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Supreme Court No. _____

Court of Appeals No. 55167-1-1

SUPREME COURT OF THE STATE OF WASHINGTON

**MICHAEL L. OLVER, Special Administrator of the Estate of
Thuy Thi Thanh Nguyen Ho, Respondent/Cross-Appellant,**

Respondent,

v.

**JULIE K. FOWLER, Special Administrator of the Estate of
Cung Van Ho,**

and

**VU NGUYEN, Guardian ad Litem for Dianna Nguyen, a minor
child, Intervenor/Appellant,**

Petitioner.

PETITION FOR REVIEW

RECEIVED
FEB 17 2006

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ORIGINAL

TABLE OF CONTENTS

1. Identity of Petitioner	1
2. Citation to Court of Appeals Decision	1
3. Issues Presented for Review	1
(1) May courts employ “meretricious relationship” equity after both partners to such a relationship have died, simultaneously and intestate, to transfer property from the estate of the person in whose name the property was at held at death to the estate of the other decedent?	1
(2) If courts may, by analogy to community property law, apply “meretricious relationship” equity to transfer property between decedents’ estates, should the analogy include that joint property be subject to liability for joint debt?	2
(3) If courts may apply the doctrine after both partners’ simultaneous, intestate, deaths, <i>should</i> they do so, if the purpose and effect of such action are to prevent recovery of tort damages?	2
4. Statement of the Case	2
5. Argument	4
A. Factors governing review: RAP 13(4), and <i>Philadelphia II v. Gregoire</i>	4
B. The Court of Appeals decision overreaches precedent, and distorts equity	6
1. The decision overreaches precedent	6
2. The decision distorts equity	7

6. Conclusion	13
7. Appendix	
<i>Olver v. Fowler v. Nguyen slip op.</i>	A-1
Statutes	A-14
<i>In the Matter of the Estate of Cung Van Ho, Stipulation and order</i>	A-16

TABLE OF AUTHORITIES

Cases

Allan v. University of Washington,	
140 Wn.2d 323, 997 P.2d 360 (2000)	10
Connell v. Francisco,	
127 Wn.2d 449, 898 P.2d 831 (1995)	6, 7, 10
deElche v. Jacobsen,	
95 Wn.2d 237, 622 P.2d 835 (1980)	10
Gormley v. Robertson,	
120 Wn. App. 31, 83 P.3d 1042 (2004)	5, 7, 11
Graham v. Radford,	
71 Wn.2d 752, 431 P.2d 193 (1967)	9
Hamm v. State Farm Mut. Auto. Ins. Co.,	
151 Wn.2d 303, 88 P.3d 395 (2004)	12
In re Estate of Braden,	
144 Wash. 669, 211 P.2d 743 (1923)	8
In re Estates of Donnelly,	
81 Wn.2d 430, 502 P.2d 1163 (1972).	3

In re Marriage of Lindsey,	
101 Wn.2d 299, 678 P.2d 328 (1984)	6
In re Marriage of Zahm,	
138 Wn.2d 213, 978 P.2d 498 (1999)	7
In re Pennington,	
142 Wn.2d 592, 14 P.3d 764 (2000)	5
Keene v. Edie,	
131 Wn.2d 822, 935 P.2d 588 (1996)	10
Kim v. Lee,	
145 Wn.2d 79, 31 P.3d 665 (2001)	8
Mahler v. Szucs,	
135 Wn.2d 398, 957 P.2d 632 (1998)	8, 12
Peffley-Warner v. Bowen,	
113 Wn.2d 243, 778 P.2d 1022 (1989)	6, 12
Vasquez v. Hawthorne,	
145 Wn.2d 103, 33 P.3d 735 (2001)	6, 7, 11

Statutes

RCW 11.04.015-.290 11
RCW 11.04.015(2)(a) 3, 5, 8
RCW 26.09.080 7, 10, 11, 12

Rules

RAP 13.4(b)(4) 5

1. Identity of Petitioner

The petitioner is Vu Nguyen, guardian ad litem for Dianna Nguyen, a minor child.

At the Court of Appeals, Mr. Nguyen was the appellant. At the trial court, he was an intervenor, in *In the Matter of the Estate of Cung Van Ho*, King County cause no. 03-4-05845 -6 SEA.

2. Citation to Court of Appeals Decision

MICHAEL L. OLVER, Special Administrator of the Estate of Thuy Thi Thanh Nguyen Ho, Respondent/Cross Appellant, v. JULIE K. FOWLER, Special Administrator of the Estate of Cung Vu Nguyen [*sic*; should be Cung Van Ho¹], and VU NGUYEN, Guardian ad Litem for Dianna Nguyen, a minor child, Intervenor/Appellant, No. 55167-1-I, filed January 9, 2006.

3. Issues Presented for Review

(1) May courts employ “meretricious relationship” equity² after both partners to such a relationship have died, simultaneously and intestate, to transfer property from the estate of the person in whose name the property

¹ Petitioner has notified the Court of Appeals of the error, for corrective action.

² The Court of Appeals expressed distaste for the term “meretricious relationship” as a defining description for an equitable doctrine. Slip op. at p. 7. Petitioner regrets the term, but uses it nevertheless because it is the term this court has used in related decisions. A different term would be welcome.

was held at death to the estate of the other decedent?

(2) If courts may, by analogy to community property law, apply “meretricious relationship” equity to transfer property between decedents’ estates, should the analogy include that joint property be subject to liability for joint debt?³

(3) If courts may apply the doctrine after both partners’ simultaneous, intestate, deaths, *should* they do so, if the purpose and effect of such action are to prevent recovery of tort damages?

4. Statement of the Case

On July 4, 2003, Cung Van Ho (“Cung”) negligently caused a motor vehicle collision in which several people were killed and injured. Among the dead were Cung, himself; his domestic partner, Thuy Thi Thanh Nguyen Ho (“Thuy”); one of Cung’s and Thuy’s two children, Rebecca Ho (their other child, Harry Ho, survived); a woman named Kathy Nguyen; and one of Kathy’s children, Dalena Nguyen. Kathy’s other child, Dianna Nguyen, was

³ This question was fully briefed and argued to the Court of Appeals, but the court declined to decide it. At oral argument one judge asked Nguyen’s counsel if the Court of Appeals *had* to decide the issue. Counsel answered “no” (because appealed trial court order did not expressly rule on it).

also in the vehicle, and was injured but not killed.⁴

Cung and Thuy both had written wills. The wills left all their property to each other, only; so, because they died simultaneously, they were intestate.⁵ Under RCW 11.04.015(2)(a), all their property, both separate and joint, after payment of creditors' claims will descend to their sole surviving child, Harry.

Cung and Thuy estates were opened. Julie Fowler was appointed special representative of the Cung estate. Michael Olver was appointed special representative of the Thuy estate.

Fowler, pursuant to her statutory duty, inventoried the property in Cung's name at his death. Olver challenged the inventory. He contended that (1) Cung and Thuy had been in a "meretricious relationship" at their deaths, (2) all property in Cung's name was joint property, and (3) therefore, half the property inventoried in the Cung estate should be transferred to the Thuy estate, based on "meretricious relationship" equity. Nguyen admitted the first two contentions, but he contended that (1) the doctrine of

⁴ The Court of Appeals said Vu Nguyen (Dianna's and Dalena's father, and Dalena's guardian ad litem) was also injured in the collision. This is mistaken, but immaterial.

⁵ Slip op. at p. 3, citing *In re Estates of Donnelly*, 81 Wn.2d 430, 433, 502 P.2d 1163 (1972).

“meretricious relationship” equity did not authorize division of property between decedents’ estates, and should not be extended to do so; and (2) equity should avoid doing *injustice*; so if, in general, the doctrine could apply to divide joint property between decedents’ estates, such property should be subject to liability for joint debt, including tort damages. Since all the property will go to Harry *without* transfer, the obvious purpose⁶ and effect of transfer are to put property beyond the reach of claims against the Cung estate, in light of the usual rule that since Cung and Thuy were not legally married, property in her estate is immune from liability for his negligence. The trial court ordered the property transferred.⁷ The Court of Appeals affirmed.

5. Argument

A. Factors governing review: RAP 13(4), and *Philadelphia II v. Gregoire*⁸

The Court of Appeals decision involves issues of substantial public

⁶ Which Olver has never denied, despite repeated assertions by Nguyen.

⁷ In the slip op. at p. 4, the Court of Appeals stated, erroneously, that the parties agreed to binding mediation. In fact, the court *ordered* binding mediation. See Appendix at A-16, p. 2 lines 22-25.

⁸ 127 Wn.2d 707, 911 P.3d 389 (1996).

interest that this court should review.⁹ A decision involves an issue of substantial public interest if (1) the issue is of public nature, (2) an authoritative determination is desirable to provide future guidance to public officers; and (3) the issue is likely to recur.¹⁰ Here, disposition of property after death, broadly; the operation of RCW 11.04.015(2)(a); and the scope and implementation of “meretricious relationship” equity, are public concerns. The Court of Appeals decision is one of first impression. The issue is likely to recur. The court’s reasoning and holding are problematic, in ways that may impede rather than guide fair and consistent resolution of similar cases which likely will arise. For these reasons, this court should grant review.¹¹

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⁹ RAP 13.4(b)(4).

¹⁰ *Philadephia II v. Gregoire, supra*, 127 Wn.2d at 712.

¹¹ On review at the Court of Appeals, “[t]he [trial] court’s findings of fact [were] entitled to deference while conclusions of law [were] reviewed de novo.” *Gormley v. Robertson*, 120 Wn. App. 31, 36, 83 P.3d 1042 (2004) (citing *In re Pennington*, 142 Wn.2d 592, 602-03, 14 P.3d 764 (2000)).

B. The Court of Appeals' decision overreaches precedent, and distorts equity

1. The decision overreaches precedent

The Court of Appeals held that this court's precedents imply that courts may, and should, apply "meretricious relationship" equity to divide joint property between intestate decedents' estates. The Court of Appeals reasoned that this court's decision, in *Vasquez v. Hawthorne*,¹² necessarily implied that "meretricious relationship" equity may apply after *one* party to such a relationship has died¹³ – and, therefore, that the same must be so where *both* parties have died. The court's extension of *Vasquez* to cases where both partners have died is problematic. The *purpose* of "meretricious relationship" equity – to avoid unjust enrichment of one partner at the other's expense¹⁴ – makes sense when one partner is living. It makes no sense when both have died (at least in the circumstance here, where Thuy had devised all

¹² 145 Wn.2d 103, 33 P.3d 735 (2001).

¹³ Slip op. at pp. 9-10.

¹⁴ See *Connell v. Francisco*, 127 Wn.2d 449, 349, 898 P.2d 831 (1995) ("the property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship"); *Peffley-Warner v. Bowen*, 113 Wn.2d at 252 (*Lindsey* "recognized the contributions made by both parties to the purchase and maintenance of property and, through an equitable division of the property or analogous compensation, sought to avoid unjust enrichment of *one partner at the expense of the other*," emphasis added).

her property to Cung). Further, the *process* this court has established for applying the doctrine¹⁵ becomes fictitious when both partners have died. Indeed, here the trial court bypassed such inquiry altogether, and simply divided the property arbitrarily, half to each estate.

2. The decision distorts equity

Courts should exercise equity power only when the facts¹⁶ make such

¹⁵ See *Connell v. Francisco*, 127 Wn.2d at 349:

Once a trial court determines the existence of a meretricious relationship, the trial court then: (1) evaluates the interest each party has in the property acquired during the relationship, and (2) makes a just and equitable distribution of the property. ...

(Citation omitted.) See also *In re Marriage of Zahm*, 138 Wn.2d 213, 218, 978 P.2d 498

(1999):

RCW 26.09.090 governs the disposition of property in marital dissolution cases. That statute instructs trial courts to make a “just and equitable” distribution of the parties’ property. The statute’s nonexclusive list of factors for consideration by the trial court include the nature and extent of the community property, the nature and extent of the separate property, duration of the marriage, **and the resulting economic circumstances of each spouse when the property is divided.** RCW 26.09.080. A fair and equitable division by a trial court “does not require mathematical precision, but rather **fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties.**”

(Emphasis added.) See also *Gormley v. Robertson*, 120 Wn. App at 35-36, 39-40. (detailing and analyzing division of joint property).

¹⁶ See *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-08, 33 P.3d 735 (2001):

Vasquez presented claims for equitable relief under several theories... When equitable claims are brought, the focus remains on the equities involved between the parties. ... **Rather than relying on analogy, equitable claims must be analyzed under the specific facts presented in each case.** Even when we

action necessary to prevent injustice.¹⁷ In seeking to do justice, courts should avoid doing *injustice*.¹⁸ The Court of Appeals' decision is problematic in each of those respects.

The Court of Appeals identified no actual injustice that would result if the disputed property were left in Cung's estate, to descend to Harry pursuant to RCW 11.04.015(2)(a). The court's concerns about unfairness to Thuy, and about her "right to devise [her] property and thereby transfer accumulated wealth [being] one of our society's most firmly guarded individual rights"¹⁹ surely are purely hypothetical, where she was dead, and before death she had devised all her property to Cung. (Her devise failed, through insufficient foresight, but that can happen to anyone who makes a

recognize "factors" to guide the court's determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence. ...

(Emphasis added.)

¹⁷ "Equitable remedies should not be granted where it [sic] would result in injustice." *Kim v. Lee*, 145 Wn.2d 79, 91, 31 P.3d 665 (2001) (citing *Mahler v. Szucs*, 135 Wn.2d 398, 412, 957 P.2d 632 (1998)).

¹⁸ See *In re Estate of Braden*, 144 Wash. 669, 671, 211 P.2d 743 (1923) ("Although the general rule in equity, as at law, is that joint and separate debts cannot be set off against each other, wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off of joint and separate debts will be allowed," citation omitted).

¹⁹ Slip op. at p. 20.

will, and does not justify exercising equity.) Clearly, however, the court's decision does *injustice*, by reducing the fund from which people hurt by Cung's negligence may recover damages. The court could have preserved what it saw as equity but avoided doing injustice, by holding that the "meretricious relationship" analogy to community property law includes that joint property be subject to joint debt; but the court declined to do so. The court's holding conflicts with the community property law, from which "meretricious relationship" equity arises by analogy, under which joint property is subject to liability for joint debt. The court's decision also deviates from the plan of statutory law for descent and distribution of property.²⁰ In so doing, the court treated Thuy's estate, and Harry, *better* than if Cung and Thuy had been legally married. If they had been married, their community property would have been subject to creditors' claims for joint debt,²¹ including tort liability;²² before anything descended to Harry. In

²⁰ Petitioner understands that the court would say it did *not* do so – that it only determined what was Cung's and Thuy's respectively at their deaths, on which the statute would operate. However, this presumes that "meretricious relationship" equity automatically gave her a half interest in joint property as it was acquired – which no court, until this case, ever held and which the decision in this case does not clearly state.

²¹ See *Graham v. Radford*, 71 Wn.2d 752, 756, 431 P.2d 193 (1967):

It is the rule in this state that the creditor must exhaust the primary fund before he can resort to the secondary fund. In the case of *In re Schoenfeld's Estate*, *supra*, this court held that community debts of a deceased husband and

Connell v. Francisco, this court said that the equity analogy to community property law goes only so far, and that “meretricious relationship” equity is *narrower* than community property law.²³ No court has ever said that “meretricious relationship” equity means to afford *unmarried* partners’ joint property *greater* protection from claims than community property law affords

surviving wife could not be charged against the separate property of the deceased before the community property was exhausted.

²² In *deElche v. Jacobsen*, 95 Wn.2d 237, 245, 622 P.2d 835 (1980) – the leading modern authority regarding community liability for one spouse’s tort – the Supreme Court said:

Torts which can properly be said to be done in the management of community business, or for the benefit of the community, will remain community torts with the community and the tort-feasor separately liable.

See also *Allan v. University of Washington*, 140 Wn.2d 323, 336, 997 P.2d 360 (2000) (Sanders, J., dissenting, quoting *deElche*). See also *Keene v. Edie*, 131 Wn.2d 822, 830, 935 P.2d 588 (1996) (“community liability could arise from a tortious act of one spouse only if the act occurred (1) in the course of managing community property, or (2) for the benefit of the marital community,” citations omitted), and at 830-31:

Our holding in *deElche*, we reasoned, more effectively balanced “these competing legal and societal considerations” and established a rule that would “impose liability on the community when a tort is done for the community’s benefit, protect the property of the innocent spouse if the tort was separate, and at the same time allow recovery by the victim of a solvent tort-feasor.”

Keene, 131 Wn.2d at 830-31 (quoting *deElche*, 95 Wn.2d at 244-45).

²³ See *Connell v. Francisco*, 127 Wn.2d at 349 (“While portions of RCW 26.09.080 may apply by analogy to meretricious relationships, not all provisions of the statute should be applied,” and limiting application to property “acquired during the relationship...so that one party is not unjustly enriched” when the relationship ends).

to married partners' community property.²⁴ Yet, that is what the Court of Appeals' decision does.

In *Vasquez v. Hawthorne*, Chief Justice Alexander wrote separately to express the view that "meretricious relationship" equity should not apply after the death of even one partner:

...I write 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. I reach that conclusion because the meretricious relationship doctrine is limited in that the trial court is to apply, by analogy, the provisions of RCW 26.09.080 [for dissolution of marriage] when it distributes the property of persons who have been living in a "martial-like relationship."^[25] **Indeed, we developed this equitable doctrine because the legislature has not provided a statutory means of resolving the property distribution issues that arise when unmarried persons, who have lived in a martial-like relationship and acquire what would have been community property had they been married, separate.**

On the other hand, the laws of intestacy, RCW 11.04.015-.290,

²⁴ While not necessary to decision in this case, it is noteworthy that to treat "meretricious" partners more favorably than spouses could discourage marriage, or at least burden marriage inappropriately.

²⁵ See *Gormley v. Robertson*, 120 Wn. App at 38:

[T]he rule that courts must examine the [meretricious] relationship and the property accumulations and make a just and equitable distribution of the property is a judicial, not legislative, extension of the rights and protections of marriage to intimate, unmarried cohabitants.

(Internal punctuation omitted, citations omitted.)

dictate how property is to be distributed when an individual dies without a will.^[26] Accordingly, we have held that the meretricious relationship doctrine’s analogy to RCW 26.09.080 does not apply when a relationship between unmarried cohabitants is terminated by the death of one cohabitant. *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 253, 778 P.2d 1022 (1989). **Thus, under the circumstances of this case, I would hold that the meretricious relationship doctrine is not an available form of equitable relief. ...**

145 Wn.2d at 108-09 (citations omitted, emphasis added).²⁷

The judgment in this case was sought for just one purpose, and achieves just one effect: to put joint property beyond the reach of claims for what should be joint liability. Nothing in equity, generally, or in “meretricious relationship” equity specifically, supports such a result. “[U]ltimate responsibility for a wrong or loss [should be imposed] on the party who, in equity and good conscience, ought to bear it”). *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 319, 88 P.3d 395 (2004) (quoting *Mahler v. Szucs*, 135 Wn.2d at 411). If “meretricious relationship” equity applies here at all, then equity and good conscience compel that Dianna’s claim (and Harry’s, and those of the others injured) be a liability against all the joint property – not just the part the Court of Appeals leaves in Cung’s

²⁶ Or, as here, when a will fails because the named beneficiary does not survive the testator.

²⁷ The Court Appeals criticized this reading of *Peffley-Warner*. However, even if the criticism is correct, Justice Alexander’s point remains sound.

estate.

6. Conclusion

The Court of Appeals' decision is wrong, on important public issues, in ways that will impede rather than guide fair and consistent resolution of similar cases which are likely to arise. This court should grant review.

DATED this 30 day of January 2006.

Respectfully submitted,

RUMBAUGH RIDEOUT BARNETT & ADKINS

A handwritten signature in black ink, appearing to read "Terry J. Barnett", is written over a horizontal line.

Terry J. Barnett, WSB 8080, Attorneys for
Vu Nguyen, Petitioner

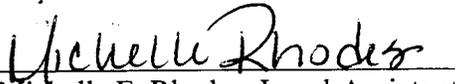
CERTIFICATE OF SERVICE

I certify that on the date noted below, I mailed copies of this pleading
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DATED this 30 day of January 2006.


Michelle E. Rhodes, Legal Assistant

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE**

MICHAEL L. OLVER, Special
Administrator of the Estate of
Thuy Thi Thanh Nguyen Ho,

Respondent/Cross-Appellant,

v.

JULIE K. FOWLER, Special
Administrator of the Estate of
Cung Vu Nguyen,

and

VU NGUYEN, Guardian Ad Litem
for Dianna Nguyen, a minor child,

Intervenor/Appellant.

No. 55167-1-1

PUBLISHED OPINION

FILED: January 9, 2006

ELLINGTON, J. Washington common law applies equitable principles to determine ownership of property acquired during a meretricious relationship. Until they were killed in a car accident, the parties here shared such a relationship, raising a family, running a business, and owning property. The question here is whether equity applies to allocate the division of their property. Washington cases already apply the doctrine after death of one party. We hold it applies where both have died, and affirm the probate court's equitable division of property.

BACKGROUND

This case arises out of a tragic car accident that left all but three members of two families dead.¹ On July 4, 2003, the Ho and Nguyen families were vacationing together, traveling in a single sports utility vehicle. The driver, Cung Ho, swerved to avoid a rear-end collision with a car ahead of him and collided head on with a truck traveling in the opposite direction. The crash killed six of the vehicle's eight occupants on impact, including Cung, his life partner, Thuy Ho, and their daughter Rebecca. Survivors included the Hos' son Harry, Vu Nguyen, and Nguyen's daughter Dianna.

Cung and Thuy Ho had lived together for nearly 15 years, since 1988. They had a religious wedding ceremony in 1990, but never legally married. They built a business together, raised their children together, and were jointly listed on their automobile insurance policy. Neither owned substantial property before their relationship began, but by 2003 they owned their business, their home, three rental properties, and held assets in several bank accounts. All the property was held solely in Cung's name, and all of the property was initially inventoried in Cung Ho's estate.

Thuy was the sole beneficiary under Cung's will. Under the simultaneous death act, chapter 11.05 RCW, Thuy is considered to have predeceased Cung, so Cung effectively died intestate.²

¹ In one family were the father and driver, Cung Van Ho, the mother, Thuy Thi Thanh Nguyen Ho, and two children, Rebecca and Harry. Only Harry survived. In the second family, mother Kathy Nguyen and daughter Dalena were killed. The father, Vu Nguyen and one daughter, Dianna, survived. For the sake of clarity, we refer to each individual in the Ho family by his or her first name and to Vu Nguyen by his last name.

² In re Estates of Donnelly, 81 Wn.2d 430, 433, 502 P.2d 1163 (1972).

The only adult survivor of the accident, Vu Nguyen, filed a claim against Cung's estate on behalf of his surviving daughter Dianna, seeking damages arising from the accident.³ He also intervened in Cung's probate.

Michael Olver, as administrator of Thuy Ho's estate, filed this action seeking partition of the property between Cung's and Thuy's estates, apparently to ensure some financial security for the Hos' only surviving child, Harry. In May 2004, the trial court ruled on summary judgment that Cung and Thuy had shared a meretricious relationship and that an equitable property division would be determined at trial.

Representatives of both estates then participated in a mediation on the question of what property should be inventoried in Thuy's estate. The parties agreed the mediated outcome would be binding. Intervenor Nguyen did not participate, ostensibly because only the inventory itself was at issue. The mediation resulted in entry of agreed findings of fact, conclusions of law, and a judgment of disbursement transferring half the inventory to Thuy's estate.

Nguyen immediately moved to amend the judgment to prevent the transfer. Though he was permitted to intervene in Thuy's probate, his motion to amend the judgment was denied.

Nguyen appeals the denial of the motion to amend the judgment. Olver cross-appeals the order permitting intervention. Disbursement to Thuy's estate was stayed pending this appeal.

³ Nguyen also filed suit on his own behalf against Thuy's estate, contending that because Thuy and Cung had been partners in a meretricious relationship, her property should be subject to Cung's creditors' claims. The matter remains pending.

ANALYSIS

Intervention. Under CR 24(a), an intervenor must make “timely application.”⁴ After a judgment is entered, intervention requires a strong showing considering all circumstances, including prior notice, prejudice to the other parties, and the length of and reasons for delay.⁵ The rule, however, is liberally construed to favor intervention.⁶ A trial court’s determination of timeliness is reviewed for abuse of discretion.⁷

Nguyen did not seek to intervene in Thuy’s probate until after his motion to amend the judgment drew an objection that he lacked standing to participate. He contended his status as intervenor in Cung’s probate gave him standing in any action involving that estate, but he nonetheless moved to intervene in Thuy’s estate. He attributed his delay to the fact that the personal representative of Cung’s estate had adequately represented his interests until her nonintervention powers were revoked, and asserted that he was not alerted that his interests diverged from those of Cung’s estate until entry of the findings and conclusions derived from the mediation.

⁴ “Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties. CR 24(a); Columbia Gorge Audubon Soc’y v. Klickitat County, 98 Wn. App. 618, 623, 989 P.2d 1260 (1999).

⁵ Kreidler v. Eikenberry, 111 Wn.2d 828, 833, 766 P.2d 438 (1989).

⁶ Columbia Gorge, 98 Wn. App. at 623.

⁷ Kreidler, 111 Wn.2d at 832.

After extensive colloquy about the timing of the motion, the court found Nguyen's assertions both credible and adequate, and permitted intervention. The decision was based on tenable grounds and was not an abuse of discretion.

Recognition of Thuy's Property Rights. Because Washington does not recognize common law marriage, the common law has developed a means of equitable distribution of property acquired by unmarried partners in committed intimate relationships⁸ (often referred to as meretricious relationships⁹). Courts make a "just and equitable" division of such property,¹⁰ applying community property laws by analogy.¹¹ All property acquired during the relationship is "presumed to be owned by both parties."¹²

Equity goes only so far, however. Unlike the division of property upon dissolution of a marriage, when both community and separate property are before the court for equitable division, a court dividing property acquired during a committed

⁸ See, e.g., Vasquez v. Hawthorne, 145 Wn.2d 103, 33 P.3d 735 (2001); Pennington v. Pennington, 142 Wn.2d 592, 14 P.3d 764 (2000); Connell v. Francisco, 127 Wn.2d 339, 898 P.2d 831 (1995); In re Marriage of Lindsey, 101 Wn.2d 299, 678 P.2d 328 (1984); In re Sutton, 85 Wn. App. 487, 933 P.2d 1069 (1997).

⁹ Various courts have sought an alternative to the phrase "meretricious relationships" to describe relationships which meet the legal standards for equitable property distribution. See Peffley-Warner v. Bowen, 113 Wn.2d 243, 246 n.5, 778 P.2d 1022 (1989); In re Relationship of Eggers, 30 Wn. App. 867, 871 n.2, 638 P.2d 1267 (1982). We share earlier courts' distaste for the antiquated term with its negative connotations, and substitute the phrase "committed intimate relationship."

¹⁰ In re Lindsey, 101 Wn.2d 299, 304, 678 P.2d 678 (1984); see also Latham v. Hennessey, 87 Wn.2d 550, 554, 554 P.2d 1057 (1976).

¹¹ Connell, 127 Wn.2d at 351; Lindsey, 101 Wn.2d at 306-07; Latham, 87 Wn.2d at 554.

¹² Connell, 127 Wn.2d at 350-51.

intimate relationship may exercise its discretion only as to property that would have been community property had the parties been married.¹³

The trial court found that Cung and Thuy Ho shared a meretricious relationship from 1988 or 1989 until their deaths in 2003. Nguyen does not challenge this finding. Rather, Nguyen asserts the doctrine permitting equitable division of property has never been applied where the relationship ends with death, and that the rationale underlying the doctrine does not apply in such circumstances. A review of the cases, however, reveals that Nguyen is mistaken on both counts.

No Washington court has refused to apply the doctrine on grounds that one or both partners has died. The most recent Supreme Court ruling on this subject, Vasquez v. Hawthorne,¹⁴ involved a claim by a surviving partner against the estate of the man with whom he lived and shared an intimate romantic relationship for many years. The Washington Supreme Court remanded for trial to determine whether their relationship constituted a meretricious relationship, a partnership, or an equitable trust.¹⁵ Although two justices argued that the meretricious relationship doctrine should not apply after death of a partner, the majority drew no such distinction.¹⁶ The court's ruling allowed the trial court on remand to award an equitable division of property to

¹³ Id. at 349–50.

¹⁴ 145 Wn.2d 103, 33 P.3d 735 (2001).

¹⁵ Id. at 107.

¹⁶ Id. at 108–09, 114 (Alexander, C.J. and Sanders, J., concurring). The justices relied upon Peffley-Warner for the proposition that the doctrine does not apply after death. Id. at 109, 114. We observe that in Peffley-Warner, the doctrine was applied in the probate proceedings. The question before the Supreme Court involved only eligibility for statutory benefits reserved to widows, not the equitable doctrine governing property ownership by committed intimate partners. Peffley-Warner, 113 Wn.2d at 245. We discuss Peffley-Warner later in this opinion.

the surviving partner if a committed intimate relationship was found to have existed. Several other cases have involved determinations made after the death of one partner.¹⁷

None of these courts showed any reluctance to apply the doctrine after death, and a review of the development of the doctrine demonstrates there is no such limitation.¹⁸

Washington first recognized a nontitleholder's rights in property accumulated by joint efforts in the "innocent spouse" cases, involving partners who believed they were married.¹⁹ Initially, the doctrine applied only where the parties chose to end their relationship.

In In re Brenchley's Estate,²⁰ the Washington Supreme Court announced that an equitable doctrine available to living partners should also be available where one party has died. The Brenchley court held that a woman who believed she was married to her deceased long-time domestic partner was entitled to an equitable property

¹⁷ See Creasman v. Boyle, 31 Wn.2d 345, 196 P.2d 835 (1948), overruled by In re Marriage of Lindsey, 101 Wn.2d 299, 678 P.2d 328 (1984) and Vasquez v. Hawthorne, 99 Wn. App. 3653, 994 P.2d 240 (2000). See also Latham, 87 Wn.2d at 550; Peffley-Warner, 113 Wn.2d at 243.

¹⁸ The parties debate the import of In re Estate of Thornton, 81 Wn.2d 72, 499 P.2d 864 (1972) and Humphries v. Riveland, 67 Wn.2d 376, 407 P.2d 967 (1965). Both cases involved unmarried committed partners and a surviving partner who advanced alternative equitable theories, including implied contract, implied trust, partnership, and joint venture, as the basis for equitable property distribution. Since neither court relied upon the theory of meretricious relationship equity, the cases do not assist us in answering whether the doctrine applies here. Thornton, 81 Wn.2d at 79 (implied partnership); Humphries, 67 Wn.2d at 382 (contract).

¹⁹ Buckley v. Buckley, 50 Wash. 213, 216, 96 P.1079 (1908); see also Knoll v. Knoll, 104 Wash. 110, 114, 176 P. 22 (1918).

²⁰ 96 Wash. 223, 226, 164 P. 913 (1917).

division, reasoning that since the property would have been divided equitably had the deceased man still lived, the man's heirs could not have "better rights" simply because of his death.²¹

In time, a similar equitable doctrine emerged to recognize property entitlements of partners fully aware of their unmarried status.²² When first presented with the question, our Supreme Court ruled that in the absence of evidence to the contrary, whichever partner held title to the property would be presumed its rightful owner.²³ This rule, labeled the "Creasman presumption," was often cited, rarely applied, and roundly criticized.²⁴

In In re Lindsey, the court recognized that "[i]n application, the Creasman presumption has been restricted to its own particular facts—one party dead and the other silenced by the deadman's statute,"²⁵ with the result that the presumption "made the law unpredictable and at times onerous."²⁶ The court formally overruled the

²¹ Id.

²² Lindsey, 101 Wn.2d at 304.

²³ Creasman, 31 Wn.2d at 357.

²⁴ See, e.g., Latham, 87 Wn.2d at 555 ("Creasman should be overruled and its archaic presumption invalidated.") (quoting In re Estate of Thornton, 81 Wn.2d 72, 79, 499 P.2d 864 (1972)).

²⁵ Lindsey, 101 Wn.2d at 302; see also Poole v. Schrichte, 39 Wn.2d 558, 563, 236 P.2d 1044 (1951) ("We have on but three occasions actually left the parties to a relationship known by both parties to be meretricious, in the position in which they had placed themselves. In each instance one of the parties . . . was dead, which . . . suggests that the difficulty of producing evidence of contrary intent is the reason [for that result].") (citations omitted).

²⁶ Lindsey, 101 Wn.2d at 304.

Creasman presumption and adopted a general equitable theory of joint ownership of property acquired during the relationship, regardless of titleholder.²⁷

The most direct effect of removing the Creasman presumption was to permit equity to divide property after death of one partner without reference to title.

The two justices who concurred in Vasquez relied on Peffley-Warner v. Bowen²⁸ for the proposition that the doctrine does not apply after death. As indicated above, the majority in Vasquez was unmoved by this argument. It is useful, however, to review Peffley-Warner to see whether it has any different force here.

After the death of Sylvan Warner, a Spokane probate court made an equitable distribution of the parties' joint property to his meretricious relationship partner. But the court denied her claim for statutory surviving spouse benefits under RCW 11.52.010.²⁹

Peffley-Warner then filed a claim for social security widow's benefits, contending that she qualified as the widow of Warner under the Social Security Act "*because she would be entitled to a wife's share of Mr. Warner's personal property under Washington laws of intestate devolution.*"³⁰ Her claim was denied, and ultimately the Ninth Circuit certified this question to the Washington Supreme Court: "Would Washington law afford a person in Ms. Warner's situation the same status as that of a wife with respect to the intestate devolution of Sylvan Warner's personal

²⁷ Id.

²⁸ 113 Wn.2d 243, 253, 778 P.2d 1022 (1989).

²⁹ Id. at 252.

³⁰ Id. at 245-46 n.3 (emphasis added).

property?”³¹ Our court held that “a surviving partner in a ‘meretricious’ relationship does not have the status of a widow with respect to intestate devolution of the deceased partner’s personal property.”³²

The court made clear that a meretricious relationship partner does not take under the intestacy statutes:

[B]ecause appellant is not a “spouse,” she cannot receive a share of the estate of Sylvan F. Warner under the intestate succession laws of the state of Washington.

. . . The division of property following termination of an unmarried cohabiting relationship is based on equity, contract or trust, and not on inheritance.

Appellant Marilyn E. Peffley-Warner is neither a surviving spouse nor an heir to decedent Sylvan F. Warner. She is therefore not entitled to share in the decedent’s estate under Washington laws of intestate succession, RCW 11.04.015.^[33]

The court’s ruling adhered to the statutory scheme and to the limits of the meretricious relationship doctrine, which has never conferred spousal status.³⁴

But we do not look to the intestacy statutes to determine what the decedent owned. Thuy’s estate does not seek a widow’s share, nor assert any claim on her behalf. It seeks only recognition that at the time of her death, Thuy owned certain property. The court identified that property by analogy to community property principles. This is the property upon which the statutes will ultimately operate.

³¹ Id. at 245.

³² Id. at 253.

³³ Id. (footnote omitted).

³⁴ See Connell, 127 Wn.2d at 349–50 (only joint property, not personal property, available for equitable distribution).

Each spouse in a marriage has a present, vested, undivided, one-half interest in the community property.³⁵ The death of one spouse does not generate a new right or interest in the surviving spouse; rather, the survivor already owns half the property, and that interest is neither created nor extinguished by the other spouse's death.³⁶ At the moment of death, the community ends and the property becomes the separate property of each.³⁷ Thus, when a married person dies, the surviving spouse immediately owns half the community property as his or her separate property. This is true whether or not the decedent dies intestate.³⁸

Applying community property principles by analogy, each partner in a meretricious relationship owns an undivided interest in the joint property.³⁹ After a partner dies, that partner's share is the estate upon which inheritance rules will operate. Because all the Hos' property was joint property, all their property is equitably divided between their estates.

Nguyen contends the result should be different here because *both* partners died. He argues that the doctrine's purpose is personal to the partners, and its benefits must be claimed by them personally. But the doctrine does not operate to *alter* property ownership at the moment the relationship ends; rather, it operates to *recognize* ownership rights acquired during the relationship. Thuy's entitlement

³⁵ Lyon v. Lyon, 100 Wn.2d 409, 413, 670 P.2d 272 (1983).

³⁶ Id.; In re Coffey's Estate, 195 Wash. 379, 382, 81 P.2d 283 (1938).

³⁷ In re Estate of Politoff, 36 Wn. App. 424, 426-27, 674 P.2d 687 (1984).

³⁸ See id. (decedent spouse owned only one-half of the community funds at the moment of her death); RCW 26.16.030(1) ("Neither spouse shall devise or bequeath by will more than one-half of the community property.").

³⁹ See Vasquez, 145 Wn.2d at 107.

preceded her death, and is not overcome or diminished by the mere circumstance that she did not survive the accident. Death does not divest her of her property just because her ownership was not judicially recognized during her life.

It is certainly the case that the doctrine seeks to accomplish a fair result between the parties and to avoid unjust enrichment of one partner.⁴⁰ We reject Nguyen's theory that any need for such fairness ends with death. The right to devise one's property and thereby transfer accumulated wealth is one of our society's most firmly guarded individual rights. There is no equitable reason, as between the parties, to cause a different result where a party no longer has personal need of the property. Unjust enrichment does not become more fair because one or both of the parties dies.

Nor does the interest of third parties affect the analysis. Nguyen alleges that Thuy Ho's estate sought partition in an attempt to place half of the Hos' joint assets beyond the reach of Cung Ho's creditors. This argument is not germane. The only question here is whether the property is subject to equitable division.⁴¹

We hold that where unmarried, committed intimate partners are separated by death, as when they separate during life, any property acquired during the relationship

⁴⁰ See Connell, 127 Wn.2d at 349 ("property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship") (citing Peffley-Warner, 113 Wn.2d at 252); Peffley-Warner, 113 Wn.2d at 252 (Lindsey "recognized the contributions made by both parties to the purchase and maintenance of the property and, through an equitable division of the property . . . sought to avoid unjust enrichment of one partner at the expense of the other").

⁴¹ Whether tort claims against one unmarried partner (Cung) may be made against the estate of the other partner (Thuy) on a theory of joint tort liability is an issue raised tangentially in Nguyen's brief and oral argument. The trial court did not rule on this question, and we do not address it. RAP 2.2(a)(1). As indicated in n.3 above, the issue is pending in Nguyen's suit against Thuy's estate.

that would have been community property is jointly owned and subject to a just and equitable division. The trial court correctly applied this rule in its judgment of disbursement. We affirm.

Edenfor, J

WE CONCUR:

Appelwick, CJ

Cox, CJ

RCW 11.04.015**Descent and distribution of real and personal estate.**

The net estate of a person dying intestate, or that portion thereof with respect to which the person shall have died intestate, shall descend subject to the provisions of RCW 11.04.250 and 11.02.070, and shall be distributed as follows:

- (1) Share of surviving spouse. The surviving spouse shall receive the following share:
 - (a) All of the decedent's share of the net community estate; and
 - (b) One-half of the net separate estate if the intestate is survived by issue; or
 - (c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his parents, or by one or more of the issue of one or more of his parents; or
 - (d) All of the net separate estate, if there is no surviving issue nor parent nor issue of parent.
- (2) Shares of others than surviving spouse. The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, shall descend and be distributed as follows:
 - (a) To the issue of the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or if of unequal degree, then those of more remote degree shall take by representation.
 - (b) If the intestate not be survived by issue, then to the parent or parents who survive the intestate.
 - (c) If the intestate not be survived by issue or by either parent, then to those issue of the parent or parents who survive the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation.
 - (d) If the intestate not be survived by issue or by either parent, or by any issue of the parent or parents who survive the intestate, then to the grandparent or grandparents who survive the intestate; if both maternal and paternal grandparents survive the intestate, the maternal grandparent or grandparents shall take one-half and the paternal grandparent or grandparents shall take one-half.
 - (e) If the intestate not be survived by issue or by either parent, or by any issue of the parent or parents or by any grandparent or grandparents, then to those issue of any grandparent or grandparents who survive the intestate; taken as a group, the issue of the maternal grandparent or grandparents shall share equally with the issue of the paternal grandparent or grandparents, also taken as a group; within each such group, all members share equally if they are all in the same degree of kinship to the intestate, or, if some be of unequal degree, then those of more remote degree shall take by representation.

[1974 ex.s. c 117 § 6; 1967 c 168 § 2; 1965 ex.s. c 55 § 1; 1965 c 145 § 11.04.015. Formerly RCW 11.04.020, 11.04.030, 11.04.050.]

NOTES:

Application, construction -- Severability -- Effective date -- 1974 ex.s. c 117: See RCW 11.02.080 and notes following.

RCW 26.09.080**Disposition of property and liabilities -- Factors.**

In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

[1989 c 375 § 5; 1973 1st ex.s. c 157 § 8.]

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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.

1
2 DONE IN OPEN COURT _____

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

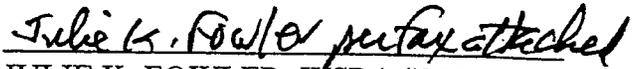
9
10 
11 HONORABLE KIMBERLEY PROCHNAU

12 Presented by:

13 MERRICK & OLVER, P.S.

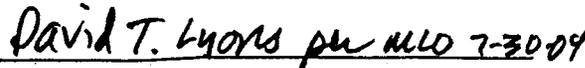
14 Approved as to Form and Content;
15 Notice of Presentation Waived:

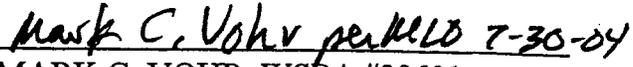
16 
17 MICHAEL L. OLVER, WSBA #7031
18 Special Administrator Estate of Thuy Ho

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:

26 
27 DAVID T. LYONS, WSBA #11263
28 Attorney for Guardian of
29 the Estate of Harry Ho

30 
31 MARK C. VOHR, WSBA #20601
32 Attorney for Guardian of
33 the Person of Harry Ho

