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NO. 55167-1-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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VU NGUYEN, Appellant/Cross Respondent,

v.

MICHAEL L. OLVER, Respondent/Cross Appellant,

v.

JULIE K. FOWLER, Cross Respondent.

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**REPLY BRIEF OF APPELLANT VU NGUYEN**

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**A. Olver's motion to strike Nguyen's assignments of error should be denied**

Olver's assertion that the scope of this appeal should be restricted to the express face of the last order filed before the appeal,<sup>1</sup> and therefore that Nguyen's first through third assignments of error should be stricken, should be denied. Olver cited no authority in support of his arguments (so the court may presume that he found none after search; *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, cert. denied, 439 U.S. 870, 99 S. Ct. 200, 58 L. Ed. 2d 182 (1978)). His arguments conflict with appellate rules that take a *liberal* approach to the scope of error appellate courts will review.

Assignments of error are governed by RAP 10.3(a)(3), which states:

*Assignments of Error.* 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.

(Emphasis added.) See also *Ruddach v. Johnston Ford*, 97 Wn.2d 277, 281, 644 P.2d 671 (1982), where the court said that **an issue not mentioned in a trial court's findings may be reviewed on appeal if the record shows the issue was raised and considered in the trial court.**<sup>2</sup>

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<sup>1</sup> RB 1.

<sup>2</sup> Specifically, the court said:

A review of the record, briefs and memoranda indicates that the impact of the supplemental agreement on damages was thoroughly discussed at trial.

Here, each assignment of error and issue relating thereto was argued, and presumably considered, at the trial court.

Further, the root decision at issue in this appeal is the trial court's (partial) summary judgment that applied meretricious relationship equity after the partners' deaths – a question of law, or mixed question of equity and law, which this court reviews *de novo*. See Niemann v. Vaughn Comm't'y. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005) (“the question of whether equitable relief is appropriate is a question of law”; and, where a dispute “can best be described as a mixed question of fact and law,” “we give deference to the trial court's factual determinations but review the trial court's grant of equitable relief *de novo*”).

Nguyen's assignments of error are proper, and Olver's motion to dismiss them should be denied.

**B. Reply to Olver's Statement of the Case**

Olver's statement that he was appointed personal representative “to pursue the equitable division of assets” between the two estates<sup>3</sup> is argument, not documented in the record.

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Attorneys for Don Johnston Ford, Inc., requested the trial judge to include the factual basis and legal conclusion regarding the impact of the supplemental agreement in his findings. We hold that the Court of Appeals properly considered this issue on appeal.

<sup>3</sup> Respondent's brief (“RB”) 4.

Olver's characterization of Nguyen's intervention as *post judgment* is misleading. It is true that Nguyen did not move to intervene in *Olver v. Fowler* when Olver moved for summary judgment to determine that Cung and Thuy had a meretricious relationship;<sup>4</sup> but there was no reason for Nguyen to do so, because he did not dispute the motion. Moreover, that summary judgment was only a *partial* judgment. When Olver moved for further judgment, to transfer money from Cung's estate to Thuy's estate, Nguyen moved to intervene. Whether such motion was even necessary was debatable, since Nguyen had already intervened in Nguyen estate.<sup>5</sup>

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<sup>4</sup> See the Appendix, the transcript of proceedings of October 28, 2004, p. 31 lines 5-7 (Olver to the court: "All you have decided was that they had a meretricious relationship."), and p. 32 lines 8-9 (Olver to the court: "You just found there is a meretricious relationship. What's the legal effect? Well, we don't know yet.").

<sup>5</sup> *Id.*, pp 15-16:

Mr. Rumbaugh: I mentioned to the court we had intervened, as Ms. Fowler notes.

Mr. Olver: You are confusing requesting notice with being a party.

Ms. Fowler: No, this was an actual intervention.

Mr. Olver: In the Cung Ho estate, not in this matter.

Mr. Rumbaugh: I think if I'm an intervenor in the estate, I have standing in any action involving the estate. And, frankly, intervention can be granted under the court rules at any time, even after entry of judgment. If you look at [*Lenzi v. Redlands*] *Insurance Company*, that is the ruling of the court.

....

Mr. Rumbaugh: [A]ny concern about whether our formal intervention in the Cung Ho estate gives us the entitlement to come before the court and make our arguments against the division would be eliminated because then we are actively, by order in this action, an intervenor. ... [I]f the court

Nguyen actively opposed Olver's motion for judgment to transfer property, by moving for oral argument, filing a brief, and participating in oral argument. The trial court heard the two motions (Nguyen's for intervention, and Olver's for judgment transferring property from Cung's estate to Thuy's estate) at the same hearing, on October 28, 2004. The court entered the judgment at that time, then on November 5 signed the intervention order, *nunc pro tunc* to October 28.<sup>6</sup> Accordingly, to be accurate, Nguyen's motion to intervene in *Olver v. Fowler* was made *before* judgment, and entered contemporaneously with judgment.

### **C. Argument**

#### **1. Standard for Review of the Appeal and Cross Appeal**

##### **(a) Nguyen's appeal**

Olver made no reply to Nguyen's statement of the standard for review of Nguyen's appeal, so apparently Olver concurs in Nguyen's statement.

Nguyen cites as additional authority, governing review of his

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**doesn't believe that our intervention by order earlier in the estate of Cung Ho gives us that right [*i.e.*, intervention] as we stand here today, [the court can] either enter[] an order allowing us to intervene, or recogniz[e] that as an intervenor in the estate we have standing right now.**

(Emphasis added.)

<sup>6</sup> CP 394-395.

appeal, *Niemann v. Vaughn Commt. Church*, *supra* (“the question of whether equitable relief is appropriate is a question of law”; and, where a dispute “can best be described as a mixed question of fact and law,” “we give deference to the trial court’s factual determinations but review the trial court’s grant of equitable relief de novo”).

**(b) Olver’s cross appeal**

Olver did not address the standard for review of his cross appeal from Judge Yu’s order that granted Nguyen’s motion to intervene in *Olver v. Fowler*.

Nguyen intervened under CR 24(a). “In Washington, as in the federal courts and other jurisdictions, the requirements of CR 24(a) are liberally construed to favor intervention.” *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn. App. 618, 623, 989 P.2d 1260 (1999) (citation omitted). In general, orders that *deny* intervention under CR 24(a)<sup>7</sup> are reviewed for errors of law.<sup>8</sup> However, where, as here, the issue

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<sup>7</sup> Nguyen knows of no Washington case that decided an appeal from *allowance* of intervention.

<sup>8</sup> See *Spokane County ex rel. County Commr’s v. State*, 136 Wn.2d 644, 649, 966 P.2d 305 (1998):

The denial of a party’s motion to intervene as a matter of right will be reversed only if an error of law has occurred. An error of law is an error in applying the law to the facts as pleaded and established.

(Citations and internal punctuation omitted.)

is whether an order granting intervention was *untimely*, the standard for review is abuse of discretion. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989) (“Abuse of discretion is the proper standard of review for a trial court’s determination of timeliness,” citation omitted).<sup>9</sup> “An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court.” *Id.* **“On the question of timeliness in particular, CR 24(a) allows intervention as of right unless it would work a hardship on one of the original parties.”** *Columbia Gorge Audubon Society*, 98 Wn. App. at 623 (emphasis added, citing *Loveless v. Yantis*, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973)).

**2. Olver’s arguments about Nguyen having received notice of proceedings do not show that the trial court abused its discretion by allowing Nguyen to intervene; the touchstone for timeliness is not timing, but prejudice. Moreover, if the trial court erred, the error was harmless.**

Olver argues that because Nguyen had long received notice of proceedings before moving to intervene in *Olver v. Fowler*,<sup>10</sup> the trial court abused its discretion by ordering intervention. In *Olver v. Fowler*, Thuy’s

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<sup>9</sup> See also *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn. App. at 622 (same, citing *Kreidler v. Eikenberry*).

<sup>10</sup> RB 7-8.

estate contends that based on meretricious relationship equity half the property Fowler inventoried in the Cung's estate should be de-inventoried, and transferred to Thuy's estate. Olver implies that such notice made Nguyen's motion untimely and the order allowing intervention an abuse of discretion. However, "[o]rdinarily there is no *duty* to intervene; the rule simply *authorizes* intervention." 3A Orland and Tegland, *Washington Practice*, CR 24 (4th ed. 1992) (citations omitted, emphasis added). Olver has cited no authority that because Nguyen had been notified of proceedings in the lawsuit, the intervention order was an abuse of discretion.

More important, Nguyen reiterates that "[o]n the question of timeliness in particular, CR 24(a) allows intervention as of right unless it would work a hardship on one of the original parties." *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn. App. at 623. In other words, an order granting intervention is not untimely unless it prejudices the nonmoving party. The intervention order did not prejudice Olver.

This brings up the harmless error rule. The only harm Olver claims from the intervention order – investment of attorney time in the litigation – is unwarranted, both legally and factually. Legally, under the so-called "American Rule" attorney fees are considered part of the normal burden of litigation. Factually, the intervention order did not affect the progress of

the lawsuit. Olver talks about “revisiting a year’s worth of court hearings, motions, and evidentiary battles.”<sup>11</sup> However, nearly all of those occurred *before* the intervention order, and the rest presumably would have occurred even if intervention had been denied (because Nguyen probably was already entitled to participate in the lawsuit by virtue of his intervention authority in the Cung Ho estate.<sup>12</sup>) Further, per RAP 2.2(a) the court’s rulings were not ripe for appeal until the trial court ordered property transferred from Cung’s estate to Thuy’s estate and amendment of that order was denied.

Absent prejudice, Olver’s citations and arguments (RB 10-12) about timeliness are immaterial. Nevertheless, to keep things straight Nguyen wants to respond to them. Olver’s argument that Nguyen should not have cited *Lenzi v. Redlands Ins. Co.*<sup>13</sup> for the statement that “intervention can be timely even after judgment has been entered” because *Lenzi* involved *default* judgment<sup>14</sup> should be both immaterial (because Nguyen probably already had standing to participate in *Olver v. Fowler* by virtue of his intervention in the Cung Ho estate, and because he

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<sup>11</sup> RB 12.

<sup>12</sup> See footnote 5.

<sup>13</sup> 140 Wn.2d 267, 996 P.2d 603 (2000).

<sup>14</sup> RB 10.

moved to intervene before judgment) and unpersuasive. Nothing in *Lenzi* (or in any other case Nguyen knows of) says intervention after judgment is permissible only where the judgment was by default. Rather, the law is simply that intervention can be allowed post judgment, to serve the purpose of intervention. See 3A *Washington Practice*, CR 24, *supra*: “Intervention even after judgment is granted if necessary to prevent the loss of rights. “ (Citations omitted.)

Washington Practice continues: “Likewise, intervention may be granted [after judgment] to enable an interested party to appeal.” *Id.* This applies even to parties who chose not to participate at the trial court. See, for example, *Mercer Enterprises, Inc. v. Bremerton*, 93 Wn.2d 624, 626, 611 P.2d 1237 (1980) (post-judgment motion to intervene granted “in order to appeal the trial court's decision”). See also *Ford v. Logan*, 79 Wn.2d 147, 150, 483 P.2d 1247 (1970) (facing “a situation in which intervention [] was the only available means by which the petition signatories would have the benefit of an appeal,” intervention was proper).

Olver argues that *Kreidler v. Eikenberry*, *supra*, is authority that the trial court abused its discretion in allowing intervention because Nguyen “offered no declarations that excuse [his] delay.”<sup>15</sup> *Kreidler* did

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<sup>15</sup> RB 11.

not require declarations, and said that trial courts should “consider all the circumstances” – including “prejudice to other parties” – in deciding whether to allow intervention after judgment.

Olver’s argument of the *Martin v. Pickering*<sup>16</sup> comment on “tactics or game plan,”<sup>17</sup> and strategy backfiring,<sup>18</sup> is unwarranted. The record shows no gamesmanship here.

**3. Olver’s argument that partners’ demise is immaterial to post-mortem application of meretricious relationship equity is unsound**

Olver’s argument that in *Creasman v. Boyle*, the Supreme Court “specifically remanded for trial the issue of ownership of an estate in a meretricious relationship”<sup>19</sup> is dead wrong. *Creasman* held that property acquired during a nonmarital relationship was *not* subject to equitable division, but rather, presumptively belonged to the person in whose name the property was held.<sup>20</sup> See *Connell v. Francisco*, 127 Wn.2d 339, 347, 898 P.2d 831 (1995):

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<sup>16</sup> 85 Wn.2d 241, 533 P.2d 380 (1975).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 31 Wn.2d at 351.

Historically, property acquired during a meretricious relationship was presumed to belong to the person in whose name title to the property was placed. **“In the absence of any evidence to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it.”** *Creasman v. Boyle*, [citation omitted]. This presumption is commonly referred to as “the Creasman presumption.”

(Emphasis added.) *Creasman* reversed the trial court’s post-mortem equitable division, and remanded to enter judgment awarding the property to the heirs of the person in whose name title was held before death. It was “[t]o avoid inequitable results under ‘the *Creasman* presumption’” (*id.*, emphasis added) that the courts developed various exceptions to it. These exceptions culminated in the meretricious relationship doctrine articulated in *Connell*.

Olver’s citation to *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.2d 735 (2001), is similarly inapt, for multiple reasons. Foremost among them is that *Mr. Vasquez was still alive*. Mr. Vasquez argued that, because he was living, the reasons for meretricious relationship equity still applied notwithstanding that his partner, in whose name all joint property was titled, had died. The majority decision did not hold that meretricious relationship equity could apply after one partner died. The Court held only that (1) meretricious relationship equity was not limited to people who

could have married,<sup>21</sup> and (2) fact questions precluded summary judgment.<sup>22</sup> Nothing in *Vasquez* suggests that meretricious relationship equity survives both partners' deaths. Two justices wrote separately to specifically to opine that the doctrine should not survive even *one* partner's death. (Olver's claim that Justice Alexander wrote separately because "one of the parties was dead *and could not marry*"<sup>23</sup> is false. Justice Alexander wrote separately "simply to indicate my agreement with Justice Sanders' view that the meretricious relationship doctrine is unavailable to a party who seeks relief when, as is the case here, one party to the alleged meretricious relationship is deceased." 145 Wn.2d at 108.) Olver's assertion that the *Vasquez* majority remanded to the trial court "to analyze the equitable factors that may or may not work against or in favor of *the estate*"<sup>24</sup> is misleading, insofar as it implies the court meant the

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<sup>21</sup> 145 Wn.2d at 107 ("Equitable claims are not dependent on the 'legality' of the of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties."); *id.* at 108 (Court of Appeals opinion vacated)..

<sup>22</sup> 145 Wn.2d at 107 ("We conclude that the trial court did not have sufficient undisputed factual information to resolve this case on the merits"); *id.* at 108 (remand the case for trial).

<sup>23</sup> RB 14 (emphasis added).

<sup>24</sup> *Id.* (emphasis added).

estate could be owed equity. The Court remanded for the trial court to consider “the various theories [Mr.] Vasquez asserts.” 145 Wn.2d at 107 (emphasis added). Olver’s assertion that “Vasquez stands for the proposition that death will not preclude a meretricious argument for equitable allocation”<sup>25</sup> is not supported by the text of the Court’s decision. Finally, Vasquez involved only joint ownership of property. The Court did not consider the question at issue here: whether equity may be applied to put joint property beyond the reach of people injured by torts committed in the course of joint activity.

Olver’s citations to In re Estate of Thornton<sup>26</sup> and Humphries v. Riveland<sup>27</sup> are irrelevant. Those cases were decided on grounds *other* than meretricious relationship equity, which was the sole ground on which Judge Yu transferred property from Cung’s estate to Thuy’s estate.

Olver’s argument that “[t]here is no statutory nor public policy basis for the argument that the estate does not stand in the shoes of the

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<sup>25</sup> RB 14.

<sup>26</sup> RB 13; 81 Wn.2d 72, 499 P.2d 684 (1979).

<sup>27</sup> RB 13; 67 Wn.2d 376, 407 P.2d 967 (1965).

decendent in cases of meretricious relationships”<sup>28</sup> is unsound. Application of meretricious relationship equity after partners’ deaths conflicts with public policy expressed in the descent and distribution statute (RCW11.04.015). Also, when both partners have died, the public policy *reason* for meretricious relationship equity – to avoid one partner’s unjust enrichment at the other’s expense – no longer applies. To apply the doctrine for benefit of partners’ *successors*, as Olver argues the court should do, would *extend* the doctrine into new and unknown territory. (Olver’s statement that “Vasquez, Creasman, Humphries and Thornton stand in opposition to *Creditor’s* proposal for a change in the law”<sup>29</sup> is untenable. It is *Olver* who is arguing for new law – and, moreover, new law the cases he cites do not support.)

Olver argues that public policy favors applying the doctrine after meretricious partners’ deaths because “[i]f Cung and 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.”<sup>30</sup> On the facts of this case, however, his concern is purely theoretical, because there are no such children. Instead, there is Harry – Cung and Ho’s child

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<sup>28</sup> RB 15.

<sup>29</sup> RB 16.

<sup>30</sup> *Id.*

together. There is no prospect of disinheritance; Cung and Thuy both had wills, under which Harry is the sole surviving beneficiary, and by law he will inherit all their joint property, no matter in whose name the property was held. As Nguyen argued in his opening brief, the real issue in this **appeal is whether meretricious relationship equity should be applied outside its intended context and purpose. The context is division of joint property when a marital-like relationship fails. The purpose is to prevent either partner from being unjustly enriched at the other's expense, as could happen if ownership were allocated according to the name in which property was held. The doctrine was not conceived to defeat publicly favored creditors' claims,<sup>31</sup> which had the partners been married would have been payable from their joint property.**

Olver's argument that Nguyen's assertion 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"<sup>32</sup> is "exactly wrong,"<sup>33</sup>

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<sup>31</sup> Such claims are favored because of policies (1) that debts be paid (expressed in the statutes that authorize claims against decedents' estates); (2) that community property be subject to satisfaction of damages from joint torts (*see* Nguyen's opening brief at p. 13, text and n.29 citing *deElche v. Jacobsen*, 95 Wn.2d 237, 245, 622 P.2d 835 (1980), *Allan v. University of Washington*, 140 Wn.2d 323, 336, 997 P.2d 360 (2000), and *Keene v. Edie*, 131 Wn.2d 822, 830, 935 P.2d 588 (1996); and (3) that tort victims be made whole (*see Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978), and numerous subsequent cases).

<sup>32</sup> RB 16.

<sup>33</sup> *Id.*

because Cung and Thuy had a meretricious relationship, is a conflation. The fact that Cung and Thuy had a meretricious relationship,<sup>34</sup> because of which a court would have equitably divided joint property had their relationship failed, does not, *ipso facto*, justify applying the doctrine after their deaths, to defeat tort creditors' claims. Who the heir is is *not* irrelevant. Assuming, for the sake of argument, that meretricious relationship *could* apply after partners' deaths, there is no reason that it *should* apply here. Meretricious relationship equity was created to avoid injustice that could result from conventional application of property law. Here there is no injustice. Under Chapter 11 RCW, Harry will inherit from his parents, pursuant to their wills, all that they had, no matter in whose name the property was held at their deaths. Additionally, RCW 11.04.081<sup>35</sup> provides that Harry inherit from both his parents exactly if they had been married. By transferring property from Cung's estate to Thuy's estate, the trial court used – or rather, *misused* – equity to make Harry *better* off than he would have been at law. Further, this gift to Harry came at Dianna's (and other creditors') expense. What the trial court did was unlawful, inequitable, and should be reversed.

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<sup>34</sup> Which Nguyen does not deny.

<sup>35</sup> The statute provides (in full): "For the purpose of inheritance to, and through, and from and child, the effects and treatment of the parent-child relationship shall not depend on whether or not the parents have been married."

**D. Conclusion**

The order granting Nguyen intervention in *Olver v. Fowler* did not prejudice Olver. Absent prejudice, the trial court did not abuse its discretion. Olver's cross appeal should be denied.

No authority supports applying meretricious relationship equity after partners' deaths. Moreover, if such equity *could* apply as an exception to statutes that govern descent and distribution of property after death, it *should* not apply on the facts here. To apply it as the trial court did put joint property beyond the reach of claims for damages caused by a tort for which, had Cung and Thuy been married, they would have been jointly liable. The trial court erred by transferring money from Cung's estate to Thuy's estate. The orders and judgment that effected the transfer should be reversed. The case should be remanded to the trial court to restore to Cung's estate all property that had been transferred to Thuy's estate, together with all accrued interest, and to take further action as appropriate consistent with this decision.

DATED this 4 day of August 2005.

Respectfully submitted,  
RUMBAUGH, RIDEOUT, BARNETT & ADKINS

  
\_\_\_\_\_  
Terry J. Barnett, WSB 8080, Attorneys  
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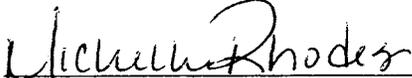
**CERTIFICATE OF SERVICE**

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DATED this 4 day of August 2005.

  
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