she requested, she is not aggrieved and has no standing to bring her cross-appeal. *Madison v. State*, 161 Wn.2d 85, 109, ¶ 47, 163 P.3d 757 (2007) (respondents lacked standing to cross-appeal

because even though they disagreed with the trial court's reasons for its order, they were prevailing parties and had been granted the relief they requested). Even if she disagreed with this Court's holding in the earlier appeal affirming the trial court's conclusion that there had been an equity relationship between the parties before they registered as domestic partners in Washington, Walsh waived her challenge by asking the trial court to maintain its distribution of assets acquired after 2005. See *Anderson v. City of Issaquah*, 70 Wn. App. 64, 72-73, 851 P.2d 744 (1993) (“[b]y bringing the cross appeal the City has come within a hair's breadth of incurring sanctions under RAP 18.9” because it had invited the error it challenged on cross-appeal). Having received the exact relief she requested on remand, Walsh cannot seek review of the trial court's decision, and this Court should dismiss her cross-appeal.

Walsh's arguments on cross-appeal are in reality alternative grounds to affirm the trial court's decision, and are properly considered in *response* to Reynolds' appeal. *Zandi v. Zandi*, 190 Wn. App. 51, 54, ¶ 6, 357 P.3d 65 (2015) (rejecting appellant's argument that respondent should have cross-appealed; the arguments he raised were not to advance a request for affirmative relief but alternative grounds to sustain the trial court's decision), *aff'd sub nom. Marriage of Zandi*, 187

Wn.2d 921, 391 P.3d 429 (2017). This Court should refuse to consider the cross-appeal because it is a transparent attempt to control the last brief on issues properly raised and addressed in response to Reynolds' appeal. To the extent the Court considers Walsh's cross-appeal on the merits, appellant relies on her substantive arguments in this and the opening brief. In particular, and in anticipation of yet another procedural argument against a decision on the merits, appellant directs the Court to the parentheticals to each argument heading in this reply brief, *infra*, which set out the "cross-appeal" issues addressed in each section of the Reply Argument.

This motion is made and should be granted pursuant to RAP 10.4(d).

II. REPLY ARGUMENT

A. Reynolds did not "invite" or "waive" her objections to the trial court's violation of the law of the case by reinstating the decision this Court reversed in the first appeal. (Reply to Resp. Br. 7-8, 12-13, 32-35)

In its earlier decision, this Court rejected Walsh's appeal of the trial court's determination that she and Reynolds were in an equity relationship before they registered as domestic partners in 2009 in Washington. On Reynold's cross-appeal, this Court rejected Walsh's claim, accepted by the trial court, that the parties' equity relationship

began only in 2005, when California expanded the statutory rights of same-sex couples registered as domestic partners:

Reynolds cross-appeals, arguing that the trial court erred in [] ruling that the parties' "equity relationship" commenced in January 2005, rather than in 1988. . . . We agree with Reynolds.

Walsh v. Reynolds, 183 Wn. App. 830, 841, ¶ 21, 335 P.3d 984 (2014), *rev. denied*, 182 Wn.2d 1017 (2015).

We also hold . . . that the trial court erred in limiting application of the "equity relationship" doctrine to only the 4½ years before the parties registered in Washington.

183 Wn. App. at 847, ¶ 34.

We hold, therefore, that the trial court should have extended application of the "equity relationship" doctrine to the parties' relationship before 2005, including their registered domestic partnership under California's act, an unimpeachable indicator of the intended nature of their relationship.

183 Wn. App. at 848, ¶ 35.

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.

The trial court failed to consider the common law and its application to the parties' "equity relationship" that existed *before* California's 2005 statutory recognition of such relationships, despite explaining that had Walsh and Reynolds been a legally recognized heterosexual marriage, it would not have "hesitate[d] to find that a meretricious or 'equity relationship'

existed for the 20 plus years prior to the date of the marriage.”

183 Wn. App. at 852-53, ¶ 45 (emphasis in original).

Walsh ignores this Court’s previous decision, and does not even cite, much less discuss or distinguish, any of the cases that required the trial court on remand to follow this “law of the case,” including *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 176 Wn.2d 662, 671, ¶ 16, 295 P.3d 231 (2013) (App. Br. 18, 21, 24, 26); *State v. Strauss*, 119 Wn.2d 401, 413, 832 P.2d 78 (1992) (App. Br. 17); *Estate of Langeland v. Drown*, 195 Wn. App. 74, 82-83, ¶¶ 16-19, 380 P.3d 573 (2016), *rev. denied*, 187 Wn.2d 1010 (2017) (App. Br. 21, 24, 26-27); *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 58, ¶ 51, 366 P.3d 1246 (2015), *rev. denied*, 185 Wn.2d 1038 (2016) (App. Br. 15-16); *Bank of America, N.A. v. Owens*, 177 Wn. App. 181, 189, ¶ 22, 311 P.3d 594 (2013), *rev. denied*, 179 Wn.2d 1027 (2014) (App. Br. 13, 21, 24-25); *Marriage of McCausland*, 129 Wn. App. 390, 399, ¶ 16, 118 P.3d 944 (2005) (quoting *Harp v. American Sur. Co. of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957)), *rev’d on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007) (App. Br. 12-14, 49).

In the cases that Walsh does briefly cite (Resp. Br. 12), the appellate court refused to reconsider its earlier decision, *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997), or considered

issues that were not raised in an earlier appeal because of an intervening change in the law, *Roberson v. Perez*, 119 Wn. App. 928, 83 P.3d 1026 (2004), *aff'd* 156 Wn.2d 33, 123 P.3d 844 (2005),¹ or that had not been at issue in an earlier appeal taken before trial. *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 948 P.2d 858 (1997) (new issue arose as a result of evidence at trial after remand from dismissal on summary judgment). Further, as discussed below (Reply Arg. §§ C, D, *infra*), Walsh’s claimed “constitutional right” to evade her equitable responsibilities to her former domestic partner – the only excuse Walsh proffers for the trial court’s defiance, at her urging, of this Court’s mandate – do not justify revisiting (or ignoring) the earlier appellate decision in this case rejecting her arguments.

¹ Walsh cites only to Division III’s opinion in *Roberson*. In affirming the Court of Appeals, the Supreme Court recognized that while an *appellate* court “may” disregard the law of the case and reconsider a prior holding, they are not required to, and that the appellate court should only exercise its discretion to do so when the decision is clearly erroneous *and* would work a manifest injustice to one party or there has been an intervening change in controlling precedent. *Roberson*, 156 Wn.2d at 41-42, ¶ 22. Walsh does not argue that there has been any intervening change in controlling precedent – to the contrary, her argument is that she was entitled to rely on principles and policies that do not reflect controlling law. Further, this Court’s earlier holdings were not “clearly erroneous” (Reply Arg. §§ B, C, D, *infra*), and it would work a “manifest injustice” only if this Court revised its earlier decision in favor of Reynolds. (Reply Arg. § D, *infra*)

Walsh does not, and cannot, refute this Court’s resolution of the substantive issues she now raises once again, as set out in the opening brief’s analysis of the trial court’s findings in the first trial and on remand, of the parties’ arguments in the first appeal, and of this Court’s resolution of those issues against Walsh in the first appeal. (App. Br. 28-45) Moreover, in arguing that this Court should “reconsider” or “revise” its previous decision (Resp. Br. 12-13), Walsh recognizes that she seeks reconsideration of her claim that she owes her long-term partner Reynolds nothing because they are lesbians. Advancing this indefensible argument for the fifth time (in the first trial in 2012, in her first appeal, in her 2014 petition for review in the Supreme Court, on remand, and now in this second appeal) does not make Walsh’s position any more defensible.

Instead, Walsh asserts specious procedural impediments to enforcement of the law of the case. Those are briefly addressed here, before turning (once again) to the merits of Walsh’s substantive arguments in defense of the trial court’s reinstatement of a decision this Court has already reversed once.

1. **Reynolds did not “invite” an unnecessary retrial on remand.** (Reply to Resp. Br. 8)

Walsh claims that Reynolds cannot complain that the trial court refused to follow the law of the case because Reynolds sought a

retrial. (Resp. Br. 8) But a trial was necessary in part to establish the status of the parties' property. In the first trial, the trial court had erroneously found nearly all of the property acquired during the parties' 23-year relationship was Walsh's separate property, and awarded it to her. As a result, Walsh had retained control over those assets during the nearly four-year period between entry of the 2012 decree and the 2016 trial on remand, and any trial should have concerned the current status of the property at issue.

Reynolds' counsel always made clear that any trial on remand should be limited to the status of the assets Walsh had continued to control during the appeal, but that it was inappropriate to retry the underlying claims decided by this Court:

[I]t's our position that if the Court made findings [on remand] that were inconsistent with the findings that were made before and did so based on the evidence that – given the fact that those findings have been affirmed, that that would not be appropriate.

(2016 RP 13)

[W]e will submit additional evidence if we have to, but we don't think it's necessary[.] . . . [W]e believe that given the findings that this Court has already made, that you're in a position to make the ultimate finding that this relationship started in 1988 now.

(2016 RP 15)

The trial court instead allowed Walsh to once again put on testimony about the nature of relationship – testimony that in the end was virtually identical to that in the first trial (App. Br. Appendix D), and that resulted in virtually identical findings (App Br. 29-30, 33, 35, 38, 42) – all while refusing Reynolds any discovery on Walsh’s post-decree management of assets in her control, including retirement accounts that had been awarded to Reynolds but that Walsh had still not transferred at the time of the second trial. (See 2016 RP 31-33, 35)

2. The Commissioner’s denial of discretionary review of the letter ruling was not a “final” decision approving the trial court’s disregard of the law of the case. (Reply to Resp. Br. 32-35)

Reynolds in fact tried to short-circuit this unnecessary, duplicative process, by asking this Court to accept review of the trial court’s letter ruling that made clear the trial court was not going to follow this Court’s mandate. This Court considered that motion to recall the mandate as a motion for discretionary review. (12/29/16 Order, Cause No. 44289-2) It was argued to Commissioner Eric Schmidt, who denied discretionary review on February 15, 2017. (2/15/17 Order Denying Review, Cause No. 44289-2)

In denying discretionary review, Commissioner Schmidt did not decide on the merits whether the trial court had properly carried out this Court’s mandate, as Walsh claims. (Resp. Br. 34) To the

contrary, the Commissioner recognized that “the trial court’s conclusions in its letter ruling . . . may be erroneous” (2/15/17 Order 6), and even awarded Reynolds most of her fees in bringing the motion. (2/15/17 Order 8)

Instead, the Commissioner declined to grant discretionary review because of this State’s strong policy against interlocutory review. (2/15/17 Order 5) Because this Court had directed the trial court to “reconsider” January 1, 2005 as the appropriate commencement date of the parties’ equity relationship, the Commissioner did not believe there was a “mechanism by which this court can, without further briefing or proceeding, order the trial court to modify its letter ruling to find a pre-2005 commencement date.” (2/15/17 Order 6-7)

Whether the Commissioner’s belief that no “mechanism” was available to correct the letter ruling’s “erroneous” conclusions was right or not, the denial of discretionary review does not now prohibit appeal of the trial court’s final decision on remand refusing to modify in any way a property division this Court had reversed and remanded for proceedings consistent with its opinion, based on precisely the arguments this Court had rejected in its reasoning in the first appeal.

Denial of discretionary review “does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision.” RAP 2.3(c); *see also* RAP 12.9(a) (objection to trial court’s failure to comply with mandate can be addressed in a second appeal). The Commissioner’s ruling was not “final” (Resp. Br. 34), nor was there any requirement that Reynolds seek further review of the denial of discretionary review, by a RAP 17.7 motion to modify and then a RAP 13.5(b) motion to the Supreme Court for discretionary review of the decision to deny discretionary review, to preserve her right to appeal the trial court’s failure to comply with this Court’s mandate. (Resp. Br. 34) This appeal of the findings on remand, which make the trial court’s error even clearer than the letter ruling, is now the “mechanism” by which this Court must decide on the merits that the trial court failed to abide by the law of the case.

3. Reynolds’ objection to the findings on remand is clear and preserved. (Reply to Resp. Br. 1)

Walsh advances the meritless argument that Reynolds did not properly assign error in the opening brief to the findings on remand, by assigning error to the fact that they were entered at all. (*Compare* Resp. Br. 1 *with* App. Br. 2) As contemplated by RAP 10.3(a)(4), Reynolds devotes 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) Reynolds' objection to the findings on remand is clear and preserved; nothing (but an over-length brief) would have been gained by setting out those findings once again in individual assignments. *See Green River Community College, Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986) (when "the nature of the challenge is perfectly clear, and the challenged finding is set forth in the [opening] brief, th[e] court will consider the merits of the challenge" regardless of whether appellant fails to assign error).

Walsh's procedural arguments in opposition to consideration of the merits are consistent with her attempts, at every stage of these proceedings, to evade and needlessly increase the cost of review of the trial court's failure to abide by this Court's mandate. She unsuccessfully resisted including the record in the first appeal in this second appeal (12/18/17 Response to Motion to Transfer Record from Prior Appeal; 12/27/17 Commissioner's ruling transferring record), and even attempted to prevent this Court from considering the briefing from her first, unsuccessful appeal. (4/11/18 Response to Motion to Transfer [Briefs] from Prior Appeal; 4/11/18 Commissioner's ruling transferring briefs from prior appeal) But

there are no procedural impediments to this Court considering, and correcting, the trial court's violation of the law of the case on remand.

B. This Court should not reconsider its holding that the parties were in an equity relationship prior to registering as domestic partners in 2009. (Reply to Resp. Br. 12-14, 19, 21-25, 38-43, addressing Cross-Appeal Issue No. 4)

In the previous appeal, this Court held “the trial court correctly ruled that Walsh and Reynolds lived in an ‘equity relationship’ *before* they registered as domestic partners in Washington in 2009,” based on the “substantial evidence of their permanency planning, shared love and intimacy, adopting and raising children as a couple, extended family relationships, caring for one another when sick, providing financial and nonfinancial support for each other and their children, and holding themselves out as a couple. That they later formalized their relationship by registering as statutory domestic partners does not defeat application of the common law ‘equity relationship’ doctrine to their years together before the statutory registration option became available to them.” 183 Wn. App. at 846-47, ¶¶ 32, 33 (emphasis in original) (addressing the factors *In re Long & Fregeau*, 158 Wn. App. 919, 244 P.3d 26 (2010) as applied by the trial court to the parties’ relationship).

This Court, however, held that the “trial court erred in limiting application of the ‘equity relationship’ doctrine to only the 4 ½ years before the parties registered in Washington.” 183 Wn. App. at 847, ¶ 34. On remand, the trial court violated the law of the case by once again holding that the parties’ equity relationship commenced no earlier than 2005, particularly when no evidence was presented distinguishing the first 17 years of the parties’ relationship to the last 4 ½ years. (See App. Br. Appendix D; Resp. Br. Appendix D)

Walsh’s “cross-appeal” asking this Court to “reconsider[] and revise[]” its prior holding that the parties were in an equity relationship prior to registering as domestic partners in 2009 is in reality a responsive argument in support of the trial court’s decision on remand, premised on her unsuccessful argument in her first appeal that the trial court could not distribute any property acquired before August 20, 2009, when the parties registered as domestic partners in Washington State a few months before they separated. (Resp. Br. 14; see § I, Motion to Dismiss Cross-Appeal, *supra*) As this Court held in the first appeal, “before the legislature’s statutory recognition of domestic partnerships in 2008, however, Washington courts recognized a common law ‘equity relationship’ in a ‘stable, marital-like

relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” 183 Wn. App. at 845, ¶ 30.

While this Court, unlike the trial court, is not bound by the law of the case, it will “reconsider only those decisions that were clearly erroneous and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside.” *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996) (citing RAP 2.5(c)(2); declining to address identical issue previously resolved in earlier decision). Further, questions determined in an earlier appeal will “not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.” *Worl*, 129 Wn.2d at 425 (quoting *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988); declining to reconsider prior holding).

The trial court could not on remand reconsider the “Long factors,” as set out in *Long & Fregeau*, 158 Wn. App. 919, to decide that the parties were not in an equity relationship prior to 2009, as it would violate the law of the case. And this Court should not reconsider its holding that the parties were in an equity relationship because as Reynolds exhaustively demonstrated in the opening brief (and as Walsh effectively concedes by not addressing in any way the opening brief’s comparison of the findings from the first and second

trials) there was no “substantial change in the evidence” on remand. (*Compare* App. Br. Appendix D *with* Resp. Br. Appendix D)

Further, this Court’s prior holding that “RCW 26.60.080 did not erase the parties’ ‘equity relationship’ that already existed before they registered as domestic partners in Washington,” 183 Wn. App. 850, ¶ 38, is not “clearly erroneous” – nor does (or can) Walsh claim it was. (*See* Resp. Br. 19) “Nothing in chapter 156, Laws of 2007 affects any remedy available in common law.” RCW 26.60.060(2). “Chapter 156, Laws of 2007 does not affect marriage or any other ways in which legal rights and responsibilities between two adults may be created, recognized, or given effect in Washington.” Legislative Finding, RCW 26.60.010. Thus, this Court properly concluded that “the 2008 amendments to this statute do not retroactively affect the rights, benefits, and property expectations of parties to a meretricious or ‘equity relationship’ accrued *before* the amendment’s effective date in 2008.” 183 Wn. App. at 849, ¶ 37 (emphasis in original) (*citing* Laws of 2008, ch. 6 § 1011).

Contrary to Walsh’s claim that this Court had not ruled on her “due process” argument that she could not be “deprived” of property acquired prior to the parties registering as domestic partners (Resp. Br. 13), this Court had indeed considered and

rejected it. By recognizing the common law equity relationship doctrine applied regardless of the parties' subsequent registration as domestic partners, this Court rejected Walsh's claim that she had a greater, constitutionally-protected "vested right" than Reynolds in property acquired during the parties' equity relationship. (Reply Arg. § D, *infra*)

Finally, maintaining this Court's prior holding that the trial court could consider and distribute property acquired before the parties registered as domestic partners would not work a "manifest injustice" on Walsh. Far from "perversely doubl[ing] down" on the discrimination Walsh claims she (and, apparently, she alone) suffered (Resp. Br. 23), it would work a manifest injustice if this Court were to hold that, after a 23-year relationship, Reynolds had no equitable interest in property acquired during the first 22 years of a relationship during which she maintained the parties' home and raised their three children.

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 (Resp. Br. 21-25) this Court to rely on homophobic laws, rightly declared unconstitutional, *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), that prevented

countless citizens from marrying their long-term partners due solely to their sexual orientation. She also embraces a disgraceful interpretation of the equity relationship doctrine to deny the same protections afforded economically disadvantaged partners in heterosexual relationships to homosexuals (Resp. Br. 25-30) – an argument definitively, if belatedly, rejected in *Gormley v. Robertson*, 120 Wn. App. 31, 38, 83 P.3d 1042 (2004), long after it ceased to be a reasoned basis for claiming a same-sex couple was not in an equity relationship. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001), reversing 99 Wn. App. 363, 994 P.2d 240 (2000). This Court should reject Walsh’s invitation to “enforce” laws that treated same-sex partners as second class citizens just so she can avoid sharing with Reynolds property acquired during the parties’ 23-year relationship.

For over a generation, the appellate courts of this state have rejected the arguments of powerful men who sought to evade the claims of the women with whom they cohabited to an equitable share of property acquired during their equity relationships. *Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984); *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995). As this Court recognized in rejecting Walsh’s first appeal, and as it should confirm in this second appeal occasioned by the trial court’s failure to abide by not only this

Court's mandate, but its own previous decision, the result can be no different here.

C. Walsh has no constitutionally protected right to “her” separate property upon dissolution of the parties’ domestic partnership. (Reply to Resp. Br. 16-25, addressing Cross-Appeal Issues Nos. 2 and 3)

This appeal arises from the dissolution of a domestic partnership under RCW ch. 26.60. Therefore, as registered domestic partners, Walsh’s supposed “separate” “vested” property interests were fully available for distribution to Reynolds regardless whether they had an “equity relationship” prior to registration. RCW 26.60.015 (“It is the intent of the legislature that for all purposes under state law, state registered domestic partners shall be treated the same as married spouses.”); RCW 26.09.080 (in a dissolution of a domestic partnership, the trial court shall divide the parties’ property, “either community or separate, as shall appear just and equitable”).

On division of the property before the court, Walsh had no greater “vested right,” worthy of constitutional protection, in property acquired during the parties’ equity relationship than Reynolds. Regardless of its characterization as separate or community, all property owned by either party was subject to distribution by the court. RCW 26.09.080. Even if the trial court had found that the parties were not in an equity relationship prior to

registering as domestic partners in Washington in 2009, any property owned by Walsh – regardless of its character – could have been distributed to Reynolds on dissolution of their domestic partnership.

1. **Walsh could not have had any protected expectation to retain ownership of property acquired prior to the parties’ registration as domestic partners.** (Reply to Resp. Br. 16-21)

In arguing that she has a “vested right” greater than Reynolds’ in property acquired during the parties’ relationship, Walsh argues that the “law of the state in which property is acquired determines the nature of property rights,” and thus Washington’s equity relationship doctrine could not be applied to property acquired prior to 2000 when the parties lived in California. (Resp. Br. 18) That the parties had lived and acquired property in California prior to moving to Washington in 2000 is irrelevant. While California law may control the character of the property acquired by the parties while living in California, *Marriage of Landry*, 103 Wn.2d 807, 810, 699 P.2d 214 (1985) (Resp. Br. 18), Washington law controls the distribution of the property owned by the parties, “either community or separate,” upon the dissolution of their domestic partnership. RCW 26.09.080.

Walsh has never argued that California law should apply to the *division* of the parties’ property – nor would it. Walsh conceded this

point in her 2011 petition to dissolve the parties' domestic partnership, acknowledging that both separate and community property were available for distribution by asserting that "[t]here is community of separate property owned by the parties. The court should make a fair and equitable division of *all* the property." (Ex. 109, ¶ 1.9) (emphasis added) After registering with Reynolds as domestic partners in Washington in 2009, and seeking to dissolve that partnership in Washington, Walsh could not have had any "expectation" that she had a constitutionally-protected "right" to retain ownership of property simply because it was acquired in California.

The parties availed themselves of the Washington laws governing spouses by registering as domestic partners; "[a]ny privilege, immunity, right, benefit, or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law" to married spouses is "granted on equivalent terms, substantive and procedural," to registered domestic partners. RCW 26.60.015. This includes, but is not limited to, the court's authority to award the separate property of one domestic partner to the other under RCW 26.09.080, as well as finding that the parties had been in an equity relationship prior to formalizing it as a domestic partnership for purposes of characterizing the assets acquired during that period.

See Marriage of Bodine, 34 Wn.2d 33, 36-37, 207 P.3d 1213 (1949); *Lindsey*, 101 Wn.2d 299, 304; *Marriage of Hilt*, 41 Wn. App. 434, 438-39, 704 P.2d 672 (1985); see Arg. § D, *infra*.

Distributing Walsh's purported separate property to Reynolds under RCW 26.09.080 does not "destroy[] 'the reasonable certainty and security' relied on by Walsh" (Resp. Br. 20-21, citing *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), *rev. denied*, 159 Wn.2d 1005 (2007)). In *Asche* this Court held that homeowners had a property right protected by due process because a zoning ordinance prevented the neighbors from building a home more than 28 feet high without approval if the views of adjacent properties are impaired, but found that the homeowners waived that right by failing to timely object to approval of the permit. *Asche*, 132 Wn. App. at 788-89, ¶¶ 1-6.

Here, Walsh voluntarily agreed to be governed by this State's laws when she registered as a domestic partner with Reynolds in Washington, and sought to dissolve that partnership under RCW ch. 26.60. Her constitutional challenge to the consequences of the parties' repeated confirmation of the committed nature of their relationship, is both absurd and offensive.

Walsh testified in both the first and second trials, and now relies on her claim, that she registered as domestic partners with

Reynolds in California in 2000 and married Reynolds in a formal wedding ceremony in Oregon in 2004 solely “to stop being invisible” (RP 72; 2016 RP 96) and “to make a political statement.” (RP 110; 2016 RP 189) But the statutory and equitable consequences of the parties’ decision to register as domestic partners in Washington in 2009 do not depend upon Walsh’s claimed motivations. *See Muridan v. Redl*, 3 Wn. App. 2d 44, 57, ¶ 28, 413 P.3d 1072 (2017) (rejecting male cohabitant’s argument that the parties had not intended to be in an equity relationship because they signed an affidavit of domestic partnership for health insurance purposes only; “[r]egardless of their underlying motives, the parties asserted under penalty of perjury that they were domestic partners”), *rev. denied*, 422 P.3d 912 (2018).

2. Neither party has a “vested right” preventing distribution of property owned by either on dissolution of a domestic partnership. (Reply to Resp. Br. 21-25)

No one is entitled to constitutional protection from change in the law. That bedrock principle disposes of Walsh’s argument that she had a “reasonable expectation of entitlement” to constitutional protection of property acquired before the parties registered as domestic partners because prior to the enactments of the domestic partnership laws in California and Washington she and Reynolds were “expressly prevented [from] marrying or enjoying the

benefits of a marriage-like regime” (Resp. Br. 21) “based on the law existent at the time [Walsh] acquired” that property.² (Resp. Br. 16) Even if property acquired prior to the parties’ registration as domestic partners was Walsh’s separate property, Walsh is not constitutionally protected from having that property awarded to Reynolds. Because separate property of either party is available for distribution upon dissolution of a domestic partnership, neither domestic partner has a vested right to their property. *See Marriage of MacDonald*, 104 Wn.2d 745, 709 P.2d 1196 (1985).

In *MacDonald*, the law prohibited division of military retired pay when the parties divorced. However, while the wife’s appeal of the distribution of property in the decree was pending, the law was changed to allow division of military retired pay. The husband argued that the new law could not be applied “retroactively” to his interest in his military retired pay because it would “deprive[] him of property without due process as prohibited by the Fifth Amendment.” *MacDonald*, 104 Wn.2d at 250. Our Supreme Court

² Analytically, Walsh’s constitutional argument is no different (and only somewhat less reprehensible) than the arguments of antebellum slave owners that the Emancipation Proclamation deprived them of “vested rights” in property. *See, e.g., Wainwright v. Bridges*, 19 La. Ann. 234 (1867) (rejecting plaintiff’s claim that he had a “vested right” to repayment of promissory notes for the sale of slaves who had been emancipated).

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 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 *MacDonald* Court held that while the husband might “have expected to be awarded his military retired pay . . . [his] expectation in the continuance of existing law is not equivalent to a vested property right;” a “vested right entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*” *MacDonald*, 104 Wn.2d at 750 (quoting *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975) (emphasis in original)).

Here, even if the parties had not been in an equity relationship prior to registering as domestic partners in Washington State in 2009, Walsh’s purported separate property became available for distribution to Reynolds upon the dissolution of their domestic partnership after registration. Walsh was not entitled to have her interest in separate property protected from distribution to

Reynolds; separate property is not “entitled to special treatment.” *Marriage of Larson & Calhoun*, 178 Wn. App. 133, 140, ¶ 16, 313 P.3d 1228 (2013), *rev. denied*, 180 Wn.2d 1011 (2014).

“This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors.” *Larson & Calhoun*, 178 Wn. App. at 141, ¶ 16 (quoting *Marriage of Konzen*, 103 Wn.2d 470, 477, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985)). In affirming an award of \$40 million from the husband’s separate estate to the wife, who had already been awarded all (\$139 million) of the community assets, *Larson & Calhoun* rejected the argument that the husband was entitled to be awarded his separate property when “ample provision for the [nonowning] spouse can made from the community estate alone.” 178 Wn. App. at 139, ¶ 12 (alteration in original).

Yet that is precisely what Walsh argues, and the trial court agreed, was required here – even though, unlike in *Larson & Calhoun*, Reynolds would be left relatively impoverished by distribution of most of the parties’ assets to Walsh, the economically advantaged partner. Because separate property is available for distribution at the conclusion of a domestic partnership, Walsh’s

constitutional claims under the takings, due process, and equal protection clauses fail.

D. Applying the equity relationship doctrine to characterize property acquired before 2005 does not violate Walsh’s constitutional rights. (Reply to Resp. Br. 14-22, 25-31, addressing Cross-Appeal Issue No. 1)

This Court must also reject Walsh’s related argument that she has a “vested right” to separate characterization of property acquired during the parties’ relationship before California expanded its domestic partnership laws to include statutory property rights. Walsh asserted, and the trial court held on remand, that it could not apply the equity relationship doctrine to any period before California’s domestic partnership law became effective on January 1, 2005 because it “retroactively deems Walsh’s separate property to be community property . . . [and] would deprive Walsh of property without due process of law.” (Resp. Br. 19; *see also* CL 15, 16, CP 642-45) This Court correctly held in the previous appeal that this was not a reason “why the five *Long* ‘equity relationship’ factors that the trial court applied to the parties’ post-2005 relationship should not also apply to their pre-2005 domestic partnership relationship in California, which, as the trial court here expressly recognized, involved *continuous cohabitation* for ‘approximately 23 years’ in a *relationship for which the purpose* was ‘to create a family’ while ‘holding

themselves out to the world as a family.” 183 Wn. App. at 847-48, ¶ 35 (emphasis in original). The law of California upon which Walsh relies in any event would not prevent the characterization as quasi-community property acquired before 2005.

1. **Reynolds has an interest in property acquired during the equity relationship under Washington law pre-dating the amendment of California’s domestic partnership statutes.** (Reply to Resp. Br. 14-16, 19-22, 25-31)

Walsh had no greater “vested right” in the property acquired during the parties’ relationship than Reynolds. As with property acquired during a domestic partnership or marriage, property acquired during an equity relationship is “presumed to be jointly owned,” and subject to division at the conclusion of the relationship. *Marriage of Neumiller*, 183 Wn. App. 914, 921, ¶ 18, 335 P.3d 1019 (2014); *see also Muridan*, 3 Wn. App. 2d at 55, ¶ 21 (“Washington courts recognize that two individuals in a CIR may both have an interest in property acquired during the relationship.”). Even after death, a partner in an equity relationship has “an undivided interest in the couple’s jointly acquired property,” even if titled in only one party’s name. *Olver v. Fowler*, 161 Wn.2d 655, 670, ¶ 30, 168 P.3d 348 (2007); *Witt v. Young*, 168 Wn. App. 211, 219, ¶ 16, 275 P.3d 1218 (a partner’s claim in the probate of her deceased partner’s estate is

not a “claim against the decedent” but is “to ensure that his or her *own* property interest was not considered part of another’s estate”) (emphasis in original), *rev. denied*, 175 Wn.2d 1026 (2012); *Estate of Langeland*, 177 Wn. App. at 324, ¶ 16 (there is a “presumption that property acquired during a committed intimate relationship is jointly owned”). Thus, between domestic partners, neither has a “vested right to their property,” entitled to protection against the other. *MacDonald*, 104 Wn.2d at 750.

Walsh claims that because Washington had not definitively applied the equity relationship doctrine “to property division at the voluntary termination of a same-sex relationship” until 2004 in *Gormley v. Robertson*, 120 Wn. App. 31, 38, 83 P.3d 1042 (2004), the equity relationship doctrine does not apply to property acquired prior to that date. (Resp. Br. 14-15, 18), arguing that “[g]iven the evolving parameters of this common law doctrine, neither of the parties here knew, or could have known, that property they were acquiring as early as 1988 would be deemed – decades later – to be community property when first acquired.” (Resp. Br. 15)

While *Gormley/Robertson* is the first decision that specifically held that the equity relationship doctrine applied to same-sex couples, none of the earlier cases in which the doctrine was

developed, including *Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1985) or *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995), excluded same-sex couples from pursuing an equity relationship claim. To the contrary, in 2001 our Supreme Court stated that “[e]quitable claims are not dependent on the ‘legality’ of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties.” *Vasquez v. Hawthorne*, 145 Wn.2d at 107 (reversing Division II’s interpretation of previous equity relationship cases to prevent same-sex couples from seeking relief under the doctrine on the grounds the couple could not marry).

It is irrelevant that Walsh argues she did not have “notice” that property acquired during her relationship with Reynolds “could be deemed community-like property under a later conceived judicial doctrine.” (Resp. Br. 20) Walsh cannot avoid sharing property acquired during her equity relationship with Reynolds – while they continuously cohabited and raised three children together – because she claims she was unaware of the “evolving” law. (Resp. Br. 15) “[I]t is well settled that a person is presumed to know the law such that ignorance of the law is not a defense.” *Dellen Wood Products, Inc. v. Washington State Dep’t of Labor & Indus.*, 179 Wn. App. 601, ¶ 44, 629, 319 P.3d 847, *rev. denied*, 180 Wn.2d 1023 (2014); *Harman v.*

Dep't of Labor Indus., 111 Wn. App. 920, 927, 47 P.3d 169 (“Ignorance of the law has never been an adequate defense.”), *rev. denied*, 147 Wn.2d 1025 (2002).

Even if the equity relationship doctrine did not apply to same-sex couples prior to the *Gormley/Robertson* decision in 2004, “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) (statute removing contributory negligence as a bar to recovery applied retroactively as there was no vested right to a common-law bar to recovery). “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.

Further, any change in the common law applies retroactively if “it remedies previous inequitable treatment or protects the interests of innocent persons.” *Marriage of Hilt*, 41 Wn. App. 434, 441, 704 P.2d 672 (1985). The equity 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 doctrine was “to avoid inequitable results” under prior law, which allowed the party whose name property was acquired to keep that property, at the expense of the other party. *Connell*, 127 Wn.2d at 347.

“The [*Creasman*] rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship.” *Lindsey*, 101 Wn.2d at 303 (quoting concurrence in *West v. Knowles*, 50 Wn.2d 311, 316, 311 P.2d 689 (1957)). The equity relationship doctrine was developed precisely to prevent the result for which Walsh advocates, in both her unsuccessful first appeal, and now.

To the extent there had been doubt whether the equity relationship doctrine applied to same-sex couples prior to 2004, *Gormley/Robertson* remedied that “inequitable treatment” to “protect the interests of innocent persons,” regardless of sexual orientation. The equity relationship doctrine applies “retroactively,” and property acquired by the parties before 2004 is community-like and subject to distribution.

2. Reynolds has an interest in property acquired during her relationship with Walsh under both California common and statutory law. (Reply to Resp. Br. 17-19)

Even under California law, Walsh still had no greater interest than Reynolds in the property acquired during the parties' relationship prior to 2005. Walsh claims that when the parties registered as domestic partners in California in 2000, the Act then in existence "expressly disavowed applying the state's community property regime to same-sex couples."³ (Resp. Br. 17) However, it is undisputed that the Act was expanded in 2005 to grant domestic partners the rights and duties of marriage, including community property rights, which was effective on the "date of registration of a domestic partnership with the state." Cal. Fam. Code § 297.5(k)(1).

California law favors the retroactive application of changes to its Family Code; thus Reynolds' community property rights under California statutory law would go back to the original registration of the parties' domestic partnership in 2000. Cal. Fam. Code § 297.5(k)(1);

³ By registering as domestic partners under the California domestic partnership law in effect in 2000, the parties agreed that they were "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring;" shared a "common residence;" and agreed to be "jointly responsible for each other's basic living expenses incurred during the domestic partnership." (Cal. Stats. 1999, ch. 588 § 1, Division 2.5, Part 1 (*former* Cal. Fam. Code § 297(a), (b)(1), (2)).

Cal. Fam. Code § 4(c) (“subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date.”).

Further, when the parties registered in 2000, California law provided that registering as domestic partners under the Act “shall not diminish any right under provisions of law,” and “shall not change [] any interest in any real or personal property owned by either domestic partner or both of them prior to the date of filing.” Cal. Stats. 1999, ch. 588 § 1, Division 2.5, Part 4 (*former* Cal. Fam. Code § 299.5 (b), (c)). Under California’s common law, Reynolds had an interest in property acquired by Walsh during the relationship regardless that the Legislature had not yet recognized the same.

As early as 1976, the California Supreme Court had declared the “principles which should govern distribution of property in a nonmarital relationship.” *Marvin v. Marvin*, 18 Cal.3d 660, 557 P.2d 106, 110 (1976). The California Supreme Court held in *Marvin* that “the courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. [] In

the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum merit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.” *Marvin*, 557 P.2d at 110, 122-23.

Based on these principles, the California appellate court affirmed an order equally dividing property acquired during a nonmarital relationship when the parties’ conduct over the 12-year period they cohabited, which included raising three children together, evidenced an implied contract to share equally all property acquired during the relationship in *Alderson v. Alderson*, 180 Cal. App. 3d 450, 225 Cal. Rptr. 610 (1986) – two years before Walsh and Reynolds began cohabiting, eventually raising their own three children.

To the extent there was any question whether these principles applied to same-sex couples by 1988 – the year the parties began living together – the California courts made clear that there was “no legal basis to make a distinction” between same-sex partners and heterosexual partners in applying *Marvin* in *Whorton v. Dillingham*, 202 Cal. App. 3d 447, 452, n. 1, 248 Cal. Rptr. 405 (1988) (holding that

male partner could pursue rights for property acquired by, and in the name of, the other male partner during their relationship). Indeed, even after California enacted its domestic partnership laws, same-sex partners continued to seek relief under the common law for the time period pre-dating the enactment of those laws. *See Velez v. Smith*, 142 Cal. App. 4th 1154, 48 Cal. Rptr. 3d 642 (2006) (holding that lesbian partner could file a civil action under *Marvin* even though she could not pursue relief under the Domestic Partnership Act because the parties had not registered under the Act).

Neither California statutory nor common law supports Walsh's efforts to evade the consequences of her equity relationship with Reynolds. To the contrary, it supports Reynolds' argument that there is no reasoned way to conclude that the parties' equity relationship, and the acquisition of quasi-community property, did not begin when the parties first began cohabiting in California in 1988. (App. Br. 29-32)

E. The supposed "oral agreement" that Walsh would control "her" assets does not support the trial court's decision on remand violating the law of the case.
(Reply to Resp. Br. 37-38, 39-41)

Walsh also claims that the parties had an agreement that Reynolds would leave the relationship penniless, relying solely on *Parentage of G.W.-F.*, 170 Wn. App. 631, 285 P.3d 208 (2012).

(Resp. Br. 37-38) Walsh never explains how the parties could have had such an agreement, which given Reynolds' total economic dependence upon Walsh would have the practical effect of only protecting assets acquired in her name, while she simultaneously relies upon her claim that "neither of the parties . . . could have known, that property they were acquiring" would be divisible "under a later conceived judicial doctrine." (See Resp. Br. 15, 20) In any event, *G.W.-F.* does not support the trial court's decision or Walsh's claim.

As an initial matter, this Court rejected any agreement-based justification for the trial court's decision in dismissing Walsh's first appeal. (See App. Br. 22-28, 41-42) Even were the Court now to consider this supposedly "new" basis for the trial court's reinstatement of that decision in violation of this Court's mandate on remand, based on argument and testimony custom-manufactured on remand to attempt to meet the criteria of *G.W.-F.*, that case is easily distinguishable solely because Dr. Weider and Dr. Finch never married or entered a domestic partnership. Thus, neither party's truly separate property was subject to division when their relationship ended. Further, Dr. Finch, who sought to avoid the consequences of the agreement, "did not deny that an oral agreement existed." *G.W.-F.*, 170 Wn. App. at 641-42, ¶ 26.

More pertinent to the equities here, however, in *G.W.-F.*, two Ph.D. psychologists with virtually identical education and career paths, “purposefully structured their lives to create an egalitarian relationship” at the insistence of the female partner, who 20 years later complained on appeal that the consequence of her decision not to engage in “gender role stereotyping” by marrying the father of her children left her with slightly less than half of the property accumulated during the parties’ 23-year relationship. 170 Wn. App. at 635, ¶ 6, 641, ¶ 23. “The oral agreement was not disproportionate to one partner, as both had the same education and the same earning potential. . . . further, the oral agreement was an agreement that evolved to fit both parties’ needs.” 170 Wn. App. at 647, ¶ 48. “[U]sually, the contribution appeared to be 60 percent from Dr. Wieder and 40 percent from Dr. Finch.” 170 Wn. App. at 635, ¶ 10.

G.W.-F. has no application here, where, in addition to the dispute over an oral agreement that must be established by clear and convincing evidence, the parties had a much more “traditional” relationship: Just as with many heterosexual couples who may not enjoy the “egalitarian relationship” the parties had in *G.W.-F.*, Walsh, a very well-compensated orthopedic surgeon, made the money and controlled the finances, while Reynolds, the far less

educated, unemployed partner, stayed home and raised their children on an “allowance” from Walsh. (See App. Br. 36-41)

Walsh’s arguments are no different those made by powerful men who relied on similar claimed “agreements” or “understandings” with their economically-dependent wives to evade equitable distribution of property on dissolution. Our courts have routinely, and rightly, rejected those arguments. See, e.g., *Marriage of Mueller*, 140 Wn. App. 498, 167 P.3d 568 (2007), *rev. denied*, 163 Wn.2d 1043 (2008). In *Mueller*, the trial court found that the parties’ oral agreement to divide the husband’s income after paying joint expenses changed what would otherwise be community property (the husband’s income) to each party’s separate property after it was divided. Division I reversed, holding that the fact that each party separately controlled and managed half of the husband’s divided income was insufficient to prove an agreement to change the character of the property. *Mueller*, 140 Wn. App. at 505-06, ¶ 18.

As in *Mueller*, the trial court’s finding here that the parties had an oral agreement to characterize community-like property acquired during the relationship as Walsh’s separate property cannot stand. Because either party can control and manage community property, the trial court’s conclusion that “each had separate and independent

control of her own finances” (CL 16, CP 645) – Reynolds over the “allowance” provided to her for “household services and childcare” (RP 227; CL 16, CP 645) and Walsh over the remainder of her income as an orthopedic surgeon – is insufficient to prove an agreement to change the character of property. “More is required.” *Mueller*, 140 Wn. App. at 506, ¶ 18.

The trial court here erred in concluding that the effect of the parties’ independent management over the community-like property in their control was an agreement changing its character to separate. In order to enforce an oral agreement that would otherwise be subject to a statute of frauds on the grounds of past performance, the parties’ actions “must unmistakably point to the existence of the claimed agreement. If they may be accounted for by some other hypotheses they are not sufficient.” *Wagers v. Associated Mortgage Investors*, 19 Wn. App. 758, 765, 577 P.2d 622 (1978). That the parties may have separately managed the assets over which they had control does not “unmistakably point” to an agreement in which Reynolds waived all right to an interest in property acquired during the parties’ relationship.

To rely on a supposed “oral agreement” to allow Walsh to keep assets “separate” to prevent an equitable distribution of property

acquired during the parties' 23-year relationship would be a travesty. To the extent Walsh relies on the parties' supposed "agreement" to prevent her "separate" property from being subject to distribution at the conclusion of their domestic partnership, her argument fails for all the reasons discussed in this and the opening brief.

F. This Court should award Reynolds all her fees. (Reply to Resp. Br. 43-45, 47)

Walsh's argument that Reynolds was not entitled to fees because this case arises out of an equity relationship (Resp. Br. 43-44), which the trial court belatedly (and wrongly) adopted on remand, fails for the simple reason that this case in fact arises out of the dissolution of a statutory domestic partnership. As a consequence, and as this Court held in the earlier appeal, RCW 26.09.140 authorizes an award of fees in this dissolution of a domestic partnership. 183 Wn. App. at 857, ¶ 56.

This Court should consider this issue in light of the parties' *relative* ability to incur the litigation expenses during the entire action, beginning when Walsh filed for dissolution in 2009. Reynolds will respond to the unsupported claims that she has no need for fees (Walsh cannot seriously argue that she has no ability to pay) pursuant to RAP 18.1.

In any event, regardless of the statutory grounds for a need-based fee award, this Court should award fees against both Walsh and her counsel for intransigence and pursuant to RAP 18.9. *See Mattson v. Mattson*, 95 Wn. App. 592, 605-06, 976 P.2d 157 (1999); *Marriage of Richardson and Fu*, 188 Wn. App. 1009, 2015 WL 3610205 (2015) (GR 14.1(a); unpublished opinion, cited as non-binding persuasive authority) (wife’s “questionable litigation tactics” and “gamesmanship to avoid compliance” warranted award of fees to husband). Particularly on remand, this decade-long ordeal was caused solely by the intransigent unwillingness of Walsh, aided and abetted by an attorney who has championed her baseless efforts to evade an equitable distribution beginning the moment Walsh filed for dissolution of the parties’ domestic partnership, to recognize the nature and consequence of the parties’ 23-year relationship.

In applying the law of the case, fees will be awarded against a party resisting enforcement of the appellate court’s earlier decision if it would otherwise deny the other party “the practical benefit of her successful appeal.” *Estate of Langeland v. Drown*, 195 Wn. App. 74, 94-95, ¶¶ 45, 46, 380 P.3d 573 (2016). Fees were also awarded against the party’s counsel, who “merely repeated arguments were unsuccessful before,” in *Langeland*, 195 Wn. App. at 88, ¶ 29.

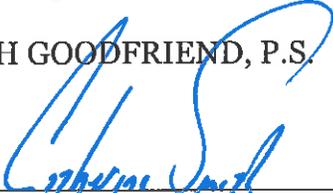
“About half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop.” *Watson v. Maier*, 64 Wn. App. 889, 891, 901, 827 P.2d 311 (Alexander, J., quoting Elihu Root; awarding fees as sanctions against an attorney who made the same meritless arguments three times because “[t]his type of misuse of the system should be discouraged”), *rev. denied*, 120 Wn.2d 205 (1992). An award against Walsh’s counsel is also justified in this case.

III. CONCLUSION

For the reasons set out in this and the opening brief, this Court should reverse and remand to a new judge for division of property accumulated during the parties’ relationship since 1988, dismiss Walsh’s cross-appeal, and award Reynolds all her fees.

Dated this 22nd day of August, 2018.

SMITH GOODFRIEND, P.S.

By: 

Catherine W. Smith, WSBA No. 9542
Valerie A. Villacin, WSBA No. 34515

Attorneys for Appellant

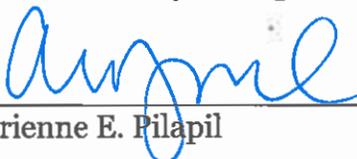
DECLARATION OF SERVICE

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

That on August 22, 2018, I arranged for service of the foregoing Reply Brief of Appellant/Motion to Dismiss and Response to Cross-Appeal, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Miryana L. Gerassimova Law Office of Amanda J. Cook, PLLC 2727 Hollycroft Street, Suite 110 Gig Harbor WA 98335 (253) 265-7515 miryana@acooklaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Barbara A. Henderson Smith Alling, P.S. 1501 Dock St. Tacoma, WA 98402 bhenderson@smithalling.com kellym@smithalling.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 22nd day of August, 2018



Andrienne E. Pilapil

SMITH GOODFRIEND, PS

August 22, 2018 - 4:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51125-8
Appellate Court Case Title: Jean Walsh, Respondent/Cross-Appellant v. Kathryn Reynolds, Appellant/Cross-Respondent
Superior Court Case Number: 11-3-00924-5

The following documents have been uploaded:

- 511258_Briefs_20180822154722D2411976_6745.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 2018 08 22 Reply Brief of Appellant.pdf
- 511258_Motion_20180822154722D2411976_8526.pdf
This File Contains:
Motion 1 - Other
The Original File Name was 2018 08 22 Motion for Leave to File 43 Page Reply Brief.pdf

A copy of the uploaded files will be sent to:

- bhenderson@smithalling.com
- kellym@smithalling.com
- miryana@acooklaw.com
- valerie@washingtonappeals.com

Comments:

- Appellant's Motion for Leave to File 43-Page Reply Brief - Reply Brief of Appellant/Motion to Dismiss and Response to Cross-Appeal

Sender Name: Andrienne Pilapil - Email: andrienne@washingtonappeals.com

Filing on Behalf of: Catherine Wright Smith - Email: cate@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20180822154722D2411976