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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JEAN M. WALSH,

Respondent/Cross-Appellant,

v.

KATHRYN L. REYNOLDS,

Appellant/Cross-Respondent.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
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I. INTRODUCTION

We respectfully submit that the emotional and pejorative Reply Brief of Appellant/Motion to Dismiss and Response to Cross-Appeal of Reynolds (“Reply Br.”) confuses the issues. That brief insults Dr. Jean Walsh (“Walsh”) and her primary attorney. Its tone most kindly can be described as overwrought. It characterizes Walsh as hostile to “lesbians” (p. 7), falsely accuses Walsh of “specious procedural impediments” (p. 7), incorrectly asserts that Walsh “at every stage of these proceedings, ...[has acted] to evade and needlessly increase the cost to review” (p. 12), alleges that Walsh wants “this Court to rely on homophobic laws” (p. 17), complains that Walsh’s citations are “disgraceful” (p. 18), dismisses Walsh’s constitutional arguments as “both absurd and offensive” (p. 22), equates Walsh’s constitutional arguments to those made by “antebellum slave owners” (p. 24), dismisses Walsh’s arguments as “no different [than] those made by powerful men” (p. 39), imperiously asks this Court to punish Walsh’s attorneys for “intransigence” (p. 42), excoriates Walsh’s primary attorney as having “abetted” the “baseless efforts” of Walsh to “evade an equitable distribution” (p. 42), and hostilely asks this Court to issue an “award against Walsh’s counsel” (p. 43).

Appellate courts are especially challenged in family law cases to “bring justice” and correctly shape “common law... because of the

emotions involved.” C.W. Smith, *Domestic Relations on Appeal: Tips for a Seldom Taken Journey*, attached as Appendix A.¹ It is in that spirit, and in contradistinction to the Reply Brief, that Walsh asks this Court – fairly and dispassionately – to address the remaining issues here:

1. The trial court’s adherence to the law of the case, especially in light of this Court’s mandate.
2. The violation of Walsh’s constitutional rights.
3. The new statutory arguments of Reynolds.
4. The trial court’s finding of an enforceable contract between the parties, which is supported by substantial evidence.
5. Why this Court should deny Reynolds’ request for attorney’s fees.

II. REPLY ARGUMENT

A. The trial court followed this Court’s mandate and did not “violate” the law of the case.

Reynolds incompletely quotes this Court’s earlier decision and even misstates her own position in arguing that the trial court did not follow the law of this case. The trial court was charged to “reconsider whether” the parties had a common law equity relationship pre-2005 and, “if so”, to redistribute the parties community assets accordingly (2016 FF 1, CP 585). In its earlier analysis, this Court indicated, “there are several

¹ The article author cautions that lawyers in such cases should act “without undue emotional involvement.”

other dates that could serve as starting points for application of this doctrine here.” *Walsh v. Reynolds*, 183 Wn. App. 830, 847, 353 P.3d 894 (2014), *rev. denied*, 182 Wn.2d 1017 (2015) (emphasis added) (“*Walsh*”). While this Court posited other dates that *could* be selected, it did not direct the trial court’s decision in that regard.

Reynolds also ignores that the “law of the case,” to which she now so firmly clings, did not address Walsh’s constitutional arguments. The trial court concluded that an award of property acquired prior to the effective date of amendments to California’s domestic partnership law (January 1, 2005) would deprive the parties of vested property rights without due process of law (2012 CL 4 and 5, CP 373).² Reynolds has never challenged this conclusion.

Walsh asks the Court to address the constitutional issues. Brief of Respondent/Cross-Appellant Jean M. Walsh (“Walsh Brief”) at 12-24. Both RAP 2.5(a)(3) and case law allow constitutional rights to be raised here, as they were in our initial appeal. Waiver of a constitutional right is not to be implied or lightly found. *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997) (citations omitted). Walsh’s initial appeal was denied review by

² This Court was clear that it did not address the due process argument at all. 183 Wn. App. at 839, n. 5.

the Washington Supreme Court because it was subject to remand. These constitutional claims must be heard now.

Reynolds also ignores the trial court's finding that the parties consciously intended and chose not to share property in a "marital-like" fashion. That agreement constituted an implied contract (necessitated by the knowledge that only private actions would create enforceable obligations). This was reaffirmed as late as August 20, 2009 when the parties registered in Washington as domestic partners. The document they received from the Secretary of State provided:

Any rights conferred by this registration may be superseded by will, deed or other instrument signed by either party to this domestic registration. (2012 FF 30, CP 458)

These parties made a conscious choice to remain separate financial entities, continuing the way each had functioned until that point. (CP 638).

1. Reynolds sought retrial on remand.

Reynolds originally argued that a trial on remand was "unnecessary". Brief of Appellant ("App. Br.") 10. She now reverses position and argues "that a trial was necessary in part to establish the status of the parties' property."³ Reply Br. 8.

³ Reynolds falsely asserts that the trial court refused Reynolds any discovery on Walsh's post-decree management of assets (Reply Br. at 9). Reynolds trial counsel filed no motion to compel additional answers to interrogatories and instead brought an untimely motion in limine on the first day of trial. Reynolds trial counsel took Walsh's deposition without limitation. RP 256.

2. The Commissioner’s ruling conclusively establishes that the mandate was followed.

Reynolds is incorrect that the trial court “refused” to follow this Court’s mandate. That position ignores both 2016 FF 1-6 (CP 636-38), and the Commissioner’s ruling of February 15, 2017 (CP 754-761). It has conclusively been established that the trial court followed the mandate. (“This Court did not order the trial court to find a pre-2005 commencement date for the equity relationship. It ordered the trial court to reconsider whether January 1, 2005 was the appropriate commencement date. The trial court did so, albeit not in the way Reynolds argued that it should have.”) (CP 759).⁴ Reynolds did not seek modification of that ruling.

3. Reynolds’ nonspecific objection to the findings on remand hampers Walsh’s ability to respond.

RAP 10.3(a)(4) requires:

A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

Rather than provide specific references, Reynolds asserts generally that “the trial court erred in entering its second set of findings, many of which are conclusions of law, and individually to each and every finding that was

⁴ Reynolds repeatedly misstates the wording of the mandate, asserting that the trial court was to reconsider “when” not “whether” an equity relationship commenced pre-2005.

entered on remand (CP 631-45)”. App. Br. 2. Reynolds now argues that “nothing would have been gained by setting out those findings once again in individual assignments.” Reply Br. 12. Rather than comply with the rules, she asserts the rules do not apply to her.

Although a case’s merits may be reviewed absent strict compliance with an applicable rule, the rules are nonetheless mandatory. See State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629, 633 (1995). The failure to specifically assign error prejudices Walsh, making it unnecessarily difficult for Walsh to provide a meaningful and focused rebuttal. Similarly, this nonspecific and unauthorized approach forces this Court to determine, as best it can, the specific issues Reynolds fails to articulate.⁵

Walsh is alleged to have taken positions to “needlessly increase” the cost of review. Reply Br. 12. Walsh is not “litigious” because she has been forced to respond to motions she did not initiate.⁶

B. This Court should limit property distribution to property acquired subsequent to August 2009.

Reynolds contends that Walsh had no constitutionally protected vested rights in her separate property because, under RCW 26.09.080, “all property owned by either party was subject to distribution by the court.”

⁵ This must be considered in relation to assessing terms against Reynolds and in consideration of her request for attorney’s fees.

⁶ Reynolds continues to file yet more motions. *See* previously filed Motions to Dismiss Cross-Appeal and to Revise Commissioner’s Ruling Denying Motion to Dismiss. Walsh has not filed a single motion during the pendency of this appeal.

Reply Br. 19. Reynolds elides not only the critical facts, but centuries of precedent. When the parties registered as domestic partners, Washington's marital dissolution statute did not encompass domestic partnerships. The subsequent amendment was effective December 3, 2009. (Ch. 21, L. 2009). There was no notification or other provision that would have allowed a party to opt out of retroactive modification.

Any property distribution should be limited to property acquired by either party after August 20, 2009 only. Property acquired during the relationship was subject to contractual agreement of the parties. The parties did not intend to acquire shared property.⁷ The trial court was uniquely able to assess the credibility of witnesses; its determination of questions of fact should not be disturbed on appeal. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

When the parties registered as domestic partners in Washington, RCW 26.60.080 provided that any community property rights of domestic partners applied only from the later of the date of the initial registration of the domestic partnership or June 12, 2008. RCW 26.60.080, Ch. 6 L. 2008. To the extent the trial court was able to find any date upon which

⁷ The parties were aware of others who operated as if they were joint financial entities, but did not elect to follow suit. (RP 94). All actions taken by the parties, including executing the deed to the Federal Way house as "joint tenants and not as community property" (CP 210), support an agreement not to acquire community property.

the agreement might no longer be operative, the earliest such date would be August 20, 2009, the day of domestic partnership registration.

This Court's prior holding that the statute did not erase the parties "equity relationship" existing when they registered in Washington does not affect the enforceable agreement of the parties regarding their property. Nor does the legislative finding regarding RCW 26.60.010 support that result. That legislative history specifically refers to marriage.⁸ It could not refer to same-sex partners because marriage in Washington was then defined as "between a man and a woman". RCW 26.04.010.⁹ (repealed by Referendum Measure No. 74, approved Nov. 6, 2012).

It is not "homophobic," as Reynolds asserts, to accurately summarize the law as it existed during this period at issue. It is equally disingenuous (and intentionally derogatory) to equate Walsh, a woman, to "powerful men". Reply Br. 18. The parties could not have acquired community property when both the common law and statutes prohibited it and the parties did not contemplate or intend it.

⁸ "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." RCW 26.60.010.

⁹ The statute was subsequently upheld, in furtherance of the discrimination suffered by all same-sex couples, including against Walsh and Reynolds. *See Anderson v. King County*, 158 Wn. 2d 1, 138 P.3d 963 (2006).

C. Both parties had a continued expectation to their constitutionally protected right to acquire and own separate property.

Reynolds argues for the first time that the 2008 amendment to RCW 26.09.080 gave the court plenary and unlimited authority to divide any and all property (separate and community) of the parties and that the statute – not common law equity – determines property distribution here. This argument is raised for the first time on appeal, and is contrary to the law of this case. This Court’s prior opinion on this issue states:

Although RCW 26.09.080 provides a framework for a trial court’s distribution of a couple’s domestic partnership property, 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. *See* LAWS OF 2008, ch. 6 § 1011. Thus, this statute does not control distribution of property that Walsh and Reynolds accumulated during their relationship before the 2008 amendment.

Walsh, 183 Wn. App. 849, ¶42.

This conclusion is correct for several reasons. First, RCW 26.09.080 does not act to change the characterization of property from separate to community or vice versa. Second, pre-2008 the statute applied to the division of “marital property”; post-2008 it applied to “domestic partnership” property. *See Marriage of Urbana*, 147 Wn. App. 1, 10, 195

P.3d 959, 963 (2008).¹⁰ That is why this Court’s mandate required the trial court to “reconsider whether the parties had a common law *equity relationship* before January 1, 2005.” *Walsh*, 183 Wn. App. at 859 ¶ 66 (emphasis added). Walsh’s petition asked the court to fairly distribute property, not to act beyond the applicable law.

The cases Reynolds cites involved parties who eventually married. See, e.g., *Marriage of Lindsey*, 101 Wn.2d 299, 304 678 P.2d 328 (1984). They are inapplicable here. “A committed intimate relationship is not a marriage. Thus, the laws involving the distribution of marital property do not directly apply to the division of property following a committed intimate relationship.” *In re G.W.-F.*, 170 Wn. App. 631, 637-38, 285 P.3d 208, 211 (2012). Property is characterized as either community or separate as of the date of acquisition. *In re Marriage of Gillispie*, 89 Wn. App. 390, 399, 948 P.2d 1338, 1343 (1997).

Walsh and Reynolds did not marry. They did not intend to jointly own property. They lacked a marital-like intimate relationship.

¹⁰ “RCW 26.09.080 replaced former RCW 26.09.110 and lists a nonexclusive set of factors that the trial court must consider when distributing the marital property. See *Zahm*, 138 Wn.2d at 212, 278 P.2d 498.”

D. Both parties had vested property rights to which retroactive application of the statute is unconstitutional.

Under Washington law, “new legislation, including amendments to existing law, is given prospective application unless there is clear intent to apply the law retroactively.” *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259, 255 P.3d 696, 701 (2011); see *Reynolds v. McArthur*, 27 U.S. 417, 434 (1829) (“It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable.”). Nothing in the legislative expansion of domestic partnerships to “everything but marriage” reflects a “clear intent” for it to apply retroactively to domestic partnerships registered prior to its enactment. The absence of the ability to “opt-out” further supports there was no intent for retroactivity.

But even if it did—which, again, it does not—such intent could not be given effect consistent with the requirements of due process. The Due Process Clause “protects the interests in fair notice and repose that may be compromised by retroactive legislation,” *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994). A retroactive enactment will be enforced only to the extent that doing so will not unjustly “impair rights a party possessed

when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1187 (9th Cir. 2016) (quoting *Landgraf*, 511 U.S. at 280). Reynolds' argument that Walsh is not "entitled to constitutional protection from change in the law," Reply Br. 25, runs head-on into that constitutional bulwark. When Reynolds and Walsh registered as domestic partners in Washington, nothing in Washington law even hinted that separate property owned by one member of a domestic partnership could later be subject to "equitable" distribution upon dissolution of the partnership. Walsh's *constitutionally protected* expectation was thus that her separate property would remain exactly—her separate property. In short, contrary to Reynolds' self-serving claim, Walsh's "expectation" when she and Reynolds "availed themselves of the Washington laws" was that Washington law would apply consistent with due process. (See Reply Br. 20-21)

Reynolds asserts in her response that "no one is entitled to constitutional protection from change in the law." Reply Br. 23. Reynolds mistakenly relies on *In re Marriage of MacDonald*, 104 Wn.2d 745, 709 P.2d 1196 (1985).¹¹ In considering the wife's community property

¹¹ In *MacDonald*, the parties were married for 17 years, 15 of which included husband's military service. Washington courts treated military retired pay as a divisible asset until the decision in *McCarty v. McCarty*, 453 U.S. 210 (1981). The wife's appeal of the trial court's decision denying division was pending

expectation, the *MacDonald* court first acknowledged that “[d]ue process is violated if the retroactive application of a statute deprives an individual of a vested right”. *Id* at 750 (citations omitted). The court acknowledged that a statute is presumed to have prospective application only. *Id* at 748.¹²

The court concluded:

As between husband and wife while married neither has a vested right to their property, nor does a trial court’s division of property create a vested right.

MacDonald, 104 Wn.2d at 750 (emphasis added).

Reynolds relies on other cases that are distinguishable, such as *Marriage of Larson and Calhoun*, 178 Wn. App. 133, 140, 313 P.3d 1228 (2003), *rev. denied*, 180 Wn.2d 1011 (2014). *Larson* involved parties who married in 1986. RCW 26.09.080 was enacted in 1973 and “specifically applies the statutory criteria to separate property.” *Larson*, at 140-41 (quoting *Marriage of Konzen*, 103 Wn.2d 470, 477, 693 P.2d 97 (1985)).

when the Uniform Services Former Spouses Protection Act (“USFSPA”) was passed. USFSPA restored to the states the authority “to determine if military retired pay is to be treated as the separate property of the service member or if it is to be treated as the community property of the service member and spouse.” *MacDonald*, 104 Wn.2d at 748.

¹² The court relied on the language of the statute and legislature history of USFSPA in determining that it was intended to have retroactive effect. 104 Wn. 2d at 748-49.

E. The retroactive application of the equity relationship doctrine is unconstitutional.

Reynolds relies on *Marriage of Hilt*, 41 Wn. App. 434, 704 P.2d 672 (1985), to argue that the equitable relationship doctrine applies retroactively to property distribution. In *Hilt*, the husband acquired a personal injury claim five months after the parties commenced cohabiting, but three years before their marriage. *Id.* at 436. At the time of the husband's injury, Washington law provided that his claim was community property. *Id.*, at 440. Thereafter, a personal injury claim was deemed the separate property of an injured spouse. *Id.* at 440. The *Hilt* court specifically declined to decide if the equitable relationship doctrine (then only recently announced in *Lindsey*) retroactively applied. In *Hilt*, the trial court, as here, relied upon the binding agreement of the parties based upon substantial evidence.¹³

F. The remedy sought by Reynolds is unconstitutional

Reynolds' argument depends on rewriting history and bypassing bedrock rules of constitutional law. This case is nothing like the opposite-sex-couple cases Ms. Reynolds cites (Reply Br. 23-6). Reynolds contends

¹³ The court determined the wife's interest in the claim based on agreement of the parties. Not only did the husband tell the wife that everything would be jointly owned, the wife managed both her individual bank accounts and husband's bank accounts, into which the funds of each were deposited. *Hilt*, 41 Wn. App. at 436. The court concluded that the parties "did not intend to keep either assets or income separate and apart." *Id.* at 436 (emphasis added).

that “no evidence was presented distinguishing the first 17 years of the parties’ relationship [from] the last 4 1/2 years.” Reply Br. 14. It is true that the contract between the parties remained unchanged. However, the evolution of law concerning same sex-couples directly contradicts Reynolds’ claim. From 1988 to 2000, the parties resided in California. At that time, same-sex couples *had no legal rights to joint property* in California. See Cal. Stats. 2003, ch. 421, § 4 (codified at Cal. Fam. Code § 297.5(a)); Cal. Stats. 1999, ch. 588, § 2 (codified at Cal. Fam. Code § 297(a)). Likewise, the State of Washington did not apply the committed intimate relationship (“CIR”) doctrine to same-sex couples until 2004, in *Gormley v. Robertson*. See 120 Wn. App. 31, 83 P.3d 1042 (2004).¹⁴

Again, Reynolds misunderstands the law of retroactivity. Of course “change[s] in the common law” apply retroactively by default. Reply Br. 31. (quoting *Marriage of Hilt*, 41 Wn. App. 434, 440, 704 P.2d 672, 676 (1985)); see also Reply Br. 34-35 (similar under California law). But a default rule can and will be superseded where application of the default rule would violate the Constitution. Such is the case here. After all, “a judicial decision that eliminates or substantially changes established

¹⁴ Indeed, it was not until 2001 that a Washington court even stated *in dictum* that equitable claims might not be dependent on the “legality” of the relationship between the parties (such that they might not be limited by the gender or sexual orientation of the parties). See *Vasquez v. Hawthorne*, 145 Wn. 2d 103, 107, 33 P.3d 735 (2001).

property rights, which are a legitimate expectation of the owner, is ‘arbitrary or irrational’ under the Due Process Clause.” *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 560 U.S. 702, 737 (2010) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005)). And here, the law of the land forbade same-sex couples from enjoying the benefits of marriage (or the benefits of a marriage-like regime) for the entirety of the subject relationship. Accordingly, neither party would have had a reasonable expectation that someday a court might order a forced transfer of her private property to the other.¹⁵

Nor can Reynolds’ argument be squared with federal Takings Clause jurisprudence. As the U.S. Supreme Court made clear in *Lucas v. S.C. Coastal Council*, “whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest ... with respect to which the takings claimant alleges a diminution in (or elimination of) value” is a core component of the takings analysis. *Lucas*, 505 U.S. 1003, 1016, n.7; *see also* 505 U.S. at 1035 (Kennedy, J.,

¹⁵ That some same-sex couples chose to approximate the burdens of marriage by private agreement does not alter that conclusion. Contract law has always allowed private parties to go beyond, or opt out of, the default rules set by the state. But the existence of contract law has never been thought to be used as a cudgel to beat away an individual’s reasonable, state-law-backed expectations regarding their property.

concurring in the judgment) (the Takings Clause “protects private expectations”). California law deprived same-sex couples of the ability to enjoy the benefits of marriage or a marriage-like regime until 2005, and Washington did not expand the CIR doctrine to same-sex couples until 2004. The only “reasonable expectation” available to a person in Walsh’s shoes before the mid-2000s would have been that a same-sex relationship would *never* be recognized by either California or Washington. *See id.* at 1016 n.7 (majority opinion).

Finally, what Reynolds labels as “disgraceful” and a “relentless quest to avoid any responsibility” (Reply Br. 17) is more accurately described as an effort to enforce the constitutional protections to which all persons, regardless of sex or sexual orientation, are entitled. This court should thus reverse the post-2005 allocation and give effect to the parties’ reasonable, state-law-backed expectations and their contractual agreement.

G. Under Washington law predating 2005 the equity relationship doctrine did not apply.

Reynolds continues to ignore the trial court’s finding that the parties were not in an equity relationship for purposes of property division. Reynolds argues that none of the earlier cases in which the equity relationship doctrine was developed excluded same-sex couples from pursuing such a claim. Reply Br. 29. This statement is simply wrong:

We hold that a same-sex relationship cannot be a meretricious relationship because such persons do not have a “quasi-marital” relationship. Same-sex persons may not legally marry and such a relationship is not entitled to the rights and protections of a quasi-marriage, such as community property-like treatment.

Vasquez v. Hawthorne, 99 Wn. App. 363, 368-69, 944 P.2d 240, 243 (2000), *rev'd* 145 Wn.2d 103 (2001).

The exclusion of same-sex relationships from the equity relationship doctrine during this time is consistent with the 2000 California statute that disclaimed community property rights. Neither statute nor common law entitled either party to the rights and protections afforded to married persons, including property rights.

H. Reynolds cannot establish an interest in property acquired during her relationship with Walsh in California.

Reynolds argues that the 2005 amendments to the California Family Code retroactively changed property rights held by persons cohabiting. Her reliance on the California Family Code is misplaced.

In her citation of Cal. Fam. Code § 4(3)(c), she curiously omits that subsection’s last phrase, and thereby distorts the meaning of the subsection. The entire subsection reads as follows:

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, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action.

Cal. Fam. Code § 4(3)(c) (emphasis added).

This statutory reference “to all matters” refers not to property rights, but rather to legal processes pending at the time of the 2005 amendments. A “matter” is “a subject under consideration, esp. involving a legal dispute or litigation;...” Black’s Law Dictionary (10th ed. 2014). This subsection means that “the new law” applies to legal proceedings pending at the time of the amendment, and does not mean that the “new law” obliterated pre-existing property rights.

Reynolds is also incorrect that the California statutes created “community property rights... back to the original registration of the parties’ domestic partnership in 2000.” Reply Br. 33. Cal. Fam. Code § 297.5(k)(1) in pertinent part provides that

“the date of a marriage shall be deemed to refer to the date of registration of a domestic partnership with the state...”
“with respect to community property, mutual responsibility for debts to third parties, the right in particular circumstances of either partner to seek financial support from the other following the dissolution of the partnership, and other rights and duties as between the partners concerning ownership of property,...”

Cal. Fam. Code § 297.5(k)(1).

The above-cited statute did not automatically terminate individual property rights. Even Reynolds admits that the California statutes do not “diminish any right or provisions of law” and do 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.” Reply Br. 34.¹⁶

Reynolds also relies on *Marvin v. Marvin*, 18 Cal.3d 660, 557 P.2d 106 (1976). However, in *Marvin* the California court did not create new domestic partnership rights, but instead recognized contractual rights held by a party. *See Marvin*, 18 Cal.3d 660, 557 P.2d 106. The California court held that the “provisions of the Family Law Act do not govern the distribution of property acquired during a non-marital relationship,…” *Id.* at 665, 557 P.2d 106.

Finally, and most importantly, the parties here are not attempting to dissolve their California domestic partnership in a California court.

I. The oral agreement of the parties is enforceable.

The parties agreed to acquire and maintain separate property. 2016 FF 6 (CP 637-38). Each party had full control and autonomy over her separate income and assets.¹⁷

Reynolds claims that the trial court’s decision is based on “testimony custom manufactured on remand to attempt to meet the criteria

¹⁶ The California courts have recognized “that the retroactive application of a statute may be unconstitutional if it deprives an individual of a vested right without due process of law.” *Velez v. Smith*, 142 Cal. App. 4th 1154, 1171, 43 Cal. Rptr. 3d 642 (2006).

¹⁷ Among other things, Reynolds paid taxes on income received from Walsh when they resided in California (2012 FF 7, CP 365-66) and established a SEP IRA.

of *G.W.-F.* ...” Reply Br. 37. See *Parentage of G.W.-F.*, 170 Wn. App. 631, 285 P.3d 208 (2012). This Court’s 2012 findings of fact prove this allegation false. For example, 2012 FF 4 (CP 373) establishes that the parties had no joint accounts of any type; neither party entered into any joint debt with the other; the parties maintained separate financial lives throughout the duration of their relationship; and each party had a vehicle titled in her name and considered that vehicle to be her separate property.¹⁸

After hearing further testimony, the trial court found that all actions taken after the parties registered as domestic partners in California in 2000 “were consistent with their intent to acquire and maintain separate property”:

Following registration, the parties took no actions to combine or co-mingle (in any way) their separate property or debt acquired by each prior to the date of registration. The parties did not thereafter create or maintain any joint account of any type, nor did they thereafter acquire joint debt. The parties continued to operate as separate financial entities before and after registering as domestic partners in California.

¹⁸ Furthermore, 2012 FF 5, (CP 365) establishes that the arrangement whereby Walsh paid wages to Reynolds was proposed by Reynolds and continued through September 2011. In the rare instances in which an asset was co-owned, it was documented in writing, to include vehicle titles and the deed to the Federal Way home, which states their intention “to acquire all interest granted them hereunder as joint tenants with right of survivorship, and not as community property or as tenants in common.” (2012 FF 20, CP 368) (emphasis added).

(2016 FF 5, CP 637).

Walsh and Reynolds consciously structured their financial lives to avoid shared property. (2016 FF 6, CP 637-38). They intended to maintain separate property throughout their relationship. Their oral agreement was meticulously observed throughout the relationship. (2016 FF 9, CP 640-41).

Despite the presence of overwhelming evidence in the record, Reynolds tries to distinguish *G.W.-F.*, claiming the relationship here was not sufficiently “egalitarian”, but instead “traditional”. Reply Br. 38. As here, the facts established “...an oral agreement existed and that it was observed throughout the relationship.” *G.W.-F.*, 170 Wn. App. at 638. Similarly, “as evidence of the existence of this oral agreement, over the course of the next 25 years, the parties avoided commingling their individual and joint assets.” *Id.* at 640, 285 P.3d at 213. There is more than sufficient proof to support the trial court’s conclusion.¹⁹

Reynolds’ reliance on *Marriage of Mueller*, 104 Wn. App. 390, 118 P.3d 944 (2005), *rev’d on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007) likewise does not support her claim that income earned by

¹⁹ Reynolds did not function as a “single mother.” Walsh’s work schedule at Group Health was designed around the children’s school hours in Tacoma, where she worked. The final parenting plan confirmed Walsh as Joe’s primary parent and Reynolds as Emily’s. (CP 7). By the second trial, all three children, including Emily, lived with Walsh. (RP 229).

Walsh must be characterized as community property. The parties in *Mueller* were married. By definition, earnings of married spouses are community property. Walsh and Reynolds never married and neither had access to, much less managed, the other's income.

III. ATTORNEY'S FEES

Through the first trial, the first appeal, and the Order Denying Discretionary Review, Reynolds has been awarded and Walsh has paid \$105,970 in attorneys fees. Since filing the instant appeal, Reynolds' decisions have resulted in increased attorney's fees of both parties. In particular, Reynolds has filed numerous motions, while Walsh has not. Walsh's attorney's fees have increased as she has been forced to respond to these motions (including twice during the time period for filing this reply brief). It was Reynolds who expanded the scope of this review by moving to include in this appeal the entire records of the first trial and appeal. Reynolds requests attorney fees because Walsh was necessarily forced to respond.

Reynolds also asserts that attorney's fees should be awarded to her via application of RCW 26.09.140, for dissolution of a domestic partnership. This ignores that the remand was limited to determine whether the parties had a common law equity relationship before pre-2005 as the sole basis upon which ("if so") the trial court could redistribute

property. Attorney's fees are not awardable for distribution of property pursuant to an equity relationship. *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d 831 (1985).²⁰

In addition, attorney's fees should not be awarded under RAP 18.9. Reynolds employs hyperbole designed to distract from the issues, and directs insults at Walsh and her counsel. Walsh has not similarly denigrated Reynolds, her counsel or the trial court. Instead, Walsh properly has defended her constitutional rights. Walsh trusts equity will fairly be applied to both parties. It is neither intransigence nor gamesmanship to seek protection of one's constitutional rights in a judicial proceeding.

IV. CONCLUSION

This Court should deny Reynolds appeal. Walsh's cross-appeal should be granted as it relates to the time period between January 1, 2005 and August 2009. This Court should remand property distribution applicable to that time period to the trial court for award to the party who acquired the same as her separate property. This Court should deny the

²⁰ Reynolds also cites *Larson* in arguing that the trial court has left her "relatively impoverished". In addition to the \$500,000 received by her during the parties' relationship, she also was awarded almost \$500,000 from sale of the Federal Way house and from Walsh's retirement accounts. Poverty should be hard to claim by a millionaire or semi-millionaire.

request to award attorney's fees on appeal.

Dated this 22nd day of October, 2018.

SMITH ALLING, P.S.

By: 

Barbara A. Henderson, WSBA No. 16175
Robert E. Mack, WSBA No. 6225

Attorneys for Respondent/Cross-Appellant
Jean M. Walsh

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of October, 2018, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

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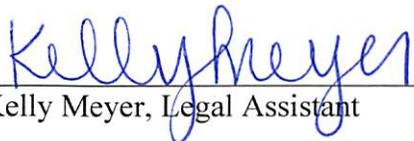
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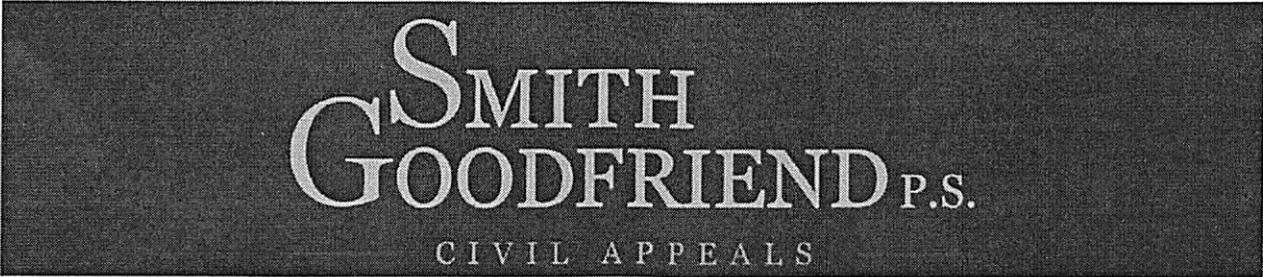
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I declare under penalty of perjury under the laws of the State of Washington that the I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of October, 2018, at Tacoma, Washington.



Kelly Meyer, Legal Assistant

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Domestic Relations on Appeal: Tips for a Seldom Taken Journey

By [Catherine Wright Smith \(catherine-wright-smith.php\)](#)

I have been a lawyer for over 25 years, and a large part of that time has been spent in the appellate courts of this state. First as a law clerk on the state Supreme Court, and then as an associate and partner in a small law firm whose attorneys have always focussed their practices on appeals, I have handled hundreds of cases, ranging from criminal misdemeanors to multi-million civil judgments, raising every substantive issue imaginable. Division I Judge Susan Agid says that appellate judges are the last generalists left in the law, and that has certainly been my experience as an appellate practitioner.

But it is in domestic relations - an area of the law that some think should not even be subject to appeal as a matter of right, and where the criteria governing decision-making at trial and the standard of review on appeal are intentionally crafted to make it more difficult to obtain effective review of a trial court's decision - that I have had the most success in fulfilling my goals as a lawyer. The thing that most drew me to appeals as a law student and young lawyer was the possibility not

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only of trying to bring justice to a particular set of litigants, but of shaping policy through the common law. I have always tried to keep those two complementary goals in mind in evaluating and arguing cases on appeal. Sometimes that is a more difficult thing to do in family law cases - because of the emotions involved, because these disputes aren't "just about money," keeping both the client's and the attorney's goals and expectations realistic can be difficult. This paper sets out some general principles that I try to keep in mind in handling domestic relations cases on appeal:

Know Your Audience

Only a few of the 30 men and women currently sitting as appellate judges in this state had an extensive domestic relations practice before joining the appellate bench. For most appellate judges, RCW ti. 26 is foreign territory - a third world country they don't really want to visit, and that they won't without a clearly written, concise guidebook. Don't presume knowledge about the law or family dynamics governing domestic relations cases in the appellate courts.

Think Outside The Box

Many matrimonial lawyers are good at their jobs because they know "how things work," can predict what a trial judge or commissioner will do given a particular fact pattern, and act on that knowledge in resolving family law disputes. When a domestic relations case has not settled (as the vast majority do), and has not only gone to trial but is on its way to appeal, "that's how we always do it" is no longer a good reason to do anything. The appellate judges don't know (or care) how things are always done (see Know Your Audience, supra), and you must think creatively to find a fair resolution for the unusual family dynamic that has lead to a domestic relations appeal.

Read The Statute

Divorce is wholly statutory, and RCW ti. 26 is the Rosetta stone of domestic relations appeals. I often joke that the secret to my success as an appellate lawyer is that I read the statutes. But there is more than a little truth to that claim in domestic relations appeals. Sometimes when I evaluate a case for purposes of appeal it seems that I am the first attorney involved who has actually looked at and critically addressed the statutory criteria for decision that govern the substantive issues in the case (see Think Outside The Box, supra).

"Family law" is not an oxymoron. The Domestic Relation Act of 1973, the Parenting Act of 1987, and the Uniform Child Support Guidelines are all comprehensive, thoughtful pieces of legislation that have consistent themes and parameters. Use the language of the statutes in arguing your cases.

Recognize Your Limits

Good lawyers (and good judges) recognize that the law is of limited utility in healing the psychological and sociological traumas that lead to and flow from the breakup of a marriage or the other dysfunctional family dynamics that are governed by the chapters of RCW ti. 26. In the end, we can not legislate or decree matters of the heart, and the statutes and case law governing domestic relations reflect those limits on our abilities as attorneys and judges. The decision in *Marriage of Littlefield* (see *Read The Statute, supra*) is a classic example of the appellate courts' proper resistance to judicial/legislative micro-management of family dynamics.

Lawyers are often drawn to matrimonial law through a desire to help others, and there is sometimes an almost overwhelming desire to "fix" things by seeking relief that a court cannot practically effect. Our clients are, by and large, adults who do not permanently lose the power of reason - and thus to make decisions for themselves and their families and to deal with the disappointment if their expectations are not fulfilled - simply because their marriages break up. Except in extraordinary situations, the law should be interpreted and applied to facilitate the autonomy of litigants, including the parties in family law cases. Recognize the limits on your ability to effect psychological healing through the law.

Avoid Projection

Most lawyers (and judges) have never been the victim of crime, and none of us (presumably, if the Bar is doing its job) are criminals. Luckily, most of us (if we are doing our own jobs!) will never be defendants in a civil case, and having seen the costs and effects of litigation we will avoid suing others as well. A large part of our value in society as lawyers is the ability to look at a fact situation dispassionately, and to advise and advocate for the participants in events that lead to litigation without undue emotional involvement.

But all of us have family relationships. We are all children, parents, siblings, or spouses, and it is difficult for both lawyers and judges not to project our own experiences into the often very different family dynamics that lead to domestic relations cases. This projection can lead to bad advice and bad decision-making that says more about the lawyers and judges involved than the cases before them.

That is one of the major reasons that as lawyers we must remain focused on the law (see *Read The Statute, supra*) in those cases that lead to appeal (see *Think Outside The Box, supra*) and must also fulfill our responsibility to keep the judges we appear before (see *Know Your Audience, supra*) "on-task" in deciding them (see *Recognize Your Limits, supra*). If projection has become a problem, it may be time to bring someone else into the loop or to try a new approach to the dynamic among the parties, attorneys, and judges involved that has led a domestic relations case to the appellate courts.

Honor The System

The power and responsibility of the courts in defining our society cannot be overemphasized. The responsible exercise of that authority is the obligation of each of us as lawyers:

[A]lways be filled with the knowledge that as a lawyer, you are fulfilling a high purpose in society. You are the instrument through which our society resolves conflicts peacefully; and the method we choose to resolve conflict is what determines whether we are civilized or savages. I know of no more important role that anyone can fill in society, and we fill that role. And it is in fulfilling that role that we are truly professional.

Being always aware of the important purpose we fill in society will help us become better advocates. We will be able to write and speak with purpose and an inner conviction that what we are doing is important. This knowledge will cause us to show respect to others involved in the process, including judges, opposing counsel and the adverse parties. We need this respect to be effective in an arena of conflict.

Being filled with the knowledge that what we are doing is vitally important will give us inner strength that will show through to the court, to the jury, and opposing counsel. This high purpose will motivate us by elevating the otherwise hundreds of mundane things we do to a part of a ritual that leads to fulfillment of a goal larger than each of us--that is, holding the fabric of society together through peaceful resolution of disputes.

M. Edwards, Professionalism on Appeal, Appellate Advocacy in the Nineties at 1 (privately published 1990, available from Edwards, Sieh, Smith & Goodfriend).

The realistic use of the appellate courts to resolve family law disputes, and to provide the parameters for resolution without litigation of the problems facing hundreds of other like-situated families, is one of the most compelling and gratifying ways of fulfilling the lawyer's role in society.

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