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NO. 55167-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

MICHAEL L. OLVER, Special Administrator of the
ESTATE OF THUY THI THANH NGUYEN HO,

Respondent,

v.

JULIE K. FOWLER, Special Administrator of the
ESTATE OF CUNG VAN HO,

and

VU NGUYEN,

Appellant.

RESPONSE BRIEF INCLUDING
CROSS APPEAL OF MICHAEL L. OLVER,
RESPONDENT, CROSS APPELLANT

MICHAEL L. OLVER
MERRICK & OLVER, P.S.
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Special Administrator for
Estate of Thuy Thi Thanh Nguyen Ho

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2. Whether Appellant’s Assignment of Errors 2 and 3 regarding joint liability should be stricken from consideration on the grounds that no pleadings framed this issue; no evidence was introduced; and no decision appealed or otherwise was made by the trial court regarding “joint liability” or appellant’s creditor claim in any manner whatsoever. 3

ISSUES PERTAINING TO CROSS APPEAL

3. Whether Creditor’s Motion to Intervene after judgment should have been denied where creditor: (a) received notice of all proceedings; and (b) decided not to intervene as a matter of strategy because Ms. Fowler was doing a “fine job”, defending his client’s position. 3

ISSUES PERTAINING TO CROSS APPEAL

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ISSUES PERTAINING TO CROSS APPEAL

5. Whether creditor has waived any claim that his interest was “adequately represented by existing parties” as contemplated by CR 24(a) as the result of his comments to the trial court. 4

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I. ASSIGNMENTS OF ERROR.

A. Objection to Appellant's Assignments of Error.

1. Olver objects generally to Appellant's Assignments of Error and moves to strike Assignments 1-3 upon the ground that they are unrelated to the subject matter of his appeal, to-wit: that his Motion to Amend pleadings under CR 52 (b) was Denied by the trial court.

2. Olver objects specifically to Appellant's Assignments of Error No. 2 and for the additional reasons that:

Appellant's Assignments of Error 2 pertains to "joint liability". In fact, the pleadings did not frame this issue for decision and the trial court did not decide this issue.

3. Olver objects specifically to Appellant's Assignment of Error 3 pertaining to Creditor rights.

Nothing in the Findings of Fact (CP 235) Judgment of Disburment (CP 232) nor Order Denying Motion to Amend (CP 354) from which the appeal has been taken addresses "joint liability" or creditor rights.

Significantly, the separate creditor's claim lawsuit was the subject of the Estate Response to Motion to Amend Judgment (CP 262) and the subject of the colloquy of counsel and the court as reflected in Appendix A, the Transcript. (pgs. 30-52).

B. Assignments of Error : Cross Appeal.

The trial court erred as a matter of law by granting creditor Vu Nguyen's Motion to Intervene after judgment when he had received notice of all proceedings but made the strategic decision to take no action because Ms. Fowler was doing a "fine job" and "properly represented" his legal position. (App. A, Transcript, pgs. 23-24).

2. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

No. 1. Whether Appellant's Assignment of Errors 1-3 should be stricken from consideration on the grounds that they fail to assign error to or to address the putative subject matter of creditor's appeal, to-wit: the Denial by the trial court of his Motion to Amend Judgment under CR 52 (b)?

No. 2. Whether Appellant's Assignment of Errors 2 and 3 regarding "joint liability" and "the reach of "joint liability" should be stricken from consideration on the grounds that no pleadings framed this issue; no evidence

was introduced; and no decision appealed or otherwise was made by the trial court regarding “joint liability” or appellant’s creditor claim?

3. ISSUES PERTAINING TO CROSS APPEAL ASSIGNMENT OF ERROR.

No. 3 Whether creditor’s Motion to Intervene after judgment should have been denied where creditor: (a) received notice of all proceedings; and (b) decided not to intervene as a matter of strategy because Ms. Fowler was doing a “fine job”.

4. ISSUES PERTAINING TO CROSS APPEAL ASSIGNMENT OF ERROR.

No. 4 Whether creditor has waived any claim of timely or proper notice of proceedings by reason of his failure to assign error to the trial court’s Finding of Fact No. 1?

“All parties and all creditors have been given timely and proper notice of the hearing for Partial Summary Judgment herein; for restrictions on respondent’s non-intervention powers in the Cung Van Ho Estate; of the court ordered arbitration before the Honorable Gerard Shellan (Ret.); and of the presentation of these Findings, Conclusions and Judgment of Disbursement.”

5. ISSUES PERTAINING TO CROSS APPEAL

ASSIGNMENT OF ERROR

No. 5 Whether creditor has waived any claim that his interest was “adequately represented by existing parties” as contemplated by CR 24(a) by creditor’s laudatory praise for Fowler’s legal work to the trial court (App. A, Transcript, pg. 23-24).

II. STATEMENT OF THE CASE.

A. Procedural Background.

Appellant was appointed sua sponte on November 6, 2003, by Commissioner Kimberly Prochnau to pursue the instant litigation after the court had removed the prior Personal Representative Cuoc Van Ho, as Personal Representative because he had taken “a position which is in direct and irreconcilable conflict with his role as Personal Representative of the above-captioned estate with respect to the equitable division of property between the two estates.”

The undersigned was appointed to pursue the equitable division of assets between the Estate of Cung Van Ho and the Estate of Thuy Ho, and on January 11, 2004, the undersigned filed suit Contradicting

the Inventory of the Estate of Cung Van Ho. Discovery was conducted; evidentiary matters were determined; and on May 14, 2004, a Motion for Summary Judgment was brought on before the Honorable Mary Yu. Judge Yu entered a finding of fact that a meretricious relationship existed and granted Summary Judgment to the undersigned on the Contradiction of Inventory claim. (CP 170).

Thereafter, the Special Administrator of the Estate of Cung Van Ho, Julie K. Fowler, refused to divide the assets of the estate. After notice to all parties (App. B, pgs. 54-56), she was then ordered into binding arbitration by Commissioner Kimberly Prochnau and her non-intervention powers were revoked when the court found her estate to be insolvent. Appendix D (pg. 57) and Appendix E (pg. 58), attached hereto. The Arbitrator, the Honorable Gerard Shellan, Retired, ruled in favor of the undersigned that the parties Cung Van Ho and Thuy Ho owned the assets equally. (CP 193-203). Thereafter, on September 7, 2004, the Honorable Mary Yu entered Findings of Fact and Conclusions of Law (CP 235) and Judgment of Disbursement. (CP 232).

The Special Administrator Julie K. Fowler continued to refuse to disburse the assets and an alleged creditor sought to intervene. Vu Nguyen, claiming to be a creditor on behalf of Dianna Nguyen, filed a Motion to Amend Pleadings as to Judge Yu's May 14, 2004 ruling and the September 7, 2004 Findings and Judgment. On October 28, 2004, Judge Yu Denied the motion. Mr. Rumbaugh, on behalf of Vu Nguyen/Dianna Nguyen, filed a Notice of Appeal to Division I. Respondent cross appealed the Order allowing the Creditor to intervene.

B. Corrections to Appellant's Statement of the Case.

1. Wills. Appellant states that no will from Thuy Ho is in the record. Brief, page 3, implying that she had no Will. In fact Thuy Ho had executed Wills dated May 13, 1996 and February 16, 2001, the latter of which was admitted to probate.

2. Petition. Appellant states that the undersigned "sued to partition the property." For the sake of accuracy, the undersigned filed a Contradiction of Inventory (CP 3 - 20) pursuant to RCW 11.44.035.

3. Reason for Suit. Appellant projects various reasons why the undersigned filed the Contradiction lawsuit. In point of fact,

the Order Appointing Respondent as Special Administrator of the Thuy Ho Estate with the Will Annexed de bonis non did so because the prior personal representative (represented by Julie K. Fowler) had a conflict of interest in pursuing an equitable division of the assets between the two estates. The Court appointed the undersigned for the purpose of filing the instant litigation.

III. ARGUMENT.

A. Creditor Received Timely and Proper Notice of All Hearings in This Case; the Cung Van Ho Estate Proceeding and of the Binding Arbitration.

It is an unnecessary exercise to recite every hearing and each notice over the last two years to which creditor has been given notice. Suffice it to say, he has been given notice of all proceedings in each case and has never claimed otherwise.

The trial court's September 7, 2004 Finding of Fact No. 1, stated as follows:

“All parties and all creditors have been given timely and proper notice of the hearing for Partial Summary Judgment herein; for restrictions on respondent's non-intervention powers in the Cung Van Ho Estate; of the court ordered arbitration before the Honorable Gerard Shellan

(Ret.); and of the presentation of these Findings, Conclusions and Judgment of Disbursement.” (Emphasis added)

(CP 235). Significantly, Findings 2 and 3, which are also unchallenged recite that notice of the various hearings was timely and proper.

Creditor never challenged these Findings below nor has he done so on Appeal. “An unchallenged finding of fact becomes the law of the case and on appeal is to be treated as a verity.” Pier 67, Inc. V. King Co., 71 Wn. 2d 92, 94 (1967).

B. Creditor’s Position Was Adequately Represented by Ms. Fowler at the Hearings and in the Arbitration that Creditor Chose Not to Attend.

Intervention of right under CR 24 (a) is limited when an intervener’s interest is “adequately represented by existing parties.”

Creditor in his Motion to Intervene claimed that Ms. Fowler had “vigorously and capably” defended the Contradiction/Meretricious position that he advocates. (CP 334).

At oral argument the trial court quizzed creditor about his lack of participation from February, 2004 to October 28, 2004. He replied that he had been:

“in consultation with Ms. Fowler throughout the pendency of all this and I felt that the estate’s assets were being properly represented. . . .”

“But the estate was represented throughout and I thought that Ms. Fowler was doing a fine job.”

Transcript, App. A, pg. 23. (Emphasis added)

C. Creditor’s Motion to Intervene Should Have Been Denied.

It is a verity on appeal, that creditor received timely and proper notice of all proceedings in this case and in the Cung Van Ho Estate probate and of the Arbitration.

Likewise, creditor admitted in open court (which the trial judge insisted be part of her order) that his interests were being “properly represented” and that a “fine job” was done by Ms. Fowler in the underlying litigation.

Creditor’s Motion to Intervene (CP 331) dated October 27, 2004, and argued November 5, 2004, came almost two months after the September 7, 2004 Judgment of Disbursement was entered herein and six months after Summary Judgment had been granted. (CP 170).

CR 24 (a) begins “upon timely application . . .”. It is hard to imagine anyone less timely.

The above matter was filed January 22, 2004 and copies of petitioner's Petition Contradicting Inventory was given to creditor by letter dated March 29, 2004. (CP 391)

Creditor below miscited Lenzi v. Redland Ins. Co., 140 Wn. 2d 267 (2000), claiming it holds that intervention "can be timely even after judgment has been entered." (CP 334). The Lenzi court denied all post judgment relief to creditor insurance company but in dicta indicated that Creditor could have moved to intervene after a Default Judgment had been entered (*Lenzi* at 278) due to the policy that default judgments are "disfavored". Creditor failed to advise the court that the dicta in Lenzi pertained to Default judgments.

Intervention should have been Denied based upon Kreidler v. Eikenberry, 111 Wn. 2d 828 (1989), where the court reviewed the criteria for post judgment intervention (before Denying same). *Kreidler*, at 832-833 states as follows:

"Timeliness is a critical requirement of CR 24(a), *Martin v. Pickering*, 85 Wn.2d 241, 243, 533 P.2d 380 (1975). Where a person seeks to intervene after judgment, the court

should allow intervention only upon a strong showing after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay. *Martin* at 243–44; *Rains v. Lewis*, 20 Wn. App. 117, 125, 579 P.2d 980 (1978).” (Emphasis added).

Kreidler imposes upon an intervener the requirement to make a “strong” showing, yet creditor has offered no declarations that excuse its delay, let alone a “strong showing”.

When delay is part of a strategy the court should view a post-judgment motion to intervene with even greater jaundice. In *Martin v. Pickering*, 85 Wn. 2d 241, 244 (1975), the court stated as follows:

“In short, the timing and tardiness of the motion to intervene was directly attributable to the tactics or game plan of MidCentury. Under these circumstances the motion to intervene cannot be considered timely.”

Martin at 241 (and cases cited).

Martin, unlike the instant case was a Default Judgment which, as indicated supra at 9 - 10, are disfavored. Even greater should be the court’s reluctance to allow intervention after a strategy “backfires” as it did here for creditor. See Transcript App. A, page 4.

In this case, creditor had a free attorney fighting its battle “vigorously” (CP 335) throughout these proceedings and was in constant consultation with her from February, 2004 onward. (App. A, Transcript, pg. 23). His choice of tactics does not provide any basis for revisiting a year’s worth of court hearings, motions, and evidentiary battles in two different causes of action.

Kreidler, at 833, also compels a consideration of the “prejudice to other parties” from granting a post-judgment Motion to Intervene. A review of record reveals the numerous hearings in this matter and in the Cung Van Ho estate; the May Summary Judgment; the Shellan arbitration; and the entry of Judgment and Findings that occurred throughout 2004. Tens of thousands of dollars were spent by both the Estate of Thuy Ho and the Estate of Cung Van Ho while creditor watched from the sidelines and “consulted” with Ms. Fowler “throughout these proceedings”. Prejudice to the Estate of Thuy Ho is substantial.

D. The Supreme Court Does Not Consider “Death” to Be A Factor in the Meretricious Relationship Analysis.

In two Supreme Court cases, our court has specifically remanded for trial the issue of an ownership of an estate in a meretricious relationship. Creasman v. Boyle, 31 Wn. 2d 345 (1948) (Reversed as

to “presumption” but not otherwise”) and Vasquez v. Hawthorne, 145 Wn. 2d 103 (2001).

Our Supreme Court in two other cases likewise ignored the fact of death while it conducted a spirited analysis of the legal issues involved in the division of property from an estate where a meretricious relationship existed. In re Estate of Thornton, 81 Wn. 2d 72 (1972) and Humphries v. Riveland, 67 Wn. 2d 376 (1965).

Because Thornton and Humphries were decided before separate legal rights were acquired by virtue of the meretricious relationship itself,¹ both majority opinions and the dissent in Humphries struggled with other equitable legal theories to determine when property division was appropriate in a meretricious relationship, e.g., implied partnership, resulting trust, etc. See Thornton supra at 75-81, remanded for trial of equitable factors and Humphries supra at 389-393, and dissent, 396-404.

In neither case did the court’s concern itself with the fact that

¹ See landmark decision of In re Lindsey, 101 Wn. 2d 299 (1984)

one partner was deceased (except in an evidentiary way), e.g., the Deadman's Statute, RCW 5.60.030 - Thornton at 368.

Creditor misplaces his reliance upon the concurring opinion of Justice Alexander in *Vasquez* at 108-109, where he advocated the position that, since one of the parties was dead and could not marry, no meretricious relationship could exist.

Fortunately for the Thuy Ho Estate, this analysis is not and was not adopted as law by the majority. The seven justices concurring in the majority opinion were not troubled by the estate being a party and in fact remanded the issue back to the trial court to analyze the equitable factors that may or may not work against or in favor of the estate. Vasquez at 107. *Vasquez* stands for the proposition that death will not preclude a meretricious argument for equitable allocation.

In addition to *Vasquez*, *Creasman* also involved an estate. The en banc court was reversed as to its famous presumption (*Lindsey* at 304) but not otherwise. The *Creasman* court treated the equitable claims of the Estate of Caroline A. Paul and of her former partner, Harvey L. Creasman, without regard to the fact that Caroline was

deceased. The court carefully reviewed the length and nature of the relationship; the intent of the parties; their income; assets, etc.

The court found that all property was acquired in a meretricious relationship irrespective of Caroline's death. (*Creasman* at 353). The majority and the two Dissents struggled to discern the intent of Harvey and Caroline during their marriage with regard to each asset and simply could not agree. As a default proposition they left the Estate and Harry Creasman where the title on the assets placed them, presuming intent. The court clearly searched the evidence for equitable factors but the death of Caroline was not one of them. The majority at 357 - 58 posited that factors in other cases might exist to grant equitable division in dealing with an estate e.g., a "trust relationship". The Creasman dissents in favor of an equitable division certainly were not troubled by the element of death.

There is no statutory nor public policy basis for the argument that the Estate does not stand in the shoes of the decedent in cases of meretricious relationships. The majority in *Vasquez* had the opportunity to concur with Justice Alexander and did not. *Vasquez* at

108. Vasquez, Creasman, Humphries and Thornton stand in opposition to Creditor's proposal for a change in the law. In fact, public policy militates in the Estate's favor. If Cung and Thuy Ho were survived by children of prior marriages, no public policy would forfeit a child's inheritance and equitable allocation due to the death of the parent.

Creditor asserts that "the judgment Thuy Ho's estate wants the court to enter would make the estate the owner of property Thuy did not own while she was alive."— which is exactly wrong. The nature of a meretricious relationship is that the non-titled cohabitant has equitable ownership over property in which she is not titled. Creasman v. Boyle, *supra*; and Vasquez v. Hawthorne, *supra* and Smith v. McLaren, 58 Wn. 2d 907 (1961), where it was contended that the deceased husband's estate inventoried property belonging to the wife (as in the case at bar), all stand for the proposition that the factual conduct during life gives rise to the division between the parties—not the fact of death—and that a factual analysis that finds a stable, long term relationship existing must result in a conclusion that a meretricious relationship exists. Findings to that effect have not been challenged at trial or on appeal. The legal conclusion that a meretricious relationship existed,

entered by this court on May 14, 2004, is consistent with the cases above cited and is the law of the case. Thuy Ho could have and would have had the exact same arguments and rights to claim her separate ownership of her property if the parties had separated. It is irrelevant who her heir is—if she had left a will leaving her estate to a local charity, that charity would have had every right to claim, as Thuy Ho’s successor, the ownership of the property that she owned during her lifetime. Creditor’s attempt to bootstrap the fact of death into a magical talisman for his failed case, finds no support in law or policy and must be rejected.

IV. CONCLUSION.

Creditor received notices of all procedures but relied upon the “vigorous” and “fine” legal efforts of the special administrator (which was provided at estate expense) until after judgment was already entered.

The trial court specifically included the argument of counsel in her Order Denying Amendment in which she repeatedly tried to elicit from creditor some basis for having waited so long to intervene. No strong showing was made and in fact creditor repeatedly praised the

special administrator's defense of his interests throughout these proceedings.

Substantially, in Vasquez, Creasman, Humphries and Thornton our Supreme Court has never been troubled by the fact that one party is deceased.

Both Cung Van Ho and Thuy Ho had wills and could have left their interests to different children or charities if they so chose. Creditor argues without controlling authority that public policy should be manufactured by this court denying deceased person's the right to control the disposition of their property after death.

No statute, case law nor public policy supports Creditor's position.

The Court's Order denying Creditor's Motion to Amend was properly considered, entered, and should be upheld.

The Court's Order allowing intervention should be reversed.

Respectfully submitted this 4th day of August, 2005.

MERRICK & OLVER, P.S.


Michael L. Olver, WSBA No. 7031
Special Administrator of the Thuy Ho Estate
Respondent/Cross Appellant

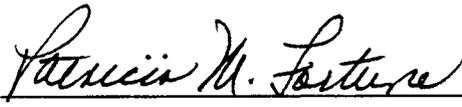
DECLARATION OF SERVICE

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 4, 2005, I arranged for service of the Response Brief Including Cross Appeal of Michael L. Olver, Respondent, Cross Appellant to the Court and the parties to this action as follows:

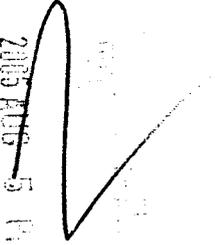
Court Administrator Court of Appeals, Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Stanley J. Rumbaugh Rumbaugh, Rideout & Barnett 820 A. Street, Suite 220 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger (next day) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Overnight Mail
Julie K. Fowler Law Offices of Julie K. Fowler 365 - 118th Ave. S.E., Suite 200 Bellevue, WA 98005	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger (next day) <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 4th day of August, 2005.



Patricia M. Fortune

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

MICHAEL OLVER, SPECIAL)
ADMINISTRATOR OF THE ESTATE)
OF THUY THI THUNH NGUYEN HO,)

PETITIONER,)

VS.)

JULIE K. FOWLER, SPECIAL)
ADMINISTRATOR OF THE ESTATE)
OF CUNG VAN HO,)

RESPONDENT.)

KING COUNTY CAUSE
NO. 04-2-36048-0 SEA

COURT OF APPEALS
NO. 55167-1-I

PROCEEDINGS OF 28 OCTOBER 2004

BEFORE THE HONORABLE MARY YU

APPEARANCES:

FOR THE PETITIONER:

MICHAEL OLVER,
ATTORNEY AT LAW

FOR THE RESPONDENT:

JULIE K. FOWLER,
ATTORNEY AT LAW

FOR THE INTERVENOR:

STANLEY RUMBAUGH,

COURT REPORTER: JANE LAMERLE, CSR

FILED
OCT 29 2004
KING COUNTY

1 MORNING SESSION

2 OCTOBER 28TH, 2004

3 THE COURT: WE'RE HERE THIS MORNING IN THE
4 MATTER OF MICHAEL OLVER, SPECIAL ADMINISTRATOR OF
5 THE ESTATE OF THUY HO VERSUS JULIE K. FOWLER,
6 SPECIAL ADMINISTRATOR OF THE ESTATE OF CUNG VAN HO,
7 NO. 04-2-02867-1 SEA.

8 LET ME HAVE COUNSEL INTRODUCE THEMSELVES FOR
9 THE RECORD.

10 MR. RUMBAUGH: STAN RUMBAUGH, YOUR HONOR.
11 THIS IS MY MOTION, AND I REPRESENT DIANNA NGUYEN IN
12 THE CAPACITY AS GUARDIAN OF THE PERSON AND ESTATE
13 OF DALENA NGUYEN. WE HAVE BEEN INTERVENORS IN THE
14 ESTATE OF CUNG HO. WE HAVE FILED CREDITORS' CLAIMS
15 AGAINST THE ESTATES OF CUNG VAN HO AND THUY THI
16 THANH NGUYEN HO.

17 MR. OLVER: GOOD MORNING, YOUR HONOR. I AM
18 HERE AS THE PERSONAL REPRESENTATIVE OF THE ESTATE
19 OF THUY NGUYEN HO.

20 THE COURT: THANK YOU. MS. FOWLER CALLED,
21 AND SHE HAS NO OBJECTION TO THE COURT PROCEEDING.
22 SHE IS STUCK IN TRAFFIC. SHE WAS GOING TO MAKE
23 HERSELF AVAILABLE, BUT I GUESS DIDN'T REALLY HAVE
24 MUCH TO ADD, AND IF SHE SHOULD JOIN US DURING THE
25 HEARING, I WOULD GIVE HER THE OPPORTUNITY TO BE

1 HEARD, IF SHE WOULD LIKE.

2 MR. RUMBAUGH, THIS IS YOUR MOTION AND I DID
3 NOT RECEIVE A REPLY TO THE RESPONSE FILED.

4 MR. RUMBAUGH: THAT'S BECAUSE I THINK THE
5 COURT HAS THE FACTS BEFORE IT.

6 AS A PRELIMINARY MATTER, MR. OLVER HAS
7 POINTED OUT TO THE COURT THAT HE DOES NOT BELIEVE
8 WE HAVE STANDING TO CONTEST THIS DISTRIBUTION AND
9 THE ENTRY OF JUDGMENT IN THIS MATTER. WE HAVE BEEN
10 INTERVENORS IN THE ESTATE OF CUNG HO, AND I BELIEVE
11 THAT GIVES US STANDING TO ADDRESS ANY ISSUES THAT
12 ARISE IN AN ACTION WHERE THE ESTATE OF CUNG HO IS A
13 PARTY.

14 HOWEVER, YESTERDAY, WE DID FILE A MOTION TO
15 INTERVENE UNDER RULE 25. I THINK IT IS
16 DUPLICATIVE, BUT JUST TO COVER THE PROCEDURAL
17 BACKGROUND OR TO BACKSTOP MY PROCEDURAL ISSUES ON
18 THIS, THAT MOTION IS PENDING BEFORE THE COURT ON
19 NOTICE A WEEK FROM NOW. AND SO I BELIEVE THAT AS A
20 CREDITOR WHO HAS ALREADY BEEN GRANTED INTERVENTION
21 RIGHTS IN THE ESTATE OF CUNG HO, WE CERTAINLY HAVE
22 STANDING TO CONTEST THIS MATTER.

23 THE COURT: LET ME JUST BACK UP AND ASK YOU,
24 WHEN WAS THE CREDITOR GRANTED INTERVENTION RIGHTS
25 IN THE ESTATE?

1 MR. RUMBAUGH: SEVERAL NOTEBOOKS AGO. IT
2 WAS EARLIER ON IN 2003. IN THE FALL OF 2003 -- I'M
3 SORRY. LITERALLY, WE HAVE FOUR OR FIVE NOTEBOOKS
4 OF PLEADINGS IN THIS MATTER AND THIS CAN ONLY CARRY
5 THE LAST TWO, BUT I WILL BE HAPPY TO PROVIDE THE
6 COURT WITH A COPY OF THAT.

7 THE COURT: AND THEN LET ME JUST ASK, IF
8 THAT WAS TRUE IN FEBRUARY OF 2003, WHY HASN'T THERE
9 BEEN ANY PARTICIPATION AT ALL IN THIS PARTICULAR
10 MATTER UNTIL POST-JUDGMENT?

11 MR. RUMBAUGH: WELL, I HAVE BEEN IN
12 CONSULTATION WITH MS. FOWLER THROUGHOUT THE
13 PENDENCY OF ALL THIS, AND I FELT THAT THE ESTATE'S
14 ASSETS WERE BEING PROPERLY REPRESENTED.

15 AND IT WAS ONLY AFTER JUDGE SHELLAN'S
16 RULING -- AND THIS WAS NOTED UP FOR THE MEDIATOR,
17 JUDGE SHELLAN -- THAT THIS WAS NOTED UP FOR
18 PRESENTATION OF JUDGMENT AND FINDINGS THAT I FELT
19 THAT PERHAPS THE ADDITIONAL ACTIVITY ON OUR PART
20 WOULD BE OF USE IN REPRESENTING THE ESTATE OF CUNG
21 HO.

22 BUT THE ESTATE WAS REPRESENTED THROUGHOUT,
23 AND I THOUGHT THAT MS. FOWLER WAS DOING A FINE JOB.
24 AND SO THAT WAS IT. THAT WAS WHY --

25 THE COURT: AGAIN, I'M STILL TRYING TO

1 UNDERSTAND, IF YOU DIDN'T INTERVENE ACTIVELY IN THE
2 SUMMARY JUDGMENT MOTION BECAUSE YOU THOUGHT THAT
3 YOUR INTERESTS WERE REPRESENTED BY MS. FOWLER --

4 MR. RUMBAUGH: THE ESTATE'S INTERESTS, YES.

5 THE COURT: -- I'M STILL AT A LOSS AS TO
6 WHY -- AGAIN, THE TIMING, BECAUSE THE ISSUES RAISED
7 IN YOUR PLEADINGS SEEM TO BE ISSUES ALREADY
8 ADDRESSED IN THE SUMMARY JUDGMENT MOTION. AND THAT
9 WAS PRIOR TO JUDGE SHELLAN BEING INVOLVED.

10 MR. RUMBAUGH: I DON'T DISAGREE THAT THE
11 PARTIES HAD A MERETRICIOUS RELATIONSHIP. THAT WAS
12 THE ISSUE ADDRESSED ON SUMMARY JUDGMENT.

13 AND I'M HERE TO ARGUE THAT MERETRICIOUS
14 EQUITY CANNOT BE APPLIED IN A POSTMORTEM CONTEXT.

15 THE COURT: OKAY. IS THERE ANYTHING ELSE
16 YOU WISH TO ADD AT THIS POINT, OR DO YOU WANT TO GO
17 TO ANYTHING ELSE THAT YOU RAISED IN YOUR MOTION AS
18 TO THE MERITS?

19 MR. RUMBAUGH: YES, I WOULD LIKE TO PROCEED
20 WITH THE MERITS. AND THE MERITS ARE AS WE HAVE SET
21 FORTH IN OUR MEMORANDUM IN SUPPORT OF THIS MOTION,
22 KIND OF TWOFOLD:

23 FIRST OF ALL, THERE IS NO AUTHORITY TO APPLY
24 MERETRICIOUS EQUITY CLAIMS IN THE CONTEXT WHERE
25 BOTH OF THE SPOUSES HAVE DIED. IN THIS CASE, AS

1 THE COURT IS AWARE, THE PARTIES TO THIS
2 MERETRICIOUS RELATIONSHIP BOTH DIED IN A TERRIBLE
3 CAR WRECK.

4 THE LEGAL PRINCIPALS THAT HAVE BEEN
5 DEVELOPED RELATING TO MERETRICIOUS RELATIONSHIP AND
6 MARITAL EQUITY CLAIMS HAVE ALWAYS HAD A LIVING
7 PARTNER TO BRING THE CLAIM.

8 IN JUSTICE ALEXANDER'S CONCURRING OPINION IN
9 VASQUEZ, WHICH WE HAVE DETAILED AT SOME LENGTH IN
10 OUR BRIEF, HE CAUTIONS AGAINST THE USURPATION OF
11 THE PROBATE AND INTESTACY LAWS BY THE USE OF THE
12 MERETRICIOUS EQUITY ARGUMENT.

13 WHAT THE ESTATE OF THUY HO IS ASKING THE
14 COURT TO DO IS IMPOSE A DE FACTO COMMON LAW
15 MARRIAGE PRINCIPLE UPON THE ASSETS OF THE ESTATE,
16 EXCEPT THAT THEY WANT TO HAVE GREATER PROTECTION
17 FOR THOSE QUASI-COMMUNITY ASSETS BY VIRTUE OF THE
18 FACT THAT THE PARTIES WERE UNMARRIED, LEGALLY
19 UNMARRIED, THAN IF THEY HAD FOLLOWED THE LAW AND
20 BECOME MARRIED.

21 AND SO THE NET RESULT OF THIS IS THAT THE
22 CLAIM WOULD BE THAT THUY HO HAS A CLAIM FOR
23 SEPARATE PROPERTY THAT WOULD BE BEYOND THE REACH OF
24 JUDGMENT CREDITORS.

25 WHEREAS, IF BOTH OF THESE -- IF THE PARTIES

1 HAD BEEN ACTUALLY MARRIED, THEN THEIR ASSETS WOULD
2 HAVE BEEN SUBJECT TO CREDITOR CLAIMS, INCLUDING
3 JUDGMENT CREDITORS, IN THE TORT CONTEXT.

4 AND SO ESSENTIALLY, BY NOT FOLLOWING THE
5 RULES -- AND I DON'T MEAN THAT IN A PEJORATIVE WAY,
6 BUT IN NOT FOLLOWING THE STATUTES FOR BEING
7 MARRIED, THEY END UP WITH BETTER PROTECTION THAN
8 THOSE PEOPLE WHO DO FILE STATUTORY PROTECTION.

9 AND IF THAT'S THE LAW, THAT IS A SUBJECT FOR
10 THE LEGISLATURE TO DEAL WITH. THAT SHOULD NOT BE A
11 JUDICIALLY MADE DOCTRINE, AND I DON'T THINK THAT IS
12 EQUITABLE OR SUPPORTED BY ANY LAW OR STATUTE OR
13 CASE LAW THAT I HAVE EVER SEEN IN THIS STATE.

14 AND SO ESSENTIALLY, I DON'T BELIEVE THAT THE
15 MERETRICIOUS EQUITY DOCTRINE WOULD APPLY TO THIS
16 CASE ANYWAY BECAUSE IT IS IN THE POSTMORTEM
17 CONTEXT. AND IF SO, THE EQUITABLE DIVISION OF THIS
18 PROPERTY -- YOU KNOW, IN THE CONTEXT WHERE YOU ARE
19 DOING EQUITY OVERALL IS NOT EQUITABLE BECAUSE IT
20 REMOVES THE PROPERTY FROM THE REACH OF A LEGITIMATE
21 TORT JUDGMENT CREDITOR.

22 IN FACT, OUR CLAIMS AGAINST CUNG HO'S ESTATE
23 HAS BEEN ALLOWED FOR MANY MILLIONS OF DOLLARS. MY
24 CLIENT LOST HER MOTHER AND SISTER IN THIS CRASH.
25 AND I CERTAINLY RECOGNIZE THAT THE HEIRS TO CUNG HO

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SUFFERED A SIMILAR LOSS.

AND I DON'T -- THERE IS NO GAIN SAYING THAT. BUT I ONLY SAY THAT TO POINT OUT THAT THESE ARE LEGITIMATE AND SERIOUS CLAIMS AGAINST THE ASSETS OF THE ESTATE. AND I THINK FOR THE COURT TO IMPOSE A DOCTRINE THAT WOULD REMOVE THOSE ASSETS THAT WERE ACQUIRED DURING THE PERIOD OF THIS MERETRICIOUS RELATIONSHIP AND CHARACTERIZE THEM AS SEPARATE PROPERTY IS NOT EQUITABLE, AND NOT JUSTICE, AND THERE IS NO LAW THAT SUPPORTS IT.

AND THAT IN A NUTSHELL IS WHERE I'M AT.

THE COURT: NOW, FOR THE RECORD, MS. FOWLER, COULD YOU STATE WHO YOU REPRESENT?

MS. FOWLER: JULIE FOWLER, SPECIAL REPRESENTATIVE OF THE ESTATE OF CUNG VAN HO.

THE COURT: MS. FOWLER, YOU WEREN'T HERE FOR THE PRELIMINARY REMARKS, BUT LET ME GIVE YOU THE OPPORTUNITY TO SAY ANYTHING YOU WISH. I'M COMFORTABLE YOU ARE COMFORTABLE IN HAVING REVIEWED THE PLEADINGS AND UNDERSTANDING WHY WE ARE HERE.

MS. FOWLER: YES, YOUR HONOR. THE ONLY REASON I DIDN'T ENTER ANY PLEADINGS ON MY OWN WAS BECAUSE COMMISSIONER PROCHNAU REMOVED MY NONINTERVENTION POWER AND ORDERED ME TO MEDIATION. AND SHE STATED THAT IF MR. OLVER WAS ABLE TO PROVE

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HIS CASE BASICALLY TO THE MEDIATOR, I HAD TO COMPLY WITH THE MEDIATION AND DISBURSE THE ASSETS.

I FULLY SUPPORT MR. RUMBAUGH, AND I HAVE ARGUED BEFORE YOU WHAT I THINK THE MERITS OF THIS CASE ARE, AND I STAND BEHIND THAT.

BUT BECAUSE OF THE COMMISSIONER'S ORDER, I DIDN'T FEEL THERE WAS ANYTHING ELSE I COULD DO. AND ONCE THE MEDIATION WAS COMPLETED, I WENT AHEAD AND AGREED TO THE FINDINGS OF FACT. I DIDN'T KNOW WHAT ELSE I COULD HAVE DONE, BUT I DON'T THINK IT IS EQUITABLE TO DISBURSE HALF THE ESTATE, AND THE REASON BEING THAT THE ROLE OF SPECIAL ADMINISTRATOR OF AN INDEPENDENT PERSON IS TO ASSESS ALL OF THE CLAIMS.

I DO BELIEVE THAT THERE IS A VALID CLAIM HERE. AND WHILE HARRY HO IS THE SOLE HEIR TO THE ESTATE THAT I'M REALLY LOOKING OUT FOR, I DO BELIEVE IT WOULD BE ABSOLUTELY INEQUITABLE FOR DIANE NGUYEN TO RECEIVE LESS THAN HALF OUT OF THIS ESTATE, OR NOTHING, GIVEN THAT SHE REALLY SUFFERED THE SAME CIRCUMSTANCES HARRY HO DID.

THE COURT: LET ME JUST ASK YOU AND MR. RUMBAUGH SPECIFICALLY, WHAT IS THE RELIEF BEING SOUGHT? YOUR PLEADING WAS TO AMEND THE JUDGMENT BUT TO VACATE --

1 MR. RUMBAUGH: THE JUDGMENT INsofar AS IT
2 SPECIFIES IT WAS A MERETRIOUS RELATIONSHIP IS
3 FINE FOR ME. AND THE AMENDMENT WOULD HAVE TO DO
4 WITH THE FACT YOU CAN'T USE MERETRIOUS EQUITY TO
5 BASICALLY MARTIAL HALF OF CUNG HO'S ESTATE AND
6 TRANSFER IT TO THE ESTATE OF THUY HO.

7 AND SO OUR JUDGMENT, DEPENDING ON WHAT THE
8 COURT RULES, WOULD REFLECT EITHER THAT RULING, OR
9 IF THE COURT DOES BELIEVE SOMEHOW THAT THE
10 MERETRIOUS EQUITY DOCTRINE SHOULD BE APPLIED,
11 THAT OVERALL EQUITY WOULD REQUIRE THE ENTIRE CORPUS
12 OF THE CUNG HO ESTATE BE IN THUY HO'S ESTATE, OR
13 CUNG HO'S ESTATE BE SUBJECT TO CREDITOR'S CLAIMS.

14 THAT'S THE DECISION WE ARE ASKING YOU TO
15 MAKE, AND THE JUDGMENT WILL REFLECT THAT.

16 MR. OLVER: YOUR HONOR, WITH ALL DUE RESPECT
17 TO MY LEARNED COLLEAGUE, MR. RUMBAUGH, A FELLOW
18 TRIAL LAWYER, HE IS ASKING THE COURT TO MAKE SOME
19 EXTRAORDINARY LAW HERE. NOT ONLY DID THEY NOT
20 PARTICIPATE IN THE ORIGINAL MOTION IN MAY, THAT WAS
21 ABLY -- AS COUNSEL CONCEDED -- ABLY ARGUED BY
22 MS. FOWLER, THERE WERE TWO HEARINGS IN FRONT OF
23 COMMISSIONER PROCHNAU, AND THE MEDIATION IN FRONT
24 OF JUDGE SHELLAN.

25 AND TO COME IN AFTER THE CASE IS OVER AND

1 SAY WE FEEL AGGRIEVED SOMEHOW, AND WE WANT YOU TO
2 UNDO THESE THINGS, AND IT IS ONLY NOW THAT IT HAS
3 REALLY BECOME CLEAR WHAT THEY ARE ACTUALLY ASKING.
4 THEY ARE ACTUALLY ASKING, UNDER THE GUISE OF
5 AMENDING THESE PLEADINGS, FOR THIS COURT TO MAKE A
6 RULING WITH REGARD TO THE LEGAL EFFECT OF THE
7 SEGREGATION OF THE ASSETS.

8 AND THAT'S NEVER BEEN AN ISSUE IN THE
9 LAWSUIT BETWEEN MS. FOWLER AND I -- THE LEGAL
10 EFFECT. WE ARE JUST SAYING THIS IS A MERETRICIOUS
11 RELATIONSHIP, GIVE US HALF.

12 IF HE CAN PROVE HIS LAW, BASED UPON HIS
13 FACTS, HE CAN DIVIDE THE BASKET OF GOODS IN MY
14 CUSTODY. HE HAS GOT A FORM; HE FILED A LAWSUIT.
15 THAT'S THE NATURE OF THAT CASE. THAT'S WHAT HE
16 PLEADED. THAT'S WHERE HE SHOULD MAKE THIS
17 ARGUMENT.

18 THIS COURT -- IT IS NOT FAIR TO THIS COURT
19 TO COME IN AND SAY, GEE, YOUR HONOR, WE WANT YOU,
20 EVEN THOUGH THIS HAS NEVER BEEN RAISED, NEVER BEEN
21 PLED, NEVER ARGUED, AND NO CASES HAVE EVER BEEN
22 SUBMITTED ON IT TO YOU, WE WANT YOU TO MAKE NEW LAW
23 WITH REGARD TO THE LEGAL EFFECT THAT CREDITORS HAVE
24 WITH REGARD TO THE SEGREGATED ASSETS.

25 I DIDN'T ASK YOU FOR THAT, AND NEITHER DID

1 MS. FOWLER. HE IS GOING TO FIGHT IT OUT IN THE
2 OTHER CASE, AND THAT'S WHERE HE SHOULD DO IT. AND
3 I THINK IT IS AN OPEN AND SHUT ARGUMENT.

4 I HAVE OTHER THINGS I COULD SAY BUT I THINK
5 THAT'S SUFFICIENT.

6 THE COURT: MR. RUMBAUGH, LET ME HEAR FROM
7 YOU. THAT DID CONCERN ME. THERE IS THIS OTHER
8 PENDING MATTER, AND WHY ISN'T IT APPROPRIATE TO
9 HAVE IT ADDRESSED THERE?

10 MR. RUMBAUGH: BECAUSE ONCE THE DIVISION IS
11 MADE, THEN THE COURT HAS IN FACT RULED THAT AN
12 EQUITABLE -- THAT MERETRICIOUS EQUITY CAN BE
13 APPLIED IN THE ESTATE CONTEXT.

14 AND WITH THE GREATEST RESPECT TO MY
15 COLLEAGUE, WHOM I ADMIRE GREATLY, I HAVE TO TELL
16 YOU, WHEN THE COURT ENTERED ITS ORDER ON SUMMARY
17 JUDGMENT DEFERRING THE EQUITABLE DIVISION OF THE
18 ESTATE UNTIL TRIAL, I WAS IN AGREEMENT WITH THAT
19 ORDER. BUT IT WAS ALWAYS IN PLAY.

20 THE ISSUE OF WHETHER THERE WOULD BE
21 MERETRICIOUS EQUITY APPLIED IN THE ESTATE CONTEXT
22 HAS ALWAYS BEEN THE OVERRIDING ISSUE IN THIS CASE.
23 OTHERWISE, THE ASSETS WOULD HAVE BEEN DISBURSED
24 LONG AGO, AND WE WOULD BE DONE.

25 THE COURT'S ORDER SAID THE DIVISION WOULD

1 ABIDE TRIAL OF THE ESTATE MATTER. I WAS GOOD WITH
2 THAT. BUT NOW THAT, IN WHAT I CONSIDER TO BE A
3 HIGHLY IRREGULAR PROCEDURE, THE COMMISSIONER HAS
4 BASICALLY CONCEDED JUDICIAL AUTHORITY TO A MEDIATOR
5 AND MADE IT BINDING.

6 I DON'T KNOW HOW YOU HAVE BINDING MEDIATION.
7 THAT'S AN OXYMORON IN MY VIEW. BUT THAT HAS
8 RESULTED, AS MS. FOWLER INDICATED A MOMENT AGO, IN
9 THE LOSS OF HER NONINTERVENTION POWERS. THAT
10 SPURRED US INTO DOING WHAT WE ARE DOING HERE.

11 AND GOING BACK TO YOUR FIRST QUESTION: WHY
12 NOW? WHY NOT AFTER THE ASSETS ARE TRANSFERRED?
13 ONCE THE ASSETS ARE TRANSFERRED, AND YOU HAVE
14 RULED, THE COURT HAS RULED THAT THERE IS A
15 MERETRICIOUS EQUITY CLAIM BY A DECEASED PARTNER
16 AGAINST THE OTHER PARTNER'S ASSETS. AND THERE IS
17 NO QUESTION ALL OF THESE ASSETS WERE NOMINALLY HELD
18 BY CUNG HO.

19 AND SO THE ISSUE IS JOINED NOW, AND IF I
20 DON'T ADDRESS IT NOW, I WAIVE MY RIGHT LATER TO
21 ARGUE, HEY, THE COURT SHOULD NOT MAKE A
22 MERETRICIOUS EQUITY DIVISION OF THE CORPUS OF THIS
23 ESTATE BECAUSE THE LAW DOESN'T SUPPORT SUCH A
24 DIVISION, AND IT IS A USURPATION OF THE PROBATE
25 LAW, WHICH IS WHAT JUSTICE ALEXANDER SAID IN HIS

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CONCURRING OPINION IN VASQUEZ.

MR. OLVER: MR. RUMBAUGH COMBINES TWO IDEAS. AND THE FIRST ONE IS HOW DO WE EQUITABLY ALLOCATE BETWEEN THESE TWO PARTIES? HE SAYS HE HAS NO PROBLEM WITH THE FACT THAT A MERETRICIOUS RELATIONSHIP WAS FOUND BETWEEN THE TWO PARTIES, AND IF WE GO TO TRIAL, HE WOULD BE OKAY WITH THAT.

LET'S SAY WE GO TO TRIAL, AND WE PRESENT ALL THE EVIDENCE, AND YOU SAY THEY ARE ENTITLED TO HALF. THEY ACQUIRED IT DURING THE RELATIONSHIP. LET'S SAY YOU RULED THAT WAY.

YOU WOULD STILL NOT BE MAKING A DECISION THAT IMPACTED HIS CREDITOR RIGHTS. HE SAYS HE IS OKAY GOING TO TRIAL AND YOUR MAKING THAT RULING.

THERE IS NO DIFFERENCE BETWEEN WHAT YOU DID ON SEPTEMBER 7TH, AND WHAT YOU WOULD HAVE DONE AT TRIAL ON NOVEMBER 15TH, VIS-A-VIS THE CREDITOR AND HE IS CONFLATING THAT CONCEPT, THE EQUITABLE CONCEPT OF SEGREGATING THE ASSETS, WITH HIS RIGHT TO SURCHARGE THE BASKET OF ASSETS ONCE IT IS IN MY POCKET.

AND HE STILL HAS THAT OPPORTUNITY TO ARGUE. YOU HAVE NOT PRECLUDED HIM FROM THAT, AND THAT ISSUE HAS NOT BEEN PRESENTED TO YOU TO AFFIRM OR DENY.

1 MS. FOWLER: ACTUALLY, I THINK I WOULD
2 ADDRESS SOMETHING, WHICH IS REALLY EARLY ON IN THIS
3 CASE, YOU ENTERED IN AS AN INTERESTED PARTY, AND WE
4 ACTUALLY --

5 MR. RUMBAUGH: RIGHT.

6 MS. FOWLER: -- HAD A BRIEF FILED WITH THE
7 COURT, THAT IF WE DO GO TO TRIAL, HE WOULD BE A
8 PART OF THAT TRIAL, AS A PARTY AT TRIAL. AND I
9 DON'T HAVE A COPY OF THAT.

10 MR. RUMBAUGH: I MENTIONED TO THE COURT WE
11 HAD INTERVENED, AS MS. FOWLER NOTES.

12 MR. OLVER: YOU ARE CONFUSING REQUESTING
13 NOTICE WITH BEING A PARTY.

14 MS. FOWLER: NO, THIS WAS AN ACTUAL
15 INTERVENTION.

16 MR. OLVER: IN THE CUNG HO ESTATE, NOT IN
17 THIS MATTER.

18 MR. RUMBAUGH: I THINK IF I'M AN INTERVENOR
19 IN THE ESTATE, I HAVE STANDING IN ANY ACTION
20 INVOLVING THE ESTATE. AND, FRANKLY, INTERVENTION
21 CAN BE ALLOWED UNDER THE COURT RULES AT ANY TIME,
22 EVEN AFTER THE ENTRY OF JUDGMENT.

23 IF YOU LOOK AT LINDSEY VS. REDMOND INSURANCE
24 COMPANY, THAT IS THE RULING OF THE COURT.

25 MR. OLVER: WE ARE BEGGING THE QUESTION.

1 THE COURT: HANG ON. WE REALLY NEED TO TAKE
2 IT ONE AT A TIME. BELIEVE ME, I WILL GIVE
3 EVERYBODY AN OPPORTUNITY TO BE HEARD HERE TODAY.

4 MS. FOWLER, GO HEAD -- EXCUSE ME, I'M
5 LOOKING AT YOU AND ADDRESSING HIM, MR. OLVER.

6 MR. OLVER: I THINK IF WE FOCUS ON WHETHER
7 OR NOT THIS COURT IS MAKING A RULING ON THE EFFECT
8 OF A CREDITOR'S CLAIM IN A MERETRICIOUS
9 RELATIONSHIP, AND WE REALIZE THAT THIS COURT IS
10 NOT, AND HAS NOT, AND HAS NOT BEEN ASKED TO, THEN
11 THE FACT THAT -- WHETHER YOU SEGREGATE THE ASSETS
12 ON SEPTEMBER 7TH OR YOU SEGREGATE THE ASSETS ON
13 NOVEMBER 15TH, HE STILL HAS A LAWSUIT PENDING
14 AGAINST ME GOING TO TRIAL NEXT YEAR. AND THAT IS
15 THE PROPER FORUM TO MAKE THAT CASE.

16 THE COURT: HOW IS IT THAT THE CREDITORS'
17 RIGHTS SOMEHOW ARE JEOPARDIZED, GIVEN THAT THERE IS
18 THIS OTHER LAWSUIT?

19 AND I DO NOT BELIEVE IN STRETCHING THE LAW.
20 I DON'T BELIEVE THAT IS THE ROLE OF A TRIAL COURT.
21 I REALLY BELIEVE THAT SHOULD BE LEFT TO THE COURT
22 OF APPEALS, OR THE SUPREME COURT, IN TERMS OF
23 CREATING NEW LAW OR APPLYING IT DIFFERENTLY.

24 HOW IS IT THAT I CAN FRANKLY AVOID THE LEGAL
25 EFFECT OF A DECISION IN REGARD TO THE MERETRICIOUS

1 RELATIONSHIP IN THIS CASE, GIVEN, AGAIN, THAT YOU
2 DO HAVE A FORUM, AND IT PROBABLY OUGHT TO BE
3 LITIGATED IN THE OTHER FORUM?

4 MR. RUMBAUGH: ONCE THE ASSETS ARE
5 TRANSFERRED AND THE DIVISION TAKES PLACE, THE COURT
6 HAS APPLIED THE MERETRICIOUS EQUITY DOCTRINE. AND
7 IT IS THE DIVISION THAT I OBJECT TO.

8 THE EFFECT OF THE CREDITOR'S CLAIM IS
9 DISTINCT FROM WHETHER OR NOT THE DOCTRINE OF
10 MERETRICIOUS EQUITY APPLIES IN THIS CONTEXT
11 POSTMORTEM. AND ONCE THE TRANSFER HAS BEEN MADE,
12 IF THE COURT SAYS, YES, THESE ASSETS WERE ACQUIRED
13 DURING THE RELATIONSHIP OF THE PARTIES; THEREFORE,
14 I WILL I APPLY THE MERETRICIOUS EQUITY DOCTRINE
15 POSTMORTEM, WHICH IS THE ONLY WAY YOU CAN DO THIS
16 IN ORDER TO GET THUY HO'S ESTATE WITH HALF OF THE
17 ASSETS -- ONCE THAT APPLICATION IS DONE, THEN AS
18 THE CREDITOR, I'M IN THE POSITION OF SAYING IN THE
19 ESTATE ACTION AGAINST THUY HO, WE HAVE A CLAIM
20 AGAINST THESE ASSETS.

21 AND MR. OLVER WILL, I'M CONFIDENT, ARGUE
22 THESE ARE THE SEPARATE ASSETS OF AN UNMARRIED
23 PARTNER. AND IF THEY ARE THE SEPARATE ASSETS OF AN
24 UNMARRIED PARTNER, THEN THEY ARE NOT SUBJECT TO A
25 TORT CLAIM.

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AND THAT IS THE MANNER BY WHICH THE CREDITOR'S CLAIM WOULD BE AVOIDED, AND THAT'S THE PLAN. AND THAT'S THE PLAN THAT I OBJECT TO.

AND SO ONCE THE COURT SAYS I'M GOING TO ORDER HALF OF THE ESTATE OF HO TRANSFERRED TO THUY HO, THE ONLY WAY THAT CAN BE DONE IS THROUGH THE MERETRICIOUS EQUITY DOCTRINE. AND I DON'T THINK IT APPLIES.

AND THAT'S THE LEGAL ISSUE BEFORE THE COURT NOW. IN ORDER TO MAKE IT, YOU MUST RULE THAT IT APPLIES. THERE IS NO OTHER WAY TO GET THE ASSETS TO THE ESTATE OF THUY HO.

AND THAT IS CREATING THE DOWNSTREAM PROBLEM THEN OF WHETHER A TORT CREDITOR AGAINST AN UNMARRIED PARTNER THEN HAS ANY CLAIM AGAINST ASSETS THAT WERE ACQUIRED DURING THE PERIOD OF THE MERETRICIOUS RELATIONSHIP.

MR. OLVER HAS INDICATED IN EARLIER PLEADINGS THAT HE DOESN'T BELIEVE THAT'S THE CASE. AND I DON'T KNOW -- IT IS CERTAINLY THE LAW THAT IF YOU ARE UNMARRIED AND YOU HAVE ASSETS, JUST BECAUSE YOUR PARTNER HAS COMMITTED A TORT, DOESN'T MEAN THAT THE JUDGMENT CREDITORS HAVE A CLAIM AGAINST YOUR ESTATE. THAT IS THE CURRENT LAW, AND SO THAT IS WHY THE ISSUE NEEDS TO BE ADDRESSED NOW, NOT IN

1 THE SPRING WHEN THIS TRIAL AGAINST THUY HO'S ESTATE
2 COMES UP.

3 MR. OLVER: BRIEFLY, IF I MAY?

4 THE COURT: LET ME ASK ONE MORE QUESTION:
5 MR. RUMBAUGH, I'M WORRIED ABOUT WHERE WE ARE
6 PROCEDURALLY, GIVEN THAT THERE SEEM TO BE SO MANY
7 OPPORTUNITIES TO HAVE A LOT OF THESE ISSUES
8 ADDRESSED.

9 I WOULD AGREE, WHEN COMMISSIONER PROCHNAU
10 ENTERED THAT ORDER, I WAS CONCERNED. BUT NOBODY
11 HAD BROUGHT ANYTHING BEFORE ME, NOBODY SOUGHT
12 REVISION. AND SO IT WAS JUST FOLLOWED. AND SO I'M
13 CONCERNED WHERE WE ARE PROCEDURALLY, AND HOW I
14 WOULD GO BACK AND CORRECT IT.

15 THERE IS A SEPARATE QUESTION AS TO WHETHER
16 OR NOT IT APPLIES. BUT HOW DO WE DO THAT IN THE
17 WAY IT PROTECTS THE PROCESS AND WHAT WE ARE DOING?

18 MR. RUMBAUGH: WELL, ONE WAY I SUPPOSE WOULD
19 BE TO GRANT MY MOTION TO INTERVENE THAT IS PENDING.
20 THAT IS SET NEXT WEEK, I CAN'T REMEMBER THE DAY IT
21 IS SET.

22 MS. FOWLER: NOVEMBER 5TH.

23 MR. RUMBAUGH: IN WHICH CASE, ANY CONCERN
24 ABOUT WHETHER OUR FORMAL INTERVENTION IN THE CUNG
25 HO ESTATE GIVES US THE ENTITLEMENT TO COME BEFORE

1 THE COURT AND MAKE OUR ARGUMENTS AGAINST THE
2 DIVISION WOULD BE ELIMINATED BECAUSE THEN WE ARE
3 ACTIVELY, BY ORDER IN THIS ACTION, AN INTERVENOR.

4 AND CERTAINLY UNDER RULE 25, WE HAVE THE
5 INTEREST NECESSARY TO INTERVENE. I DON'T THINK
6 THERE IS ANY QUESTION ABOUT THAT, AND I WOULD BE
7 SURPRISED TO HEAR AN OBJECTION.

8 AND SO IF THAT'S THE WAY THAT THE COURT
9 WISHES TO GET OUR PROCEDURAL FEET UNDER US, THAT'S
10 PROBABLY A WAY, IF THE COURT DOESN'T BELIEVE THAT
11 OUR INTERVENTION BY ORDER EARLIER IN THE ESTATE OF
12 CUNG HO GIVES US THAT RIGHT AS WE STAND HERE TODAY.

13 AND SO IF THAT IS THE CONCERN, I THINK WE
14 CAN DO IT BY EITHER ENTERING AN ORDER ALLOWING US
15 TO INTERVENE, OR RECOGNIZING THAT AS AN INTERVENOR
16 IN THE ESTATE, WE HAVE STANDING RIGHT NOW.

17 AND THE OTHER QUESTION IS HOW TO BACK THIS
18 THING UP WOULD BE -- YOU KNOW, THIS COURT'S ORDER
19 SAID THE ISSUE OF THE DIVISION OF ASSETS WILL AWAIT
20 TRIAL.

21 AND I'M NOT CERTAIN HOW -- I DON'T KNOW HOW
22 THAT GOT UNDONE. I DON'T KNOW THE EFFECT OF A
23 COMMISSIONER'S RULING IN CONTRAVENTION OF AN ORDER
24 ON SUMMARY JUDGMENT IN THE SUPERIOR COURT. I DON'T
25 KNOW HOW THAT CONFLICT WAS EVER ALLOWED TO DEVELOP,

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FRANKLY. BUT I CAN'T TELL YOU RIGHT OFF THE TOP OF MY HEAD, THE PROCEDURAL UNSNARLING THAT NEEDS TO TAKE PLACE.

BUT I DO KNOW THAT THIS MATTER WAS NOTED UP FOR ENTRY OF JUDGMENT. AND WE TIMELY FILED A MOTION UNDER RULE 25 TO AMEND THE FINDINGS AND CONTEST THE JUDGMENT.

AND SO FROM THAT POINT OF VIEW, IF THE ISSUE IS SHOULD THE COURT ENTER A JUDGMENT -- AND THE PROPOSED JUDGMENT FROM MR. OLVER IS BEFORE THE COURT, THEN WE ARE PROPERLY BEFORE THE COURT ON MOTION TO CONTEST OR TO REVISE THAT JUDGMENT.

THE COURT: AND SO JUST OUT OF LOOKING FORWARD, IF THE COURT WERE TO GO AHEAD AND GRANT FORMAL INTERVENTION STATUS, WHICH I THINK IT IS SOMEWHAT CONSERVATIVE, BUT I KNOW I NEED TO DO THAT.

IF THE COURT WERE TO DO THAT AND IF THE COURT WERE THEN TO SAY I WILL ALLOW US TO REVISIT THE JUDGMENT, WHERE DO YOU SEE IT GOING FROM THERE? BECAUSE I REALLY DO THINK, AGAIN, PROCEDURALLY, WE ARE IN A VERY TOUGH SPOT, ONCE THE COMMISSIONER ENTERED THE ORDER AND EVERYTHING THAT FLOWED FROM THERE.

I DON'T REALLY KNOW HOW TO UNUNDO THAT, AND

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I'M SAYING RIGHT NOW, AS I SIT HERE, I HAVE NOT
DONE ANY ADDITIONAL RESEARCH ON THE QUESTION, BUT
I'M CONCERNED ABOUT HOW WE CAN POSSIBLY DO THAT,
AND IT REALLY BE A DEFENSIBLE ACT THAT THIS COURT
WOULD TAKE. AND I WILL ADDRESS IT TO YOU.

AND MS. FOWLER, I WILL GIVE YOU AN
OPPORTUNITY.

AND MR. OLVER, I WILL COME BACK TO YOU AND
ALLOW YOU TO ADDRESS ALL THESE ISSUES.

MR. RUMBAUGH: YOUR HONOR, AS I STAND HERE
TODAY, THE PROCEDURAL POSTURE THAT I SEE BEFORE ME
IS THAT THERE HAS BEEN A JUDGMENT THAT HAS BEEN
ENTERED. AND WE'RE HERE ON A TIMELY MOTION TO
AMEND AND CONTEST THE FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND AMEND THE JUDGMENT.

IF COMMISSIONER PROCHNAU'S ORDER SOMEHOW WAS
A FINAL ORDER DIVIDING THE ASSETS OF THE ESTATE,
THEN WHY ARE WE HERE AT ALL?

COUNSEL, MR. OLVER, SUBMITTED FINDINGS AND
CONCLUSIONS AND A JUDGMENT TO THE COURT. AND WHEN
THAT WAS SUBMITTED, WE MADE A MOTION TO AMEND. AND
SO FROM THE PROCEDURAL POINT OF VIEW HERE TODAY,
THAT'S HOW WE GOT HERE.

AND I THINK THAT'S PROPER. AND TO BE HONEST
WITH YOU, I CAN'T TELL YOU OFF THE TOP OF MY

20
1 HEAD -- I AM AS FLUMMOXED AS THE COURT ABOUT THE
2 EFFECT OF THE COMMISSIONER'S RULING, AND THEN WHAT
3 HAPPENS WITH A MEDIATOR'S OPINION.

4 IN THIS CONTEXT, IT IS UNUSUAL, TO SAY THE
5 VERY LEAST. AND I WOULD LIKE TO HAVE THE COURT, IF
6 THAT IS TRULY A MATTER OF GREAT CONCERN, GIVE US AN
7 OPPORTUNITY TO DO SOME BRIEFING ON THAT ISSUE.

8 AND AS FAR AS THE INTERVENTION IS CONCERNED,
9 I WOULD SIMPLY REQUEST IT BE MADE NUNC PRO TUNC TO
10 THIS MORNING, SO WE ARE OKAY WITH THE RECORD HERE.

11 MS. FOWLER: I THINK PROCEDURALLY HOW THIS
12 WOULD BE UNDONE IS THE FACT THAT BECAUSE
13 MR. RUMBAUGH INTERVENED EARLY ON IN THE PROCESS
14 WHEN WE WENT BEFORE THE COMMISSIONER ON JULY 21ST,
15 THAT WAS TO HAVE THE ESTATE DECLARED SOLVENT.

16 AND AT THAT POINT, SHE WENT ON TO RULE
17 INDEPENDENTLY THAT WE HAD TO GO INTO MEDIATION ON
18 THE ISSUE OF THE DISBURSEMENT OF THE ESTATE.

19 AND AT THAT POINT, MR. RUMBAUGH PROBABLY
20 SHOULD HAVE BEEN PRESENT TO ARGUE AT THAT POINT,
21 AND PROBABLY SHOULD HAVE BEEN PART OF THE MEDIATION
22 BECAUSE HE WAS AN INTERESTED CREDITOR AT THAT TIME.
23 AND HE WAS NOT PART OF THE PROCESS.

24 AND WHEN THE MEDIATION CAME OUT -- HE DID.
25 ONCE HE GOT THE MEDIATION RULING, HE DID

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IMMEDIATELY RESPOND TO THAT AND START WITH THE
OBJECTION TO THE FINDINGS. BECAUSE IF YOU LOOK AT
THE DATES, FROM THE MEDIATION TO THE FINDINGS OF
FACT, THEY WERE QUICKLY DONE TO TRY TO BE ABLE TO
GET THE ESTATE DISBURSED OUT TO MR. OLVER.

AND SO I THINK PROCEDURALLY HE SHOULD HAVE
BEEN PART OF THAT PROCESS AND WAS NOT.

AND I THINK THAT COULD HAVE BEEN WHERE
COMMISSIONER PROCHNAU VEERED OFF. IT WASN'T REALLY
NOT WHAT WE WENT TO ARGUE THAT DAY. IT WAS SOLELY
THE ISSUE OF SOLVENCY.

MR. OLVER: YOU CAN'T BLAME THE COMMISSIONER
FOR THE RULING. WHEN HE GOT NOTICE, HE GOT NOTICE
AND DIDN'T APPEAR. HOW IS SHE SUPPOSED TO CONSIDER
HIS ESOTERIC CONCERNS IF HE DIDN'T SHOW UP?

HE DIDN'T FILE A MOTION TO REVISE. HE GOT
NOTICE WE WOULD MEDIATE, AND HE DIDN'T ATTEND, AND
DIDN'T SEND PAPERWORK. AND, NOW, HE WANTS THE
COURT TO UNDO, BASED UPON THE TRANSFER OF ASSETS
CONCEPT.

HE IS SAYING TO YOU THAT THIS MERETRICIOUS
RELATIONSHIP -- ONCE YOU TRANSFER ASSETS, THAT HAS
SIGNIFICANCE.

THAT IS NOT THE LAW. IF HE CAN PROVE THAT
THE LAW SHOULD -- THAT MY DECEDENT SHOULD PAY HIM

1 MONEY, A CONSTRUCTIVE TRUST IS HOW COURTS TRACE IT.
2 AND IT DOESN'T MAKE ANY DIFFERENCE WHETHER IT IS
3 SITTING IN HER POCKET OR MINE, BUT IT JUST SO
4 HAPPENS TO BE MY ASSET.

5 AND THE IDEA THAT THIS COURT IS COMMITTING
6 SOME SORT OF NEW EXPANSION OF MERETRICIOUS
7 RELATIONSHIP CREDITOR RIGHTS, WHEN HE HAS GOT THIS
8 OTHER LAWSUIT SITTING THERE, WHICH IS THE PLAIN
9 OBVIOUS PLACE TO DO IT -- AND IT OCCURRED TO ME HE
10 WASN'T SHOWING UP AT ALL AT THESE HEARINGS OR THE
11 MEDIATION BECAUSE HE KNEW HE HAD THIS OTHER CLAIM
12 FILED. THAT'S WHERE IT IS GOING TO BE DONE. AND
13 IF HE CAN PROVE THE LAW IN THAT CASE, HE CAN PROVE
14 THE LAW IN THAT CASE.

15 HE DIDN'T COME TO THE HEARINGS HERE, AND IF
16 HE DOES PROVE THE LAW IN THAT CASE, THAT
17 CONSTRUCTIVE TRUST GOES RIGHT INTO MY POCKET, JUST
18 AS EASILY AS IT DOES ANYWHERE ELSE.

19 BUT HE DOESN'T HAVE ANY RIGHT TO COME IN
20 AFTER SIX MONTHS, AFTER WE HAVE SPENT TENS OF
21 THOUSANDS OF DOLLARS FIGHTING THESE ISSUES, ARGUING
22 HALF A DAY IN FRONT OF SHELLAN, AND SOME TIME IN
23 FRONT OF THE COMMISSIONER, AND THE SUMMARY JUDGMENT
24 IN FRONT OF YOU, IN MAY.

25 WE GAVE HIM NOTICE OF THAT IN APRIL, AND WE

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HAVE GONE NOW ALMOST TO NOVEMBER. AND, NOW, HE IS COMING IN AND SAYING, "I'M A CREDITOR. YOU HAVE GOT TO FIX ME IN THIS PROCEEDINGS."

WELL, WE DON'T HAVE TO FIX HIM IN THIS PROCEEDING. HE HAS A PERFECT REMEDY, JUST LIKE HE FILED IT. HIS COMPLAINT IS WELL DONE.

IT IS NOT AN ACCURATE STATEMENT OF THE LAW, AND HE WILL LOSE, BUT IT GIVES HIM THE PROPER FRAMEWORK.

INTERVENTION IS NOT AN ISSUE HERE. THE LACK OF APPEARANCES -- AT ANY TIME, HE COULD HAVE FILED A PETITION IN THIS PROCEEDING, OR IN THE THUY HO ESTATE. HE COULD HAVE SAID, "HEY, I HAVE THIS RIGHT, AND YOU ARE PREJUDICING MY RIGHT, AND I WANT TO ASSERT THIS, THAT, AND THE OTHER THING."

WE HAVE GONE SIX MONTHS WITH NOTHING. AND, NOW, AFTER IT IS ALL OVER, HE IS SAYING HE IS SOMEHOW PREJUDICED.

BUT THE LAW DOES NOT PREJUDICE HIM, AND THIS COURT CAN DENY HIS MOTION TO AMEND, AND HE IS STILL GOING TO HAVE EVERY RIGHT TO CLAIM THAT THESE -- THAT THE BASKET OF GOODS IN MY POSSESSION ARE SUBJECT SOMEHOW TO HIS CREDITOR RIGHTS, IN FRONT OF JUDGE MACINNES. AND HE CAN IMPOSE A CONSTRUCTIVE TRUST ON THOSE, IF HE CAN PROVE THE LAW IS AS HE

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WANTS THIS COURT NOW TO MAKE IT.

IT IS NOT FAIR TO THIS COURT AND WOULDN'T BE FAIR TO COMMISSIONER PROCHNAU TO GO BACK AND UNDO HER PROCEDURE.

WHY DO WE GIVE PEOPLE NOTICE? WHY DO WE HAVE PROCEDURES? SO THAT THINGS MOVE IN AN ORDERLY WAY. SO THAT, NOW, WE ARE NOT LEFT WITH JUST GOING "EQUITY, EQUITY, FIX ME, FIX ME," AND WE ARE SUPPOSED TO.

WELL, HOW DO WE UNRAVEL ALL OF THESE COURT ORDERS? HOW DO WE VALIDATE THE FACT THAT OLIVER AND FOWLER HAVE SPENT 30 THOUSAND DOLLARS MESSING WITH ALL OF THESE ISSUES, WHEN, IF HE HAD HAD THESE ARGUMENTS, THEY COULD HAVE BEEN PRESENTED?

AND, NOW, WE ARE GOING TO UNDO IT ALL? I SAY JUST LET THEM GO WITH JUDGE MACINNES' THEORIES.

AND HE IS RIGHT. I AM GOING TO RESIST IT. IT IS NOT THE LAW IN THIS CASE, BUT HE HAS A FORUM TO DO IT.

BUT A RECORD FOR REVIEW CAN BE MADE. AND IF HE WANTS TO APPEAL THIS, AND IF WE ARE GOING TO MAKE APPELLATE LAW, THAT'S THE PLACE TO DO IT, BECAUSE THAT'S WHERE HE IS A CREDITOR. THAT'S WHERE HE IS SAYING THAT THE MERETRICIOUS RELATIONSHIP SHOULD BE SURCHARGED, AND THAT'S WHAT

HE PLED IN PARAGRAPH 6 AND 7 OF HIS COMPLAINT.

THAT IS PROPERLY PLED, AND THAT IS AT ISSUE.
AND IF WE ARE GOING TO MAKE NEW LAW -- IT WAS NEVER
PRESENTED TO YOU AND NEVER PRESENTED TO PROCHNAU,
AND THAT'S THE PLACE TO MAKE NEW LAW.

THANK YOU.

MR. RUMBAUGH: WELL, COUNSEL, WOULD LIKE YOU
TO SKIP A STEP. AND THAT'S WHAT THIS IS ABOUT.

LET ME JUST BRIEFLY SAY THAT UP UNTIL
MS. FOWLER LOST HER NONINTERVENTION POWERS, THE
ESTATE, CUNG HO'S ESTATE, WAS ABLY REPRESENTED.
AND I TALK TO MS. FOWLER REGULARLY, AND I WAS VERY
SATISFIED WITH WHAT IS BEING DONE TO PROTECT MY
CLIENT'S INTEREST AS A CREDITOR.

I'M A CREDITOR TO THE ESTATE OF CUNG HO, AS
WELL AS THUY HO. BUT IN ORDER TO MAKE THE
TRANSFER, THERE IS ONLY ONE WAY THAT THAT TRANSFER
CAN BE MADE. THIS COURT HAS TO FIND THAT THE
MERETRICIOUS EQUITY DOCTRINE APPLIES.

AND THAT IS A DECISION OF LAW. AND ONCE
THAT DECISION OF LAW IS MADE, IF I DO NOT APPEAL
THAT DECISION, OR, YOU KNOW, MAKE A RECORD IN THIS
PROCEEDING TO OBJECT, THEN I'M NOT GOING TO BE ABLE
TO DO THAT IN THE CREDITOR'S CLAIM AGAINST THE THUY
HO ESTATE, WHICH WOULD THEN BE CHARACTERIZED AS

1 SEPARATE PROPERTY AND BEYOND THE REACH OF MY
2 CLIENT, THE JUDGMENT CREDITOR, TO CUNG HO.

3 AND SO THIS IS IT. THIS IS WHERE THE
4 DECISION IS BEING MADE THAT IS THE LEGAL DECISION,
5 WHICH I THINK IS CORRECT. MR. OLVER'S POSITION IS
6 NOT SUPPORTED BY THE LAW.

7 THERE IS NO LAW THAT SAYS, INSTEAD OF USING
8 THE NORMAL LAWS OF ESTATES OR PROBATE, WE WILL
9 APPLY MERETRICIOUS EQUITY IN THE POSTMORTEM
10 CONTEXT. THERE IS NO LAW CITED ANYWHERE THAT SAYS
11 THAT. THERE IS NO STATUTORY LAW OR CASE LAW.

12 THE ONLY CASE LAW LANGUAGE IS DIRECTLY
13 CONTRARY TO THAT POSITION: THAT YOU DO NOT APPLY
14 THE MERETRICIOUS EQUITY DOCTRINE WHEN THE
15 MERETRICIOUS PARTNERS ARE DEAD.

16 AND SO WHEN JUSTICE ALEXANDER WROTE THAT,
17 WHETHER HE HAD IN MIND THAT THERE WAS GOING TO BE A
18 PROBLEM WITH CREDITORS' CLAIMS OR NOT, I DON'T
19 KNOW. BUT THAT WAS -- WE REPRESENTED FRANK
20 VASQUEZ, AND THAT WAS THE FIRST QUESTION OUT OF
21 JUDGE ALEXANDER'S MOUTH WHEN WE GOT TO ARGUMENT AT
22 THE SUPREME COURT. "AREN'T WE USURPING THE PROBATE
23 LAWS?"

24 AND THE OTHER JUSTICES DID NOT JOIN IN THAT
25 CONCURRING OPINION, NOT FEELING IT NECESSARY TO

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REACH THE QUESTION IN ORDER TO DECIDE THE CASE
BEFORE THEM REGARDING MR. VASQUEZ.

BUT THE ONLY THING WE HAVE OF ANY KIND IS
THAT THE COURT DOES NOT APPROVE OF THE MERETRICIOUS
DOCTRINE.

TO SAY THAT THIS HAS NOT BEEN AN ISSUE FROM
THE BEGINNING OF THIS CLAIM IS SIMPLY NOT TRUE.
FROM THE VERY BEGINNING, THE CUNG HO ESTATE HAS
TAKEN A POSITION THAT MERETRICIOUS EQUITY DOES NOT
APPLY. AND THERE ARE REAMS OF PLEADINGS THAT TOUCH
ON THAT ISSUE, INCLUDING THE SUMMARY JUDGMENT
MOTION BEFORE THIS COURT.

AND SO IT HAS BEEN CLEAR. THIS IS NO KIND
OF SURPRISE TO THE ESTATE OF THUY HO, THIS CLAIM
DIDN'T JUST MATERIALIZE LAST WEEK. THIS HAS BEEN
THE PIVOTAL ISSUE THAT HAS BASICALLY KEPT THE
ESTATE FROM DISBURSING FUNDS AND BEING CLOSED FOR
MONTHS -- FOR A YEAR PERHAPS.

THE COURT: LET ME ASK YOU A QUESTION,
BECAUSE THE ARGUMENT THAT I'M FINDING PERSUASIVE
FROM MR. RUMBAUGH IS WHETHER OR NOT REALLY YOU HAVE
HAD AN OPPORTUNITY TO ADDRESS THESE ISSUES IN THE
OTHER FORUM.

MR. OLVER: HERE IS THE PROBLEM: WE ARE
STILL CONFLATING TWO LEGAL THINGS THAT ARE NOT

1 NECESSARILY CONFLATIVE. HE SAYS HE IS OKAY WITH
2 THE MERETRICIOUS RELATIONSHIP, AND THEN WE
3 SEGREGATE THE PROPERTY.

4 THE MERETRICIOUS EQUITY DOCTRINE -- THAT IS
5 NOT THIS UMBRELLA THING THAT YOU HAVE DECIDED. ALL
6 YOU DECIDED WAS THAT THEY HAD A MERETRICIOUS
7 RELATIONSHIP.

8 AND THEN THE SECOND THING, AND THEN THERE IS
9 A THIRD THING. BUT THE SECOND THING IS WHAT IS THE
10 FAIR PERCENTAGE BASED UPON THE EQUITY? DID THEY
11 ACQUIRE IT DURING THE RELATIONSHIP WITH THEIR SWEAT
12 EQUITY?

13 NOW, IF WE WENT TO TRIAL ON THAT, ON
14 NOVEMBER 15TH, AND THIS COURT SAID, "I THINK IT IS
15 50/50," HE IS NOT IN THERE AT THAT TIME ARGUING HIS
16 CREDITOR'S CLAIM. THAT'S NOT AN ISSUE.

17 THE ONLY ISSUE IS DID THEY ACQUIRE IT DURING
18 THE COURSE OF THE RELATIONSHIP WITH THEIR SWEAT
19 EQUITY, OR DID IT DERIVE FROM SEPARATE PROPERTY.
20 OKAY. WHAT HE WANTS TO DO IS HE WANTS TO, AS A
21 CREDITOR, NOW SURCHARGE THUY HO'S HALF.

22 OKAY. THAT'S A FAIR DECISION OR A FAIR
23 DISCUSSION. WE CAN FIGHT THAT BATTLE.

24 BUT YOU DON'T DO IT WHEN YOU ARE JUST
25 DIVIDING THE GOODS -- THE BAKED GOODS. ON NOVEMBER

1 15TH, ALL WE WOULD HAVE BEEN DOING IS DIVIDING IT.
2 THAT'S ALL YOU WOULD HAVE BEEN DOING.

3 AND SO HE IS PRECLUDED FROM ARGUING THAT
4 THERE IS A MERETRICIOUS RELATIONSHIP, BUT HE SAYS
5 HE IS FINE WITH THAT. HE IS NOT PRECLUDED FROM
6 ARGUING THE LEGAL EFFECT OF THAT. ALL THAT IS IN
7 THE OTHER CASE.

8 YOU JUST FOUND THERE IS A MERETRICIOUS
9 RELATIONSHIP. WHAT'S THE LEGAL EFFECT?

10 WELL, WE DON'T KNOW YET. HE IS CITING A
11 DISSENT, A CONCURRING OPINION, AND ACTUALLY THERE
12 IS NO LAW ON THIS. HE IS GOING TO MAKE IT. HE IS
13 NOT GOING TO MAKE IT IN HIS CREDITOR'S CLAIM CASE.
14 AND SO DO I HAVE A RIGHT TO SURCHARGE THAT?

15 THE MERETRICIOUS RELATIONSHIP HE IS FINE
16 WITH, AND SEGREGATING THE ASSETS DOES NOT PRECLUDE
17 IT -- IT IS THE THIRD STEP THAT HE HAS ALREADY
18 TAKEN WHERE HE CAN SURCHARGE. AND THAT'S THE CLEAN
19 WAY. THAT'S THE WAY THAT THE COURT OF APPEALS CAN
20 SEE IT. AND HE IS PRECLUDED FROM THE MERETRICIOUS
21 RELATIONSHIP, BUT NOT FROM THE LEGAL EFFECT OF WHAT
22 THAT MEANS.

23 THE COURT: I HAVE TO MAKE A DECISION. WE
24 COULD BE HERE ALL DAY ARGUING THIS, AND I RECOGNIZE
25 IT.

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AFTER LISTENING TO ALL THREE OF YOU AND DOING EVERYTHING I CAN TO CONSIDER IT, GIVEN WHAT I HAVE IN FRONT OF ME, I AGREE AT THIS POINT WITH MR. OLVER.

THAT'S REALLY THE FORUM TO ADDRESS THE LEGAL EFFECT OF FINDING WHETHER THERE IS A MERETRICIOUS RELATIONSHIP BETWEEN THESE TWO. THAT IS PROPERLY DONE IN ANOTHER FORUM, AND I BELIEVE THAT'S WHERE THE QUESTION CAN BE RAISED IN TERMS OF WHAT RIGHT THE CREDITOR HAS, AND HOW THE ASSETS SHOULD BE DIVIDED. AND I'M DENYING THE MOTION.

MR. OLVER: I JUST HAVE A SIMPLE FORM THAT SAYS "DENIED" ON IT, YOUR HONOR.

THE COURT: THE ONLY THING I ASK THAT WE ADD, AND I SPECIFICALLY ASKED THAT A COURT REPORTER BE HERE TODAY. I THINK IT IS IMPORTANT TO HAVE A RECORD OF ARGUMENT THAT IS PRESENTED AS WELL AS THE COURT DECISION. AND WE COULD INCORPORATE BY REFERENCE THE ARGUMENTS MADE IN THE COURT'S DECISION.

MR. OLVER: IN THE BODY OF THE ORDER?

THE COURT: YES, PLEASE, OR ANYWHERE ON THE NOTATION. I WANT YOU TO KNOW THAT I APPRECIATE ARGUMENT FROM EACH OF YOU, AND I RECOGNIZE THE ISSUE.

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MR. RUMBAUGH: AND THE DATE OF THE JUDGMENT
WILL RUN FROM TODAY?

THE COURT: I THINK YOU CAN PROBABLY DO THAT
GIVEN THAT WE ARE HERE AND WE CONSIDERED IT.

MR. RUMBAUGH: ALL RIGHT. THANK YOU FOR
HEARING US THIS MORNING.

THE COURT: THANK YOU.

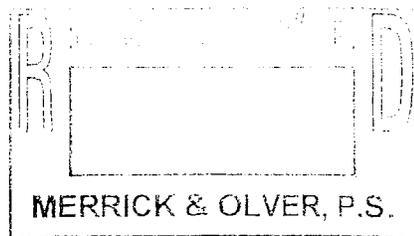
MS. FOWLER: THANK YOU FOR LETTING ME APPEAR
LATE. I APOLOGIZE FOR THAT.

THE COURT: I KNOW THAT YOU CAN'T CONTROL
TRAFFIC.

MS. FOWLER: THERE WAS A FOG BANK OUT THERE.

THE COURT: AGAIN, THANK YOU ALL.

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SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In re the Estate of:)
CUNG VAN HO,) NO.: 03-4-05845-6 SEA
Deceased.) **DECLARATION OF SERVICE**

I declare that on July 1, 2004, the Law Office of Julie K. Fowler P.S. served copies of the Notice of Insolvency and Petition for Determination of Solvency and Order to each of the following counsel at their stated addresses.

Dave T. Lyons
Lyons Law Offices
900 Fourth Avenue, Ste 4050
Seattle, WA 98164

Stanley J. Rumbaugh
Rumbaugh, Rideout, Barnett & Adkins
4041 Ruston Way
P.O. Box 1156
Tacoma, WA 98401

Michael L. Olver
Merrick & Olver, P.S.
9222 Lake City Way NE
Lake City, WA 98115

Mark B. Shepherd
Larson, Hart & Shepherd
600 University Street, Ste 1730
Seattle, WA 98101

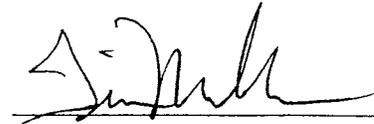
Mark C. Vohr
Aiken, St. Louis & Siljeg, P.S.
801 Second Avenue, Ste 1200
Seattle, WA 98104



4

1 This declaration is made under oath, under penalty of perjury under the laws of the State
2 of Washington.

3
4 Dated this 29th day of June 2004.



6 Tina Miller, Paralegal
7 For the Law Office of Julie K. Fowler, P.S.

CLERK
SEATTLE WA

RECEIVED

JUL 14 2004

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In the Matter of the Estate of:	)	NO. 03-4-05845-6 SEA
)	
	)	CERTIFICATE OF MAILING:
CUNG VAN HO,	)	OBJECTION TO
	)	NON-INTERVENTION
Deceased.	)	POWERS
)	

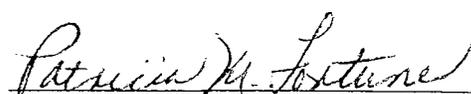
THE UNDERSIGNED certifies that on **Tuesday, July 13, 2004**, I sent by ABC Legal Messengers, Inc. for delivery, a copy of the above document to the attorneys listed below:

- | | | |
|--|--|--|
| Julie K. Fowler
365 - 118 th Ave. S.E., #200
Bellevue, WA 98005 | David T. Lyons
Lyons Law Offices
900 Fourth Ave., # 4050
Seattle, WA 98164 | Mark C. Vohr
Aiken, St. Louis & Siljeg
801 Second Ave., #1200
Seattle, WA 98104 |
| Stanley J. Rumbaugh
Rumbaugh, Rideout,
Barnett & Adkins
4041 Ruston Way
Tacoma, WA 98401 | Mark B. Shepherd
Larson, Hart & Shepherd
600 University Street, #1730
Seattle, WA 98104 | |

CERTIFICATE

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

DATED: July 13, 2004, at Seattle, Washington.


 PATRICIA M. FORTUNE

Certificate of Mailing Objection
to Non-Intervention Powers

MERRICK & OLVER, P.S.
 Attorneys at Law
 9222 Lake City Way NE
 Seattle, WA 98115-3268
 (206) 527-1100

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

Estate of)
)
 Plaintiff)
 vs.)
 Cung Van Ho)
 Defendant.)

Cause No 03-4-05845-6 SETA

ORDER ON CIVIL MOTION
(ORM)

The above-entitled Court, having heard a motion Petition for
Determination of Solvency

IT IS HEREBY ORDERED that The non-intervention powers
of Julie K. Fowler are revoked.

Mediation w/ Ms. Fowler and Mr. Oliver
and Mr. Oliver will provide a brief supporting
claim. IF Ms. Fowler finds that a prima
facie case has been made, she shall
amend her inventory and give notice to the
creditors.

DONE IN OPEN COURT this _____ day of _____

ORDER & ATTACHMENT
APPROVED
JUL 21 2004
Kimberly Prochnau
COURT COMMISSIONER

COURT COMMISSIONER/JUDGE

Presented by:

Mukul Oliver

Copy Received:

Julie K. Fowler

RECEIVED
W325

2004 JUL 30 AM 11:31

EXP01

KING COUNTY
SUPERIOR COURT

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In the Matter of the Estate of:	)	NO. 03-4-05845-6 SEA
)	
)	
CUNG VAN HO,	)	STIPULATION AND
	)	ORDER CLARIFYING
Deceased.	)	JULY 21, 2004 ORDER
)	

To minimize legal expenses and promote an orderly mediation, the parties Stipulate

as follows:

1. The May 14, 2004 Order of Judge Mary Yu Found as Fact that Thuy Ho and Cung Van Ho "lived in a meretricious relationship" (pg.1, line 23).
2. The May 14, 2004 Order of Judge Mary Yu "Ordered Adjudged and Decree that Petitioner's Motion for Summary Judgment on his Contradicting Inventory is Granted and equitable division shall await trial." (pg 2, lines 1-5).
3. The July 21, 2004 Order of Commissioner Kimberley Prochnau revoked non-intervention powers and Ordered both estates to participate in Mediation which is scheduled for August 10, 2004 with the Honorable Gerard Shellan.

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1 4. Mr. Olver was ordered to provide a Brief supporting his claim for an equitable
2 division of assets.

3 5. If Judge Shellan finds that Mr. Olver has made a prima facie case that the assets
4 inventoried were acquired with income, assets, and efforts during the parties' meretricious
5 relationship, then the Special Administrator, Julie K. Fowler, shall amend her Inventory to
6 claim 50% of the assets so traced and give notice to the creditors.
7

8 DATED this 30 day of July, 2004.

9
10 Julie K. Fowler per fax attached
11 JULIE K. FOWLER, WSBA #30108
12 Special Administrator Estate of Cung Van Ho

Michael L. Olver
MICHAEL L. OLVER, WSBA #7031
Special Administrator Estate of Thuy Ho

13 David T. Lyons per MLO 7-30-04
14 DAVID T. LYONS, WSBA #11263
15 Attorney for Guardian of the
16 the Estate of Harry Ho

Mark C. Vohr per MLO 7-30-04
MARK C. VOHR, WSBA #20601
Attorney for Guardian of
the Person Harry Ho

17 **ORDER**

18 Based upon the foregoing, Stipulation, it is hereby

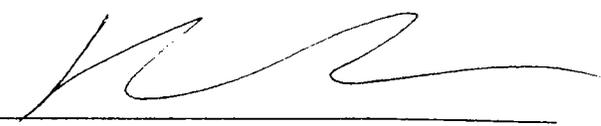
19 **ORDERED** as follows:

- 20
- 21 1. The Court's Order of July 21, 2004 is Clarified and adopts the above
22 Stipulation as a modification of said Order as though fully set forth; and
23
 - 24 2. The Special Administrator is Authorized to advance and pay the costs of
25 Mediation, one-half of which shall be reimbursed by the Estate of Thuy Ho.
26

/////

1
2 DONE IN OPEN COURT _____

3
4 ORDER & ATTACHMENT
5 APPROVED
6 JUL 30 2004
7 Kimberly Prochnau
8 COURT COMMISSIONER

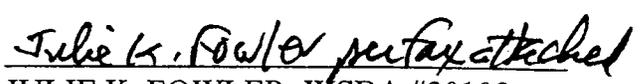
9
10 
11 HONORABLE KIMBERLEY PROCHNAU

12 Presented by:

13 MERRICK & OLVER, P.S.

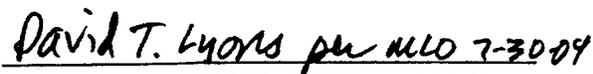
14 Approved as to Form and Content;
15 Notice of Presentation Waived:

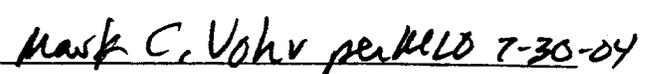
16 
17 MICHAEL L. OLVER, WSBA #7031
18 Special Administrator Estate of Thuy Ho

19 
20 JULIE K. FOWLER, WSBA #30108
21 Special Administrator Estate of Cung Van Ho

22 Approved as to Form and Content;
23 Notice of Presentation Waived:

24 Approved as to Form and Content;
25 Notice of Presentation Waived:

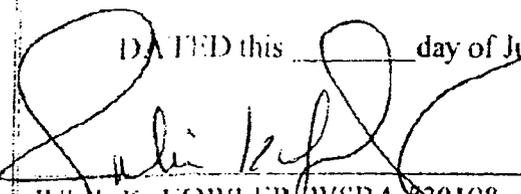
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DAVID T. LYONS, WSBA #11263
Attorney for Guardian of
the Estate of Harry Ho


MARK C. VOHR, WSBA #20601
Attorney for Guardian of
the Person of Harry Ho

4 Mr. Olver was ordered to provide a Brief supporting his claim for an equitable
2 division of assets.

3 5. If Judge Shellan finds that Mr. Olver has made a prima facie case that the assets
4 inventoried were acquired with income, assets, and efforts during the parties' meretricious
5 relationship, then the Special Administrator, Julie K. Fowler, shall amend her Inventory to
6 claim 50% of the assets so traced and give notice to the creditors.
7

8 DATED this _____ day of July, 2004.

9
10 
11 JULIE K. FOWLER, WSBA #30108
12 Special Administrator Estate of Cung Van Ho

MICHAEL L. OLVER, WSBA #7031
Special Administrator Estate of Thuy Ho

13
14 DAVID T. LYONS, WSBA #11263
15 Attorney for Guardian of the
16 the Estate of Harry Ho

MARK C. VOIR, WSBA #20601
Attorney for Guardian of
the Person Harry Ho

17 **ORDER**

18 Based upon the foregoing, Stipulation, it is hereby

19 **ORDERED** as follows:

20
21 1. The Court's Order of July 21, 2004 is Clarified and adopts the above
22 Stipulation as a modification of said Order as though fully set forth, and

23
24 2. The Special Administrator is Authorized to advance and pay the costs of
25 Mediation, one-half of which shall be reimbursed by the Estate of Thuy Ho.
26

Stipulation and Order Clarifying July 21, 2004 Order - 2

MERRICK & OLVER, P.S.
Attorneys at Law

9221 Leach Way NE
Seattle, WA 98148-1768
(206) 577-1100

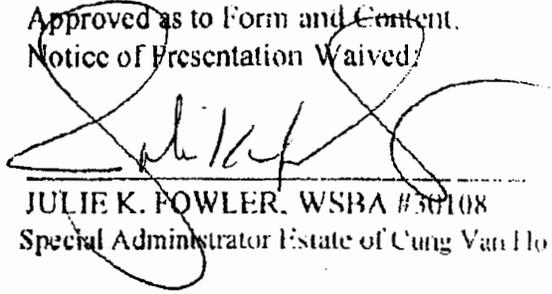
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DONE IN OPEN COURT _____

HONORABLE KIMBERLEY PROCHNAN

Presented by:
MERRICK & OLVER, P.S.

Approved as to Form and Content,
Notice of Presentation Waived

JULIE K. FOWLER, WSBA #30108
Special Administrator Estate of Cung Van Ho

MICHAEL L. OLVER, WSBA #7031
Special Administrator Estate of Thuy Ho

Approved as to Form and Content;
Notice of Presentation Waived;

Approved as to Form and Content;
Notice of Presentation Waived;

DAVID T. LYONS, WSBA #11263
Attorney for Guardian of
the Estate of Harry Ho

MARK C. VOHR, WSBA #20601
Attorney for Guardian of
the Person of Harry Ho

of A Court Report

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Estate of:)	
)	NO. 03-4-05845-6 SEA
)	
CUNG VAN HO,	)	ORDER DIRECTING
	)	FULL DISBURSEMENT
Deceased.)	
_____)	

THIS MATTER having come on regularly before the undersigned; Petitioner being represented by Merrick & Olver, P.S., and Michael L. Olver; and Respondent being represented by the Law Office of Julie K. Fowler; and Creditor Vu Nguyen, being represented by Mr. Stanley J. Rumbaugh, and the Court finding that the Honorable Mary I. Yu has entered a Judgment of Disbursement dated September 7, 2004, in King County Cause No. 04-2-02867-1 SEA; Now, Therefore, it is hereby

ORDERED that Special Administrator Julie K. Fowler is Authorized and Directed to immediately disburse one-half of the inventoried assets herein in the amount of \$423,729.20 to the Estate of Thuy Thi Thanh Nguyen Ho, to Michael L. Olver, Special Administrator; and it is further

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In the Matter of the Estate of:)	NO. 03-4-05845-6 SEA
)	
	)	CERTIFICATE OF MAILING;
CUNG VAN HO,	)	NOTICE OF PRESENTATION;
	)	PETITION TO COMPEL
Deceased.	)	DISBURSEMENT AND
	)	PROPOSED ORDER
)	

THE UNDERSIGNED certifies that on **Monday, November 2, 2004**, I sent by facimile transmittal and United States mail, copies of the above documents to the attorneys listed below:

Julie K. Fowler	Stanley J. Rumbaugh
365 - 118 th Ave. S.E., #200	Rumbaugh, Rideout, Barnett
Bellevue, WA 98005	4041 Ruston Way
	Tacoma, WA 98401

CERTIFICATE

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

DATED: November 2, 2004, at Seattle, Washington.


 PATRICIA M. FORTUNE

Certificate of Mailing Notice of Presentation;
Petition to Compel Disbursement; Proposed Order

64

MERRICK & OLVER, P.S.
 Attorneys at Law
 9222 Lake City Way NE
 Seattle, WA 98115-3268
 (206) 527-1100

