Cause No. 91078-2

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Domestic Partnership of:

JEAN M. WALSH,

Petitioner,

and

KATHRYN L. REYNOLDS,

Respondent.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

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

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

Attorneys for Respondent

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A. RELIEF REQUESTED BY RESPONDENT

Kathryn Reynolds, cross-appellant/respondent in the Court of Appeals, asks this Court to deny Jean Walsh's petition for review of Division Two's September 30, 2014 decision. There is no basis for review of Division Two's decision, which is consistent with our state's common law, statutory law, and public policy, under RAP 13.4. To the contrary, Walsh seeks review to urge a return to the discredited "*Creasman* presumption" that this Court expressly disavowed in *Marriage of Lindsey,* 101 Wn.2d 299, 304, 678 P.2d 328 (1984). This Court should deny review and award attorney fees to Reynolds under RAP 18.1(j).

B. RESTATEMENT OF THE CASE

1. The parties had lived and raised a family together since 1988. Dr. Walsh was the wage earner and Reynolds cared for their home and family.

The parties first met and moved in together in California over 25 years ago. (RP 39, 48-49) Petitioner Jean Walsh, an orthopedic surgeon, had graduated from medical school in 1978 and owned the home where the parties resided, her medical practice, SEP-IRA, and two vehicles when the parties moved in together in mid-1988. (RP 38-41) Respondent Kathryn Reynolds

had not graduated from college, was working at a hardware store, and owned a car and other personal items. (RP 52, 215-16, 218)

In November 1988 the parties exchanged rings in a commitment ceremony and decided to start a family. (CP 2; RP 39, 48, 49, 215-19) Theirs was in many ways a very traditional relationship between a highly-educated, high-earning professional and her stay-at-home partner. Dr. Walsh on appeal relies heavily in her argument for a return to the *Creasman* presumption on her testimony that between 1990 and 2011, she "gave" Reynolds over $500,000 ($22,727, annualized) in "discretionary income" for her "household services," including child care for the parties' children. (RP 70) (*See* Petition 3) But those same years, Dr. Walsh was earning on average over $322,000 annually (*see* Ex. 3), and wholly controlled the parties' finances. Dr. Walsh gave Reynolds an "allowance" and paid the family's bills, including the mortgage, from an account in her name. (RP 80-81, 238)

The parties' first two children were born to Dr. Walsh in August 1992 and July 1996. (RP 55, 60, 222-23, 233) Their youngest child was born to Reynolds in September 1998. (RP 83) The parties agreed that Reynolds would stay home and take care of the children. (RP 57, 225-26) Except to volunteer at the children's

school and help out at Dr. Walsh's office by filing, Reynolds did not work outside the home after their first child was born. (RP 232) Reynolds formally adopted the children born to Dr. Walsh in 1993 and 1997 and Dr. Walsh formally adopted the child born to Reynolds in 1998. (RP 64) In 1996, Dr. Walsh executed a Will referring to Reynolds as her "(domestic) life partner," bequeathed all personal and real property to her, and provided that Reynolds would hold the residue of her estate in trust for their children. (RP 164; Ex. 39)

2. The parties took every opportunity to formalize their relationship, including registering as domestic partners in California in 2000 and Washington in 2009.

Although theirs was a "traditional" family in many ways, the parties' consistent efforts to formalize their relationship also reflect the rapidly evolving recognition of same-sex couples in this century. On March 6, 2000, after being together more than 12 years, the parties registered as domestic partners in California, just as soon as the law allowing them to register was enacted. (RP 71, 245; Ex. 41) Both Dr. Walsh and Reynolds testified that they would have legally formalized their relationship sooner if it had been possible. (*See* RP 71-72, 246) Dr. Walsh testified that she wanted to register to be recognized as a couple because she no longer wanted to be

"invisible" simply because the parties could not legally marry. (RP 71-72) Reynolds testified that she wanted to register to make the couple's "union stronger and more like a marriage," and to make their "family stronger." (RP 246)

The parties moved to Washington in July 2000. (RP 72, 253) At the time, the Washington Legislature had not yet established a means for same-sex couples to marry or establish domestic partnerships, but Dr. Walsh told Reynolds that their California registration would "carry over" to Washington. (RP 247) When Oregon (briefly) made it legal for same-sex couples to marry, Dr. Walsh and Reynolds traveled to Oregon to be married on March 19, 2004. (RP 196, 248-50; Ex. 60) But this "marriage" was short-lived, as the Oregon Supreme Court declared it invalid on May 6, 2005. (RP 106-07)

When the parties initially registered as domestic partners, the California statute allowed them to be each other's next of kin, granted hospital visitation rights, and provided them with some healthcare benefits, but did not create any interest in property. CA Assembly Bill no. 26, ch. 588, Article 9 (RP 71; FF 2.20(16), CP 367) Effective January 1, 2005, California amended its domestic partnership law to provide that registered domestic partners would

have the same protections and rights as married spouses, including property rights. (FF 2.20(26), CP 368-69) The law required that notices be sent to domestic partners registered under the prior law to give them an opportunity to terminate their domestic partnership before the expanded rights become effective. (FF 2.20(27), CP 368-69) Both parties denied receiving notice of the changed law; neither party ever sought to terminate their registration in California. (FF 2.20(28), CP 369; RP 72, 246-47)

In 2007, the Washington Legislature passed a law that allowed same-sex couples to register as domestic partners. SSB 5336, ch. 156, Laws of 2007. Similar to the 2000 version of the California law, the 2007 Washington law granted rights to same-sex couples limited to "hospital visitation, health care decision-making, organ donation decisions, and other issues related to illness, incapacity, and death." RCW 26.60.010. In 2009, the Legislature amended the statute to ensure that domestic partners are "treated the same as married spouses." E2SSB 5688, ch. 521, Laws of 2009; RCW 26.60.015. Soon after the amended law went into effect, on August 20, 2009, Dr. Walsh and Reynolds registered as domestic partners in Washington State. (FF 2.20(28), CP 369; Ex. 40)

3. The trial court refused to acknowledge the parties' relationship prior to 2005, when California statutes first granted domestic partners the same property rights as spouses.

On March 11, 2011, Dr. Walsh petitioned to dissolve the parties' domestic partnership. (FF 2.20(36), CP 370; Ex. 109) By then, the parties had amassed over $2 million in real property, retirement, and investment accounts, mostly held in Dr. Walsh's name. (*See* CP 4, 31) Dr. Walsh took the position that the only property available for distribution was that acquired after the parties registered their domestic partnership in Washington on August 20, 2009, less than two years before trial. (*See* CP 152-69) Reynolds asked the court to consider all property acquired during their 22-year relationship in making a just and equitable distribution. (*See* CP 106-14)

After a three-day trial, the trial court recognized that "if the two people in this case were a heterosexual couple that had been cohabiting since 1988, bore three children and had married on August 20, 2009, this Court would not hesitate to find that a meretricious or equity relationship existed for the 20 years plus prior to the date of marriage." (CP 412) However, the trial court concluded that because "there was no ability for domestic partners to accumulate or create community property in California until

January 1, 2005, and in Washington until the 2008 amendment to the Domestic Partnership statute (RCW 26.16 et sq), [then] prior to those dates there is no legal basis for finding an equitable relationship to exist without violating the constitutional rights of the parties." (CL 4, CP 373)

The trial court held as a "matter of law that an equitable relationship [only] existed between Dr. Walsh and Ms. Reynolds during the time from January 1, 2005 to August 20, 2009," (CL 6, CP 373) and as a consequence awarded Reynolds only half of the parties' "joint retirement" (approximately $81,532); $46,000 in retirement in her name; $43,046 from an investment account; personal property; and 48% of the sale proceeds from the family home, after a $40,000 "offset" to Dr. Walsh for her "separate" contributions. (CP 443-45) The trial court also awarded attorney fees of $35,000 to Reynolds under RCW 26.09.140 based on her need and Dr. Walsh's ability to pay. (CP 437-38)

Although she left the parties' 22-year relationship with all of the remaining assets from their $2 million-plus estate – at least three times the assets awarded Reynolds – Dr. Walsh appealed. (CP 446) Reynolds cross-appealed the trial court's refusal to

recognize the community-like nature of assets acquired during the parties' entire relationship beginning in 1988. (CP 492)

4. Division Two reversed, holding that the trial court erred in limiting the application of the equity relationship doctrine to the period after the parties would have had property rights under California law.

Division Two succinctly described each party's appeal: "Each party seeks a greater share of the assets than the trial court awarded. More specifically, Walsh argues that the trial court should have applied community property law more narrowly, i.e., only to assets acquired as of their Washington domestic partnership registration on August 20, 2009 (thereby decreasing the community assets available for distribution and leaving a greater share of assets as her separate property). Reynolds argues that the trial court should have applied community property law more expansively, *i.e.,* to assets acquired from the beginning of the parties' relationship in California, 1988 (thereby increasing the community assets available for distribution and increasing her share of property)." (Opinion 2)

Division Two agreed with Reynolds, holding that the trial court erred in "fail[ing] to consider the common law and its application to the parties' 'equity relationship' that existed *before*

California's 2005 statutory recognition of such relationships, despite explaining that had Walsh and Reynolds been [in] a legally recognized heterosexual marriage, it would not have hesitated to find that a meretricious or 'equity relationship' existed for 20 plus years prior to marriage." (Opinion 20-21, *emphasis in original*) Division Two further held that Washington's Domestic Partnership Act "did not erase the parties' 'equity relationship' that already existed before they registered as domestic partners in Washington." (Opinion 17-18) Division Two affirmed the award of fees to Reynolds in the trial court, awarded Reynolds need-based fees on appeal, and remanded for redistribution of the parties' estate.

C. GROUNDS FOR DENIAL OF REVIEW

1. Division Two's decision that the equity relationship doctrine could apply prior to the parties' registration as domestic partners is consistent with the domestic partnership statute and compelled by decisions of this Court and the Court of Appeals.

Division Two properly held that the equity relationship doctrine could be applied to characterize property acquired prior to the date that the parties were granted statutory property rights as domestic partners. This decision was not an "expansion" of the equity relationship doctrine. (Petition 5) It is wholly consistent

with three decades of case law and the Legislature's intent when it enacted the statutes governing domestic partnerships.

As early as 1949, this Court held that "when [an equity] relationship terminates in a valid marriage and that marriage terminates in divorce, the trial judge may be [ ] justified in treating such property [acquired during the equity relationship] as though it belonged to the community." *Bodine v. Bodine,* 34 Wn.2d 33, 36, 207 P.2d 1213 (1949). Thirty-five years later, in *Marriage of Lindsey,* 101 Wn.2d 299, 304, 678 P.2d 328 (1984), this Court held that the court *must* consider property accumulated during the parties' equity relationship when dividing the assets at the end of the parties' subsequent marriage. In other words, *all* the parties' property was available for distribution at the end of their relationship.

That these parties' equity relationship terminated in a domestic partnership, rather than a "valid marriage" as in *Bodine* and *Lindsey,* is irrelevant. The Legislature created domestic partnerships to ensure "equal treatment" between registered domestic partners and married spouses. RCW 26.60.015. The creation of domestic partnerships did not impact the common law, including use of the equity relationship doctrine to characterize

assets acquired by the parties before their domestic partnership. To the contrary, RCW 26.60.060(2) specifically provides that "nothing in chapter 156, Laws of 2007 [Domestic Partnerships] affects any remedy available in common law." *See also* RCW 26.60.010 ("Chapter 156, Laws of 2007 does not affect marriage or any other ways in which legal rights and responsibilities between two adults may be created, recognized, or given effect in Washington.")

Dr. Walsh's petition ignores this controlling law, claiming that "to treat unmarried parties as if married, but only with regard to the distribution of property at the termination of the relationship, contravenes the public interest to allow individuals to organize their lives as they choose, foisting upon them a distribution that does not result in equity." (Petition 12) Dr. Walsh also claims that application of the equity relationship doctrine "removes the ability of unmarried individuals to choose how one acquires property at the time of acquisition." (Petition 13; *see also* Petition 7: "the parties intentionally organized their lives consistent with their awareness that they did not (and could not) have a legal marriage.") Dr. Walsh's arguments are premised on at least three faulty principles, each of which have been expressly rejected in decisions of this Court and the Court of Appeals:

First, these parties were not merely "unmarried individuals." They were in an equity relationship, "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). The equity relationship doctrine has been used to characterize the property of same-sex couples such as Dr. Walsh and Reynolds since at least 2001. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107, 33 P.3d 735 (2001) ("equitable claims are not dependent on the 'legality' of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties."), *reversing* 99 Wn. App. 363, 994 P.2d 240 (2000); *see also Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004); *Relationship of Long*, 158 Wn. App. 919, 244 P.3d 26 (2010).

Second, Dr. Walsh's proposed "rule" would be a return to the *Creasman* presumption that this Court expressly rejected in *Lindsey*. Worse, Dr. Walsh urges this Court to impose the *Creasman* presumption solely on same-sex couples, despite the Legislature's expressed intent that same-sex couples and heterosexual couple be given "equal treatment." *See* RCW 26.60.015.

In *Creasman v. Boyle*, 31 Wn.2d 345, 356, 196 P.2d 835 (1948), this Court held that property acquired by "a man and woman not married to each other, but living together as husband and wife, is not community property [and] belongs to the one in who name the legal title to the property stands." After years of criticism, this Court overruled *Creasman* in *Lindsey*, holding that the courts must examine the property accumulations during the equity relationship and "make a just and equitable disposition of the property." *Lindsey*, 101 Wn.2d at 304. As a consequence of the *Lindsey* decision, "[i]ncome and property accumulated during [the] relationship should be characterized in a similar manner as income and property acquired during marriage," "all property acquired during [an equity] relationship is presumed to be owned by both parties," and this property is "subject to a just and equitable distribution." *Connell*, 127 Wn.2d at 351.

Dr. Walsh's argument that applying the equity relationship doctrine to property acquired before the parties registered as domestic partners in Washington is somehow an impermissible "retroactive application of a common law doctrine" (Petition 13, 15), or that applying the equity relationship doctrine to same-sex couples "presumes they could or should have known to acquire and

hold property in a different manner" (Petition 13), is no different than any argument that could have been made by any of the economically advantaged litigants in *Lindsey*, *Connell*, *Vasquez,* or *Gormley* who sought to deprive their partners of any interest in property acquired during cohabitation. Use of the equity relationship doctrine is not limited to cohabitants who "know" that the property they acquire might be considered community-like property in the event of the parties' separation.

In *Gormley*, for instance, there was not yet any legal precedent in Washington applying the equity relationship doctrine to same-sex couples when the parties separated in 1998. To the contrary, Division Two had held in *Vasquez* that the equity relationship doctrine could not apply to same-sex relationships while the *Gormley* litigation was pending, and Gormley and Robertson were presumably not on "notice they could be deemed to acquire community-like property." (Petition 15) Nevertheless, Division Three affirmed the trial court's equitable decision awarding Gormley a lien of 30% of the equity in a home purchased in Robertson's name. *Gormley*, 120 Wn. App. at 38, 39.

Third, *both* parties have rights in property acquired during their cohabitation, and application of the equity relationship

doctrine to assets acquired before the parties registered as domestic partners does not deprive a cohabitant of any "vested property right." (Petition 15-16) *See Olver v. Fowler,* 161 Wn.2d 655, 168 P.3d 348 (2007); *Witt v. Young,* 168 Wn. App. 211, 275 P.3d 1218, *rev. denied,* 175 Wn.2d 1026 (2012). This Court held in *Olver* that a deceased female cohabitant had an undivided interest in the couple's jointly acquired property even though it was titled in the deceased male cohabitant's name. 161 Wn.2d at 670, ¶ 30. Division Two in *Witt* recognized that a cohabitant had her own interest in property accumulated during an equity relationship. In *Witt,* the male cohabitant died intestate. His female cohabitant was not a creditor of his estate but was asserting her existing interest in property held by the male cohabitant's estate, and thus not making a "claim against the decedent" to which the time limits in the non-claim statute applied. *Witt,* 168 Wn. App. at 221, ¶ 22.

Division Two properly remanded to the trial court to consider the parties' equity relationship and their property accumulations prior to 2005. This Court should deny review because Division Two's decision is wholly consistent with the domestic partnership statute and compelled by decisions of this Court and the Court of Appeals.

2. The Court of Appeals properly awarded attorney fees based on Reynolds' need and Dr. Walsh's ability to pay. This Court should also award Reynolds fees under RAP 18.1(j).

The Court of Appeals also properly awarded Reynolds attorney fees on appeal. RCW 26.60.015 provides that "for all purposes under state law, state registered domestic partners shall be treated the same as married spouses" and that "the provisions of chapter 521, Laws of 2009 shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses." This includes providing for an award of attorney fees under RCW 26.09.140 when one partner has the need and the other has the ability to pay.

Dr. Walsh complains that the Court of Appeals had no authority to award attorney fees because its decision "was dedicated to the application of the equity relationship doctrine." (Petition 17) However, as she concedes (Petition 17), the equity relationship issue directly impacts the property distribution upon the dissolution of the parties' domestic partnership. The Court of Appeals' authority to award attorney fees under RCW 26.09.140 is in any event not limited because the parties litigated claims related to their equity relationship. The language of the statute is broad,

and there is no authority for the proposition that the Court of Appeals could not award attorney fees solely because the issues litigated include claims under the equity relationship doctrine. *See Seals v. Seals,* 22 Wn. App. 652, 657-58, 590 P.2d 1301 (1979) (awarding attorney fees under RCW 26.09.140 for the wife's separate partition action against former husband).

The cases cited by Dr. Walsh do not support her claim that the Court of Appeals could not award attorney fees, because the parties in those cases never married. *See Connell,* 127 Wn.2d at 344; *Western Comm. Bank v. Helmer,* 48 Wn. App. 694, 740 P.2d 359 (1987) (Petition 18-19). In any event, the Court of Appeals decision dealt with more than just application of the common law equity relationship doctrine. The Court of Appeals also interpreted the Domestic Partnership Act and whether Reynolds' equitable claims would result in a purported "retroactive application" of the Act. (*See* Opinion 15-18, 19-21; *see also* Cross-Appeal Br. 26-33)

The Court of Appeals properly awarded attorney fees to Reynolds, and this Court should also award attorney fees to her for having to answer the petition under RAP 18.1(j), which provides that a party awarded attorney fees in the Court of Appeals is

entitled to fees in successfully defending a petition for review in this Court.

D. CONCLUSION

This Court should deny review and award Reynolds her fees in this Court under RAP 18.1(j).

Dated this 5th day of January, 2015.

SMITH GOODFRIEND, P.S.

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

Attorneys for Respondent

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 January 5, 2015, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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Barbara A. Henderson Smith Alling Lane 1102 Broadway Plaza, #403 Tacoma, WA 98402	___ Facsimile ___ Messenger X U.S. Mail X E-Mail

DATED at Seattle, Washington this 5th day of January, 2015.

V. Vigoren

Victoria K. Vigoren

OFFICE RECEPTIONIST, CLERK

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Attached for filing in pdf format is an Answer to Petition for Review, in *Domestic Partnership of: Walsh and Reynolds*, Cause No. 91078-2. The attorney filing this document is Catherine W. Smith, WSBA No. 9542, email address: cate@washingtonappeals.com.

Victoria Vigoren
Paralegal
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974